OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOL. III

January 1, 1914, to December 31, 1914

SEVENTH BIENNIAL REPORT

July 1, 1912, to June 30, 1914

LAW FACULTY
UNIV. OF WISCONSIN

WALTER C. OWEN
Attorney General
ATTORNEY GENERAL'S OFFICE

WALTER C. OWEN.................................................. Attorneys General
WALTER DREW.................................................. Deputy Attorney General
BYRON H. STEBBINS (To Sept. 1, 1911)........... Assistant Attorney General
WINFIELD W. GILMAN............................. Assistant Attorney General
JOSEPH E. MESSERSCHMIDT.......................... Assistant Attorney General
JULIUS T. DITHMAR (From Sept. 1, 1914)....... Assistant Attorney General
ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE.

JAMES S. BROWN, Milwaukee............ from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee............ from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva........ from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison............ from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point..... from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh............... from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay............. from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee........... from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown........... from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona........... from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam........... from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point...... from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend........ from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc..... from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison.......... from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau.......... from Jan. 7, 1895, to Jan. 2, 1899
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. 5, 1913 to
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To His Excellency, FRANCIS E. McGOVERN,
Governor of Wisconsin.

Sir:—I herewith respectfully submit to you a report containing an account of all matters pertaining to my office for the biennial period ending June 30, 1914, including the substance of all legal opinions rendered on matters of public interest from January 1, 1914, to December 31, 1914, pursuant to the provisions of section 20-31, Statutes of Wisconsin for 1913.

WALTER C. OWEN,
Attorney General.

Dated Madison, Wisconsin, December, 1914.
COLLECTIONS

The following is a statement of collections which have been paid directly to the attorney general and by him paid to the state treasurer covering the biennial period ending June 30, 1914. This statement does not include collections which have been paid to the state treasurer without passing through the attorney general's hands.

1913

Feb. 15, Payment of costs (G. & N. W. Ry. Co. v. Railroad Commission)................................................ $31.10
Feb. 20, Payment of judgment and costs (State ex rel. Spritka v. Parsons)............................................. 53.50
Feb. 28, Back taxes and penalty (Chicago & Lake Superior Ry. Co.).................................................. 233.35
Mar. 24, Penalty for delay in filing annual report (Milwaukee Mut. Loan & Bldg. Assn.).......................... 40.00
Apr. 17, Escheated estate of John Pfandler.................................................................................................. 238.01
May 1, Escheated estate of William Reinke................................................................................................. 400.19
May 29, Payment of costs (State ex rel. Spritka v. Parsons)................................................................. 31.58
Nov. 22, Back taxes and penalty (Arms Palace Horse Car Co.).............................................................. 1213.44
Dec. 9, Payment of costs (G. M. & St. P. Ry. Co. v. Railroad Commission)........................................... 29.70

1914

Jan. 21, Part payment of taxes under 1913 assessment (Chicago & Lake Superior Ry. Co.).................... 39.00
LOANS FROM THE TRUST FUNDS

Application for loans from the trust funds of the state passed upon and approved by this department:

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<th>Town or Towns</th>
<th>County or Counties</th>
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<td>County of Pierce</td>
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<td>Towns of Onalaska and Holland</td>
<td>County of La Crosse</td>
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<td>Jt. Dist. No. 6, Towns of Lincoln and Clayton</td>
<td>County of Polk</td>
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<td>County of Clark</td>
<td>February 21, 1913</td>
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<tr>
<td>Dist. No. 1, Town of Balsam Lake</td>
<td>County of Polk</td>
<td>March 5, 1913</td>
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<td>County of Portage</td>
<td>May 13, 1913</td>
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<tr>
<td>Dist. No. 6, Town of Oshkosh</td>
<td>County of Winnebago</td>
<td>May 19, 1913</td>
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<td>Dist. No. 2, Town of Eureka</td>
<td>County of Polk</td>
<td>May 24, 1913</td>
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<tr>
<td>Dist. No. 2, Town of Sumner</td>
<td>County of Barron</td>
<td>May 28, 1913</td>
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<tr>
<td>Dist. No. 1, Town of Armstrong</td>
<td>County of Oconto</td>
<td>May 28, 1913</td>
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<tr>
<td>Jt. Dist. No. 6, Towns of Helvetia and Union</td>
<td>County of Waupaca</td>
<td>June 7, 1913</td>
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<tr>
<td>Board of Education, City of Marinette</td>
<td>County of Marinette</td>
<td>June 14, 1913</td>
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<tr>
<td>Town of Chetek, County of Barron</td>
<td>June 18, 1913</td>
<td>2,500</td>
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<tr>
<td>Jt. Dist. No. 3, Towns of Taft and Thorp, Counties of Taylor and Clark</td>
<td>June 20, 1913</td>
<td>2,500</td>
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<tr>
<td>Town of Hixon, County of Clark</td>
<td>June 20, 1913</td>
<td>3,000</td>
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<tr>
<td>Town of Port Wing, County of Bayfield</td>
<td>June 23, 1913</td>
<td>5,000</td>
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<tr>
<td>Dist. No. 3, Towns of Hillsboro and Greenwood and Village of Hillsboro, County of Vernon</td>
<td>June 27, 1913</td>
<td>10,000</td>
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<tr>
<td>Town of Withee, County of Clark</td>
<td>June 27, 1913</td>
<td>4,000</td>
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<tr>
<td>Dist. No. 4, Town of Trego</td>
<td>County of Washburn</td>
<td>July 3, 1913</td>
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<tr>
<td>Jt. Dist. No. 1, Towns of Eureka and St. Croix Falls</td>
<td>County of Polk</td>
<td>July 14, 1913</td>
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<td>Dist. No. 3, Town of Brighton</td>
<td>County of Marathon</td>
<td>July 15, 1913</td>
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<tr>
<td>Jt. Dist. No. 1, Towns of Madison and Middleton, County of Dane</td>
<td>July 17, 1913</td>
<td>1,800</td>
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<tr>
<td>Jt. Dist. No. 6, Towns of How and Breed</td>
<td>County of Oconto</td>
<td>July 29, 1913</td>
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<tr>
<td>Jt. Dist. No. 3, Towns of How and Maple Valley</td>
<td>County of Oconto</td>
<td>July 29, 1913</td>
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<tr>
<td>Jt. Dist. No. 2, Town of Hixon and Village of Withee</td>
<td>County of Clark</td>
<td>July 29, 1913</td>
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<tr>
<td>Jt. Dist. No. 1, Town of Linden and Village of Linden</td>
<td>County of Iowa</td>
<td>July 30, 1913</td>
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<td>Jt. Dist. No. 1, Town of Linden and Village of Linden</td>
<td>County of Iowa</td>
<td>July 30, 1913</td>
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<td>District Number</td>
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<td>No. 4</td>
<td>Town of Clear Lake</td>
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<td>No. 6</td>
<td>Town of Windsor</td>
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<td>No. 2</td>
<td>Town of Laketown</td>
<td>Polk</td>
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<td>No. 1</td>
<td>Town of Spruce</td>
<td>Oconto</td>
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<td>No. 4</td>
<td>Town of Greenwood</td>
<td>Taylor</td>
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<tr>
<td>No. 9</td>
<td>Towns of Sampson and Bloomer</td>
<td>Chippewa</td>
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<tr>
<td>No. 3</td>
<td>Towns of Leola and Plainfield</td>
<td>Adams and Waushara</td>
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<tr>
<td>No. 1</td>
<td>Towns of Meenon and Oakland</td>
<td>Burnett</td>
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<tr>
<td>Village of Coon Valley</td>
<td>Vernon</td>
<td>September 12, 1913</td>
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<tr>
<td>No. 6</td>
<td>Town of Bovina</td>
<td>Taylor</td>
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<tr>
<td>No. 9</td>
<td>Town of Bridgecreek</td>
<td>Eau Claire</td>
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<tr>
<td>No. 1</td>
<td>Towns of West Kewaunee, Pierce and City of Kewaunee</td>
<td>Kewaunee</td>
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<td>No. 1</td>
<td>Town of Forestville</td>
<td>Door</td>
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<td>No. 3</td>
<td>Town of Randolph</td>
<td>Columbia</td>
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<td>No. 2</td>
<td>Town of Langlade</td>
<td>Langlade</td>
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<td>No. 7</td>
<td>Town of Seymour</td>
<td>Outagamie</td>
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<td>No. 3</td>
<td>Town of Vance Creek</td>
<td>Brown</td>
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<td>No. 6</td>
<td>Town of Roosevelt</td>
<td>Taylor</td>
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<tr>
<td>No. 1</td>
<td>Towns of Waterville and Frankfort</td>
<td>Pepin</td>
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<tr>
<td>No. 1</td>
<td>Town of Gale and Village of Galesville</td>
<td>Trempeala</td>
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<td>No. 6</td>
<td>Towns of Weston and Spring Lake</td>
<td>Dunn</td>
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<td>No. 3</td>
<td>Town of Preston</td>
<td>Adams</td>
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<td>No. 1</td>
<td>Town of Middle Inlet</td>
<td>Marinette</td>
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<td>No. 8</td>
<td>Towns of Ironton and Westford</td>
<td>Richland and Sauk</td>
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<td>No. 5</td>
<td>Town of Roosevelt</td>
<td>Taylor</td>
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<tr>
<td>No. 5</td>
<td>Town of City Point</td>
<td>Jackson</td>
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<td>No. 7</td>
<td>Towns of Dodgeville and Wyoming</td>
<td>Jackson</td>
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<tr>
<td>No. 2</td>
<td>Towns of Warren and Marion</td>
<td>Waushara</td>
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Dist. No. 2, Town of Ringle, County of Marathon, November 14, 1913. $2,000
Dist. No. 1, Town of Amberg, County of Marinette, November 28, 1913. 12,000
Dist. No. 10, Town of Sampson, County of Chippewa, December 1, 1913. 1,180
Dist. No. 6, Town of Amherst, County of Portage, December 2, 1913. 1,500
Jt. Dist. No. 11, Towns of Sampson and Cleveland, County of Chippewa, December 4, 1913. 750
Jt. Dist. No. 1, Towns of Lindina and Lemonweir and City of Mauston, County of Juneau, December 13, 1913. 25,000
Dist. No. 8, Town of Birnamwood, County of Shawano, December 18, 1913. 2,200
Jt. Dist. No. 4, Towns of Maple Grove and Arland, County of Brown, December 19, 1913. 2,000
Dist. No. 3, Town of Daniels, County of Burnett, December 19, 1913. 3,000
Jt. Dist. No. 5, Towns of Burns and Bangor, County of La Crosse, and Town of Sparta, County of Monroe, December 30, 1913. 2,100
Jt. Dist. No. 2, Towns of Almena and Clinton, County of Barron, January 5, 1914. 3,000
Dist. No. 9, Town of Auburn, County of Chippewa, January 6, 1914. 2,000
Dist. No. 6, Town of Eau Pleine, County of Portage, January 9, 1914. 700
Dist. No. 1, Town of Forest, County of St. Croix, January 19, 1914. 2,000
Dist. No. 8, Town of Fremont, County of Clark, January 30, 1914. 1,100
Dist. No. 3, Town of Oneida, County of Outagamie, January 30, 1914. 2,100
Jt. Dist. No. 2, Towns of Kingston and Manchester, County of Green Lake, January 30, 1914. 8,000
Jt. Dist. No. 2, Town of Sheboygan and Village of Kohler, County of Sheboygan, February 11, 1914. 10,000
Dist. No. 18, Town of Dodgeville, County of Iowa, February 11, 1914. 1,000
Dist. No. 5, Town of Texas, County of Marathon, February 13, 1914. 1,700
Jt. Dist. No. 1, Town and Village of Arcadia, County of Trempealeau, and Dist. No. 4, Town of Glencoe, County of Buffalo, February 20, 1914. 25,000
Village of Albany, County of Green, March 2, 1914. 20,000
Dist. No. 5, Town of Lawrence, County of Brown, March 4, 1914. 5,000
Jt. Dist. No. 4, Towns of Mapleton and Arland, County of Barron, March 5, 1914. 1,000
Village of Readstown, County of Vernon, March 7, 1914. 5,600
Jt. Dist. No. 7, Towns of Maxville and Durand, Counties of Buffalo and Pepin, March 11, 1914. 1,100
Jt. Dist. No. 3, Towns of Chimney Rock and Hale, County of Trempealeau, March 16, 1914. 1,500
Jt. Dist. No. 5, Town of Alban and Village of Rosholt, County of Portage, March 19, 1914. 6,000
Dist. No. 2, Town of Liberty Grove, County of Door, March 23, 1914. 2,000
Dist. No. 6, Town of Seneca, County of Green Lake, March 25, 1914. 800
Jt. Dist. No. 3, Town of West Sweden and Village of Frederic, County of Polk, March 30, 1914. 1,500
Jt. Dist. No. 2, Towns of Unity and Albion, County of Trempealeau, March 31, 1914. 7,000
Applications for loans from the teachers' insurance and retirement fund passed upon and approved by this department:

Board of Education, City of Madison, County of Dane, September 22, 1913.................. $15,000
Taylor County Courthouse Bonds, September 30, 1913.................. 41,000
City of Superior, County of Douglas, School Bonds, October 2, 1913.................. 34,000
City of Antigo, County of Langlade, Street Improvement Bonds, October 8, 1913.................. 15,000
City of West Allis, County of Milwaukee, October 21, 1913,
Street Improvement Bonds................................................... $20,000
School Bonds............................................................... 60,000
Street Improvement Bonds................................................. 10,000
Storm Sewer Bonds.......................................................... 10,000
Water Bonds..................................................................... 5,000
School Bonds.................................................................. 6,000
City of Janesville, County of Rock, Milwaukee Street Bridge
Bonds, October 22, 1913..................................................... 38,000
Grant County Asylum Bonds, April 3, 1914............................. 100,000
City of Racine, County of Racine, School Bonds, April 21, 1914. 95,000
CIVIL CASES DISPOSED OF

EXPRESS CASES.

Wells Fargo & Company v. Railroad Commission.
Northern Express Company v. Railroad Commission.
Western Express Company v. Railroad Commission.
Duncan I. Roberts, as President of the United States Express Company v. Railroad Commission.
W. M. Barrett, as President of the Adams Express Company v. Railroad Commission.

Action brought in circuit court for Dane county under Railroad Commission Law to vacate and set aside orders of the railroad commission prescribing express rates and charges throughout the state. Actions discontinued by stipulation, plaintiffs paying court fees.


Action brought in circuit court for Dane county to review and set aside order of the railroad commission denying authority to proposed competitive company to issue securities under Stock and Bond Law, and to test application of telephone antiduplication statute. From judgment for plaintiff, defendant appealed to supreme court. Decision of the supreme court reversed judgment of circuit court and affirmed order of commission.


Action brought in circuit court for Dane county to vacate and set aside order of railroad commission, fixing joint rate
on pulpwood shipments and allowing refund. From judgment affirming the order, plaintiffs appealed. The decision of the supreme court affirmed the judgment below.


Action brought in circuit court for Dane county to vacate and set aside order of railroad commission fixing rates on pulpwood. Judgment for defendant.


(Ice Rate Case.)

Action brought in circuit court for Dane county to vacate order of railroad commission reducing freight rates on ice and authorizing refund and to test right of commission to consider facts outside of the record. From judgment affirming the order plaintiff appealed. Decision in the supreme court affirmed judgment below.

Town of Polk v. Railroad Commission.

Action brought in the circuit court for Dane county to set aside order of the railroad commission as to apportionment of cost of grade separation between town and railroad. From order sustaining demurrer to complaint, plaintiff appealed. Decision in supreme court affirmed order below and sustained power of commission to apportion cost.

Montreal Mining Company v. State.

Action brought in circuit court for Dane county to recover alleged illegal income tax. From order sustaining special demurrer to complaint, plaintiff appealed. Decision of the supreme court affirmed order of the trial court. Action was abandoned.

United States Glue Company v. State.

Action brought in circuit court for Dane county to recover alleged illegal income tax. Action abandoned as ruled by decision in Montreal Mining Co. v. State.
Ludington, Wells & Van Schaick Lumber Co. v. State.
Action brought in circuit court for Dane county to recover alleged income taxes. Action abandoned as ruled by decision in Montreal Mining Co. v. State.

Montreal Mining Company v. Town of Montreal.
Action brought in circuit court for Iron County, this department acting as of counsel for defendant. Judgment for plaintiff within defendant's offer of judgment. Costs allowed defendant.

Board of Agriculture v. The Milwaukee Electric Railway & Light Co.
Proceeding before the railroad commission to obtain reduction of street railway fares to state fair park. Order entered reducing rates.

Chicago, Milwaukee & St. P. Ry. Co. v. Railroad Commission. (Milk Station Case.)
Action to vacate order of railroad commission requiring plaintiff to establish a milk station at Omdoll's Crossing between Whitewater and Palmyra. From judgment sustaining the commission's order plaintiff appealed. Decision of the supreme court affirmed judgment below.

Action begun in circuit court for Fond du Lac county to condemn land for spur track ordered by railroad commission on petition of the intervenor under the Spur Track Law, secs. 1797-11m to 1797-12n, Stats. Condemnation resisted on ground that Spur Track Law was unconstitutional. Decision of the state supreme court sustained statutes and order of commission. Case taken on writ of error to the Supreme Court of the United States, where this department filed brief as amicus curiae and argued the case in support of the statute and the commission's order as of counsel for intervenor. Decision of the United States Supreme Court affirmed decision of the state supreme court and held Spur Track Law constitutional.

Action brought in circuit court for Dane county to set aside order of the railroad commission requiring operation of a branch line or logging road as a common carrier. After trial in circuit court, the record was returned to the commission and the proceeding was dismissed and ordered rescinded by the commission on stipulation.

Appleton Waterworks Company v. Railroad Commission.

Action brought in circuit court for Dane county to review order of the commission fixing compensation to be paid by the city of Appleton for the property of the Appleton Waterworks Company. From judgment of circuit court both sides appealed to supreme court, decision of the supreme court affirming in part and reversing in part with directions to remand case to the railroad commission for modification of the award in accordance with the opinion.


Proceedings instituted in Milwaukee county court to collect inheritance tax on estate of Joseph Dessert, deceased, including tax on certain transfers of property made by decedent during his lifetime. Appealed to circuit court of Milwaukee county. From judgment in circuit court against state's claim, state appealed to supreme court. Decision of the supreme court affirmed judgment of the circuit court.

Arnold v. Schmidt.

Habeas corpus proceeding brought in circuit court for Milwaukee county to secure the discharge of one convicted and sentenced for practicing osteopathy without a license. To review an order of the circuit court discharging the prisoner, the sheriff, Arnold, sued out a writ of error from the supreme court. This department appeared in the supreme court as of counsel for Arnold. Decision of the supreme court reversed order of circuit court and directed that an order be entered remanding the prisoner to custody of the sheriff.

Original actions in supreme court to test constitutionality of Income Tax Law. After decision of supreme court sustaining the law, the case was taken on writ of error to supreme court of United States. Writ of error dismissed.


Action to set aside order of railroad commission requiring the operation of about eight miles of road originally constructed as a logging railroad and known as the Rib Lake Branch extension. After the testimony had been taken in the circuit court the record was remanded to the commission pursuant to the statute and the commission thereupon dismissed the proceeding pursuant to a stipulation of the parties, and upon return of the record to the circuit court the action was there dismissed by stipulation.


Action to recover back taxes for years 1903 to 1913, inclusive. The action was dismissed on payment of the full amount of taxes together with interest and costs amounting in all to $1213.44.

Alfred G. Petersen v. Louis G. Widule, Clerk of Milwaukee County.

The above case involved the constitutionality of ch. 738, Laws of 1913, the so-called Eugenics Law. The law was held unconstitutional by the circuit court of Milwaukee county but on appeal the judgment of the circuit court was reversed and the constitutionality of the law upheld. The attorney general prepared brief and participated in the arguments in both the circuit and supreme courts.

State of Wisconsin ex rel. J. B. Arpin v. F. H. Eberhardt, as County Clerk of Wood County, Wisconsin, and as Clerk of the County Board of Review of Wood County under the Income Tax Law.

Action of certiorari to set aside the action of the county
board of review in inserting a certain item in the assessment of the income of J. B. Arpin. The question involved was whether the profits received by a resident of this state from his interest in a nonresident partnership is taxable under the Wisconsin Income Tax Law. Both circuit and supreme courts decided that it was not.

State ex rel. Joseph Spritka v. J. W. Parsons County Judge.
Certiorari to recover custody of minor children of relator, committed to state public school. From a judgment of the circuit court for Langlade county affirming the order of commitment, relator appealed to the supreme court, where the judgment was affirmed. A motion for a rehearing was denied.

The relator was convicted of usury in the District Court for Milwaukee county, and sentenced to a term of thirty days imprisonment, and sued out a writ of *habeas corpus*. The circuit court of Milwaukee county remanded him to serve out the remainder of his term, and upon his bringing a writ of error to the supreme court, that judgment was affirmed.

An original proceeding in the supreme court for the forfeiture of the charter of the defendant for failure to file alleged amendments to articles of incorporation in the office of the secretary of state. The court refused to forfeit the charter, but issued an alternative writ of mandamus, requiring defendant to file such alleged amendments or show cause why it should not do so. Defendant made return that it was organized under a special act of the legislature, and that the alleged amendments increasing its capital stock were mere resolutions, authorized by its charter. The court ordered the alleged amendments filed, and that defendant pay a fee of $95,000 for such filing, which was done.
In the Matter of Hattie Darby, an alleged feeble-minded person.

Proceeding in county court for Chippewa county for release from the state home for the feeble-minded. A jury found the alleged feeble-minded person sane, and she was released.

Board of Regents of University v. Hassard, et al.

Judgment of foreclosure of mortgage held by Board of Regents of University rendered in December, 1912, by circuit court of Bayfield county. In February, 1914, mortgaged premises sold at foreclosure sale and full amount of mortgage with interest and costs received and paid to University Regents.

City of Superior v. Roemer, et al.

Action to set aside order of the commission in apportioning part of the cost of construction of a viaduct to the city in proceedings on its application before the railroad commission. Judgment for defendants in circuit court. Case appealed to the supreme court, where the judgment of the lower court was reversed.


Action to vacate order of railroad commission on making an award of damages to plaintiff in proceedings before the commission to assess and apportion damages and cost for construction of viaduct in the city of Superior. Judgment in favor of defendants in circuit court. Ruled by the decision of the supreme court in City of Superior v. Roemer.


Action to set aside order of the railroad commission in respect to the construction of a bridge. Action abandoned.

State ex rel. Rock County v. Henry Johnson, State Treasurer.

Application to the circuit court for Dane county for the issuance of a peremptory writ of mandamus demanding the defendant to pay over to the county of Rock, the sum of
$2995.29, being the sum withheld to pay for the costs of reassessment of the property of the city of Janesville, in compliance with an order of the tax commission. Peremptory writ granted.

INDUSTRIAL COMMISSION CASES

The following are cases on appeal from awards of the industrial commission in which the orders of the commission have been confirmed:
Mellen Lumber Co. v. Industrial Commission and William H. Winters.
Felix Pliska v. Industrial Commission and Hatton Lumber Company.
Milwaukee Northern Ry. Co. v. Industrial Commission and Theodore Reiter.
City of Milwaukee v. Henry Miller and Industrial Commission.
City of Milwaukee v. Industrial Commission and Minnie Althoff.

In the following cases the actions to set aside the orders of the industrial commission were dismissed by stipulation:
City of Kenosha v. Industrial Commission and Mary Umatham.
CIVIL CASES PENDING

Mandamus to compel the Wisconsin Highway Commission to prepare plans, specifications and estimates for Merrimac bridge, pursuant to ch. 586, Laws of 1913, which the commission refused to do on advice of the Attorney General that the statute is unconstitutional. Pending in supreme court on appeal from order of circuit court for Dane county overruling motion to quash writ. Briefed, argued and submitted in supreme court.

Wisconsin Telephone Company v. Railroad Commission, et al. (La Crosse Physical Connection Case.)
Action to set aside order of railroad commission requiring physical connection of competing telephone systems at La Crosse and to test validity of Telephone Physical Connection Law. Case tried and submitted in circuit court for Dane county.

Duluth Street Ry. Co. v. Railroad Commission. (Superior Street Railway Fare Case.)
Action brought in circuit court for Dane county to set aside order of commission fixing valuation of street railway property and reducing rates of fare. Tried and submitted in circuit court, for Dane county.

Action in circuit court for Dane county to review order of railroad commission fixing valuation of electric lighting utility for municipal purchase. At issue on complaint and answer.
State v. City and County of Milwaukee.

Action brought in circuit court for Milwaukee county to recover fines collected in state cases in Milwaukee municipal and district courts and belonging to the common school fund, but not paid over to the state for several years past. From judgment in circuit court for the state and against the city of Milwaukee for fines collected from 1899 to 1908, inclusive, and interest amounting to $102,743.90, the city appealed, and from disallowance of claim for fines collected in 1898 and additional interest claimed, the state appealed. Appeals pending.


Action brought in circuit court for Dane county to vacate order of railroad commission reducing street railway fares in the city of Milwaukee and to test power of the state to regulate rates prescribed in the franchise ordinance granted to the plaintiff by the city of Milwaukee under authority of sec. 1862, Stats. From judgment entered following an order sustaining general demurrer to complaint, plaintiff appealed. Decision in supreme court affirming judgment below. Case taken on writ of error to Supreme Court of the United States, where it is pending awaiting argument.


Action brought in circuit court for Dane county to vacate order of the railroad commission requiring additional train service and to test the constitutionality of ch. 483, Laws of 1911, amending sec. 1801, Stats. From judgment affirming order of the commission plaintiff appealed. Decision of the supreme court affirmed order and sustained statute. Case taken on writ of error to Supreme Court of the United States, where it is pending for argument.

Fidelity Trust Company v. Henry Johnson, State Treasurer.

Action brought in circuit court for Dane county to secure an order of the court for the delivery to plaintiff of deposit with the treasurer, the trust company having satisfied all trust obligations and being in process of liquidation. Case pending for trial on complaint and answer.
State v. Chicago, M. & St. P. Ry. Company. (Upper Berth Case.)

Action in circuit court for Dane county to enforce penalty for violation of the Upper Berth Law. From judgment for plaintiff, defendant appealed. Decision of the supreme court affirmed judgment. Case taken on writ of error to Supreme Court of the United States.


Action begun in supreme court to recover license fees paid in 1912 and 1913, ($987,836.45), interest and costs, and to test constitutionality of law imposing license fee taxes on domestic level premium companies. Pending on demurrer to complaint.

Semet-Solvay Company v. City of Milwaukee.

Suit brought in United States district court for the eastern district of Wisconsin to recover alleged illegal income tax and test validity of income tax assessment of foreign corporation. This department acted as of counsel for defendant. Pending on demurrer to complaint.

Farmers' Loan & Trust Co. v. City of Racine, Railroad Commission, et al.


Suit brought by trustee for bondholders in United States district court for the western district of Wisconsin to enjoin proceedings before the railroad commission for valuation of property of Janesville Water Company for municipal acquisition under the Public Utility Law. Summons and complaint served.
United States Glue Company v. Town of Oak Creek.
Action brought in the circuit court for Milwaukee county to recover alleged illegal income tax. This department appeared as of counsel for defendant. From judgment for plaintiff, defendant appealed to supreme court. Appeal pending.

Action brought in the circuit court for Dane county to set aside order of the commission fixing compensation to be paid by the city of Antigo for property of Antigo Water Company. Stipulation filed for possession of property by city.

Action brought in the circuit court for Dane county to set aside order of the railroad commission fixing water rates. Pending on complaint and answer.

Oshkosh Water Works Company v. Railroad Commission.
Action brought in the circuit court for Dane county to review order of the railroad commission fixing compensation to be paid by city of Oshkosh for property of Oshkosh Water Works Company. Tried and submitted in circuit court. Pending awaiting decision.

Milwaukee Northern Ry. Co. v. Railroad Commission.
Action brought in circuit court for Dane county to set aside order of commission fixing terms and requiring joint use of plaintiff's tracks on Wells Street, city of Milwaukee, by the Milwaukee Electric Railway & Light Company. Pending on demurrer to complaint.

Action brought in the circuit court for Dane county to set aside order of the railroad commission fixing terms and requiring joint use of plaintiff's tracks on Wells Street, city of Milwaukee, by the Milwaukee Electric Railway & Light Company. Pending on demurrer to complaint.
State ex rel. Walter C. Owen, Attorney General v. John S. Donald, Secretary of State.

Petition to Supreme Court for writ of mandamus, requiring defendant to audit an order for final payment upon a land contract for land purchased for the state forest reserve. A motion to quash the alternative writ was denied, and the defendant then made return, alleging that the statutes under which the contract was made are unconstitutional, and that such statutes do not authorize the making of contracts involving deferred payments.

State ex rel. Orrin Carey v. Clinton Ballard, et al., Members of the Town Board of the Town of Grand Chute.

A writ of mandamus was granted by the circuit court of Langlade county, requiring defendants to levy a tax for permanent improvement of a highway under the provisions of subsec. 3, sec. 1317m-4, Stats. Defendants appealed to the supreme court, alleging that the subsection in question is unconstitutional, and this department was requested to file a brief as amicus curiae, which was done.

Fred Vaughn v. H. F. Norris and State.

Action in circuit court for Iron county to quiet title to a certain island claimed by the state.

The Milwaukee Electric Railway & Light Co. v. City of Milwaukee and State.

Action in circuit court for Dane county for recovery of amount of alleged illegal tax paid.


Claim of State.

Claim of state for damages by reason of failure of Bradley Iron Works to perform its contract for furnishing the ornamental iron work for the south wing of the capitol, filed with receivers appointed by circuit court of Baltimore City, Maryland.


Action in circuit court for Monroe county to quiet title to certain lands patented to the state in trust for the benefit of the La Crosse & Milwaukee Railroad.
Matter of the Estate of Thomas J. Donlevy, deceased.

Two claims were filed against the above estate, which is one that escheats to the state, in the sums of $2,357.45 and $596.00, which, after trial in county court, were allowed by stipulation at the sums of $1,000 and $298.00 respectively. Final judgment will soon be entered assigning the residue of the estate to the state of Wisconsin.


Action to compel industrial commission to make an award. Argued in circuit court of Milwaukee county.


Action to review action of the tax commission in assessing relator on interest paid to bondholders. Case argued in the circuit court for Dane county.


Action in circuit court for Oneida county to set aside certain tax deeds obtained by defendant on land conveyed to the state for forestry purposes.

Carl Fairweather v. State of Wisconsin.

Application made to the industrial commission for compensation against the state on account of an injury to applicant who claims to be an employe of the state by reason of work done while a student at the Milwaukee state normal school. Testimony taken and the matter submitted to the commission.


Application to the industrial commission for an award against the state on account of the death of applicant's husband who was killed while engaged in rifle practice as a member of the Wisconsin National Guard. Testimony taken and the matter submitted to the industrial commission.
George Zeck v. Wisconsin State Hospital.
Application to the industrial commission for an award against the state on account of an injury to applicant received by him while performing his duties as engineer at the Mendota state hospital. No date for hearing has as yet been set by the industrial commission.

_In re_ Estate of Michael McQuade, Deceased. Rose Dilger v. Estate of Michael McQuade.
Action to establish claim to the entire estate of deceased which otherwise would escheat to the state. The claim was allowed by the county court of Brown county but on appeal, the venue having been changed to the circuit court of Fond du Lac county, the judgment of the county court was reversed and the claim disallowed. The case is now pending on appeal to the supreme court.

_In re_ Estate of Earnest Von Baumbach, Deceased.
Action pending in circuit court for Milwaukee county on appeal from order of the county court. The case involves the question as to whether a widow's dower is taxable under the Inheritance Tax Law. The order of the county court appealed from exempts the widow's dower.

Action begun by the state of Minnesota in the supreme court of the United States to determine the boundary line between Minnesota and Wisconsin, as the same extends through Lake Pepin. Pursuant to the suggestion of the attorney general, the legislature appointed a committee of five members to confer with a similar committee appointed by the legislature of Minnesota upon an amicable adjustment of the matter by compact. The matter is now pending before the commissions which have had several meetings at St. Paul.

Action in the circuit court of Waukesha county for damages which the plaintiff claims to have sustained by reason of the negligent operation of the dam connected with the fish hatchery on the Bark river, at Delafield. $20,000 damages were asked for in the complaint. On a demurrer _ore_
the circuit court, on the 27th day of April, 1914, sustained the demurrer. An appeal to the supreme court is being prepared by the plaintiff.

George Apfelbacher v. State of Wisconsin, et al. (Equity)
In the circuit court of Waukesha county, suit brought to restrain the defendant from using the water and operating the mill dam on the Bark river, in Waukesha county, connected with the fish hatchery at Delafield, in the manner in which the same was used and operated in the past since state had control of the dam.

In re Estate of T. J. Donlevy, Deceased.
Proceedings to settle the Estate of Thomas J. Donlevy are pending in the county court of Portage county, in which the attorney general has been duly notified that no heirs can be found and that it is an escheat case. Inventory shows that estate consists of $3,725.93. Attorney general filed objections to claims brought against this estate. Two trials have already been had and one other is still pending.

Action brought in the circuit court for Dane county to recover fees alleged to have been collected by Zeno M. Host, during his term as insurance commissioner, which were not turned in to the state treasury. Answer denies the allegation of the complaint.

Action brought in the circuit court for Dane county, to recover fees alleged to belong to the state and collected by Wm. A. Fricke, while insurance commissioner of the state of Wisconsin, Charles F. Pfister and Rudolph Giljohann being sureties on his bond. Defendant denies having retained fees belonging to the state.

Action in the circuit court of Dane county, to recover fees alleged to have been collected and retained by Emil
Giljohann, as insurance commissioner, belonging to the state of Wisconsin, the defendants, R. E. Giljohann, and C. K. Kalvenlage, being sureties on his official bond. The defendant denies having retained fees belonging to the state.

State of Wisconsin v. George E. Beedle and National Surety Company.

Action to recover fees alleged to belong to the state of Wisconsin and which, it is alleged, were retained by Mr. Beedle while holding the office of insurance commissioner, the National Surety Company being surety on his bond. Defendant denies having retained fees belonging to the state.


Suit brought in the U. S. district court for the western district of Wisconsin, to restrain the defendant from revoking the license of the plaintiff to do business in the state of Wisconsin, as a foreign corporation. Case was heard on Nov. 24, 1913, at Chicago, before Honorable Christian C. Kohlsaat, U. S. circuit judge, Honorable Ferdinand A. Geiger, and Honorable Arthur L. Sanborn, District judges, under sec. 266 of the Judiciary Code. Decision not yet handed down. Temporary restraining order was issued by Judge Sanborn.

The Western Union Telegraph Company v. James A. Frear, in his capacity as Secretary of State of the State of Wisconsin.

Suit brought in the U. S. circuit court, for the western district of Wisconsin, to restrain the defendant from revoking the license of the plaintiff to do business in the State of Wisconsin, as a foreign corporation. The case was argued in conjunction with the case of Philadelphia & Reading Coal & Iron Company v. Donald, Secretary of State, and Walter C. Owen, Attorney General, above cited, on the 24th day of November, 1913. Decision not yet handed down. Temporary restraining order was issued by Judge Sanborn.
The following are cases on appeal from awards of the industrial commission, in which decisions have not yet been rendered:

International Harvester Co. v. Industrial Commission and Ernest Koenig.


City of Milwaukee v. Frederica Ritzow and Industrial Commission.

Milwaukee Coke & Gas Co. v. Industrial Commission and Pauline Dixon.

City of Milwaukee v. Amalia Torney and Industrial Commission.


Milwaukee Western Fuel Co. v. Industrial Commission and Barbara Hartmann.


Helena Hoenig v. Industrial Commission and Lindauer-O'Connel Company.

Albertina Tank v. Industrial Commission and City of Milwaukee.

City of Superior v. Industrial Commission and Josephine Frederick.


CASES PENDING IN UNITED STATES SUPREME COURT

Action to reduce street railway fares in the city of Milwaukee and to test power of the state to regulate rates prescribed in franchise ordinance. Pending on writ of error.

Action to vacate order of commission requiring additional train service and to test the constitutionality of ch. 483, Laws of 1911. Pending on writ of error.

State v. C. M. & St. P. Railway Company.
Action to enforce penalty for violation of the Upper Berth Law. Pending on writ of error.

Minnesota v. Wisconsin.
Action begun originally in the United States supreme court to determine the boundary line between the states as it extends through Lake Pepin.

State v. Farringer.
Action involving the constitutionality of the Usury Law, which was sustained by the supreme court of this state.
### FORFEITURE CASES DISPOSED OF

July 1, 1912, to June 30, 1914

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### CRIMINAL CASES DISPOSED OF

#### July 1, 1912, to June 30, 1914.

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<td>State v. Peeters</td>
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<td>State v. DeWitt</td>
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<td>as appellant died before</td>
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<td>State v. Koch</td>
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<td>Waupaca</td>
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<td>Affirmed</td>
</tr>
<tr>
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<td>Violation of pure food law</td>
<td>Reversed</td>
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Four certified questions: two answered in affirmative; two in negative.
The following are the rules adopted by the executive department pertaining to applications for requisitions for fugitives from justice:

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. See opinions of Attorney General: 1904, pp. 32, 33, 39, 53; 1910, p. 40.

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. See Opinions of Attorney General: 1904, pp. 32, 33, 37, 39, 51, 53, 54; 1906, pp. 55, 56; 1910, p. 40.

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. See Opinions of Attorney General: 1904, pp. 39, 53; 1910, p. 40.
4. The facts and circumstances constituting the offense charged must appear by affidavit and must be sufficient to establish _prima facie_ evidence of guilt against the party accused. See Opinions of Attorney General: 1904, pp. 33, 37, 39; 1908, pp. 47, 48, 49, 52; 1910, pp. 38, 41.

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. See Opinions of Attorney General: 1904, p. 39.

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. See Opinions of Attorney General: Vol. 1, Bancroft-Owen, p. 566.

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. See Opinions of Attorney General: 1904, pp. 33, 37, 49; 1908, p. 47; 1910, p. 40, Vol. 1, Bancroft-Owen, p. 567.

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. See Opinions of Attorney General: 1904, pp. 52, 54; 1906, pp. 54, 55; 1908, p. 47.

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. See Opinions of Attorney General: 1904, p. 39; Vol. 1, Bancroft-Owen, p. 566.

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

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. See Opinions of Attorney General: 1904, pp. 33, 37, 39, 54, 55; 1906, p. 56.

12. If the offense was not of recent occurrence, satisfactory reasons must be given why the application has been delayed. See Opinions of Attorney General: 1904, p. 32.

13. The magistrate before whom the affidavits are taken must certify whether, in his opinion, the parties making the same are to be believed. See Opinions of Attorney General: 1904, pp. 32, 37, 54, 55; 1906, p. 60.

14. The official character of the officer before whom the affidavits are taken must be certified to by the clerk of the circuit court. See Opinions of Attorney General: 1904, p. 55; 1908, p. 48; 1912, p. 958; Vol. 1, Bancroft-Owen, p. 566.

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. See Opinions of Attorney General: 1904, pp. 39, 54; Vol. 1, Bancroft-Owen, p. 566.

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. See Opinions of Attorney General: 1904, pp. 50, 54; 1906, p. 56; 1908, p. 50.

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. See Opinions of Attorney General: 1904, p. 36; 1906 p. 54; Vol. 1, Bancroft-Owen, p. 567.

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. See Opinions of Attorney General: 1904, p. 38.

20. If a requisition shall have been improperly or unadvisedly granted, there will be no hesitation in revoking it. See Opinions of Attorney General: Vol. 1, Bancroft-Owen, p. 565.

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.

**What Offenses Extraditable.** See Opinions of Attorney General: 1904, p. 43; 1912, pp. 957, 961.

OPINIONS RELATING TO APPROPRIATIONS AND EXPENDITURES

Appropriations and Expenditures—Fisheries—The appropriations made to the commissioners of fisheries by sec. 172-22, ch. 675, laws of 1913, are continuing, non-lapsible and available until used.

JAMES NEVIN,

Superintendent of Fisheries.

In your letter of the 3rd you ask me to advise you whether the appropriations to the commissioners of fisheries for operation, repairs, and maintenance and land, and land improvements, provided by ch. 675, sec. 172-22, laws of 1913, are continuing, non-lapsible and available until used. In this connection you call my attention to sec. 172-130, ch. 760, laws of 1913.

Sec. 172-22, ch. 675, laws of 1913, provides in part as follows:

"1. There is annually appropriated, beginning July 1, 1913, forty-eight thousand five hundred dollars, payable from any moneys in the general fund not otherwise appropriated, for the commissioners of fisheries for operation.

"2. There is appropriated on July 1, 1913, five thousand eight hundred dollars, and on July 1, 1914, three thousand two hundred fifty dollars, payable from any moneys in the general fund not otherwise appropriated, for the commissioner of fisheries for property, repairs and maintenance.

"3. There is appropriated on July 1, 1913, seven thousand eighty dollars, and on July 1, 1914, four thousand nine hundred ten dollars, payable from any moneys in the general fund not otherwise appropriated, for the commissioners of fisheries for land and land improvements, new structures and buildings, machinery, furniture and furnishings and for other permanent property and improvements."

Sec. 172-130, ch. 760, laws of 1913, provides in part as follows:
“In the construction of appropriation clauses, the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the legislature; that is to say, (1) appropriations in the following language, or substantially similar language, shall be construed to be annual, continuing, non-lapsible appropriations, and shall be available until used.

“There is annually appropriated, beginning (day of month and year) ................. dollars, payable from any moneys in the ............... fund not otherwise appropriated, for (department, board or other body) for (purpose or object).”

The several appropriations made by the quoted portions of ch. 675, laws of 1913, are made in almost exactly the language quoted from sec. 172–130, ch. 760, laws of 1913. In my opinion such appropriations are continuing, non-lapsible and available until used.

Appropriations and Expenditures—The appropriations made by ch. 392, laws of 1909, cannot be used since the passage of ch. 685, laws of 1913, but have lapsed and reverted into the general fund.

J. C. McKENZIE, Secy.

State Board of Agriculture.


In your letter of the 8th you state that between July 18th and July 31, 1913, contracts were let by your board to the Wadhams Oil Co. and the Wauwatosa Stone Co. for material for permanent improvements upon certain streets at the state fair park, West Allis. From a conversation with you I learn that some of the material under these contracts was delivered prior to July 31, but that no part of the contract price was due until after that date.

You also state that on July 27, 1913, your board advertised for bids for certain permanent work to be done upon the first section of the new grand stand, and that contracts therefor were let Aug. 13, 1913. That after the completion of the work, the board called upon the secretary of state to transfer funds with which to make payment under said contracts, pursuant to ch. 392, laws of 1909, when your atten-
RELATING TO APPROPRIATIONS AND EXPENDITURES. 3

tion was called to ch. 685, laws of 1913, published July 31, 1913, which repeals ch. 392, laws of 1909.

You say: *

"The question now arises whether this board will be com- pelled to meet these contracts out of the funds derived from the state fair, or whether the secretary of state should be in- structed to make the necessary transfer, in view of the fact that a part of the contracts, at least, were made prior to the passage of the act transferring the balance remaining in said fund, and bids had been advertised for, in accordance with law, on the other contracts."

Ch. 392, laws of 1909, provides in part:

"There is appropriated to the state board of agriculture out of any moneys in the state treasury not otherwise ap- propriated, for the purpose of making improvements upon the state fair grounds, located in Milwaukee county, the sum of fifty thousand dollars annually for three years. This appropriation is made for the purpose of erecting the follow- ing buildings and making the improvements herein design- nated, in order of the greatest need therefor: addition to executive building at a cost not to exceed $2,500; * * * streets and walks at a cost not to exceed $7,000; * * * section of grand stand, at a cost not to exceed $25,000." The amounts thus enumerated, including those omitted from the quotation, in each instance preceded by the words "at a cost not to exceed," total $136,500.

Former Attorney General Gilbert ruled that any part of the annual appropriation not used during the year, was avail- able in succeeding years and did not revert to the general fund. Biennial Report and Opinions of Attorney General 1910, p. 65.

It will be noted, however, that it, in fact, did not absolutely appropriate a specific amount for the three years, but an amount not to exceed a total of $136,500 and not more than $50,000 in any one of the three years. It seems clear to me that the amount available for any one purpose could not exceed the specific amount named for that purpose. Any part of the specific amount named not needed for that pur- pose would revert to the general fund. As the total specific sums named are less than $150,000, the difference between the specific amounts and the $150,000 never was appro-
appropriated and remained in the general fund. This was held in two opinions given by my predecessor to Hon. John M. True, then secretary of the state board of agriculture, under dates of Jan. 17th and Jan. 25th, 1911, but not published in the reports of this department.

By ch. 570, laws 1911, the board was authorized to use certain unexpended balances of these specific amounts for the purpose of improving the street running along the south side of the state fairgrounds.

Ch. 685, laws 1913, authorizes the board to permanently improve a specific portion of the street running along the south side of the fairgrounds, and makes an appropriation therefor. It also expressly repeals ch. 392, laws of 1909, and 570, laws of 1911.

The question is, what is the effect of such repeal upon the appropriations made by the repealed laws?

I am informed by Mr. Lee, chief bookkeeper in the office of the secretary of state, that money thus appropriated is not transferred from the general fund at the beginning of the fiscal year for which appropriated, but remains in that fund until needed for the purposes for which appropriated. Can it be transferred under authority of a law no longer in existence? I have been unable to find any authority passing upon this precise question.

It has been frequently held that where an appropriation is made to cover expenses for a particular period, it is not necessary that the money be actually drawn from the treasury during the time for which it was appropriated, but that the expense must be incurred, or the salary earned during such time. See cases cited on page 14, Biennial Report and Opinions of the Attorney General for 1912.

Such appropriations, however, are available only to meet such obligations as mature within the fiscal period for which they are voted. 16 Current law, 2176; Jobe v. Caldwell and Drake, 99 Ark. 20, 136 S. W. 966.

In the latter case the court said:

"In fixing the amount of an appropriation, the legislature anticipates and makes an estimate of the amount of money to become due and payable by the state during the specified fiscal period, and sets that much aside for such use during that period. Payments out of the appropriation of amounts falling due after the expiration of that fiscal period are
not anticipated and included in the estimates, and cannot therefore be paid, even if the unexhausted appropriation be sufficient for that purpose. * * * It is not sufficient that an obligation may arise out of dealings with the state, to mature during a later fiscal period. The debt must, as already stated, mature and become payable during the fiscal period, before it can be held to come within the appropriations made for that period. In other words, a mere promise on the part of the state, within the lifetime of an appropriation, does not fall within the appropriation, unless such promise matures within that period. It is not correct to say that an amount earned under contract with the state comes within an appropriation, when the contract provides for payment after expiration of that fiscal period."

The supreme court of Nebraska holds that where an appropriation lapses, and reverts to the general fund, it is that portion for which no warrants have been drawn which lapses. *State v. Brian, 84 Neb. 30, 120 N. W. 916.

It seems perfectly plain to me that as to the contracts which were let Aug. 13, 1913, the appropriations lapsed, and are no longer available for that purpose. The repeal of the law making the appropriation had become effective before the contracts were made.

Ch. 760, laws 1913, enacted sec. 172-130, Stats., which provides in part:

"In the construction of appropriation clauses, the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the legislature; that is to say: * * * (2) Appropriations in the following language or in substantially similar language, shall be construed to be lapsible appropriations, and balances unexpended at the close of the appropriation period or interval shall revert to the fund from which appropriated. There is annually appropriated, not to exceed dollars, payable from any moneys in the fund not otherwise appropriated, for (department, board, body, purpose of object)."

It seems to me that the appropriations in question here were made in substantially the language here quoted. Does the rule apply? Of course a statute ought not to be so construed as to give it a retroactive effect. It should be construed as applying only to the future. But it appears to me that the quoted portion of the statute is merely declaratory
of a rule that had been in existence, and had been applied long before its enactment. In my opinion the unexpended portion of the several appropriations made by ch. 392, laws 1909, lapsed and reverted to the general fund at the end of the three year period. This may not be in strict accord with the opinion given by Mr. Gilbert, but is the conclusion at which I have arrived. Possibly this is not true as to the appropriation made by the 1911 law, but I do not understand that that appropriation is in question here.

Appropriations and Expenditures—Fish and Game—Statutes—Under ch. 528, laws 1913, appropriating money for the purchase of game birds and their eggs for breeding purposes, it is not permissible to use part of such appropriation for the transportation and retention of deer or elk.

March 6, 1914.

 JOHN A. SHOLTZS,

State Fish and Game Warden.

In your letter of the 5th inst. you ask to be advised as to whether or not the state game warden may construct a suitable fence to enclose deer or elk in carrying out the provisions of ch. 528, laws of 1913. In your supplemental letter of the same date you state that if any elk are placed within the enclosure it will be necessary to pay for the loading and the transportation of the elk from Yellowstone park, and you inquire whether it would be reasonable to use a part of the appropriation under the chapter mentioned for the outlay to place the elk in the enclosure.

The title to said ch. 528 is as follows:

"An Act to Create Section 1498–25 of the Statutes relating to the Establishment of a State Game Farm, and Making an Appropriation."

Said sec. 1498–25 reads as follows:

"1. The state fish and game warden is hereby authorized to purchase game birds and their eggs for the breeding and propagation of game."
"2. The distribution of said game birds and eggs shall be made throughout the various parts of the state under the supervision and direction of the state fish and game warden, the state forester, and the governor, and according and under such rules and regulations as they shall prescribe.

"3. There is hereby annually appropriated out of any moneys in the general fund derived from licenses to hunt or fish or derived from the sale of fish by the state fish and game warden, not otherwise appropriated, a sum not to exceed two thousand dollars, for the purpose of carrying out the provisions of this section."

You will notice that this statute restricts your powers to very narrow limits. You are simply authorized to purchase game birds and their eggs for the breeding and propagation of game. There is no intimation in the language used that the appropriation should be used for any other purpose than those specifically mentioned. I do not believe you are authorized to expend any of the money available, for this purpose for the transportation and retention of deer or elk. The language used does not warrant a construction broad enough to include these animals. Your questions, therefore, must be answered in the negative.

Appropriations and Expenditures—State Park—Money received by the park board for the sale of wood, etc. and for leases on cottages may be used to purchase additional park land.

E. M. Griffith,
Acting Secretary State Park Board,
Madison, Wis.

In your letter of May 13th you state that the legislature in 1913 appropriated $38,000 for the care and supervision of state parks, but that no appropriation was made for the purchase of additional lands, which it will be necessary for the state to acquire in order to complete the state parks; that there is, however, from moneys formerly appropriated for the purchase of park lands a balance of some $9,600 available; that the state park board is preparing to sell some of the old buildings on the parks and also to lease camp and cottage sites, sell hay, wood, and other products of the parks,
and you inquire whether such moneys should be paid into the state treasury under the provisions of subsec. 14, sec. 1494t-3m, and then become available for the purchase of additional park lands under the provision of subsec. 7.

Said subsec. 14 provides as follows:

“All money received from the sale of wood, timber, rocks, or other products or attributes of the park land shall be paid into the state treasury.”

Said subsec. 7 provides as follows:

“Said board is authorized and empowered to purchase or acquire for and in the name of the state of Wisconsin in the manner hereinafter provided and for the purposes hereinafter designated, title to such tracts of land as it may select, which in the opinion of said board shall most adequately and suitably fulfill the requirements of a state park, and shall duly take into consideration in the acquirements of such lands, their relative cost and value for park purposes, out of any moneys appropriated to or received by the said state park board.”

Under this provision the state park board is authorized to purchase land for park purposes and pay for the same “out of any moneys appropriated to or received by the said state park board.” This is broad enough to include the money received from the sale of any product or the lease of any cottage by the state park board.

I am, therefore, of the opinion that such money received should be paid into the treasury and that it becomes available for the purchase of park land for the state.

Appropriations—Commissioner of Insurance—The expenses incurred pursuant to subsec. 5 sec. 1968, Stats., should be paid out of the general fund pursuant to the appropriation made by sec. 172, Stats., and not pursuant to sec. 172-14.

May 19, 1914.

JOHN S. DONALD,
Secretary of State.

In your letter of May 11th you request my advice as to whether the expense of examinations of insurance com-
panies which are collected by the commissioner of insurance and paid into the state treasury at the time of the payment of such expenses should be charged to the appropriation of the commissioner of insurance under sec. 172-14, Stats., or to what appropriations such expenses should properly be charged.

Sec. 1968, Stats., authorizes the commissioner of insurance to make examinations of insurance companies and subsec. 5 thereof provides that "The company or society, through the commissioner, as ordered by him, shall pay into the state treasury the actual cost of such examination in expenses paid or to be paid by the state" etc. Prior to the revision of the appropriation statutes by the 1913 legislature subsec. 7 of the same section of the statutes provided for the payment of such expenses out of the state treasury upon vouchers approved by the commissioner of insurance and audited by the secretary of state; and subsec. 9 appropriated a sum sufficient to carry out the purposes of the section "not exceeding the amount paid into the state treasury under this section." Both these subsections were repealed by sec. 76, ch. 772, laws 1913, but prior to such repeal sec. 172, Stats., had been amended by sec. 3, ch. 760, laws 1913, to read:

"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, where such salaries, compensations or other disbursements are not by law charged or are not properly chargeable to any other appropriation."

In view of the fact that the expense of examining insurance companies is necessarily an amount indefinite and fluctuating from year to year and might easily exceed in any year the sums appropriated by sec. 172-14, Stats. "to carry into effect the powers, duties and functions" of the commissioner, I do not think that the expenses incurred and paid pursuant to subsec. 5, sec. 1968, Stats. were intended to be charged to the appropriation made by sec. 172-14, Stats. Such expenses should obviously be paid out of the same fund as that to which they are credited and since they are required to be paid "into the state treasury" and not into any particular fund thereof, and since sec. 172 makes an appropriation out of the general fund sufficient to pay all "disbursements
authorized by the statutes to be made where such * * * disbursements are not by law charged or are not properly chargeable to any other appropriation” I think that it was clearly the legislative intent that the moneys collected by the insurance commissioner should be paid into the general fund and that the expenses properly payable from such moneys should be payable from the same fund and charged to the appropriation made by sec. 172, Stats.

Appropriations and Expenditures—Normal Schools—Appropriation to the Stevens Point normal school may be increased 10 per cent or $270.

George B. Nelson,
Normal School Regent,
Stevens Point, Wis.

In your letter of Aug. 20th you refer to sec. 1, ch. 758, subsec. 22, laws of 1913, and you submit the following questions:

“1. May the board of regents of normal schools use the $2,700.00 appropriated to Stevens Point, for the purchase of land?
“2. May the board of regents reapportion the several amounts so as to give Stevens Point the sum of $270.00 additional appropriation under said Law?”

Said sec. provides in part as follows:
“There is appropriated on March 1, 1914, eighty-two thousand one hundred dollars, and on March 1, 1915, ninety thousand dollars, payable from any moneys in the normal fund income not otherwise appropriated, to the board of normal regents for the purchase of land and for land improvements at the various named normal schools and in the sums set out as follows:
* * *
“Normal school at Stevens Point, two thousand seven hun-
dred dollars;
* * *
“The board of normal regents are authorized to reapportion the one hundred seventy-two thousand one hundred dol-
ars herein appropriated but such reapportionment shall not change any item of the foregoing distribution more than 10 per cent.”
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Your first question must, of course, be answered in the affirmative for the statute appropriates $2,700 for the use of the Stevens Point Normal School for the purchase of land.

Your second question must also be answered in the affirmative for under the last sentence in the above quoted statute the normal regents are expressly authorized to increase the appropriation for any normal school as high as ten per cent. I see no reason for questioning the validity of these enactments.

Appropriations and Expenditures—Bridges—The appropriation of not less than $30,000 per year to pay the state's share of bridges under sec. 1321a lapses if not used within the year.

September 10, 1914.

WISCONSIN HIGHWAY COMMISSION.

In your letter of Sept. 9th you state:

"During the fiscal year beginning July 1, 1913, and ending June 30, 1914, the Wisconsin highway commission received a number of petitions for state aid in building bridges as provided under sec. 1321a, Stats. Acting under subsec. 4 of this section, the commission found two of these bridges to be necessary and made certifications to the county clerks of the counties in which the petitions originated. One of these petitions was for a bridge in the village of Nekoosa, Wood county, the certification being made on November 7, 1913, and the other being on account of a bridge to be built in the village of Prairie du Sac, Sauk county, and the town of West Point, Columbia county, the certification being made on Nov. 3, 1913.

"Plans and specifications for the Nekoosa bridge were prepared and bids received on two plans providing for different sites, but no contract was let.

"Acting upon advise given by its district attorney, the county board of Columbia county failed to levy any funds to provide its percentage of the cost of the Prairie du Sac bridge, and nothing more than some preliminary work has been done with regard to the preparation of these plans."

You inquire whether that portion of the appropriation for the years 1913 and 1914 necessary to pay the state's per-
percentage of the cost of these two bridges is still available or whether this appropriation lapses through a failure to expend these funds so that none of it can now be used?

Sec. 172-123, Stats. provides as follows:

“There is annually appropriated on July 1st, not to exceed thirty thousand dollars, payable from any moneys in the general fund, not otherwise appropriated, for the purpose of carrying out the provisions of sec. 1321a.”

Sec. 172-130 provides in part as follows:

“In the construction of appropriation clauses, the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the legislature; that is to say:

“(1) * * *
“(2) Appropriations in the following language, or in substantially similar language, shall be construed to be lapsible appropriations and balances un expended at the close of the appropriation period or interval shall revert to the fund from which appropriated.

“There is annually appropriated, not to exceed _______ dollars, payable from any moneys in the ____ fund not otherwise appropriated, for (department, board, body, purpose or object).”

Under these provisions of our statutes it must be held that the appropriation of a sum not to exceed thirty thousand dollars annually lapses at the end of the fiscal year if it is not expended in compliance with the provisions of the statute. This has not been done in the case of the two bridges in question. You are, therefore, advised that that portion of the appropriation for the year 1913 necessary to pay the state’s percentage of the cost of those two bridges is not now available as the appropriation has lapsed through failure to expend the money before the close of the appropriation period.
Relating to Appropriations and Expenditures.

Appropriations and Expenditures—Public Officers—Secretary of State—Board of Public Affairs—Industrial School for Girls—An appropriation for "care of property" is chargeable with salaries of gardener, engineer and night watch.

Secretary of state is, under the constitution auditor of the state and should audit claims against the treasury without interference or advice from board of public affairs.

John S. Donald,
Secretary of State.

I have your request for opinion of the 21st inst. in which you refer to the appropriations in sec. 172-65, Stats., for the industrial school for girls at Milwaukee, and ask, in effect, to be advised whether salaries of a gardener, engineer and night watch at that institution are properly chargeable to the appropriation provided in subsec. 1, sec. 172-65, which appropriates $10,500 from the general fund "for insurance by the state, repair of buildings and care of property of said school."

You state in substance that the practice has been to charge the salaries of these employees of the industrial school to this appropriation in subsec. 1, of the section referred to, but that this classification is objected to by the board of public affairs, who contend that these items are proper charges not against said subsec. but against subsec. 3, sec. 172-65, which appropriates moneys deposited by the Institution in the state treasury, "to carry on the work of said school."

You further state that it is represented by the officials of the institution that to make these charges against the appropriation in subsec. 3 would embarrass the institution, and you enclose a communication from the superintendent of the school, in which it is stated as follows:

“Our engineer, gardener and night watchman have regularly been paid out of the general state fund for the care and repair of buildings and this has been known by each Legislature before our appropriation bills were passed. An estimate of our expenses for the two years has to be itemized and given to the joint committee on claims and, also, a statement of our expenditures for the preceding two years, so that they know explicitly what our money has been spent for and what we expect to spend it for during the two years.

September 23, 1914.
for which it was appropriated and, of course, we have to pay our men from this fund, which is proper and right, as they are directly responsible for the care of our buildings and grounds."

Assuming these statements by the officials in charge of the school to be true, it is quite proper to refer to the circumstances and conditions with which the legislature was dealing and, as it is represented, dealing with knowledge of those circumstances and conditions to clear up any ambiguity which there might be in the language of the appropriation. It will be observed that the appropriation in subsec. 1, sec. 172-65 is for three purposes, namely, insurance, repairs "and care of property of said school." What expenditures, if any, might be incurred in addition to repairs and insurance for the "care of" such property, unless it be for items of the nature in controversy, do not readily occur to me. Certainly it would seem that the legislature, having appropriated for repairs and insurance and desiring to appropriate in addition for a watchman, gardner and engineer, who are, according to the statement of the superintendent, "directly responsible for the care of our buildings and grounds," could hardly have found more apt language in which to make such appropriation in general terms than that used, to wit, "for ** care of property of said school."

It is the established rule of this department on all questions of appropriation to resolve doubts in favor of the treasury, but this situation is not, to my mind, one involving any doubt permitting the application of such rule. Accordingly, I find no difficulty in holding that the items in question are properly chargeable to the appropriation for care of property in subsec. 1, sec. 172-65, and that the ruling of your Department heretofore followed in that respect is correct.

Your inquiry indicates some doubt in your mind as to your duty in the premises in view of the fact that the board of public affairs is of a different opinion, and I assume that you have in mind the powers of the board of public affairs under secs. 990-40 to 990-60, Stats. These sections define "public body", as therein used, to include the incumbent of any office under the Const. or laws of the state (Sec. 990-40), and give the board of public affairs "such
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supervision of every public body as shall be necessary to secure uniformity and accuracy of accounts” (Sec. 990-55, subsec. 1).

These sections further provide:

“The board shall devise for all public bodies uniform systems of accounts and uniform accounting procedures adequate to record in detail all transactions affecting the acquisition, custodianship and disposition of values, including cash receipts and disbursements, and every such public body shall keep its accounts and maintain its accounting procedure accurately and faithfully as prescribed and directed by the board.”

In my opinion these statutory provisions, while probably conferring upon the board of public affairs the power to prescribe a system of accounts for the secretary of state’s department and imposing upon the secretary of state a statutory duty to observe and use in his department the system of accounts so prescribed, do not go to the extent of conferring upon the board of public affairs any duty or authority to determine what appropriations made by the legislature are chargeable with particular items of disbursement, or impose any duty upon the secretary of state to defer to the judgment of the board of public affairs upon matters of that character.

If there were any doubt upon this point with respect to the construction to be given these sections of the statutes, such doubt would have to be resolved so as to harmonize the provisions of the statute with the constitution of the state, so that the statute itself may be sustained. Sec. 2, art. VI, Const., prescribing the duties of the Secretary of State, provides, among other things, that “he shall be ex officio auditor.” It is, of course, a primary function of the auditor of the state to determine whether a claim or disbursement is properly chargeable to or payable out of an appropriation made by the legislature from the treasury of the state, and in each case what appropriation.

It is the settled law of this state since the decision of the supreme court in Crawford v. Hastings, 10 Wis. 525, that this function is one created by the constitution exclusively in the secretary of state, beyond the power of any legislature to detract from it or to transfer it in whole or in part to any other
officer or functionary. In the discharge of this duty the secretary of state acts upon his own responsibility as a constitutional officer of the state and is answerable upon his official bond. In the exercise of this function he is not and cannot be required to defer to any other authority, either advisory or supervisory, except that he is entitled, upon request, to an official opinion from the attorney general as to the construction of any appropriation act or other law upon which he may be in doubt.

In view of the foregoing, it is hardly necessary, perhaps, to expressly answer your question whether, in view of the criticism of the board of public affairs, the secretary of state has the authority, notwithstanding the claim of the officials of the industrial school, and notwithstanding the fact that the institution is not strictly a state institution, to charge the items in question to subsec. 3, sec. 172–65, as contended by the board of public affairs. As already stated, these items are, in my opinion, proper charges to the appropriation made in subsec. 1 of that section.

If, however, the secretary of state should be of different opinion, he has authority and it is his duty to audit and allow said items against such appropriation as, in his judgment, is properly chargeable therewith, and at least to refuse to audit or allow the same against any appropriation against which they are not, in his judgment, properly chargeable.

Appropriations and Expenditures—County Board of Education—Public Officers.—The appropriation made by sec. 702–11, stats., to each county board of education, is subject to the orders of the county clerk, as provided in sec. 702–10, par. 13, Stats., as soon as it is paid into the county treasury.

STANLEY G. DUNWIDDIE,
District Attorney,
Janesville, Wis.

In your letter of the 2nd you state that a short time ago your county treasurer received from the state treasurer the sum of $500 as state aid to the county board of education district of your county under sec. 702–11, Stats. That the
county board of education has made and determined the amount of money necessary for carrying out this work and has reported the total amount to the county clerk. That the county board of supervisors will not meet until next week. That the county board of education desires that the county clerk should draw orders on the $500 of state aid money, now in the county treasurer's hands. That the clerk does not feel that he is authorized to draw any orders on said sum until the county board of supervisors meets and levies the amount necessary for the work of the county board of education. You ask:

"Is the county clerk authorized at the present time, to draw an order on the said sum of $500 at the request of the county board of education?"

Par. 13, sec. 702-10, Stats., provides in part:

"On or before the first Monday in November, in each year, the county board of education shall report the total amount required to the county clerk who shall report the same to the county board of supervisors at its annual meeting in November, and such amount shall be levied in the county tax and collected as other taxes, and shall be set aside by the county treasurer as a separate fund to be paid out by him upon the orders of the county clerk issued in accordance with schedules submitted to him by the county board of education, which schedules shall give the names of persons, the amount due each and the purposes for which issued."

Sec. 702-11, Stats., provides that the state aid shall be placed in the separate fund created by the provision quoted above.

I find nothing in the statutes which prohibits the drawing of orders against this separate fund whenever there is any money in the fund with which said orders can be paid. As soon as the $500 was received by your county treasurer, he should have placed it in such separate fund. In my opinion the county clerk is authorized at the present time to draw orders at the request of the county board of education payable out of said sum of $500.
Appropriations — Counties — Tuberculosis Sanatorium —
State's liability for patients in county tuberculosis sanatoriums.

December 11, 1914.

STATE BOARD OF CONTROL.

With your communication of the 7th inst., receipt of which is hereby acknowledged, you enclose a statement made by the trustees of the Sunny Rest Sanatorium, the same being the Racine county tuberculosis sanatorium, bearing date the 14th day of July, A. D., 1914, setting forth the names of all persons cared for at public expense in such institution during the year preceding the first day of July, 1914, the date when such persons were admitted, and the number of weeks each of them was cared for during such year, such certificate having been made and presented for the purpose of securing the state aid provided for by sec. 1421–14, Stats.

On this statement appears the name of Mamie Bose with the notation, “Pays $7 a week toward maintenance;” also the name of Daniel Banov with the notation, “Paid $6.25 per week toward maintenance,” and the name of Robert Hedstrom with the notation, “Paid $5 per week toward maintenance.”

You state that these patients were in the Sanatorium under no order of a county judge; that you assumed that, therefore, the state was not liable for any part of their maintenance and you deducted from this bill or statement the amount claimed by the Sunny Rest Sanatorium for the maintenance of these persons.

You ask to be advised whether these deductions were properly made or whether Racine county is entitled to $5 per week for the maintenance of these patients.

Par. 3, sec. 1421–14, provides as follows:

“On the first day of July, the trustees of any county, operating such an institution, shall certify to the secretary of state the names of all persons cared for at public expense in such institution, the date when such persons were admitted, the number of weeks each of them was cared for during the preceding year, which certificate shall be verified by the affidavit of the trustees, and delivered by said secretary to the state board of control, and if such board of control shall
approve the same, and cause its approval to be indorsed thereon by the president and secretary thereof, the secretary of state shall credit the amount so certified to be due such county on the next taxes due therefrom."

Sec. 172–120 provides as follows:

"The amount contributed as state aid for tuberculosis in the advanced or secondary stages in county institutions, to carry into effect the provisions of section 1421–14 shall not exceed fifty thousand dollars annually and such aid shall be apportioned among the various county institutions in proportion to the number of patients in each institution during the year ending on the thirtieth day of June; provided, that there shall not be allowed more than five dollars a week per patient for the number of weeks such patients shall be a resident of such institution."

These provisions of the Stals. contemplate that certain persons are or may be cared for at public expense in county tuberculosis sanatoriums and that the amount to be paid therefor is $5 per week.

The question is naturally presented of what persons are to be cared for at public expense and how such persons are to be designated and by what means they are to secure admission to the institution. This is provided for in sec. 1421–12, which provides as follows:

"Any indigent person suffering from tuberculosis in the secondary or advanced stages, who shall have been a resident of the state for at least one year, shall be received into the institution, within the limits of its capacity, as determined by the state board of control. Before such person shall be admitted, he shall file a statement with the county judge of the county in which he resides, setting forth the fact that he is unable to pay for his care and treatment. The county judge of the county, in which such person resides, shall make a thorough investigation of the case, and if he finds that the applicant, or his legal representatives, are unable to pay for his care, he shall approve in writing, the application of such person. The judge shall immediately forward to the superintendent of the institution, a statement in writing that such person is indigent and is suffering from tuberculosis in the secondary or advanced stages. Upon receipt of such certificate, it shall be the duty of the superintendent of the institution to receive and care for such indigent person, until the superintendent shall recommend his discharge or removal."
By the section of the statutes last quoted we see that only "indigent persons" are to be thus cared for. It also naturally follows that there must be some way provided for determining whether a person claiming to be such is, in fact, an indigent person. That is a matter that certainly could not be left to the person seeking admission, nor should it properly be left to the determination of the officers of the institution. It is, therefore, provided in the section above quoted that "the county judge of the county in which such person resides shall make a thorough investigation of the case and if he finds that the applicant or his legal representatives are unable to pay for his care he shall approve in writing, the application of such person."

The judge is required to forward his certificate in writing to the superintendent of the institution, upon receipt of which it is made the duty of such superintendent to receive and care for such indigent person.

There is no provision in the statutes that I can find providing for the admission of persons into such institutions at public expense in any other manner, nor is any other way provided by which the state may become obligated in whole or in part to pay the expenses of any person admitted to such institution. The state certainly could not assume to incur the obligation of caring for dependent citizens of the state unless in doing so it provided some means by which it could be satisfactorily determined whether the person seeking such aid was actually dependent. This is the reason for the statute requiring the county judge to make the investigation required. It is to protect the state from fraud and imposition which might be practiced unless some way were provided of determining whether the person making application for the aid is, in fact, an indigent and dependent person.

Assuming, as you state in your letter, that the persons, for the maintenance of whom you made deductions for the claim presented by the Sunny Rest Sanatorium, were not certified to be indigent persons by the county judge of the county from which they respectively came, under the provisions of sec. 1421-12 above quoted, the state is not liable for the maintenance of such persons in said institution and the deductions were properly made and should not be allowed.
Although not called for by your request for opinion, I volunteer the statement that unless the board of control has some practical way of keeping track of the certificates made under sec. 1421–12 by the county judge, that the law should require the statement provided for by par. 3, sec. 1421–14, to include a reference to such certificate.

I may also volunteer the statement that the certificate accompanying your communication is not a proper basis for either approval on the part of your board or audit by the secretary of state for the reason that it is not "verified by the affidavit of the trustees" of the institution.
Banks and Trust Companies—State Officers—Under sec. 2024-77j, the state treasurer is not authorized to accept in exchange for other securities deposited with him by a trust company bank a certificate of deposit made payable to the commissioner of banking, and which certificate is not endorsed.

HENRY JOHNSON,
State Treasurer.

In your letter of the 17th you enclose a letter from Hon. A. E. Kuolt, commissioner of banking, in which he states:

"Under sec. 2024-77j, Stats. I, Albert E. Kuolt, commissioner of banking of the state of Wisconsin, do hereby approve the following security, property of the Citizens Savings & Trust Company, of Milwaukee, Wisconsin, and by said trust company deposited with the state treasurer, as by law required, to wit:

"Certificate of deposit of the Merchants & Savings Bank, of Kenosha, Wisconsin, number 13294, payable to the order of the commissioner of banking of the state of Wisconsin, dated January 13, 1914, for $15,000.00.

"To replace:

"Note and mortgage and other papers of the Clark Realty Company, Loan No. 2843, for $15,000.00."

You also enclose the certificate of deposit referred to in your letter. This certificate recites that "Citizens Savings & Trust Co., in liquidation, has deposited in this bank $15,000.00 payable to the order of A. E. Kuolt, commissioner of banking, on the return of this certificate properly endorsed." You state that Mr. Kuolt refuses to endorse this certificate of deposit with the proper endorsement. That you have had no notification from courts or anywhere
of the liquidation of this trust company, and you ask if you may take this certificate without the proper endorse-
ment, in exchange for other securities.

Sec. 2024-77j, Stats., requires trust company banks to make a deposit with the state treasurer

"in cash, bonds or mortgages, or notes and mortgages on unincumbered real estate within this state worth double the amount secured thereby, or public stocks or bonds of the United States, or of any state of the United States that has not defaulted on its principal or interest within ten years immediately preceding the date of such deposit, or of any county, town, village, or city in this state, and upon all which bonds and other securities there shall have been no de-
fault in the payment of interest or principal for a longer period than thirty days."

These securities are to be approved by the commissioner of banking and held by the state treasurer in trust and pro-
vision is made for exchanging securities of the same kinds. A certificate of deposit is nowhere mentioned as one of the securities that may be deposited. Possibly if this certi-
ficate were properly endorsed it could be treated as cash but certainly it cannot be so treated in its present form. In my opinion you have no authority to accept this certificate in its present form in exchange for other securities.

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_Banks and Banking—_An employer who permits his em-
ployees and others to leave their wages and earnings with him and issues an acknowledgment therefor in which he agrees to repay the sums as left on demand (subject to 30 days notice if desired) with 6% interest, is "doing a banking business" as defined by sec. 2024-78l, Stats.

Feb. 10, 1914.

ALBERT E. KOULT,
Commissioner of Banking.

In your letter of Feb. 6th you enclose correspondence had with the Wisconsin Bridge & Iron Co. of North Milwau-
kee and request my opinion as to whether the facts set forth
in their letters show a violation of the banking laws of this state.

In a letter of Jan. 29th to you the Wisconsin Bridge & Iron Co. state that

"We have been allowing our employes and others to leave their wages and savings with us and are giving them an acknowledgment as per enclosed blank form. We have done this for several years in order to encourage our employes to save their money."

The blank form of acknowledgment referred to is as follows:

"North Milwaukee, Wis. ........................................

We have credited your account with ................. Dollars, ($ .............. ) due you for wages during week ending ...........

This amount bears interest at the rate of 6 per cent per annum, computed in accordance with our established rules, and, if desired by us, is subject to thirty days notice before withdrawal.

WISCONSIN BRIDGE & IRON CO.

Per ...........................................

Sec. 2024-78m, Stats. makes it unlawful "for any person, co-partnership, association or corporation to do a banking business without having been regularly organized and chartered as a national bank, a state bank, a mutual savings bank, or a trust company bank."

Sec. 2024-78l provides that:

"The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, co-partnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal."

The right of the state to enact these sections has been expressly affirmed by our supreme court in Weed v. Bergh, 141 Wis. 569, and MacLaren v. State, 141 Wis. 577, so that the only question is as to whether the facts stated bring the present situation within the language of sec. 2024-78l.
In the *MacLaren Case* it was held that the proprietor of Gimbel Brothers' store, which, in a "deposit purchase department," received deposits of money, issued pass books evidencing such deposits, paid interest thereon and gave to the depositor an option to withdraw the deposit on demand with interest, either in money or in goods, was doing a banking business within sec. 2024–78l. In that case it was said that:

“The main purpose of regulating the banking business as the business is now carried on is to insure the safety of deposits. The calamities that befall individuals and communities as a result of bank failures are well known. The necessity for the regulation of establishments carrying on the kind of business that Gimbel Brothers carries on is just as apparent as it is in the case of regular banking institutions.” (141 Wis. 582.)

And further that:

"Regulation must be carried on through the medium of general laws which often bear more heavily on some than on others owing to the circumstances which surround them. If the general purpose of the law is regulation, and not the suppression of lawful business, the fact that some persons on whom it operates may have to reconstruct their methods of doing business, or cease doing business at all, does not render the law void. This court recently approved a rule, abundantly supported by authority, to the effect that the legislature in enacting a police regulation may include within the purview of the statute acts innocent in themselves and not a subject of police regulation, where the inclusion of the acts is necessary in the opinion of the legislature in order to make the regulation effective." (141 Wis. 584.)

It seems to me that there can be no doubt under the ruling in the above quoted case that what is being done by the Wisconsin Bridge & Iron Co. constitutes "doing a banking business" within the definition thereof given in sec. 2024–78l. According to the facts stated money is left with the company for safe-keeping and is left not for a fixed period but is payable on demand (subject to thirty days notice before withdrawal at the option of the company) so that, while it may be difficult to always distinguish between a deposit and a loan, and accepting or receiving of the wages of employees and others under the circumstances here is quite clearly ac-
cepting money "on deposit" within the following definition approved by the supreme court of Wisconsin, to wit:

"A deposit is where a sum of money is left with a banker for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. While the relation between the depositor and his banker is that of debtor and creditor simply, the transaction cannot in any proper sense be regarded as a loan unless the money is left, not for safe-keeping, but for a fixed period, at interest, in which case the transaction assumes all the characteristics of a loan." *State v. McFetridge*, 84 Wis. 473, 515-6.

That such deposits are received "as a regular business" by the Wisconsin Bridge & Iron Co. is conceded so that it seems clear that both the essential elements of the statutory definition of banking are present.

In the *MacLaren Case* it was said that

"However, we do not wish to be understood as holding that Gimbel Brothers might not receive money on deposit from its patrons, where such money is deposited for the purpose of enabling the depositor to purchase goods from its store and where the money is used for that purpose." (141 Wis. 584.)

This limitation can have no effect here for the deposits quite plainly are made for no other purpose than for safe-keeping and for the interest they will earn.

While it may well be that the policy pursued by the Wisconsin Bridge & Iron Co. is one very advantageous to its employes in encouraging them in habits of saving by affording them an easy and safe investment for their earnings, the legislature has seen fit to require that only such persons and corporations shall be permitted to accept deposits as have thrown about them the safeguard provided by the national and state banking laws. In order to protect depositors from the comparatively few dishonest, careless or incompetent persons who might solicit their deposits, the legislature considered it necessary to regulate the business of accepting deposits and to make such regulations applicable to all engaged in such business. With the policy of such legislation
we have nothing to do for that is a matter resting solely with the legislature. The only open question is as to the meaning of the law passed by the legislature. As to that I have no doubt and am clearly of the opinion that sees. 2024–78/l and 2024–78m, as interpreted by the supreme court in the Mac Laren Case, prohibit the Wisconsin Bridge & Iron Co. from doing the business set forth in their correspondence with you.

Banks and Banking—Mortgages—State banks may within their charter powers take several notes secured by a real estate mortgage and assign the notes separately, retaining the custody of the mortgage instrument and incidental papers for the benefit and convenience of the assignees. If the notes are endorsed “without recourse” the bank incurs no liability as a trustee or otherwise.

April 15, 1914.

ALBERT E. KUOLT,
Commissioner of Banking.

You submit for my examination a mortgage taken by a state bank as mortgagee to secure several promissory notes, together with the several notes and the form of assignment by which these notes and the pro rata of the mortgage security are by the bank assigned to different purchasers, the notes being endorsed by the bank “without recourse”. You ask to be advised whether the conduct of this business in this manner by state banks is within the proper scope of their powers as banking corporations. You further suggest that the practice is objectionable from the standpoint of your department because of the difficulty of detecting any liability of the bank as indorser of such notes in case the same are not endorsed “without recourse”.

I find that this precise question has been answered to you in an opinion under date of June 19, 1912, by my predecessor in office. In that opinion it is held that it is not unlawful for state banks to engage in this business in the manner indicated. Upon a reexamination of the question presented, I am unable to find any authorities or any rules of law which would support a contrary conclusion.
The powers of state banks are enumerated in sec. 2024–9, Stats. and include, among others:

"To exercise, by its directors, duly authorized officers, or agents, all such powers as shall be usual in carrying on the business of banking; by buying, discounting and negotiating promissory notes, bonds, drafts, bills of exchange, foreign and domestic and other evidences of debt; by receiving commercial and savings deposits under such regulations as it may establish; by buying and selling coin and bullion, and by buying and selling exchange, foreign and domestic; issuing letters of credit, and by loaning money on personal or real security, as provided hereinafter."

Under this statute it is clearly competent for state banks to lend money upon promissory notes secured by real estate mortgages and it may, of course, make such a loan represented by several notes secured upon a single mortgage. Also, it would have the right to sell and assign such notes and mortgage. Clearly, also, under its powers to do a general banking business, it may act as a collection agency in collecting and receiving the interest payments for the purchasers of such notes. There would probably be no serious question of its right, furthermore, to retain the custody of the papers belonging to its patrons or clients, or in which they have an interest, at their request.

The only ground of possible objection against a state bank engaging in this business arises upon the provision in the assignment form used to the effect that the bank shall retain the custody of the mortgage, insurance policies and tax receipts for the benefit of the assignees and holders of the several notes. These provisions in the form of assignment possibly raise the question whether the bank thereby becomes a trustee and undertakes to act as a trustee for the assignees of the several notes, the same as the trustee in a trust deed becomes a trustee for the benefit of the holders of bonds secured by such trust deed.

In an opinion rendered to you under date of June 15, 1911, by my predecessor in office, it is held that a state bank is not authorized to act as a trustee in a mortgage made to secure an issue of industrial bonds. Assuming that this opinion is correct, the question arises whether,
under an assignment or partial assignment of the mortgage and of the notes secured thereby, the bank becomes a trustee and so exceeds its charter powers. The answer to this question depends upon the situation in law arising from the transaction.

The bank assigns the notes by endorsement "without recourse," thus expressly relieving itself of any liability upon the notes. Does it incur any liability by retaining the mortgage and other incidental documents?

It is a well settled rule of law in this state that the transfer of a promissory note secured by a real estate mortgage carries with it, either with or without a written assignment of the mortgage, the mortgage security as an incident of the debt represented by the note. *Milw. Trust Co. v. Van Valkenburg,* 132 Wis. 638, 646–7; *Boyle v. Lybrand,* 113 Wis. 79; *Roach v. Sanborn Land Co.,* 135 Wis. 354, 360; *F. Miller Brg. Co. v. Manasse,* 99 Wis. 99; *Frank v. Neisler,* 97 Wis. 364, 367; *Lane v. Duchac,* 73 Wis. 646, 655; *Woodruff v. King,* 47 Wis. 261; *Croft v. Bunster,* 9 Wis. 503; *Martineau v. McCollum,* 3 Pin. 455; *Rolston v. Brockway,* 25 Wis. 407.

The assignment of the note need not, therefore, be accompanied by an assignment of the mortgage in form. An interest in the mortgage security passes by operation of law with the endorsement and delivery of the note. In *Boyle v. Lybrand,* supra, where the contest was between two parties, to one of whom the note had been endorsed and delivered and to the other of whom the mortgage had been assigned and delivered, it was held that the assignee of the note took also the mortgage security and the assignee of the mortgage took nothing.

In *Wilson v. Carpenter,* 17 Wis. 512, it was likewise held that an assignment and delivery of the mortgage without delivery of the note did not transfer any interest.

The only case in this jurisdiction holding that mortgage notes may be transferred without an interest in the mortgage is the case of *Rolston v. Brockway,* supra, in which the decision was rested upon an express agreement between the parties to the transfer that, by the assignment of the notes referred to, no interest in the mortgage security should pass.
It is a general rule that the assignment of a demand entitles the assignee to every assignable remedy, lien or security available by the assignor as a means of indemnity or payment unless expressly exempted in the transfer. 


In view of these authorities it is clear that, by the assignment of the notes in question, the bank transfers not only the ownership of the debt, but all interest in the mortgage security. Moreover, as appears from the following authorities, the purchasers of such notes may sue upon them in their own name and may maintain actions to foreclose the mortgage in their own names and without the bank being a party to such actions. While the right of the holder of one of several notes to bring an action in his own name against the mortgagor to foreclose the mortgage securing several notes has not been expressly passed on in our supreme court, the case of _Pierce v. Shaw_, 51 Wis. 316, was such an action, in which the right does not appear to have been challenged.

In _Rankin v. Major_, 9 Ia. 297, 299, it is expressly held that the assignee of one of several notes secured by a mortgage may maintain an action to foreclose in his own name.

In _Surine v. Winterbotham_, 96 Ill. App. 123, 124, it is held that the assignee of notes secured by a trust deed may bring foreclosure in his own name and need not have such a suit brought by the trustee, although a trustee is named in the deed.

In _Barber v. Stroub_ (Mo.), 85 S. W. 915, it is held that, the mortgage being a mere incident of the note, it follows that the right to bring action as assignee upon the note carries also the right to foreclose the mortgage.

In _Page v. Pierce_, 26 N. H. 317, where a mortgage had been given to secure several notes, all but one of which were paid, and the holders of the notes so paid undertook to discharge the mortgage on record, it was held that such discharge was not effectual as against the assignee of the unpaid note, but that he could maintain in his own name upon the note a writ of entry to foreclose the mortgage.

To the same effect is _Johnson v. Brown_, 31 N. H. 405, where the court said:
"When a mortgage is given to secure several notes or demands, it is an incumbrance upon the land until all are paid. It is a security for all and each of the notes, in whosoever hands they may be." (p. 410.)

In that case it was held, the notes having been assigned to two persons, one of whom refused to join in a bill to foreclose, that one of the assignees of one of the notes could bring the action and could, upon giving security for costs, join the other with him without his consent.

It appears to follow that there is no obligation or liability upon the bank by reason of its retaining custody of the mortgage instrument to act as a trustee or become a party in any litigation growing out of the mortgage debt, and that, therefore, it can not be said that the bank, by virtue of its mere possession of the mortgage instrument or the other incidental papers, becomes a trustee in any sense or is subject to liability if the notes had been endorsed "without recourse."

Of course, if a situation should arise in which the bank, by reason of having assigned only some of the notes secured by a certain mortgage, should in its own behalf, as holder of the note, retained by it, take possession of the property under the mortgage, it would then become a trustee for all other parties interested, the assignees of such of the notes as had been sold by it and the mortgagor. Moore v. Ware, 38 Me. 496.

But that situation would only arise in the event the bank should take possession of the property in its own interest. It is, moreover, a situation which might arise under any real estate mortgage taken by the bank without reference to whether part of the mortgage debt and mortgage security had been by it assigned, for even if there had been no assignment by the bank and it were to take possession under the mortgage it would hold the property in trust subject to its own claim for the benefit of the mortgagor. To this extent and for this purpose the bank may undoubtedly become a trustee as a necessary incident of its power to lend money upon real estate mortgages, and hence to enforce its security and to take any appropriate action in that behalf.

Upon the foregoing, I am of the opinion that the business described is within the lawful powers of a state bank and is
within the power of the bank whether the notes assigned by it be endorsed "without recourse" or otherwise. If not endorsed "without recourse," there would, of course, be a contingent liability upon the bank as an indorser, and that liability should appear and be disclosed by the bank upon its reports required to be made to the commissioner of banking under sec. 2024–20, Stats. A failure to disclose such a liability in any case with intent to deceive the commissioner of banking would subject the bank officer responsible to the penalty prescribed in sec. 2024–22 for making a false statement.

Banks and Trust Companies—Corporations—A foreign corporation, having the word "trust" as a part of its corporate name, cannot be authorized to do business in this state.

A. E. Kuolt,
Commissioner of Banking.

In your letter of the 1st you enclose a letter from J. M. Martin, general counsel for the Minn. Loan & Trust Co., and ask my opinion upon the matter therein submitted.

Mr. Martin refers to an opinion given you by my predecessor under date of May 10, 1912, and published on page 46, biennial report 1912, in which it was held that a foreign corporation having the word "trust" as a part of its corporate name cannot be licensed to do business in this state, because of the provisions of sec. 2024–77p, Stats.

Mr. Martin states that his company has only done, and only sought to do, the kind of business that any corporation, not a trust company, could properly do if licensed in this state, such as loaning money upon real estate security, accepting titles, and conveying lands.

He states that Minnesota has a law similar to sec. 2024–77p, which has been in force for over thirty years, and that the practical construction placed thereon by the state officers is that it does not affect foreign corporations doing other than trust business therein, and being licensed as are other foreign corporations. That the intent was to prevent fraud and misrepresentation by those not entitled to do a trust business.
Since the former opinion was given some changes have been made in sec. 1770b, Stats., relating to the licensing of foreign corporations. That section now provides in part:

Subsec. 2: "No corporation, incorporated or organized otherwise than under the laws of this state, [with certain enumerated exceptions not important here], shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the secretary of state a copy of its charter, articles of association or incorporation and all amendments thereto duly certified," etc. "Mortgages or trust deeds taken by foreign corporations after the 26th day of May, 1911, and prior to Jan. 1, 1914, to secure the payment of money herefore or hereafter loaned or advanced pursuant to such mortgages or deeds of trust, are hereby declared valid. But no trust deed given as security upon property in this state, if otherwise valid, shall be void merely because the trustee named therein shall be a foreign corporation which is not licensed to do business in this state."

Subsec. 10: "All foreign corporations and the officers and agents thereof doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater powers."

Sec. 2024–77p forms a part of subch. 4, ch. 94, Stats., and provides:

"Any such corporation [trust company] so continued or reorganized [under section 2024–77o] may continue its present name without change. The word 'trust' shall form part of the name of every such corporation hereafter organized under this subchapter, but the word 'bank' shall not be used as a part of such name. All persons, partnerships, associations, or corporations not organized under the provisions of this subchapter are hereby prohibited from using the word 'trust' in their business, or as portion of the name or title of such person, partnership, association, or corporation. Any person or persons violating any of the provisions of this section, either individually or as an interested party in any copartnership, association, or corporation, shall be guilty of a misdemeanor," etc.

It will be noted that one of the restrictions imposed upon domestic corporations is the prohibition against the use of the word "trust" in their business or as a part of their names.
unless they are organized under the subchapter referred to. A foreign corporation cannot obtain any other or greater powers than a domestic corporation.

The prohibition in sec. 2024–77p against the use of the word "trust" in the business, or as a part of the name, is expressly made to apply to "all * * * corporations not organized under the provisions" of that subch. The term "all corporations" is broad enough to include foreign corporations. *State v. Leuch*, (Wis.) 144 N. W. 290, 292; *Broome v. G. D. D. & M. Packet Co.*, 9 Minn. 239, 243; *Brooks v. Dun*, 51 Fed. 138, 142–3.

In an opinion given to John S. Donald, secretary of state, under date of Oct. 21, 1913, I held that sec. 1786e–17, Stats., was applicable to foreign corporations. That section provides:

"No corporation or association hereafter organized or doing business for profit in this state shall be entitled to use the term 'co-operative' as part of its corporate or other business name or title, unless it has complied with the provisions of sections 1786e–1 to 1786e–17, inclusive."

The restriction contained in sec. 2024–77p is not upon the kind of business that may be done, but upon the use of the word "trust". The purpose of the section probably is, as stated by Mr. Martin, to prevent fraud and deception. It occurs to me that if the section is held not to apply to foreign corporations licensed to do business in this state, such purpose is only partially accomplished. Such a name as that of the Minn. Loan & Trust Co., at once suggests that it is a corporation carrying on the same kind of business as do corporations organized under the subchapter referred to. Does the fact that it does not attempt to do that class of business in this state exempt it from the prohibition of the statute? I cannot believe that it does. If it does, then when the officers and stockholders of any corporation, foreign or domestic, are charged with a violation of the provisions of this section the state must show not only that they have used the word "trust" in the business or as a portion of the corporate name, and that the corporation is not organized as a trust company, but also that such corporation in fact carried on a trust business. Such an emasculation of the plain language of the statute does not appeal to me as giving effect to the intent of
the legislature. It would give too great an opportunity for fraud and deception.

Had the supreme court of Minnesota, or of any other state, passed upon this question, its opinion would be entitled to great weight, but practical construction by the administrative officers of a state which violates the plain language of the law will not be followed by the courts. *Travers Ins. Co. v. Fricke*, 94 Wis. 258, 266 and cases cited; *Lawrence Univ. v. Outagamie Co.*, 150 Wis. 244, 252; *State ex rel. Milwaukee v. Milw. E. R. & L. Co.*, 151 Wis. 520, 536.

I see no reason, at this time, for coming to a different conclusion than that reached in the former opinion.

Bank and Trust Companies—Corporations—A foreign corporation having the word "trust" as a part of its corporate name may hold title to lands and mortgages, acquired by it when lawfully authorized to do business in this state, for a reasonable length of time without violating the law.

June 11, 1914.

A. E. KUOLT,

*Commissioner of Banking.*

I have received from you the letter written you by J. M. Martin, general counsel of the Minnesota Loan & Trust Co., of Minneapolis, Minn., bearing date June 9, 1914, with reference to my recent opinion regarding the authority of foreign trust companies to do business in this state.

Mr. Martin suggests that the prohibition of the statute relates merely to new business, and that it does not affect the title to lands heretofore taken by his company nor their right to dispose of the same, nor affect mortgages taken by them prior to the amendment to the law.

I do not believe the courts would so construe this law as to affect the title to lands acquired and mortgages taken at a time when this corporation was lawfully authorized to do business in this state. I am inclined to think that they may hold title to such lands for a reasonable length of time, and may collect the indebtedness represented by such mortgages in the usual manner, including, if necessary, foreclosure of such mortgages, without violating the laws of this state.
Banks and Banking—Amendments to Articles—State banks organized prior to bank act of 1903 are required to file amendments to articles of incorporation with the commissioner of banking, in compliance with sec. 2024–18.

October 6, 1914.

A. E. KLOLT, Commissioner of Banking.

I have your request for opinion of the 3d inst. in which you ask to be advised whether a state bank heretofore organized under the provisions of the general banking act of 1852, which, with sundry amendments, comprises ch. 94, Stats. 1878 and 1898, is required to file an amendment to its articles of association in compliance with sec. 2024–18, as amended by ch. 749, laws of 1913.

Under the constitution as it existed prior to the general election in 1902, all banking legislation had to be approved by a referendum vote of the electors. By the amendment of sec. 4, art. XI, Const. at the election of that year, the legislature was authorized by a two-thirds vote of all the members elected to each house to enact banking legislation. The general banking law of 1852 continued in force with comparatively few amendments, until the legislature, acting pursuant to the constitutional amendment of 1902, enacted ch. 234, laws of 1903.

This statute is a general and comprehensive scheme for the organization and regulation of banking in the state. In ch. 4 of the act, now sec. 2024–78, Stats., it was provided:

"The term ‘bank,’ as used in this act, shall be construed to mean any incorporated banking institution which shall have been incorporated under the laws of this state as they existed prior to the passage of this act, and to such banking institutions as shall hereafter become incorporated under the provisions of this act."

Manifestly, this act was intended to apply to all banking institutions incorporated under the laws of this state either before or after its passage. Sec. 1, ch. 5 of the act enacts the following repealing clause:

"All acts and parts of acts of which this act is amendatory and all acts or laws inconsistent with the provisions of this act are hereby repealed."
Save the provision contained in the original bank act of 1852, as amended by ch. 98, laws of 1858, relating to the increase or reduction of capital stock, the former bank act contained no general provision for the amendment of articles of incorporation.

Ch. 234, laws of 1903, in sec. 3, ch. 2, now, as amended, sec. 2024-8, Stats., provides for the filing of original articles of incorporation with the commissioner of banking. The act of 1903 further, in sec. 13 of ch. 2, now, as amended, sec. 2024-18, Stats., contains general authority to state banks to amend their articles of association, “in any manner not inconsistent with the provisions of law, at any time,” and provides certain special provisions with respect to amendments increasing and reducing the amount of capital stock, all of which are inconsistent with the provision of the pre-existing law above referred to. Hence, those provisions of the pre-existing law come within the repealing clause of the act of 1913.

For the purpose of this opinion it is assumed that the legislature has constitutional authority by general law to alter or repeal all laws incorporating state banks and the charters of banks organized thereunder. In this situation the power and authority of any state bank organized under the old law to amend its articles of association is referable to the provision of sec. 2024-18, Stats. This section of the statutes expressly provides:

“Such amendment, certified by the president and cashier, shall be filed as required for articles of incorporation.”

Under sec. 2024-8, all original articles of incorporation must, as a condition precedent to their becoming operative, be filed with and approved by the commissioner of banking and recorded in the office of the register of deeds of the county in which such banking corporation is located.

So far as there may be any question of statutory construction, it seems to me clear that the legislature designed to impose, by the language above quoted, defining the word “bank,” as used in the act of 1903, all of the conditions and terms of that statute upon all existing, as well as all subsequently created, state banks. This question was raised under the provisions of the general incorporation laws as
applied to a railroad corporation which has been organized by special act prior to the passage of the general statute. The general statute contained the following provision:

"Every corporation organized * * * under the laws of this state, which may hereafter increase its capital stock, shall pay a fee therefor," etc. (Sec. 1772, Stats. 1898.)

This statute certainly did not more clearly comprehend pre-existing corporations than the term "bank", as used and defined in the bank act of 1903. In the railroad case, the supreme court held that a railroad corporation organized by special act and by special act empowered to increase its capital stock was, nevertheless, required to file the resolutions constituting and evidencing its action in increasing its capital stock as an amendment to its articles in the office of the secretary of state and to pay the fee therefor provided by the general law, subsequently enacted. State ex rel. Attorney General v. Northern Pac. Ry. Co., 157 Wis. 73.

I am, therefore, of the opinion that the provisions of sec. 2024-18 apply likewise to all amendments of the articles of any state bank heretofore organized, which amendments have been adopted subsequent to the taking effect of ch. 234, laws of 1903, and that such amendments are required to be filed with and approved by the commissioner of banking.

Banks and Banking—County Depository—A bank with a stockholder, director or officer a member of the county board may not be designated as a county depository.

November 19, 1914.

STANLEY G. DUNWIDDIE,
District Attorney,
Janesville, Wis.

In your letter of Nov. 17th you state that your county board, under sec. 693, Stats., has designated as county depositories all the banks in the county upon their furnishing a proper bond, and has directed that they may receive sums of the county money in proportion to their capitaliza-
tion. That all the banks agreed to pay 3 per cent on the deposits that are to be made with them. That nine members of the county board are either directors, officers or stockholders of various banks. That at the meeting of the board at which the action was taken these nine members did not vote. You inquire whether, under these facts, the banks who have directors, officers or stockholders on the board, may be designated as county depositaries, and also whether, when the bonds are submitted to the committee of the county board, such objection may be raised before the committee. Also, whether a bond may be objected to before such committee on the ground that one or more of the sureties on such bond are connected with the bank and are also members of the county board.

Sec. 4549 Stats., provides in part as follows:

"Any officer, agent or clerk of the state or of any county, town, school district, school board, city or village therein, or in the employment thereof, or any officer, regent, treasurer, secretary, superintendent, clerk or agent of any penal, correctional, 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, or in any tax sale, tax title, bill of sale, deed, mortgage, certificate, account, order, warrant or receipt made by, to or with him in his official capacity or employment, or in any public or official service, or who shall make any contract or pledge, or contract any indebtedness or liability, or do any other act in his official capacity or in any public or official service not authorized or required by law, * * * 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, in the case of Land, L. & L. Co. v. McIntyre, 100 Wis. 245, that a contract made in violation of sec. 4549 is not merely voidable but is absolutely void.

A stockholder, director or officer of a bank is certainly pecuniarily interested in the designation of such bank as a
county depository. This department has ruled that a stockholder in a telephone company which furnishes telephone service to the public schools is not eligible to membership on the school board by reason of the provisions of sec. 4549.

The principle involved here has been discussed at length in official opinions of this department 1906, p. 742, and in the report 1908, p. 473, 475, 566, 702 and 779.

The fact that the nine members of your county board did not take part in the meeting when the county depositories were designated does not change the situation. They were qualified members of the county board and it was their duty to take part in its proceedings. They had no right to withdraw therefrom and shirk their duty. A member of such board has greater powers, generally, than those exercised by his right to vote. He has an influence over other members of the board which often gives him an advantage over other competitors who are not so favored. Besides, it is a well-known fact that the withdrawal of members of such bodies sometimes has a decisive influence on the action taken. It is a well-known fact that members of the legislature who were opposed to the election of Senator Stephenson to the United States Senate were able to defeat his election on certain days by failing to attend the session.

I am of the opinion that the banks who have a stockholder, director or an officer acting as a member of the county board are ineligible to become the depositories of said county.

The same reasoning will apply to sureties on the bonds furnished by such banks. A surety on a bond is interested in a financial way in the contract or obligations entered into by his principal. The objections to such banks and also to such bonds should be made to the committee appointed to pass upon the bonds and should also be made in the regular session of the county board when the question for approval comes before said body.
RELATING TO BANKS AND BANKING.

Banks—Insolvent—Set-off—1. A deposit may be set off against a note held by an insolvent bank.

2. An indorser on a note may set-off his deposit against the same if he can show that the principal is execution proof.

November 30, 1914.

A. E. Kuolt,
Commissioner of Banking.

In your letter of Nov. 30th you submit the following:

"1. A. bank re-discounts paper with B. bank; A. bank subsequently becomes insolvent; C, the maker of said note, has a deposit with A. bank. The paper matures today. I desire to know whether C’s deposit is an offset against his liability on the note.

"2. John Brown borrows money from A. bank; John Smith is an indorser on John Brown’s note; A. bank subsequently becomes insolvent. Is John Smith’s deposit with A. bank an offset on the above note?"

As I understand your statement of fact, bank A when it became insolvent had a note which it had purchased from bank B, which note was signed by C. C also had a deposit with bank A. The question is whether he can offset his deposit against his liability on the note.

This question is answered in the affirmative by the ruling of our court in the case of Jones v. Pieening, 85 Wis. 264.

The answer to your second question depends upon whether John Brown is insolvent or execution proof. If he is and John Smith is able to prove it he will be liable on the note which he endorsed and may place his deposit as an offset. See Hiner v. Newton, 30 Wis. 640; McDonald Mfg. Co. v. Moran, 52 Wis. 203. The case of Hiner v. Newton, supra, was approvingly cited in Pendleton v. Beyer, 94 Wis. 31, 33.

In an official opinion to you under date of October 14th, it was held that the rights to a set-off against a bank are not changed by the bank becoming insolvent. This principle is applicable to both of your propositions.
Banks and Banking—Public Officers—The bank commissioner when in possession of an insolvent bank may apply a deposit against a depositor's note without order from court.

December 21, 1914.

A. E. KUOLT,
Commissioner of Banking.

In your letter of Dec. 18th you direct my attention to subsec. 3, sec. 2022, Stats., and you state that you have taken possession of an insolvent bank and inquire whether you may apply a deposit against the depositor's note in the same manner as though it were a going business, without a court order.

Subsec. 3, sec. 2022, provides as follows:

"Upon taking possession of the property and business of such bank or banking corporation, the commissioner is authorized to collect moneys due to such bank or banking corporation, and do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The commissioner shall collect all debts due and claims belonging to it, and upon the order of the circuit court may sell or compound all bad or doubtful debts, and on like order may sell all the real and personal property of such bank or banking corporation on such terms as the court shall direct; and may, if necessary to pay the debts of such corporation, enforce individual liability of the stockholders."

In a recent opinion to you I have held that a deposit in an insolvent bank is a valid set-off against the depositor's note. Under the above quoted statute, it is necessary for you to secure the order of the circuit court if you desire to sell or compound bad or doubtful debts. A deposit or a depositor's note is not a bad or doubtful debt in contemplation of the above statute.

Your question must, therefore, be answered in the affirmative.
OPINIONS RELATING TO BRIDGES AND HIGHWAYS.

_Bridges and Highways—Constitutional Law_—Legislature may appropriate money from state treasury to aid in building bridges forming parts of public highways. Sec. 10, art. VIII, Const. (amendment of 1908).

An act of the legislature to become operative upon the performance of a condition or the ascertainment of a fact is valid and not a delegation of legislative power.

Legislature may require municipalities to aid in construction of public highway bridges outside their corporate boundaries.

Ch. 628, Laws of 1913, is valid.

Ch. 586, Laws of 1913, is a special and local act for construction of a bridge in a manner different from that provided by the general statutes and violates sec. 23, art. IV, Const.

You request my opinion upon the constitutionality of ch. 628 and ch. 586, laws of 1913. We will consider first ch. 628. This chapter reënacts and amends sec. 1321a, Stats., relating to the construction and maintenance of bridges across navigable or meandered streams, and creates sec. 172–123, Stats., making an appropriation from the general fund of the state in aid of the construction of such bridges pursuant to this chapter.

In several opinions previously rendered by this department the validity of this statute has been assumed, although not especially examined. In an opinion under date of July 23, 1913, to M. W. Torkelson, bridge engineer of the state highway commission, it was held that the appropriation
provided in this act should be allotted to the extent of state aid provided for in the act in full upon petitions presented therefor pursuant to the terms of the act in the order in which such petitions are filed.

In an opinion under date of Sept. 6, 1913, to the highway commission it was held that the construction of a bridge under the provisions of this act would not invade the constitutional or property rights of a private toll bridge with which the proposed bridge would compete. In an opinion to M. E. Davis, district attorney of Brown county, under date of Oct. 29, 1913, it was held that the provisions of this act are mandatory upon counties to pay their proportion of proposed bridge construction after the towns, cities or villages therein had taken the proper initial proceedings.

In opinions rendered to J. Henry Bennett, district attorney of Vernon county, under date of Nov. 29, 1913, and to the highway commission under date of Dec. 11, 1913, it was held that the provisions of this section are exclusive upon the subject of the division between the town, city or village and the county of the expense burden of constructing bridges upon prospective state highways. In an opinion under date of Nov. 4, 1913, to the highway commission it was held that the appropriation made in this chapter became available July 1, 1913.

Sec. 13216, Stats., as amended and reënacted by ch. 628, laws of 1913, empowers cities, villages, towns and counties bordering upon or through which any navigable or meandered stream runs to build, purchase or maintain a bridge across such stream, provided the electors thereof have first voted to levy and collect a tax or issue bonds for such a purpose. To which provisions, previously existing, are added several paragraphs by way of amendment, of which the following may be noted as possibly raising constitutional questions.

In the third paragraph it is provided that, whenever any town, village or city shall vote in favor of constructing any such bridge, either alone or in conjunction with another town, village or city,

"the county in which such town, village or city is located, the said municipalities and the state shall pay for the construction of such bridge as follows: provided, however, that
state aid shall be extended in constructing not more than six such bridges in any one year:

“(a) Where such bridge is located wholly within one town, village or city, or is constructed by a town, village or city alone, such town, village or city shall pay two-fifths thereof. Any town, village or city situated within five miles of such bridge may contribute towards said cost and maintenance a sum not to exceed one-sixth thereof.

“(b) When such bridge is located between two towns or between a town and a village or city or between two villages or two cities and is constructed by them jointly, then said municipalities shall pay together two-fifths thereof, to be borne by each in proportion to the equalized valuation of each, as fixed by the last county board and if said municipalities are in different counties each shall then pay one-fifth thereof. A town, village or city may participate in the construction and maintenance of a bridge located or to be located within one mile from said town, village or city and without the borders of the county wherein such town, city or village is located in the same manner and to the same extent as if said bridge were located or to be located partly within said town, village or city, and in such case, the county wherein such town, city or village is located shall pay one-fifth of the cost of constructing such bridge.

“(c) The county shall in all cases pay two-fifths of such cost, except when such bridge is located on or across the line between two counties, and in that case each county shall pay one-fifth of such cost.

“(d) The state shall in all cases pay no more than one-fifth of the cost of constructing such bridge.”

The above quoted provisions raise all the constitutional questions that occur to me upon an examination of the statute. The remaining provisions of the act, relating to the procedure, handling and disbursement of funds and the maintenance of such bridges, need not be especially considered. These further provisions, it is believed, at least raise no additional constitutional questions. The questions raised by the provisions quoted may be stated as follows:

(1) Whether the legislature may make an appropriation from the state treasury for the construction of bridges.

(2) Whether a county may be required by the legislature to levy taxes and contribute to the cost of constructing a bridge upon condition that one of its municipalities may vote to construct a bridge and raise money therefor.

(3) Whether a town, city or village or county may be authorized or compelled to levy taxes and expend money
raised by taxation upon the construction of a bridge outside of the boundaries of such town, city or village or county.

Sec. 10, art. VIII, Const., as amended by the amendment adopted in 1908, carries the following proviso:

"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."

There may be some question, in view of the distinction so frequently made in our statutes between bridges and highways, whether this amendment of the constitution authorizes the legislature to appropriate money from the state treasury for the construction of bridges. It would seem, however, that in construing a constitutional provision of this character the language should be taken in its broad, general meaning. As was said by the Supreme Court in Neewes v. Wood County, 72 Wis. 629.

"A public bridge for public travel, connecting parts of a public highway, is itself a part of a public highway," citing 2 Am. & Eng. Ency. Law 541, and cases there cited, (p. 637).

That the term "highway," when used in law and in the absence of anything to indicate a restricted meaning, includes bridges forming a part of such highway appears to be supported by the overwhelming weight of authorities. See cases cited, 4 Words & Phrases, pp. 3294, 3295.

I am, therefore, of the opinion that the legislature may, under the constitutional amendment referred to, appropriate money from the state treasury to aid in the construction of bridges forming parts of public highways.

The second question presented under this statute is whether there is here an improper delegation of legislative power. It will be observed that the statute is mandatory upon the county to pay two-fifths in case the bridge is all within the county and one-fifth in case it is constructed across the boundary line of two counties, whenever any town, village or city shall vote in favor of constructing any such bridge, either alone or in conjunction with another town, village or city. Under this question the distinction must be observed between a delegation of legislative power, which is void, and a power or authority conferred to create or ascertain a fact or condition and upon which the law, as
enacted by the legislature, shall operate, and which is valid. It is well settled that an enactment by the legislature which declares a rule or requirement which shall become operative upon the doing of some act, the occurrence of some event or the ascertainment of a fact, as a condition precedent, is valid and is not a delegation of legislative power. Milwaukee Med. College v. Chittenden, 127 Wis. 468; M. St. P. & S. S. M. Ry. Co. v. Railroad Commission, 136 Wis. 146. Supervisors of Will Co. v. Commissioner of Highways, 110 Ill, 511, 518–520.

It is reasonably clear that the vote of the town, city or village to construct a bridge under this act is not a legislative power to compel the county to contribute to the construction of the bridge, but is merely power to perform the condition, upon the performance of which the legislature has directly enacted that the county shall pay its proportion of the cost. This form of legislation has existed in this state for many years, at least since ch. 187, laws of 1885, and has come down to us in the present form in sec. 1319, Stats., and has been repeatedly before the supreme court and its validity sustained. Town of Baraboo v. Supervisors of Sauk Co., 70 Wis. 485; State v. St. Croix County, 83 Wis. 340.

I am of the opinion, therefore, that the statute is not objectionable upon the second ground indicated.

The question whether a town, city or village may be authorized to levy and collect taxes to aid in the construction of a bridge outside of the corporate limits of such municipality and whether a county may be compelled to do so in the case of a bridge outside of its boundaries is perhaps somewhat more difficult of solution than those heretofore considered.

While the statute is uniform in its operation throughout the state and while the rule of taxation under it is uniform within the requirements of the decisions of the Supreme Court, there are certain limitations of a fundamental nature upon the power of taxation, as, for example, the taxation must be for a public purpose. It would require no argument to support the proposition that the legislature would not have power, even in the absence of the constitutional rule of uniformity to impose upon one county a tax to defray the ordinary running expenses of another county, but the construction of a bridge as a part of a public highway is not a
matter affecting only the particular governmental subdivision in which it may be located. It is a matter of general public concern and of special importance and benefit to that part of the public residing in the immediate vicinity, whether residing within the same county or municipality, or not.

The legislature has undoubtedly power to require local subdivisions of the state to maintain highways for public travel and to meet by taxation the expense thereof, subject to the requirement that the rule of taxation shall be uniform and subject to the fundamental requirement that the tax burden shall be imposed equitably as nearly as may be. It may, acting within these limitations, impose upon towns the entire burden of constructing highways or bridges therein, or it may compel the county to share that burden. It may do this not because the bridge or highway in question is located within the town or within the county, but because of such location of the bridge or highway such legislation measures approximately the burden imposed to the benefit derived.

There may be cases where the construction of a bridge in a town in one county may be of equal benefit to the residents of another town just over the line in an adjoining county. In such a case the legislature has, in effect, said in this act that such benefit to such adjoining town justifies such adjoining town in assuming a part of the expense of the improvement, and further that, if such town assumes this burden, then the improvement is one of such benefit to the county in which such town is situated that the county shall also assume a portion of the expense. In this arrangement it is clear that the legislature has sought under this law more closely to measure the expense to the benefit than under former statutes. Of course, it may be that the apportionment of the expense is not exactly in proportion to the benefit. That would be impossible of accomplishment by a general law, nor is it necessary in order to make the statute constitutional.

It is held that counties may be required by the legislature to bear many kinds of expenses which are not strictly county expenses or expenses of county government when there is a corresponding benefit to the county justifying the imposition upon it of such burden. Milwaukee County v. Halsey, 149 Wis. 82, 91–92.
Nor is it necessary that the tax burden upon each county or local subdivision be equal. *Jensen v. Polk County*, 47 Wis. 298, 312–314; *Town of Baraboo v. Supervisors of Sauk County*, 70 Wis. 485, 488–490.

The extent to which the legislature may interfere with the fundamental rights of local self-government has not been fully defined in the decisions of our Supreme Court. There are many decisions, however, which hold that the legislature may, for proper purposes and within proper limitations, exercise rather extensive powers of direct control over these local subdivisions, and that as agencies of the state they may be required to perform at their own expense certain acts of a general public concern, such as the maintenance of bridges and highways.

Under sec. 1319, Stats., above referred to, the legislature has for years compelled counties, excepting certain cities and villages therein, to contribute to the cost of constructing town bridges and to levy taxes upon towns, cities and villages within the county for the construction of bridges not within the corporate limits of such towns, cities and villages.

Under ch. 284, laws of 1899, towns have been required to contribute to the cost of the construction and maintenance of bridges not within their corporate, i. e., legal, boundaries, when such bridges are constructed by incorporated villages located geographically within the towns. These statutes have been attacked as invalid upon the ground that they invaded the right of local self-government and as against such attacks have been (the former in several cases) sustained by the Supreme Court. *Town of Baraboo v. Supervisors of Sauk Co.*, supra; *Woodland v. Sauk County*, 70 Wis. 491; *Rochester v. Racine County*, 70 Wis. 543; *Spring Lake v. Pierce Co.*, 71 Wis. 321; *Battles v. Doll*, 113 Wis. 357; *Bloomer v. Bloomer*, 128 Wis. 297; 304–5, 310; see also *Supervisors of Will Co. v. Commissioner of Highways*, 110 Ill. 511; *Travelers Ins. Co. v. Town of Oswego*, 59 Fed. 58, 65–67.

The reasoning of the foregoing authorities and also what was said by the court in *Jenson v. Polk County*, supra, pp. 312–314, are, on principle at least, equally applicable upon the constitutionality of the statute in force. The underlying idea of this reasoning is that, because of the interest of the public of the state generally, the state may compel the
construction of highways and bridges, and because of the special benefit to the immediate locality the cost of such improvements may be imposed by the state upon its agencies in such locality, and in cases of improvements involving large expense may be distributed among municipalities other than those in which the improvement is located.

In the case of Bloomer v. Bloomer, supra, it is said:

"The point is made that the law violates the constitutional right of local self-government. That is answered substantially by what we have said as to the bridges referred to being as much local affairs of the towns as of the villages. The argument that the law provides for construction and maintenance of village bridges at the expense in part of towns is clearly, it is thought, beside the case. But if it were otherwise, it would be answered by the rule well established that the maintenance of a bridge or a highway is not a purely local matter which must be left, necessarily, to the sole discretion of the town within which it is located. The state at large is interested in such matters and may impose the duty on one municipality or a collection of municipalities to aid in maintaining a bridge in another." (p. 310.)

While in these cases the municipalities affected were, in each case, all within the same county, it is not apparent wherein the principles laid down do not likewise apply as between municipalities in the same locality and having a similar interest in the construction of the bridge, although situated in different counties, or as between two counties where the bridge to be constructed is either on the boundary line between the two counties or within a mile thereof and so situated that the special interest and special benefits of the residents of the two counties are substantially equally promoted by its construction. While I do not find any authorities dealing with precisely such a situation, it is believed that the situations dealt with in the authorities cited are, in principle and in legal contemplation, the same as that presented under this statute. No authorities to the contrary have been called to my attention and I find none.

In this situation and in view of what has been said above, nothing is disclosed which casts upon the constitutionality of this law such a doubt as would warrant the attorney general in holding it invalid. As the act is one carrying an appropria-
tion from the state treasury, were it made to appear that its validity is substantially doubtful, the attorney general would not hesitate to advise the secretary of state to refuse to audit and the state treasurer to refuse to pay claims against the appropriation, which it carries, until its validity had been established by a decision of the supreme court, but in this case no such doubt appears either on principle or upon authority and I can not so hold. I am of the opinion that the act is valid.

Ch. 586, laws of 1913, is entitled:

"An act to authorize the erection, construction, and maintenance of a free wagon bridge across the Wisconsin river in the counties of Sauk and Columbia at or near the village of Merrimac, Sauk County, Wisconsin, and to make the state park at Devils Lake more accessible, and creating section 172-122 of the statutes, and making an appropriation therefor."

By this act it is provided, in sec. 1, that the village of Merrimac and the town of Merrimac, Sauk county, and the towns of West Point, Caledonia and Lodi and the village of Lodi in Columbia county are authorized to build a free wagon bridge over the Wisconsin river, at the location designated, "the said bridge to connect the highways adjacent thereto in Sauk and Columbia counties"; in section 2, that the village of Merrimac, the town of Merrimac and the town of West Point shall contribute $5,000 each, the town of Caledonia, $1,000, and the town of Lodi and the village of Lodi, $2,000 each; and that upon the filing with the county boards of Sauk and Columbia counties by the respective towns and villages of certificates to the effect that said towns and villages have voted to construct said bridge and to raise these amounts, either by taxation or by the issuance of town or village bonds, each of said counties shall appropriate $10,000 for the cost of said bridge.

Secs. 3, 4, 5, 6, 7, 8 and 9, providing for the procedure to be followed and the supervision of the construction of the bridge, need not be especially considered. Sec. 10 of the act creates secs. 172-122, Stats., and provides in part:

"Upon condition that the $40,000 required to be raised by the towns, villages and counties for the construction of said bridge is paid into the state treasury, there is appropriated
from any moneys in the general fund not otherwise appropriated the sum of $50,000 or so much thereof as may be necessary to aid in the construction of said bridge.

Sec. 23, art. IV, Const. provides:

"The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."

It will be observed that the legislature has, by general law, under the provisions of sec. 1319, Stats. and under the provisions of sec. 1321a, Stats., as amended, and possibly under other statutes, provided a general scheme operative throughout the state for the construction of bridges over navigable streams by towns, cities and villages with county and state aid. These laws are uniform in their operation throughout the state and create upon this subject, if it be one of town and county government, one system and a uniform system, or a system as nearly uniform as practicable.

Ch. 586, laws of 1913, undertakes to establish for the construction of a particular bridge between two certain named counties and by certain towns and villages therein designated by name, a special provision in the nature of an exception to this general, uniform system. This would seem to be clearly in contravention of the constitutional provision above quoted.

Sec. 1319, Stats. 1878, was amended by ch. 315, laws of 1881, to provide for county aid in the construction and repair of town bridges under certain conditions and with the proviso added that "this act shall not apply to the county of Grant."

The statute, as so amended, was held in Town of La Valle v. Sauk County, 62 Wis. 376, unconstitutional as in violation of sec. 23, art. IV, citing: McRae v. Hogan, 39 Wis. 529; Peck v. Riordan, 24 Wis. 484; Keenan v. Supervisors, 25 Wis. 339; Walsh v. Dousman, 28 Wis. 541.

The statute before the court in McRae v. Hogan was held unconstitutional in that it provided a special method differing from that of the general law for the expenditure of money raised for highway taxes and the making of highway improvements in Chippewa county. After referring to that case the court said:
The act of 1881 now under consideration relieves all of the towns in the state outside of Grant County from the expense of erecting and maintaining the bridges specified in the act and casts the burden of doing so upon the respective counties, while each town in Grant County is compelled to erect and maintain any such bridges within its limits at its own expense. There is no difference in principle in the two cases * * *

Necessarily, of course, under this opinion, the general scheme of the statutes for the construction of highways and bridges was regarded by the court as a part of the system of town and county government required by section 23 of article IV to be uniform. The case is so explained by the supreme court in a later decision, in which the distinction is made in that regard between the construction of bridges and the establishment of drainage districts. Bryant et al. v. Robbins, et al., 70 Wis. 258. In this case the court referred to La Valle v. Sauk Co., and said:

"Imposing taxes for the erection of bridges is one of the usual powers and duties of the constituted authorities of towns or counties, and ever has been; and it was essential that there should be no discrimination on that subject, but that the act should be uniform in its application." (p. 263.)

La Valle v. Sauk County, supra, is followed and applied in the later case of Wagner v. Milwaukee County, 112 Wis. 601, in which it was held that an act which, although in general terms, by devices of classification and limitation applicable only to Milwaukee county, undertook to confer upon that county authority to construct a bridge or viaduct therein upon different terms and conditions than were prescribed in the general laws applicable to other counties was in contravention of sec. 23, art. IV, Const., and void.

In Wagner v. Milwaukee County the attempt to evade this provision of the constitution by classification necessitated an examination of the statute and of the rules of classification as laid down in Johnson v. Milwaukee, 88 Wis. 383, to determine that the act was in fact a special and local act.

The act before us is special and local on its face. It provides in terms for the construction by certain named munici-
palities and by the counties of Sauk and Columbia of a bridge upon different terms with respect to the proportion of the cost to be borne by the municipalities and the counties involved by special procedure and with a greater amount of state aid authorized than would obtain under the general laws relating to the construction of such bridges by municipalities and counties elsewhere in the state. In my opinion it comes clearly under the condemnation of the constitutional provision referred to, as construed and applied in the several authorities cited.

Accordingly, I am of the opinion that chapter 586, laws of 1913, is unconstitutional and void.

Bridges and Highways—State Aid—Under sec. 1321a, as amended by ch. 628, Laws of 1913, state aid may not be granted for any bridge less than 300 feet in length.

Wisconsin Highway Commission.

In your letter of Jan. 3rd you request my opinion as to whether state aid may be granted under ch. 628, laws of 1913, for any bridge less than three hundred feet in length.

Ch. 628 amends and reënacts sec. 1321a, Stats. The first subsection authorizes cities, villages, towns and counties to build or purchase or aid in building or purchasing a bridge across any navigable or meandered stream, etc. Subsec. 2 provides that:

"Whenever said bridge is necessarily more than three hundred feet in length, not including approaches, the state highway commission shall, upon request of any such town, county or village board, estimate the cost of such bridge, or ascertain the reasonable price which should be paid for said bridge."

The following subsections provide for state aid for "such" bridges.

It will be noted that no change is made in sec. 1321a as it stood prior to its amendment by ch. 628, laws of 1913, and that such chapter merely adds to the section all that part thereof beginning with subsec. 2 above quoted. This subsec-
tion could hardly have been inserted merely for the purpose of making it the duty of the highway commission upon the request of any town, etc., to estimate the cost of the bridge, etc. Such duty already rested on the commission pursuant to the provisions of subsec. 3, sec. 1317m-2, which requires the commission to "advise towns, villages and counties with reference to the construction and maintenance of any road or bridge."

The purpose of subsec. 2, heading as it does the new matter added to sec. 1321a, seems rather to have been to define and limit the scope of the new matter added to the section. The dominant purpose of the amendment seems to have been to provide state aid for such bridges as are too large and expensive to be built by the local community. Unless the bridge is necessarily more than three hundred feet in length it appears that the state is to have nothing to do with it. The expression "such bridge" as used in subsec. 3, sec. 1321a, granting state aid, must, I think, be held to refer back to the nearest antecedent which is the three hundred foot bridge mentioned in subsec. 2.

This thought is re-enforced by reference to subsec. 6 which provides that "The construction of any such bridge shall be under the supervision and control of the state highway commission and all moneys paid therefor shall be paid upon the order of said commission." By this subsection it appears that the construction of all bridges within contemplation of the amendment of 1913 is to be under the supervision of the state highway commission, yet by subdiv. 2 it is provided that only in case the bridge exceeds three hundred feet in length is the state highway commission even to estimate the cost of such bridge. This provision does not harmonize with the thought that state aid is to be provided for all bridges whether three hundred feet in length or less because if a bridge less than three hundred feet in length is to be constructed under the supervision of the state highway commission it seems reasonable that the commission should "estimate the cost" and "ascertain the reasonable price which should be paid for said bridge" as provided in subsec. 2.

The amendment of 1913 classifies bridges into those more than three hundred feet and those three hundred feet or less. This classification is made for some purpose. As here-
inbefore indicated it would seem to be a trifling matter if such classification were made for the purpose of determining whether the highway commission should “estimate the cost” and “ascertain the reasonable price which should be paid for said bridge.” Reading the amendment as a whole it seems quite clear to me that the classification is made for the purposes of state aid and that unless the bridge is more than three hundred feet in length the local communities constructing the same are not entitled to such aid. This construction brings into harmony all the provisions of the act and is, I am convinced, the correct one.

_Bridges and Highways—Towns—_A town has no power to bid on and contract for state highway work.

March 2, 1914.

WISCONSIN HIGHWAY COMMISSION.

In your letter of Feb. 26th you request my opinion on a question which you state as follows:

“Is it legal for a town board, acting on behalf of the town, to bid on state highway work which has been advertised for bids; and if their bid is the lowest, or most satisfactory, can the town board enter into a contract in the name of the town, to contract the work at figures named in the contract between the town and the county, to pay the expense incurred on the work out of the funds of the town, and to charge any profit or loss resulting from the contract to the general funds of the town?

“Putting the question in a slightly different way: Has the state highway commission a right to let contracts for state road or bridge construction to a town through its board, and to make payments to the town treasurer upon these contracts in the same way as any other contractor would be paid?”

Our supreme court has said:

“It is well settled that a town is a quasicorporation only, with limited powers, and can do nothing which is not expressly authorized or clearly implied from authority expressly conferred by statute.” _State ex rel. Thompson v. Welbes_, 129 Wis. 639, 641.
An examination of the laws prescribing the powers and duties of towns and town boards, as well as the state aid highway law, fails to disclose any provision of the statute which either expressly or impliedly authorizes towns to engage in the construction of roads on the terms outlined in your question, and I am therefore of the opinion that towns possess no such power.

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*Bridges and Highways.*—A defect in a bridge or its abutments is one subject to repair pursuant to subd. (a), subsec. 8, sec. 1317m–9, Stats.

March 9, 1914.

C. S. Roberts,
*District Attorney,*
Balsam Lake, Wis.

In your letter of March 4th you request my opinion as to whether subsec. 8, sec. 1317m–9, Stats., applies to a case where the dangerous or unsafe condition of a highway is due to a defective bridge or to the abutments of a bridge on such highway.

Subd. (a), subsec. 8, sec. 1317m–9, provides that "If a portion of any public highway in any town is dangerous or unsafe for travel or is allowed to remain in poor condition for travel", the town board shall, upon petition of twenty-five freeholders, cause the road to be put in a safe and fit condition for public travel.

Subd. (b), of the same subsection, provides that if the town board shall fail to put the road in proper condition within sixty days the petitioners may appeal to the county highway commissioner who shall cause the repairs to be made if he finds that conditions justify and shall pay for the same out of the county road and bridge fund, and that if funds are not available the county highway commissioner may refuse to make the repairs "and further action shall be in accordance with sec. 1338, Stats."

Subsec. 5, sec. 4971, Stats., provides that the word "highway" may be construed to include any road, etc., "and all bridges upon the same."
It seems to me that this statutory rule of construction is applicable to subsec. 8, sec. 1317m–9, and that pursuant thereto the words, “portion of any public highway,” may reasonably be interpreted to include bridges on such highway. This construction is fortified by the reference at the end of subd. (b), subsec. 8, to sec. 1338, Stats., which section expressly deals with failure or neglect “to repair any public highway or build or repair any bridge thereon”.

I am therefore of the opinion that where a highway has become dangerous or unsafe by reason of a defective bridge or defective abutments of a bridge, proceedings to put the same in a safe and fit condition for public travel may be taken under subsec. 8, sec. 1317m–9, Stats.

Bridges—County Board—Procedure—Contract for building of bridges on state roads should be made by county board.

Proceedings in town of Woodville not strictly according to law.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of April 3rd you have submitted a few questions concerning the right of the state highway commission to order the erection of a bridge in the town of Woodville in your county. You have stated in your letter some of the facts upon which you base your questions.

I have inquired of the highway commission and they have given me also a statement of the facts as shown by the records in their office. I enclose a copy of their letter herewith.

It appears that at the annual town meeting held in April, 1913, the sum of $500 was voted in the town of Woodville for building bridges on the county system of prospective state aid for highways, under sec. 1317m–4, Stats., which resulted in an appropriation from the county of $500 and $250 from the state, making a total sum of $1250 available for the work.

April 7, 1914.
The particular bridge in question was in a very bad condition and it was necessary, in the judgment of the town board, to proceed with construction immediately for the reason that the town might be in danger of action for damages because of the weak condition of the bridge. The matter was taken up with the highway commission and plans and specifications for the new bridge were prepared by the highway commission and the commission expressed the view that there would be no objection to the use of the fund available for 1914 to pay for this work as soon as the same became available. The state highway commission did not order the construction, but merely cooperated with the town board to enable the new work to be built earlier than would otherwise have been the case. The contract was let by the town board and this contract was approved by the commission on July 30, 1913.

I am also informed that the county highway commissioner was consulted and acquiesced in the matter. It appears that the town board borrowed the county's and state's share for the work of construction in order to have the same available when the work was completed; that the 1914 allotment from the state highway fund is available and the county taxes are all paid, and the town board evidently wishes to reimburse the town for the amount borrowed.

You inquire what law gives the state highway commission the right to order such bridge built or at what costs, or can they determine its costs.

In answer I will say I know of no law which authorizes the highway commission to order the erection of the bridge, but according to the statement given to me by the highway commission no such order has been made. The statute authorizes the state highway commission to approve the contract made by the county board for the construction of bridges (see sec. 1317m–7), but such contracts must be made between the county board and the contractor and they must have the written approval of the state highway commission. (Subsec. 3, sec. 1317m–7.)

Your second question is as follows:

"What law authorizes said commission to build an isolated bridge like this on said system, without any part or action by the county board thereon, or in letting said con-
tract or ordering said bridge, though said county has to pay two-fifths of its cost?"

Under sec. 1317m–4 bridges may be built on state highways. In the present case, as already stated, the contract should have been made by the county instead of by the town officers, but under subsec. 4, sec. 1317m–7, the state highway commission is authorized in certain cases to construct bridges or highways under its own supervision without a contract having been entered into by the county board, but in that case the money must be paid out of the county treasury as the county board may authorize the same to be paid.

Your third question is as to what law permits or authorizes a town to raise all the moneys necessary to build such a bridge and pay same into the county treasury, and then by what practice and law is such money paid out of said county treasury?

In answer I will say that the town officers paid the money into the treasury for the reason that they desired the bridge to be built and paid for prior to the time that the county and state appropriation was available. The practice pursued in this case was, of course, somewhat irregular, but in view of the fact that the county board has appropriated its share to this bridge, as I understand the fact to be, and that the state highway commission and the county highway commissioner were consulted in regard to the matter, and that the plans, specifications and contract were approved, there ought to be no difficulty in adjusting the matter satisfactorily to all parties concerned.

I see no objection to the refunding of the money to the town of Woodville by the county board as soon as the county’s and state’s share of the cost of the bridge is paid into the county treasury.
RELATING TO BRIDGES AND HIGHWAYS.

Bridges and Highways—Public Officers—Municipal Corporations—A petition for aid in building a bridge under sec. 1321a, Stats., does not designate the location of the bridge "as near as may be" where any place along the river bank for a distance of one mile would be within the designated location.

Under a petition made pursuant to sec. 1321a, Stats., the state highway commission is authorized to fix the exact location of the bridge within the limits of the locality designated.

April 24, 1914.

WISCONSIN HIGHWAY COMMISSION.

In your letter of the 22nd you state that the village of Nekoosa has petitioned for state and county aid in building a bridge across the Wisconsin river under the provisions of sec. 1321a, Stats. That the location of the proposed bridge as given in the petition is very vague and such that the bridge may be located anywhere within a mile along the river bank and still comply with the terms of the petition. That there is a possibility that the state highway commission and the village board may not agree as to the particular spot for building the bridge. You ask if there is anything in the law by which the village board may force the construction of such bridge at a point which the state highway commission does not approve.

Subsec. 4, sec. 1321a provides in part:

"Whenever any town, village or city shall file a petition with the state highway commission, setting forth that said town, village or city has voted to construct any such bridge, designating as near as may be the location of the same and showing that such town, village or city has provided for the payment of its proportion of the cost thereof, and the said highway commission shall find said bridge to be necessary, said commission shall so certify and further certify the amount to be paid by the state as its share for the construction of said bridge, and also certify the share to be paid by the county, or counties, to the county clerk, or county clerks thereof."

Subsec. 6, sec. 1321a, provides that the construction of any such bridge shall be under the supervision and control of the state highway commission.

It appears to me that subsec. 4 above referred to has not been complied with where the designation of the location
is so indefinite as it appears to have been in this case. In my opinion that subsection contemplates that the exact location of the proposed bridge shall be stated in the petition with reasonable certainty. It should appear what roads or streets are to be connected by said bridge so that when the petition is presented the state highway commission may know where the bridge is to be built. Stating the location so indefinitely that it would apply to any place along the river bank within a distance of a mile, in my opinion is not designating the location as near as may be.

Furthermore it appears to me that subsec. 6 gives to the state highway commission considerable discretion as to the location of the bridge within the designated locality. As the construction is to be under the supervision and control of the state highway commission it appears to me that that is the body to designate the exact location, but of course it could not designate a locality different from that stated in the petition.

_Bridges and Highways—County Boards_—A county board has no power to borrow money in anticipation of taxes levied to build county roads, the cost thereof not being a current expense within the meaning of subsec. 11a, sec. 669, Stats.

**Sam J. Williams,**

_District Attorney,_

Hayward, Wis.

In your letter of May 20th you state: “Under secs. 1300–1301a, the county board of Sawyer county at a special meeting held on the 15th of April 1914 appropriated $17,000 for the purpose of building county roads.” You ask “Can the county board of supervisors borrow money against this levy now and go ahead building roads?”

County boards have only such powers as are expressly granted by the statutes or necessarily implied therefrom. _Frederick v. Douglas Co.,_ 96 Wis. 411, 418. Subsec. 11a, sec. 669, Stats., gives county boards power “to borrow money after taxes have been levied in any year to pay the current expenses of the county in any sum not exceeding ten per cent of the amount of the last tax levied for county purposes.”
I do not think that the cost of building roads is one of the "current expenses of the county" within the meaning of that phrase as used in the above statute. It has been held that the expression "current expenses" is identical in signification with "running expenses" and does not include the expense of erecting permanent county buildings. *State ex rel. Reed v. Marion Co.*, 21 Kan. 419, 434; *State v. Board of Education, Neptune City*, 53 Atl. (N. J.) 236, 7; *Sheldon v. Purdy*, 49 Pac. (Wash.) 228, 230.

The contrary has been decided in California where it has been held that the phrase "current expenses" meant expenses of the current year and included the building of a jail. *Babcock v. Goodrich*, 47 Cal. 488, 510. But this last decision was rested on the peculiar wording of the statute under consideration. The phrase "current expenses" in sec. 669, Stats., cannot well include the expense of building roads without also including any expense that the county may incur in a given year. That the phrase was not used in any such broad sense is clearly evident from the statute itself. Had it been intended to authorize the county board to borrow money in anticipation of all taxes that had been levied it would have been unnecessary to limit such power as to taxes levied merely "to pay current expenses."

I am therefore of the opinion that sec. 669 does not authorize the county board to borrow money in anticipation of the collection of a tax to build county roads. I know of no other section of the statute that gives the county board any such power and consequently am of the opinion that they do not possess such power.

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**Highways — Construction — Highway Commissioner**—County Highway Commissioner is authorized to close highways under course of construction to all parties under subsec. 9, sec. 1317m–6, Stats.

June 12, 1914.

**James Kirwan,**

*District Attorney,*

Chilton, Wis.

In your letter of June 10th you inquire whether the highway commissioner is authorized to cross a highway under sec. 1317m–6, subsec. 9, so as to shut out doctors who
have patients living along the highway, or rural mail carriers whose route passes over the same.

In answer I will say that said subsec. 9 provides as follows:

“The county highway commissioner shall have power, in his discretion, to suspend the right to travel on any highway in process of construction or repair, by posting notices forbidding such travel at each end of said highway, and any one violating his order in that regard shall be guilty of a misdemeanor, and be punished by a fine not exceeding one hundred dollars, and in addition thereto shall be liable for all damages done to such highway by such travel, said damages to be sued for and recovered by the county.”

I believe this statute is a valid enactment and provides for a temporary closing of a highway. There are no exceptions provided for in said section and I see no reason why doctors or mail carriers should be exempted. As I understand it, mail carriers are not required to pass over impassable roads and it is not their duty to violate a state law in performing the duties of their position. Of course, the county highway commissioner must not abuse the discretion that is given him by this section of the statutes for if he does, his orders might be void as exceeding his powers. If it is necessary for the county highway commissioner to make the order closing the highway and he has done so by a proper exercise of his discretion, his order will apply to all parties alike, including physicians and mail carriers.

Bridges and Highways—Municipal Corporations.—A defective petition under subsec. 4, sec. 1321a, Stats., gives the highway commission no jurisdiction and any certificate issued by them, based upon such defective petition, is void.

The commission cannot be compelled by mandamus to declare a bridge necessary, under sec. 1321a, Stats.

If a bridge is built jointly by a town and village under that section each must contribute the share of the cost fixed by statute.

A town is not authorized to make a contribution to a village for the building of a bridge by the latter.

One municipality has no authority to lay out a highway in another municipality.
Wisconsin Highway Commission.

In your letter of the 17th you enclose a petition filed by the village board of the village of Nekoosa, Wood county, on July 24, 1913, and a copy of the certification made to the county clerk of Wood county in consequence of such filing. You also enclose a petition filed by the town of Saratoga, Wood county, on May 15, 1914, and an amended petition filed by the village of Nekoosa on May 28, 1914, with a copy of an opinion given to the village by Mr. Geo. L. Williams, attorney, Grand Rapids, Wis.

You refer to former correspondence with this department regarding this matter, and say that the site designated by the petition of the town of Saratoga is for a bridge at one of the sites for which plans were prepared and bids taken on April 4th last. That the amended petition of the village of Nekoosa is for a bridge on the other site. That this amended petition was considered by the commission at its meeting held in Milwaukee on June 12th, and that before taking action it desires my advice on the following questions:

"(1) Will the certification of necessity, given the county clerk of Wood county on November 3, 1913, operate in any way to prevent the commission from finding a bridge at the site named in the second petition not a necessity?

"The commission does not favor the site at this point for the reason that it is believed that a bridge built at this site will not serve the public interests as well as a bridge at the site named in the petition of the town of Saratoga.

"(2) In case the commission should declare a bridge at the so-called F street site to be not a necessity, do you believe that the village board of Nekoosa would be successful in mandamus proceedings instituted to compel the state highway commission to declare a bridge at this site a necessity?

"(3) Would it be legal for the village of Nekoosa to build the bridge jointly with the town of Saratoga, allowing the town of Saratoga to contribute less than the percentage named in subsec. 3, section 1321a?

"(4) In case your answer to the foregoing question is in the negative, could the town of Saratoga lawfully contribute any sum to the village of Nekoosa to aid in the construction of this bridge, and the bridge then be built by the village of Nekoosa alone?

5—A.G.
“(5) If the bridge is built at the Ferry site, a new road will have to be opened for about one-half mile, in order to connect with the existing highway. Would the village of Nekoosa, under sec. 1321a have authority to open this road?”

The original petition of the village of Nekoosa bears date July 17, 1913. In an opinion given you under date of April 24, 1914, I held that this petition did not comply with the law, in that it did not designate “as near as may be the location” of such bridge, as required by subsec. 4, sec. 1321a, Stats. This same subsection is the one under which the commission gets its authority to find such bridge to be necessary, and to certify the amounts to be paid towards its construction by the state and by the respective municipalities contributing to its cost. It appears to me that it is only upon the filing of a proper petition that the commission has any authority in the matter. If the petition is not sufficient, then any action taken by the commission, based upon such petition, is without authority and void. In my opinion the commission had no authority to issue its certificate, dated November 3, 1913, and that therefore that certificate has no force or effect whatsoever, and does not in any way interfere with the authority of the commission to take such action as to any subsequent petitions as it could have taken had the petition of July 17, 1913, never been filed, and the certificate of Nov. 3, 1913, never been issued.

The amended petition recites the filing of the original petition, and recites that it was not acted upon or authorized by the village board, and that on Jan. 19, 1914, and again on April 4, 1914, the board fixed the location of the bridge at Ferry street, followed by the petition for aid. This petition, in my opinion, sufficiently designates the location of the proposed bridge, in the following language:

“Commencing on the westerly bank of said Wisconsin river at or near the easterly end of F street, in this village, and to run from thence east at right angles across said river as near as may be.”

However, there is another provision of the section in question that needs to be considered in this connection. Subsec. 1 provides in part:
"The common council of any city and the board of any village, town or county bordering upon or through which any navigable or meandered stream runs, are authorized and empowered to build, purchase or maintain or to aid in building, purchasing or maintaining a bridge across such stream, provided that such city, village, town or county shall have previously voted to levy and collect a tax or to issue its bonds for such purpose as provided in sections 1320 and 1321 of the statutes; and provided further that the location and construction of such bridge shall be approved by the war department of the United States."

There is nothing in any of the papers submitted to show that the location and construction of this proposed bridge has been approved by the war department. In the recent case of State ex rel. West Point v. Price, County Clerk, in circuit court for Columbia county, Judge Fowler said of this provision:

"The provision is inserted in the statute, no doubt, by reason of Sec. 9 of the act of March 3, 1899, U. S. Compiled St. (West) III, page 3540, which provides that bridges over navigable streams wholly within a single state may be built under authority of the state legislature provided the location and plans thereof are submitted to and approved by the chief of engineers and by the secretary of war before the construction is commenced. This law of Congress must be taken judicial notice of. Conceding the power of the state legislature to span the bridge (river ?), and conceding that the legislative act relied upon is a determination by the legislature to erect a bridge, although it is perhaps an abortive attempt of the legislature to delegate to the Highway Commission or to the adjacent municipalities or both the exercise of the power imposed by Congress by the act cited direct upon 'the legislature of the state,' still the bridge can be 'located' only with approval of the United States engineer and of the war department. Can we assume that these authorities will approve the location of the bridge within the limits or near enough to the limits of Columbia county so as to authorize the taxation of Columbia county to pay for it, even though we might perhaps assume that plans of the bridge could and would be made that the department would approve? It seems to me that it will be time enough to mandamus the county when it appears beyond peradventure that the bridge is to be so located as to subject the county (to) contribute to its cost."

It appears to me that before the certificate can legally be issued, requiring the levying of a tax by the county for the
purpose of paying its share of the cost of the bridge, the required approval of the United States authorities must be procured.

There may, also, be some question as to whether or not the question of issuing the bonds with which to pay the village's share of the cost of the bridge was properly submitted to the electors of the village. The papers submitted do not show anything with regard to this. That ought to be shown before any certificate is issued.

Presumably the notice of election did not state a definite location for the proposed bridge. There may well be a question as to the validity of the election in the absence of such a statement, although I do not wish to be understood as holding that to be necessary.

What has already been said necessarily indicates the answer to your second question. In my opinion the commission has not, at this time, sufficient facts before it to warrant a finding or certificate based upon the amended petition. In my opinion mandamus would not lie to compel a finding by the commission that a bridge at the F street site is necessary.

The law contemplates a decision by the commission, upon the filing of a proper petition and proofs, as to the necessity of the proposed bridge. What such decision shall be must be determined by the commission, upon a careful consideration of all the facts. There is no clear and absolute duty imposed by law to find the proposed bridge to be necessary. Unless there is a clear abuse by the commission of the discretion conferred upon it, its decision either that the bridge is, or is not, necessary, will not be interfered with in a mandamus proceeding. *State ex rel. Gericke v. Ahnappe, 99 Wis. 322, 326; State ex rel. Court of Honor v. Giljohann, 111 Wis. 377, 386*.

Subsec. 1, sec. 1321a, Stats., expressly authorizes "the board of any village, town or county, bordering upon or through which any navigable or meandered stream runs" to "build, purchase or maintain or to aid in building, purchasing or maintaining a bridge across such stream."

Subsec. 3, however, seems to fix absolutely the proportion of the cost to be paid by each municipality sharing in such cost. It would seem that if the town of Saratoga contributes
anything towards the cost of the proposed bridge, it must contribute the share fixed by the statute.

I know of no authority for a contribution by the town of Saratoga to the cost of a bridge to be built by the village of Nekoosa alone.

Your question No. 5 does not state where the new roads would have to be made if the bridge is built at the Ferry site. I assume it would be in the town of Saratoga. I know of no authority by which one municipality can open a highway in another municipality.

In the decision of Judge Fowler, referred to above, he holds that the question of issuing bonds or levying a tax for the county's share of the cost of the proposed bridge must be submitted to a vote of the electors before the county can be compelled by mandamus to contribute. Inferentially he seems to hold that no bonds can be issued, or tax levied, without such vote. I am informed that this case will be appealed to the supreme court, and am inclined to think that that court will reverse this portion of the decision, but until it does so I believe all public officials should follow Judge Fowler's opinion.

_Bridges and Highways—Under sec. 1321a, Stats., the approval of the U. S. war department should be obtained in all cases before building a bridge across a navigable stream._

July 1, 1914.

_Wisconsin Highway Commission._

In your letter of the 29th you refer to my opinion of the 26th in answer to your questions dated June 17th, and particularly to that portion of the opinion which quotes the decision of Judge Fowler in the case of _State ex rel. West Point v. Price, County Clerk_. You state that the U. S. war department does not concern itself with that portion of the Wisconsin river above the canal at Portage. That is, that below Portage the Wisconsin river is a navigable stream insofar as the U. S. war department is concerned; that above it is not. You ask if the fact that any navigable or meandered stream within the state is not of any concern
to the U. S. war department makes it necessary to obtain the approval of such department before state aid can be granted under the provisions of sec. 1321a. The first subsection of sec. 1321a contains the following proviso:

"and provided further that the location and construction of such bridge shall be approved by the war department of the United States."

This section relates to the building of bridges across navigable or meandered streams. Unless the stream it is proposed to bridge is a navigable or meandered stream then it is not proper to proceed under this section. The section itself expressly provides that the location and construction of the bridge must be approved by the war department of the United States.

Under the decisions of our supreme court, any stream that can be made use of for floating the products of the country to market, even though it be merely the floating of a saw log, is a navigable stream. It would appear to me that the only safe way in the case of a bridge across any stream that is navigable under the decisions of our supreme court, is to first get the approval of the war department. There can at least be no harm in doing this, even though it should appear, upon such application being made, that the war department does not regard such stream as a navigable one. It is well known that the federal government improves streams and makes them navigable, and the mere fact that a stream is not at the present time being used for commercial transportation does not preclude its becoming a navigable stream, in fact, in the future. Of course if the war department should decline to approve the plans upon the ground that the stream is not a navigable one and therefore it has no jurisdiction, another question might arise. I believe, however, that even though a stream is not deemed navigable by that department, it would not refuse its approval upon its attention being called to the terms of our statute and the decisions of our supreme court as to what constitutes a navigable stream.
Bridges—Municipal Corporations—A certain town having raised $1,000 for the erection of a bridge and having petitioned the county board, under sec. 1319, for its share, is obligated to build said bridge although the location for said bridge has been attached to another town. Mandamus may be brought.

Clive J. Strang,
District Attorney,
Grantsburg, Wis.

In your letter of July 29th you state that at the annual town election in 1913 the town of La Follette, in your county, voted one thousand dollars to build a bridge; that they filed the necessary petition to the county board under sec. 1319 and thereafter the county board, at the annual meeting, voted one thousand dollars to cover the county's share of the work. That in Oct., 1913, the circuit court divided the town of La Follette uniting the territory where the bridge was to be built with another section of land taken from an adjoining town so that half of the new town was taken from La Follette and half from the town of Daniels. That the town of La Follette now refuses to build the bridge for the reason that the territory where the bridge was to be built is now a part of another town, and they wish to divide up the money so raised between the two towns according to the valuation of property in the two. That the county board wishes the bridge built but that there is an uncertainty whether the town of La Follette can be compelled to build the same. You inquire whether an action of mandamus will lie against the present town board of La Follette to compel them to build the bridge with the money now in the treasury of the said town and in the treasury of the county of Burnett.

According to the above statement of facts the town of La Follette has taken all the necessary steps to insure the appropriation for the said bridge by the county board. The money has been raised and is now in the treasury. It was raised for a specific purpose and of course must be used for that purpose. I believe it is the duty of the town board of La Follette to erect the bridge at the place designated in the petition. The fact that the location of the bridge is now
in another town cannot relieve the town board of the duty of building the bridge. There certainly is no authority given anywhere in the statute for a division of the money as is contemplated by the town of La Follette. It being the duty of the town board to build said bridge and the money for the same having been raised and being now in the treasury available for such purpose, I see no reason why mandamus by an interested party would not lie to compel the town board to perform its plain duty. In the case of State ex rel. Star Prairie v. St. Croix County, 83 Wis. 340, our court held that in a proceeding by mandamus brought by the town of Star Prairie the county board could be compelled to appropriate the county's share of the erection of a bridge as provided by statute. If mandamus will lie against a county board to compel it to perform its duty under sec. 1319, Stats., I see no reason why the same proceeding could not be brought against the town board to compel it to act where its duty is plain.

**Bridges and Highways—Municipal Corporations**—Where two towns, located in the same county, join in a petition for county aid in building a bridge costing more than $400, under sec. 1319, Stats., if the bridge has been apportioned to the two towns for maintenance and repairs, each town should pay one-half the cost of the building that portion of the bridge apportioned to it, and the county the remaining half.

If such bridge has not been so apportioned, then each town should pay such proportion of one-half the cost of the bridge as its assessed valuation bears to the total assessed valuation of the two towns.

AUGUST 25, 1914.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

In your letter of the 24th you state that two towns in your county, by joint petition, asked the county to pay one-half of the cost of constructing a bridge; that the petition and resolution are drawn under sec. 1319, Stats.; that the valua-
tion of one town is $480,000 and of the other town $1,000,000, as equalized by the county board; that your understanding of the law is that each of the towns, irrespective of their valuation, under the section above referred to, will pay one-fourth of the cost of said bridge, said bridge costing $900, and that you have so ruled. That your attention has been called to the last part of sec. 1273, providing for the cost of the bridge and payment of the same, and you also call my attention to sec. 1321a, subsec. 3, which you state apparently provides a scheme for getting county and state aid; that this bridge is to take the place of an old one that is built on a highway that has been laid out and traveled for twenty-three years. You ask what part of the total cost each town should pay.

Sec. 1319, Stats., speaks all through of the building of a bridge by any town. Subsec. 2 of that section provides:

"When such bridge to be constructed or repaired is located wholly or partly within a town having a total valuation of $400,000 or more according to the last assessment as equalized by the county board, the county shall pay the cost in excess of two hundred dollars until the cost is four hundred dollars. When the cost exceeds four hundred dollars the town and county shall each pay one-half the cost of such construction or repair."

In the case of State ex rel. Shawano County v. Sexton, 124 Wis. 352, the supreme court intimated that where a bridge was located in part in two towns, a joint petition by the two was the proper method under sec. 1319. It would seem to follow from this that where the proceedings are under sec. 1319 the county is to pay one-half of the total cost of the bridge, where such cost exceeds four hundred dollars, and the town or towns interested the other half. The latter part of sec. 1273 provides:

"Any bridge on a highway between two towns, or between a town on one side and a village or a town and village on the other side, which highway has become such by reason of having been used and worked as provided in section 1294, and which bridge has not been assigned to either of the adjoining towns or village, shall be repaired and maintained by such towns and village, and the cost of repairs and maintenance shall be paid by them in proportion to the valuation of the property therein as equalized by the county board or boards at the last equalization."
You state that the highway upon which this bridge is located has been laid out and traveled for twenty-three years. Presumably, therefore, the part which each town should keep in repair and maintain has been assigned. That being true, the provision of sec. 1273, above quoted, would not be applicable. In my opinion, each town should pay one-half of the cost of building that portion of the bridge assigned to it.

If the bridge has not been assigned to the two towns then it would appear to me that each town should pay such proportion of one-half of the cost of building the bridge as its assessed valuation, as equalized by the county board, bears to the total assessed valuation of the two towns as equalized by the county board.

Sec. 1321a, Stats. does provide a scheme for the building of bridges across navigable streams and obtaining county and state aid in so doing. However, according to your statement, these proceedings are brought under sec. 1319 and not under sec. 1321a. In an opinion by this department found on page 69 of the Biennial Report and Opinions 1912, it was held that a town might proceed under either sec. 1319 or sec. 1320 in building a bridge across a navigable stream. It appears to me that it is also true that a town or towns may proceed either under sec. 1319 or under sec. 1321a, where they desire aid in the building of a bridge across a navigable stream.

The towns not having proceeded under sec. 1321a, the provisions of that section as to the cost are not especially pertinent. That section does provide, however, that where the proceedings are under that section and the bridge is located between two towns, the two towns together shall pay two-fifths of the cost of the bridge, to be borne by each in proportion to the equalized valuation of each, as fixed by the last county board, except that if the municipalities are in different counties, then each of them shall pay one-fifth of the cost of such bridge.

There is nothing in this section that changes my opinion as expressed above in regard to the portion of the cost to be borne by each of the towns.
Bridges and Highways—County and State Aid—Bond Issue—A city cannot raise its share for building bridges on prospective state highway under sec. 1317m-4 by bond issue and receive county and state aid under sec. 1317m-5.

October 3, 1914.

Charles A. Taylor,
District Attorney,
Barron, Wis.

In your letter of Sept. 14th you state that the city of Chetek, in your county, has voted to borrow money for the purpose of building a bridge on the system of prospective state highways under the provisions of the state aid highway law, and that you will be called upon to pass upon the question of whether the city has the authority to borrow money and issue bonds for such purpose and whether the county is obliged to raise a similar amount of money to put into the bridge. You state that you believe it is questionable whether subsec. 7, sec. 1317m-4, and sec. 1317m-13 give bonding powers to any municipal corporation other than towns and villages. You inquire whether, when the city has in some way, legal or otherwise, provided a sum of money, the county has any right to question the validity of the proceedings by which the city obtained the money which it offers as its share of the cost of the highway improved, or whether county aid must be given for such purpose.

Sec. 1317m-4, Stats., provides:

"The electors of any town, the village board of any village, and the common council of any city of the fourth class, having a population of five thousand or less, at any regular meeting or legally called special meeting, may vote, in addition to all other taxes, a special tax of not less than two hundred and fifty dollars for building bridges on a prospective state highway or a tax of not less than four hundred dollars for improving a portion of the system of prospective state highways, by grading, draining, surfacing, or in other manner approved by the state highway commission, provided that no tax of less than the minimum shall be voted for the grading, draining and surfacing of any one portion of the prospective state highway unless such portion shall completely connect portions of road already constructed with county or state aid."
Sec. 1317m-5, provides:

"1a. The county boards are given authority to construct or improve, or aid in the construction or improving any road or street in any village or city of the fourth class having a population of five thousand or less in the county; provided, that such road or street shall directly connect roads now or hereafter put on the county system of prospective state highways. The county board may provide funds for such improvement by a county tax upon all the taxable property of the county and may fix a portion of the cost to be paid by such city or village or abutting property owners or subscribers, or all of them, and such portion of the cost shall be paid into the county treasury before the improvement shall be constructed.

"2. Upon receiving a petition in accordance with subsection 5 of section 1317m-4, 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; provided that the amount allotted to the county from the appropriation for state aid for highways is sufficient to pay the state's share of the cost of all the improvements to be made under subsection 1 of this section and those petitioned for by all the towns in the county."

Subsec. 3, sec. 1317m-4, provides that if any town fails to appropriate at its annual meeting sufficient sum that any group of freeholders may donate such funds, and that the subsequent procedure shall be the same as if a tax of like amount had been voted under the provisions of subsec. 1, of said section.

Sec. 1317m-13 provides that towns may issue bonds for highway improvements and that the proceeds of the town bonds shall be available for state aid to the extent of the tax levy in the town each year to pay the face of such bonds and the petition for county aid for such year, under sec. 1317m-5, shall include such amount and the county board shall grant such petition the same as in case of a tax voted under such section, etc.

Subsec. 7, sec. 1317m-4 provides:

"Any incorporated village shall have all the rights and privileges conferred upon towns by section 1317m-1 to section 1317m-15 of the statutes, inclusive, and the powers and duties therein assigned to towns, town boards of super-
visors, and town chairmen, clerks, and treasurers are hereby extended to villages, village boards, and village presidents, clerks, and treasurers.”

There is no provision in this statute authorizing a city to issue bonds and that the proceeds of such bonds shall be available for state and county aid under sec. 1317m–5. There is an express provision, as above quoted, for towns to issue such bonds and villages are given the same rights as towns. Had the legislature intended that cities should be authorized to issue such bonds the same as villages and towns, it would have been an easy matter to have said so. I do not believe that it was the intention of the legislature to authorize cities to raise their share by a bond issue for the statute expressly provides that the money shall be raised by a special tax levy.

Under subsec. 5, sec. 1317m–4 it is provided:

“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. Such petition shall state the location of the bridge or road to be improved, the character of the improvement desired, 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.”

The county board is required to appropriate the county’s share upon receiving such petition, under subsec. 2, sec. 1317m–5. A petition that states to the county board that the money was raised by a bond issue does not comply with this statute.

I am of the opinion that the city cannot raise its share for building bridges on prospective state highways and improving a portion of the system of prospective state highways under sec. 1317m–4 by a bond issue, and that if it does the county will not be compelled to furnish its share under sec. 1317m–5.
Highways—A highway may be established by twenty years adverse user alone.

D. S. Law,
District Attorney,
La Crosse, Wis.

In your letter of Oct. 3rd you describe a certain road, being partly in the town of Greenfield and partly in the town of Washington, which you say has been open to and traveled by the public for a period of more than fifty years, and that ten families who reside along the road use it continuously; that no portion of the road has ever been legally adopted and recorded as a town road by either the town of Greenfield or the town of Washington; that the portion lying in the town of Greenfield is kept in repair by the town, but the small portion in the town of Washington has never been repaired by the town, but has heretofore been kept in repair by some of the parties who use the road the most; that for over twenty-five years there has not been a gate on any portion of the road, but it has at all times been open to the free and unobstructed use of the public.

You inquire whether the owners of the land which is crossed by this road can close it now or whether it is a public road at this time. You state in your letter that you have come to the conclusion that it is a public road and cannot be closed by the owners of the land over which it runs and you have cited the case of City of Chippewa Falls v. Hopkins, 109 Wis. 611, in which our supreme court held that a highway may be established by twenty years adverse user alone. On page 616 the court said:

“In Lemon v. Hayden, 13 Wis. 159, and in Wyman v. State, 13 Wis. 663, it was held in effect that the use of a definite highway by the public for twenty years with the consent of the owner was conclusive evidence of dedication, and in the first case cited it was further said that the first clause of the section quoted from the Statutes of 1858 was simply declaratory of the common law. The principle that twenty years’ user alone is sufficient to establish a highway by user is either expressly or impliedly recognized in the following subsequent cases in this court: Hanson v. Taylor, 23 Wis. 547 (overruling State v. Joyce, 19 Wis. 90); State v. Castle, 44 Wis. 670; Pewaukee v. Savoy, 103 Wis. 271; Stricker v. Reedsburg, 101 Wis. 457.”
Since that time our supreme court has approvingly cited said case in *Rolling v. Emrich*, 122 Wis. 134, 136.

As the road in question under the facts stated by you has been used for highway purposes for a period longer than twenty years, these cases are decisive of the question and I am constrained to hold that the road in question is a public highway and cannot now be closed by the owner of the land which it crosses.

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*Bridges and Highways—Highway Commission—“Force clause” of Highway Law—Apportionment of State Highway Fund*—In apportioning state highway fund to counties, highway commission will disregard amounts reported as available for improvements instituted under the “force clause,” subsec. 3, sec. 1317m-4, Stats.

October 21, 1914.

A. R. Hirst, *Highway Engineer*,

*State Highway Commission.*

I have your request for opinion of the 6th instant, in which you refer to the decision of the supreme court of that date in the case of *Carey v. Ballard, et al.*, in which the “force clause” of the highway law, that is, subsec. 3, sec. 1317m-4, Stats., was declared unconstitutional. You submit the following state of facts and question:

“The most important and immediate matter is the effect which this decision will have upon the distribution of the state highway appropriation available for work to be done in 1915. In accordance with law, petitions from the town boards for state aid must be in the hands of the county clerks on or before Sept. 1st, and the county clerks must have certified copies of these petitions in the hands of the state highway commission on or before October 1st. The state highway commission must allot the state funds available in accordance with certain restrictions, on or before November 1st.

“The question directly before us is whether, in view of the decision of the supreme court that the so-called ‘force clause’ of the law is unconstitutional, the state highway commission shall allot state aid to the various counties upon the basis of the petitions received, exclusive of those apparently
originating under the 'force clause', or whether state aid shall be allotted to the counties in accordance with the total applications from each county, including applications under the 'force clause':

"Put in briefer terms, the question is whether the state highway commission shall disallow those petitions evidently originating under the 'force clause', and granting only those originating under other provisions of the state aid law."

Under sec. 1317m–8, Stats., it is the duty of the state highway commission to distribute the state highway fund to counties. This section provides that the state shall pay not more than one-fifth of the cost of bridges and not more than one-third of the cost of road improvements under the state aid highway law. Subsec. 2 of this section provides that the clerk of each county shall, on or before the 1st day of October of each year, notify the highway commission of the amounts to be available for the ensuing year in the various towns in the county, and the amount needed from the state highway fund to pay for the state's share of improvements contemplated. The third subsection provides a scheme for prorating the funds of several counties in case that the state's share of improvements contemplated, as notified to the highway commission by the county clerks, exceeds the amount estimated to be available in the state highway fund under appropriations for that year.

By implication, this section of the statutes, therefore, contemplates and provides that if the state highway fund appropriation is sufficient to meet the state's share of contemplated improvements as petitioned for and approved, the highway commission shall apportion to each county the full amount so petitioned for.

The amount and character of these improvements are determined in the first instance under the provisions of sec. 1317m–4, either by the electors of the town in town meeting under subsec. 1 of that section; by petitioners under the "force clause," subsec. 3 of said section; or by the electors in town meeting, as under subsec. 1, in the case of bequests or donations, under subsec. 4 of said section. By subsec. 5 it is provided that

"Whenever it has been determined in accordance with subsecs. 1, 3 or 4 of this section that funds will be available, the town board shall, on or before the first day of the follow-
ing 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.

"Such petition shall state the location of the bridge or road to be improved, the character of the improvement desired, 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."

By subsec. 2, sec. 1317m-5, it is provided:

"Upon receiving a petition in accordance with subsection 5 of section 1317m-4, 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; provided, that the amount allotted to the county from the appropriation for state aid for highways is sufficient to pay the state's share of the cost of all the improvements to be made under subsection 1 of this section and those petitioned for by all the towns in the county."

Your question is, what action shall be taken by the state highway commission in apportioning the state highway fund in respect to amounts called for for the several counties on account of petitions filed by the town boards on account of improvements instituted and contemplated under subsec. 3, sec. 1317m-4, which the supreme court has held unconstitutional.

The supreme court held this subsection of the statutes unconstitutional as a delegation of legislative power, in that it, in effect, gave to private parties willing to contribute one-half of the town's share of the cost the power to select a portion of the system of prospective state highway for improvement and to compel town boards to levy a tax to pay the town's share of the cost of such improvement—an unconstitutional delegation of legislative power to such private parties.

In the case of such improvements this subsection of the statutes provided that the town board should levy the tax. That the tax should be voted at a town meeting was neither contemplated nor provided for. With this subsection declared unconstitutional and void, there is no authority in the law for the levying of a tax in the town to meet the town's share of the cost of such improvements. As any such tax, if levied or attempted to be levied, would be illegal and unenforceable, it follows that town officers will neither levy,
spread upon the tax rolls nor attempt to collect any tax to defray the town’s share of the cost of any improvement instituted or sought to be instituted under this subsection.

It follows further that any action whatever taken or attempted to be taken under or by authority of this subsection will be absolutely void from inception. This, of course, will include the petition of the town board through the county clerk to the county board for an appropriation of county aid for any such improvement.

Moreover, it is seen that, under subsec. 2, sec. 1317m–5, the authority of the county board to levy a tax for the county’s share of the cost of highway improvement, except in the case of improvements made under subsec. 1, sec. 1317m–5, upon the initiative of the county board, rests upon the fact that the county board has received a petition in accordance with subsec. 5, sec. 1317m–4. Of course, in case the petition is one which sets forth that the improvement contemplated is instituted and the money to meet the town’s share of the cost of which is available under subsec. 3, sec. 1317m–4, such petition is void and of no effect to authorize the county board to levy a tax to pay the county’s share of the cost of such improvement.

From the foregoing it follows that, in apportioning the state highway fund under sec. 1317m–8 the state highway commission will disregard all amounts reported by the county clerks as available for state highway improvement in the various towns under subsec. 3, sec. 1317m–4, Stats.

Bridges and Highways—Towns—Counties—Where the amount raised by a town for building a bridge is, when taken with the aid received from the county and state, sufficient for that purpose, upon the town taking the proper proceedings before the bridge is built, the county is obliged to contribute its share of the additional amount required.

Clive J. Strang,
District Attorney,
Grantsburg, Wis.

In your letter of the 23rd you state that a town in your county voted its share of money to build a bridge a year ago
last April at its annual spring election. That the county board raised its share at the last Nov. meeting. That the amounts so voted were not sufficient to build the bridge, and it has not yet been built. That the town wants to raise half of this balance now, at a special town meeting, and have requested you to take the matter up with the county board at this Nov. meeting. You ask if the county can be compelled to raise this amount, and if they have authority to raise it even though willing to do so.

I am not quite certain whether the amounts raised were raised under the provisions of the state aid highway law, or under the provisions of sec. 1319.

Sec. 1317m–4, being a part of the state aid highway law, provides that the electors of any town, at any regular meeting or legally called special meeting, may vote a special tax of not less than $250 for building bridges on a prospective state highway. That when this has been done the town board shall, on or before the first day of the following Sept. petition the county board to appropriate the county's share of such improvement.

Sec. 1317m–5 gives the county board authority to construct or aid in constructing any bridge within the county. The same section provides that upon receiving a petition from a town in accordance with the provisions of sec. 1317m–4, the board shall appropriate a sum to cover its share of the cost of constructing the improvement. According to your statement the bridge has not yet been built, and the town and county have appropriated only a part of the necessary expense. It appears clear to me that if the proper proceedings are taken under the state aid highway law it is the absolute duty of the county board to appropriate its share. If I correctly understand your letter, however, the county board cannot be compelled to take such action at its Nov. meeting. According to my understanding of the facts the town has not as yet raised its share of the expense, and has not made its petition for the additional sum required from the county. Under the provisions of sec. 1317m–4 such petition must be made prior to Sept. 1st in order to compel the county to raise its share.

Under the provisions of sec. 1317m–5, however, the county board is authorized to construct or aid in constructing
any bridge in the county. It would seem to me that under this provision it has authority to raise its share of the expense of the bridge even though the provisions of sec. 1317m-4 have not been fully complied with by the town.

Under sec. 1319 the county board is required to appropriate its share of the expense of constructing any bridge upon the filing of the proper petition by the town board. I see no reason why this section is not applicable to the raising of an additional amount, as well as to raising the amount first asked for. In my opinion, if the proper petition is filed, the county board may be compelled to appropriate its share toward the additional expense for this bridge, whether the proceedings are under the state aid highway law or under sec. 1319.

Bridges and Highways—County and State Aid—The provision in sec. 1317m-4, subsec. 5, that the petition for county and state aid shall be made on or before Sept. 1st, is mandatory and if not made on time no aid is required to be given.

James Kirwan,
District Attorney,
Chilton, Wis.

In your letter of Nov. 4th you direct my attention to subsec. 5, sec. 1317m-4, Stats., providing for county and state aid for the building of bridges on a prospective state highway and improving a portion of the system of state highways. You state that in one of the villages in your county $1,500 was raised for the improvement of the prospective state highway system but that the officers neglected to file the petition with the county clerk on or before Sept. 1st, but filed the same Oct. 1st. You inquire whether such failure to file in time will relieve the county and state from furnishing their share for such improvement.

Said subsec. 5, sec. 1317m-4 provides:

"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. Such petition shall state the location of the bridge or road to be improved, the character of the improvement desired, 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."

Subsec. 2, sec. 1317m-5, provides that upon receiving a petition in accordance with subsec. 5 of sec. 1317m-4, the county board shall appropriate a sum to cover its share of the cost of constructing the improvement and cause such sum to be levied on all the taxable property in the county, provided, etc.

The question is, is the provision in the above quoted subsec. 5, that the petition to the county board shall be made on or before the first day of the following September, mandatory as to time, or is it simply directory?

The statute above quoted requires the town board to make the petition through the county clerk to the county board on or before the first day of the following September. The word "shall" is used which has a mandatory significance.

In subsec. 2, sec. 1317m-8, it is provided that

"the county clerk of each county, on or before the first day of October of each year, shall notify the state highway commission of the amounts to be available for the ensuing year in the various towns in the county under subsecs. 1, 3 or 4, sec. 1317m-4, and the amount needed from the appropriation for state highway aid to pay the state's share of the cost of improvements contemplated."

Subsec. 4 of the same section provides:

"On or before the first day of November of each year, the state highway commission shall notify the county clerk of each county of the amount which it is estimated the county will be entitled to receive from the appropriation for state aid for highways for the ensuing year."

It is necessary that the county clerk be in possession of all the petitions sent in by the different town boards in his county early enough so that he may get his report ready for the state highway commission, which he is required to make on or before the first day of October and it is necessary for the state highway commission to receive the reports from the
various counties early enough so that they may make their computation and notify the county clerks on or before the first day of Nov. of each year of the amount which it is estimated each county will be entitled to receive from the appropriation for state aid for highways for the ensuing year.

The legislature has prescribed a method of procedure by which method these various officers are given a reasonable time in which to perform the duties imposed upon them. It seems to me there is a substantial reason why the law should be construed as mandatory, for by so doing it will give the county clerks and the state highway commission sufficient time to do the necessary work connected with the matter.

There are a great many decisions by courts of last resort construing statutes as to whether they are mandatory or directory. There is no statute that I have been able to find, similar to the one under consideration, which has been passed upon by a court of last resort to aid us in solving this problem. Lord Penzance said:

"I have been carefully through all the principal cases, but upon reading them all the conclusion at which I am constrained to arrive is this: That you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together and the tendency of my mind after reading them is to come to the conclusion which was expressed by Lord Campbell in the case of Liverpool Bank vs. Turner, where he said: 'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or directory.'" Sutherland on Statutory Construction, p. 574.

I believe a rule of construction which is applicable to this statute is the one stated in par. 458, in Sutherland on Statutory Construction:

"Where a statute confers a new right, privilege or immunity the grant is strictly construed and the mode prescribed for its acquisition, preservation, enforcement and enjoyment is mandatory."
The same rule is laid down in 26 Am. & Eng. Ency. of Law (2nd ed.) page 691.

It is true that often provisions relating to the duties of public officers, specifying the time for the performance, are in that regard generally directory, though the statute uses the term "shall." 25 Am. & Eng. Ency. of Law (2nd ed.) p. 634.

While the question is not free from doubt, after a careful consideration of the various provisions of the law in question I believe it was the intention of the lawmakers that this statute has a mandatory significance. You are, therefore, advised that the failure of the town board to file the petition in time will relieve the county and state from furnishing their share for the improvements in question.

Bridges and Highways—Public Officers—Constitutional Law—Sec. 1317m-6, Stats., relating to the election of county highway commissioner, is not unconstitutional.

November 17, 1914.

THOMAS A. SANDERSON,
District Attorney,
Sturgeon Bay, Wis.

In your letter of the 14th inst. you say:

"Will you kindly give me an opinion upon the following question:

"Are those provisions of the highway law—sec. 1317m-6 in particular—that refer to the election of county highway commissioners, constitutional?

"Art. 6, sec. 3 of the Wisconsin constitution provides that—‘sheriffs and all other county officers .................. shall be chosen by the electors at the respective counties once in every two years.’

"Art. 13, sec. 9 provides—‘All county officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct ..................’

"Assuming that the county highway commissioner is a county officer, under sec. 9, art. 13, has the legislature any greater power than to determine whether he shall be selected,

(A) By election by the electors; or
(B) Appointed by the Board of Supervisors; or
(C) Appointed by other county authorities?
In other words, has the legislature the right to incorporate such conditions and restrictions into the way and manner in which a county highway commissioner shall be selected as has been done by the enactment of sec. 1317m-6?

"2—If such provisions are a violation of the constitutional provisions above quoted, then, has the state the power to deny a county the right to participate in the benefits of the state aid for highways, in the event the county board should fail to elect a county highway commissioner as provided by sec. 1317m-6?"

Sec. 1317m-6, Stats., provides in part:

"1. The county board of each county shall elect a competent man as county highway commissioner. If any county board shall fail to elect, that county shall not participate in the benefits of the state aid for highways; provided that the county shall participate if the county board, by resolution, request the state highway commission to take charge of the work and to make arrangements to insure the proper construction and maintenance of highways and bridges built with state aid in the county, * * *.

"2. Candidates for the office of county highway commissioner shall be examined at the county seat by the state highway commission to determine their relative fitness for the position. Said commission shall notify the county clerk of the relative standing of the various candidates in their ability to conduct the work, and the county board shall elect as county highway commissioner one of the first two men on the list so certified as eligible, striking out the names of those who refuse to qualify when elected."

It is plain, of course, that if the commissioner of highways comes within the provisions of art. VI, sec. 4, Const., (referred to by you as sec. 3), it is under the phrase "all other county officers." Our court has said of this phrase:

"We are constrained to hold that the term 'all other county officers' was used in the instance in question in harmony with the statutory division of officers into state, county, and town officers existing at the time of its incorporation into the fundamental law. In other words, in its particular sense—that of heads of the several major divisions of county government as then understood—and without any thought of surrendering the legislative power mentioned in sec. 9, art. XIII, to create other county officers with duties other than
those incident to those offices grouped under the special statutory treatment of the subject, and to provide for the manner of filling such offices, not of course invading the constitutional system of local self-government. " State ex rel. Williams v. Samuelson, 131 Wis. 499, 512.

That case holds that a law providing for the election by the county board of a county supervisor of assessments to hold office for the term of three years does not violate the constitutional provision.

Jury commissioners, appointed by the circuit judge are not county officers within the provisions of this section. State ex rel. Gubbins v. Anson, 132 Wis. 461. Neither are assessors of incomes. Income Tax Cases, 148 Wis. 456.

The office of county highway commissioner was unknown at the time of the adoption of the constitution, nor was there any county officer having substantially the same duties as those devolving upon such officer. In my opinion the section in question does not conflict with sec. 4, art. VI, Const.

In O'Connor v. City of Fond du Lac, 109 Wis. 253, to which you refer in a note at the end of your letter, our court says of the intention of the framers in adopting sec. 9, art. XIII, Const:

"They intended that all local officers, according to the then known schemes for local self-government, should be chosen by the people of the localities affected." p. 267.

That case related to the office of policeman, an office well-known at the time of the adoption of the constitution.

The case of Cole v. Village of Black River Falls, 57 Wis. 110, also referred to by you, holds that this constitutional provision prohibits the appointment of village officers by the legislature, and that a statute, providing that the officers of a town shall be the officers of a village created from a portion of such town is invalid.

In State ex rel. Harley v. Lindemann, 132 Wis. 47, cited by you, it is held that a statute authorizing the three circuit judges of Milwaukee county to appoint the board of school directors for the city of Milwaukee, violates this constitutional provision.

Thus it appears that all of these cases involved the selection of local officers by some one other than the local
authorities, and all involved officers known at the time of the adoption of the constitution.

That portion of art. XIII, sec. 9, to which you refer provides:

“All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct. * * All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct.”

If the county highway commissioner is an officer, then the office was created by law after the adoption of this section.

Our court has said,

“that sec. 9 in the opening lines refers to the recognized heads of the several divisions of county government as treated in the statutes from the beginning under the head of county officers, and in the closing lines to such other county officers as the legislature might from time to time create, reserving to it authority to provide for filling the offices either by election or appointment.” State ex rel. Williams v. Samuelson, 131 Wis. 499, 512.

As to such officers their “appointment can be delegated by the legislature under this constitutional provision to such an appropriate agency as is not prohibited by the constitution and laws from executing such a legislative mandate.” In re Appointment of Revisor, 141 Wis. 592, 624.

This last quotation is from the dissenting opinion of Mr. Justice Siebecker, but I do not understand that the court was divided upon this particular proposition.

As to these offices created since the adoption of the constitution, the officers may be elected or appointed “in any way that the legislature may in its discretion direct.” Income Tax Cases, 148 Wis. 456, 511.

As the statute expressly provides that the commissioner of highways shall be elected by the county board, it seems clear to me that, to that extent, at least, the constitutional provision is not violated. But I understand your question to relate more particularly to the provision for certifying
an eligible list by the state highway commission, and limiting the county board's choice to such eligible list.

There is nothing in this constitutional provision which expressly prohibits the prescribing of qualifications for holding office, by the legislature. Certainly it is not an uncommon thing to make such provisions as this, and the prescribing of the qualifications in no sense removes the power of appointment or election from the proper local authorities. This particular provision is along the lines of the civil service laws relating to the appointment of state, county and municipal officers, which have been quite generally sustained.

"It is elementary law that an act of the legislature will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond reasonable doubt." State ex rel. Hessey v. Daniels, 143 Wis. 649, 653.

And the court should be able to point out the particular part of the constitution which is violated. State ex rel. Chandler v. Main, 16 Wis. 399.

In my opinion the statute referred to is constitutional. This probably renders unnecessary an answer to your second question. I will merely suggest this, however, that it seems doubtful to me if the legislature would have passed the law providing for state aid without the provision for assuring proper and economical expenditure of such aid under the supervision of competent county highway commissioners. If the court should so hold, then, if the provisions herein referred to are unconstitutional it would invalidate the entire law.

Bridges and Highways—County Board—County board cannot grant aid to a town after bridge is built.

EDGAR EWERS,
District Attorney,
Richland Center, Wis.

In your communication of the 18th inst., you state that on July 24, 1914, the village of Cazenovia, Richland county,
entered into a contract with one Edwin Kelley whereby in consideration of the sum of $5200 the said Kelley was to, and did, construct a bridge in said village; before beginning the bridge the village of Cazenovia had on hand the sum of $2400 to apply on the payment of this bridge; the said village duly presented a petition to the county board of Richland county on or before Sept. 1, 1914, asking the said county to raise the sum of $2400 to apply on said bridge; that the state highway commission had before the letting of the said contract condemned the said bridge; that the new bridge which was completed on or about the first day of Nov., 1914, was completed in accordance with the plans and specifications furnished by the state highway commission and the contract was made out and signed upon the blanks furnished by said commission, and that the bridge passed inspection of said commission; that the petition of the village of Cazenovia is now up before the board of Richland county for its consideration; that the said county board is hesitating to appropriate the sum asked for by the said petition for the reason that the work is already completed and for the further reason that the county board of Richland county did not enter into the written contract with the said Kelley.

You ask whether the present county board of Richland county may make the appropriation of $2400 asked for by the petition of the village of Cazenovia and pay this money over to the said village to be applied on the said contract on the foregoing statement of facts.

It was held by our supreme court in the case of State ex rel. Town of Hamburg v. Board of Supervisors of Vernon County, 145 Wis. 191, that, as the law stood prior to the passage of ch. 397, Laws of 1909, the county board has no power to grant the aid provided for in sec. 1319 after the bridge was completed.

Ch. 397, laws of 1909, added to said sec. 1319 what now appears as subsec. 4 thereof and which reads as follows:

"Whenever the construction or repair of any bridge lying wholly or partly within any town is required to be made without delay, by reason of being washed out or damaged by floods or other cause, the town may file its petition with the county clerk setting forth the facts respecting such immediate necessity for construction or repairs. The chairman of the county board shall appoint two of its members who shall
have the same powers and duties as the members appointed pursuant to subsection 6. The construction or repair of a bridge performed and accepted pursuant to this subsection, shall entitle the town to county aid to an amount of money equal to that which the town would have been entitled to if it had filed its petition with the county board as hereinbefore set forth, and the county board shall levy such sum upon the taxable property of the county; * * * *

A perusal of the Hamburg case above quoted does not disclose whether the petition therein considered was filed before or after the enactment of the amendment just quoted. At any rate, it does not seem to have received the attention of the court in that case which was apparently decided upon the assumption that if the petition was presented after the enactment of said amendment, the circumstances under which the bridge was built did not bring the case within the terms thereof.

Upon the authority of the Hamburg case it is plain that the county board has no power to grant aid to a town for construction of a bridge after it has been built, except in cases contemplated by subsec. 4, sec. 1319, above quoted, in which case the petition filed with the county clerk must "set forth the facts respecting such immediate necessity for construction or repairs," and the chairman of the county board must have appointed two of its members to "act as its commissioners and who shall co-operate with the board of such town * * * to act in the letting, inspecting and acceptance of the work."

Unless such petition was filed with your county clerk "setting forth the facts respecting such immediate necessity for construction or repairs" before the letting of the contract, and unless the chairman of your county board appointed "two of its members to act as its commissioners to co-operate with the town board in the letting, inspecting and acceptance of the work," your county board is without authority to grant the aid in this case.
Bridges and Highways—County Board—County board cannot grant aid for construction of a bridge after same is built.

November 20, 1914.

EDGAR EWERS,
District Attorney.
Richland Center, Wis.

Under date of the 19th inst. I transmitted to you my official opinion in reply to an inquiry propounded by you under date of the 18th inst. concerning the power of your county board to grant aid to the village of Cazenovia in your county for the construction of a bridge in said village after the bridge had been built.

I answered your inquiry upon the assumption that application for this aid was made under sec. 1319, entirely overlooking the fact that it was a village making the application for this aid, and the provisions of sec. 1319 only provide for the extension of such aid to towns.

In your telephone communication this morning you stated that you desired to know whether such aid could be granted under the provisions of sec. 1317m-4 and sec. 1317m-5.

Sec. 1317m-4 provides a number of methods for raising money on the part of towns, villages and cities of the fourth class with a population of five thousand or less, for the purpose of building bridges on a prospective state highway, and that when it is determined in one of the methods provided therein that funds will be available for such purpose

"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. Such petition shall state the location of the bridge or road to be improved, the character of the improvement desired, 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."

It is provided in sec. 1317m-5 that:

"Upon receiving such petition 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."

By subsec. 4 of said sec. 1317m-5 it is provided that:
“The county clerk shall, on or before the first day of January of each year, file with the state highway commission a written statement setting forth the petitions granted by the county board, the location, character, and contemplated cost of each improvement, and the amount to be paid by the county, town, and state for making each of said improvements.”

Subsec. 3 of sec. 1317m-7 provides:
“All highways and bridges for which state aid is granted shall be constructed and improved by contract, unless the county highway commissioner and the state highway commission shall agree that some other method is more advisable. The manner of advertising for proposals, the forms of proposals, contract and bond shall be uniform, as fixed by the state highway commission. All contracts shall be between the county board and the contractor, and no contract shall be awarded without the written approval of the state highway commission.”

The same considerations which prompted our supreme court to hold in the case of State ex rel. Hamburg v. Vernon County, 145 Wis. 191, that a county board had no power under the provisions of sec. 1319 to grant the aid therein provided for to a town after the bridge had been constructed, renders it imperative that the power of the county board to give aid under the provisions of the statutes herein referred to after the bridge has been constructed, be denied. As stated in that opinion these statutes give the county board of a county, under specified conditions, competency to levy a tax on all the taxable property thereof for the purpose of paying a portion of the cost of constructing a bridge on the system of prospective county highways. The county board has no power to act in the matter of appropriating aid under these statutes until the town has first raised its share and filed its petition with the county clerk. When that is done a statement thereof must be filed with the state highway commission by the county clerk and the contract for the construction of the bridge must be entered into by the county board. None of these conditions precedent to the receiving of county and state aid have been performed; consequently your county board is without any authority now, after the construction of the bridge, to grant aid to the village of Cazenovia.
Bridges and Highways—Counties—Right of county of La Crosse to revert a county road to the township in which the road lies.

Right of a town board to discontinue a road extending from its town to an adjoining town considered.
Secs. 1308; 1310.

Dec. 16, 1914.

D. S. Law,
District Attorney,
La Crosse, Wis.

I have your letter of the 9th inst. in which it appears that there is a certain road in the town of Holland, your county, connecting with a bridge, and by means of said bridge access is afforded to an adjoining town and county; that such bridge, and possibly a portion of the road, was originally built in the main by subscriptions from the two counties which the bridge connects.

It appears further that said road is known as the McGillvray road and was adopted in 1894 by the board of supervisors of La Crosse county pursuant to sec. 1308, laws of 1878, and it became, thereby, a county road. So decided in the case of State ex rel. Johnson et al. v. Hintgen and La Crosse County, 157 Wis. 355.

It further appears that at a recent meeting of the county board of La Crosse county, the board, pursuant to sec. 1310, caused this so-called McGillvray road to revert to the sole control of said town of Holland.

It further appears from your letter that the right of La Crosse county to so revert said road to the town of Holland is questioned by the supervisor of said town of Holland and by the supervisor of the adjoining town in the other county.

It further appears that the town of Holland is considering the proposal to discontinue said so-called McGillvray road, and its right to do so is questioned by the supervisor of the adjoining town in the other county.

Upon these facts, as I have re-stated them from your letter, you desire my opinion, first, as to the right of La Crosse county to so revert the so-called McGillvray road to the town of Holland, second, as to the right of the town of Holland to discontinue said road under the circumstances stated.
My opinion on the first proposition is this:
Under sec. 1310, referred to by you in your letter, and which I do not deem necessary to quote at length, the county of La Crosse undoubtedly had the right to revert the control of said road to the town of Holland. My opinion on the second proposition is this,—under section 1310 the supervisors of the town of Holland have the right to discontinue said so-called McGillvray road "the same as though it had originally been laid out by them." However, if the whole or any part of this highway extends from one town to another adjoining town (and I take it that the road in question does) then the proceedings to discontinue said road must be taken under secs. 1272 and 1273.

Bridges and Highways—Public Officers—County Board—
The two resolutions passed by the county board of Manitowoc county delegating to town and village boards the right to select the location where money shall be expended for highways is an unlawful delegation and therefore void.

December 19, 1914.

Wisconsin Highway Commission.

In your letter of the 3rd inst. you refer to the action of the county board of Manitowoc county appropriating $32,000 to be expended in the improvement of highways in said county under sec. 1317m–5, Stats. You state that on Sept. 15, 1914, said county board had a special meeting and passed the following resolution:

"BE IT RESOLVED that it is the sense of this meeting that the county of Manitowoc appropriate the sum of $32,000 to be levied on the assessed valuation of the entire county for the purpose of building roads and bridges in said county according to the sections aforesaid and the said amounts be distributed according to the assessed valuation of each town, city and village and that the supervisors of each town, city and village be authorized to designate on which state highways said money is to be spent, and none of said moneys to be spent on the highways or streets in the cities of Manitowoc or Two Rivers."

7–A.G.
You state that you understand that the resolution was passed largely by the city vote, the city members having a special object in view which was to obtain enough money to complete fully the road between the city limits of the city of Two Rivers and Manitowoc along the lake shore; that application was legally made by the county clerk for state aid to the amount of $16,000, and that said amount was allotted to Manitowoc county in the distribution of the state highway appropriation made by the state highway commission; that at the November meeting of the county board another resolution was passed by the county board by a vote of sixteen to fifteen, in which the $48,000 made available by the state and county taxes was divided between the towns and villages in the county cutting out the allotment originally made to the cities of Two Rivers and Manitowoc, and distributing their share between the towns and villages in the county. Said resolution contained the following:

"Whereas, the aforesaid mentioned resolution (being the former resolution) was indefinite in its provisions as to the distribution of said sum so appropriated,

"THEREFORE, BE IT RESOLVED, by the board of supervisors of Manitowoc county that the aforesaid sum of $48,000 be apportioned among the several towns and villages of said county for expenditure upon the highways of said towns and villages, upon the county system of prospective state highways in the amounts following."

Then follows a list of towns and villages with the amount apportioned to each set opposite their names.

You inquire whether the county board had a right, after once determining upon the distribution of this money, to legally change the same at a subsequent meeting. In this case the county board took the initiative under the provisions of sec. 1317m-5 instead of the electors of the towns, the village board of the villages, and the common council of cities to which the law is applicable. The county board is given authority to "construct or improve or aid in constructing or improvement of any road or bridge within the county." There is no authority whatever in said statutes authorizing the county board to delegate any of its powers to the towns and villages or town boards and village boards. In both of these resolutions the right to select the portion of
the state highway on which the improvement should be made was delegated by the town board to the various "supervisors of each town, city and village in the county."

It must be remembered that these supervisors of the various towns and villages are not a part in any way of the county board. They do not constitute a committee of said board and that body has no power to control their actions. I believe that the determination of the location of the improvement of the highway is a discretion vested by the legislature in the county board under the section in question and that this power cannot be delegated to the town and village boards. It is well known that county boards have no other powers than those granted to them either expressly or by necessary implication by enactments of the legislature.

"It is an elementary rule that when authority is conferred on public officials to do acts which involve the exercise of judgment and discretion, the execution of that authority cannot be delegated to others and this principle is applicable to boards of county supervisors of commissioners, but the usual limitation to the rule against the delegation of power obtains and the board may delegate purely ministerial and executive duties, the discharge of which does not call for the exercise of reason or discretion." Am. & Eng. Ency. of Law (2nd ed.) 988.

In the case of Northern Trust Company v. Snyder, 113 Wis. 516, the court said:

"It must be conceded that the county board has no general power of legislation. It possesses such powers of legislation in purely local matters as are delegated to it by the supreme legislative power."

And in that case it was held that the provision of the statutes which authorizes county boards to change the fee system of sheriffs to a salary basis did not impliedly give them the power to return to the fee system after once having adopted the salary system for such office and it was held that the county board could not change the salary system of sheriffs to the fee system. I believe, therefore, that both resolutions of the county board are void, they being an unlawful delegation of powers granted to the county board to town and village boards. I am strengthened in this belief by the provisions of subsec. 4, sec. 1317m–5, which provides:
“The county clerk shall on or before the first day of January of each year file with the state highway commission his written statement, setting forth the petition granted by the county board, the location, character and contemplated cost of each improvement and the amount to be paid by the county, town and state for making each of such improvements.”

Here the county clerk is required to give the location where the improvement is to be made. There is no provision in the law by which the county board can compel the various town and village boards to select within a definite time the location upon which the improvement is to be made. It follows that the county clerk may not have, and it is very probable that he would not have, a report from all the town and village boards as to the location selected by them for the improvement of the share of the appropriation given to said town or village.

In the case of People v. Supervisors of Lawrence County, 25 Hun (N. Y.) 131, it appeared that the county board had authorized a committee of five to select a site for the Children’s Home to be erected by the county. This was held to be an unlawful delegation of its powers. The court said on page 133:

“Nothing is better settled both on principle and authority than this, that rights, privileges and duties conferred or imposed on public officers and public bodies in the aggregate, cannot be delegated—especially is this so as to subjects and matters where judgment and discretion are to be invoked and exercised. The authority to select a site for the ‘home,’ to contract for its purchase, and to direct expenditures in the erection of the building, rests with the board, and requires the exercise of the judgment and discretion of that body when legally convened for the performance of public duties. Its power and authority could be exercised in no other way. The substitution of a committee to take the place of the entire board, as to matters involving the judgment and discretion of that body was unauthorized.”

In the case of Duluth, South Shore and At. Ry. Co. v. Douglas County, 103 Wis. 75; our court recognized that municipal boards, and in that case a county board, commonly act through committees and can delegate only ministerial and executive functions.

You are, therefore, advised that both resolutions of the county board of Manitowoc are void and illegal.
Bridges and Highways—Municipal Corporations—Where a bridge upon a highway extending from a city into a town becomes out of repair, each municipality to repair that portion within their respective boundaries.

Liability for damages for injuries received by reason of lack of repairs of such bridge rests upon that municipality within whose boundaries such injuries are received.

Dec. 23, 1914.

D. S. Law,
District Attorney,
La Crosse, Wis.

In your letter of the 21st you state that the city of La Crosse is bounded on the northwest by Black river, the corporate limits of the city extending to the center of the channel of said river. That on the other side of this river is located a large island, which is a portion of the town of Campbell in your county. That across this river, leading from the city of La Crosse to the town of Campbell is an old wooden bridge some four hundred feet in length, connecting a road leading to West La Crosse in the town of Campbell, this bridge and road affording the only means of exit by land from that portion of the town of Campbell located upon this island. That several years ago your county board adopted this road, beginning at the corporate limits of the city of La Crosse, as a part of the county system of prospective state highways. That you have gone through all the county records but have been unable to discover from them how this bridge was originally built. That it is reputed to have been built many years ago by the lumber companies then located there, some of them maintaining their lumberyards at that time on the other side of the river, but that if this is true, the bridge has long since been abandoned by them, and has for thirty years or more been used as a public bridge. That some years ago a portion of this bridge was destroyed by fire and was repaired by the town of Campbell with the assistance of a small appropriation from the county. That the town has made some repairs on the bridge, as has also the city of La Crosse. That with reference to this road and bridge your county board wishes you to submit to me the following two questions for my opinion:
"1. Upon what municipalities rests the burden of repairing this bridge and in what proportion should the expense be borne?

"2. Is the county or the town liable for damages resulting from the alleged lack of repair of this prospective state highway in the town of Campbell?"

I assume from what you say that while this bridge is upon the county system of prospective state highways, it has not been permanently improved so as to bring the maintenance thereof within the provisions of the state aid for highway law.

I have not found any statutory provision that seems to cover this situation. If this bridge had been improved so as to become a portion of a state highway as provided by subsec. 8, sec. 1317m–7, Stats., then clearly it would be the duty of the county to keep it in repair. Sec. 1317m–7, subsec. 9, and in that case the county would be liable for damages incurred by reason of insufficiency or want of repair therein. Sec. 1317m–9, subsec. 5. As it had not become a portion of a state highway, I am of the opinion that the county is not bound to repair, and is not liable for injuries incurred through lack of repair.

As you are not officially interested in these questions except in so far as they affect the county, and as it is no part of my duty to advise you on matters not concerning your official duties, I might well end this opinion here. However, the questions you ask are important, and seem not to have been settled in this state, and I gladly give you my views upon them.

Sec. 1273, Stats., provides in part:

"Any bridge on a highway between two towns, or between a town on one side and a village or a town and village on the other side, which highway has become such by reason of having been used and worked as provided in section 1294, and which bridge has not been assigned to either of the adjoining towns or village, shall be repaired and maintained by such towns and village, and the cost of repairs and maintenance shall be paid by them in proportion to the valuation of the property therein as equalized by the county board or boards at the last equalization."

While subd. (17), sec. 4971, Stats., provides that the word town may be construed to include all cities it appears
to me that the quoted provision is not applicable, because it relates to bridges on highways between towns—that is on town line highways—and not to a bridge across a stream forming the boundary line of two towns, or of a town and a city. Neither have I found any other statutory provision which seems to me to fully cover the situation.

Of course, somewhere in that stream is the boundary line between the city and the town. It is the duty of each to keep in proper repair all highways, including bridges, within its own boundaries. It appears to me, and I am of the opinion, that it is the duty of each municipality to keep in proper repair that part of the bridge lying within its boundaries, the same as it is its duty to keep in proper repair that portion of any ordinary highway lying within its boundaries. *Village of Marseilles v. Howland*, 124 Ill. 547, 16 N. E. 883.

Sec. 1339, Stats., provides that any damage to person or property caused by the insufficiency or want of repair of any bridge or road shall give to the person injured thereby a cause of action against the municipality in which such damage occurs, and also contains this provision:

“If such damages shall happen by reason of the insufficiency or want of repairs of a bridge erected or maintained at the expense of two or more towns the action shall be brought against all the towns liable for the repair of the same and upon recovery of judgment the damages and costs shall be paid by such towns in the proportion in which they are liable for such repair.”

In my opinion this provision is not applicable to the situation set forth in your inquiry. This provision is intended to apply to bridges such as are referred to in that portion of sec. 1273, Stats., quoted above, and also to those referred to in sec. 1321a, Stats., and sec. 1319, Stats., if located in two municipalities. If I am correct in my opinion as to the duty to keep in repair, the duty in this case is not joint, and neither would the liability for damages be joint. In my opinion the liability for damages due to insufficiency or want of repair would be upon the municipality within whose boundaries the injury occurred. *Village of Marseilles v. Howland*, supra.
I do not find that our court has passed upon either of these questions, and there appears to be a dearth of authorities from other states. I may be wrong in my conclusion, but until our court has passed upon a similar case it seems to me advisable for the various municipalities interested to act in accordance with what I have said above.
OPINIONS RELATING TO CIVIL SERVICE.

_Civil Service_—Leave of absence in contemplation of rule 13 of civil service commission is synonymous with vacation.

March 31, 1914.

JOHN A. HAZELWOOD,
Secretary & Chief Examiner,
Wis. Civil Service Commission.

In your letter of March 30th you direct my attention to rule 13 of your commission in regard to reinstatements, which reads as follows:

"Any person who has held a position by appointment under the civil service rules and who has *separated* from the service without any delinquency or misconduct on his part but owing to reasons of economy or otherwise, may be reinstated within one year from the date of such separation to the same or similar position in the same department **.*"

And you state that an employee from the state service was given a leave of absence in March, 1913, and that the leave of absence, as interpreted by him and the appointing authority, has continued to the present time and will continue for some time longer. You inquire whether or not a leave of absence must be interpreted as a separation from the state service.

The term "leave of absence" is used in our statute as synonymous with a vacation. Sec. 169c contains the following:

"Heads of departments may, in their discretion, grant to each clerk or other person employed upon a yearly salary one month's *leave of absence* in each year without loss of pay."

I believe that a separation from the service in contemplation of this rule means that the person has quit and vacated his position. Any other interpretation would lead to ab-
surd results, for those who are on a vacation or leave of absence for one month would then have to be reinstated under our civil service law. The party in question being given a leave of absence is still connected with the public service and is not separated therefrom.

_Civil Service_—Civil service appointee separated from the service without misconduct on his part is eligible to reinstatement within one year.

Provisional appointment may be made under sec. 990–17 to fill positions until civil service commission can provide a list of eligibles by competitive examination.

July 22, 1914.

**Louis F. Meyer,**

*Supervisor of Inspectors of Illuminating Oils.*

I have your request for opinion, in which you state:

"Should a deputy oil inspector be elected to the assembly would it be possible for me, having the permission of the civil service commission, to grant him a leave of absence during the legislative session and later reinstate him after the session has terminated?"

Replying to this question, I find nothing in the civil service law which prohibits you to grant one of your subordinates a leave of absence. If such leave of absence should continue for such time as to be regarded as a separation from the office, the person to whom such leave of absence is granted would, nevertheless, be eligible, under subsec. 3, sec. 990–19, to reinstatement within one year. The same would likewise be true in the case of a resignation.

You further ask to be advised whether in such an event you would have power to appoint a deputy oil inspector to serve in the place of the one elected to the assembly during the session of the legislature. Replying to this question, I find that the only absolute power of appointment to positions in the classified service appears to be the power to make emergency appointments not exceeding ten days under subd. (1), sec. 990–17. Temporary appointments may be made
under subd. (3) of this section from the civil service lists, but without reference to standings, for a period not to exceed one month.

You do not state whether the civil service commission has an eligible list upon competitive examination for deputy oil inspector in the district in question. This would affect the situation, as subd. (1), sec. 990–17 provides:

"Whenever there are urgent reasons for filling a vacancy in any position in the competitive class and the commission is unable to certify to the appointing officer upon requisition by the latter a list of persons eligible for appointment after a competitive examination, the appointing officer may nominate a person to the commission for noncompetitive examination, and if such nominee shall be certified by the said commission as qualified after such noncompetitive examination, he may be appointed provisionally to fill such vacancy only until a selection and appointment can be made after competitive examination."

It would seem that in the event that one of your deputy oil inspectors should be elected to the legislature and desire a leave of absence during the session and the same were granted, a provisional appointment could be made with the approval of the civil service commission under the above quoted provision of law; and I am of that opinion.

This opinion is not to be taken, however, as passing upon the question whether the office of member of the assembly and deputy oil inspector are so incompatible or inconsistent that a member of the assembly can not on that account hold the office of deputy oil inspector during his term as a member of the legislature. That question is not considered in this connection, as your inquiry does not indicate that you desire an opinion thereon.
OPINIONS RELATING TO CONSTITUTIONAL LAW.

Constitutional Law—Public Lands—The sale of lands granted to the state by the United States for forest purposes, and applying the proceeds of such sale to the purpose named in the grant, is not in violation of sec. 10, art. VIII, Const. Neither does such sale violate sec. 6, art. VIII, Const., nor does it conflict with the terms of the grant.

Jan. 6, 1914.

HENRY JOHNSON,
State Treasurer.

In your letter of the 30th ult. you ask my opinion as to whether it would not be advisable to postpone the sale of forestry lands advertised for January 8th at Superior until after the decision of the supreme court in the forestry case. You say if the decision of the court should be adverse to the contention of the state, this sale might complicate matters. The lands so advertised, as I am informed, were granted to the state by the United States for forestry purposes. The grant, I am informed, authorizes the state to sell these lands and devote the proceeds to forestry purposes. The decision of our court cannot possibly affect this sale, nor can the sale in any way complicate matters. The principal question in the forestry case is as to whether or not the purchase of lands for a forest reserve constitutes "works of internal improvement." Sec. 10, Art. VIII, Wis. Const., after providing that the state shall never be a party in carrying on works of internal improvement, continues:

"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."
Under this provision, even if the purchase of lands for a forest reserve does constitute "works of internal improve-
ment" the state is expressly authorized to devote the proceeds of this sale to that purpose.

The other questions suggested by the supreme court are these: In buying lands for forestry purposes, on land con-
tract, has the state violated sec. 6, art. VIII, Const., pro-
hibiting the state from contracting indebtedness in excess of one hundred thousand dollars? Does the provision placing all lands owned by the state north of township 33 in the forest reserve (sec. 1494-43, Stats.) violate the provisions of the grants under which the state obtained title to such lands?

Clearly this sale cannot in any way be affected by the decision of these questions, nor can such sale in any way complicate matters if the decision should be adverse to the state. I see no good reason for postponing the sale.

Constitutional Law—Public Officers—Any law providing for the granting of pensions or gratuities to public officers or servants, in recognition of services performed prior to the passage of the law, or which does not prescribe the conditions under which any person may become a beneficiary of such bounty, is unconstitutional.

Mary Moran,
Wisconsin Free Library Commission.

In your letter of the 29th ult. you say:

"I would like to know whether under the Wisconsin law it would be possible for any department or institution of the state to grant a pension to persons, or their dependents, who had worked for the advancement of the state and had per-
formed a great and valuable service for it. For instance, under the law, would the regents of the university have the power to grant some kind of material recognition to persons who had been in the service of the university for a number of years and who had done something worth while for it?"

At the present time I know of no law in this state authoriz-
ing any branch or department of the state government to grant pensions in recognition of past services, other than the
so-called Teachers' Retirement Fund Law. That law, however, does not apply to those who ceased to teach prior to its passage. Neither does it leave it to the discretion of the board in charge of the fund to say to whom or under what circumstances pensions or benefits may be paid. All who comply with the provisions of the law are absolutely entitled to its benefits. Such benefits, therefore, are in no sense a gratuity, nor given in recognition of distinguished services, nor are they in any degree dependent upon the financial circumstances of the beneficiaries.

When I speak of branches and departments of the state government, in the foregoing paragraph, I use those terms as including the state university, normal schools, and other bodies that are given corporate capacity for the purpose of enabling them to carry on some portion of the functions of the state government. Towns, villages, cities, and other municipal corporations are not included. Many of the latter have so-called firemen's and police pension laws.

I presume what you especially wish to know is whether a law authorizing the granting of such pensions would be constitutional.

On page 139, Biennial Report & Opinions of Attorney General 1912 you will find quite an extended opinion holding that the Teachers' Retirement Fund Law is constitutional. I see no reason, at this time, for doubting the correctness of that conclusion, nor do I care to add anything to what is there said upon the subjects therein considered. I believe a law similar to that one, but relating to other classes of public servants, would be upheld by the courts.

If I correctly understand your inquiry, however, you have in mind a different kind of a law. I believe you desire information as to the validity of a law authorizing the regents of the university, for instance, to grant pensions or gratuities in recognition of past services, that body to be given discretion in selecting the objects of such bounty, and not to be limited to such as shall perform services after the passage of the law.

Sec. 26, art. IV, of our constitution, provides in part:

"The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered or the contract entered into."
The legislature cannot delegate any greater powers, in this respect, than it itself possesses.

At p. 160, Biennial Report & Opinions of Attorney General 1910, will be found an opinion holding that a proposed teachers' pension fund law, which authorized the payment of pensions to teachers who had retired from that profession prior to the passage of the law was, in that feature of it, in conflict with the constitutional provision above quoted, and therefore void. The opinion cites as authorities on this point: *State v. Ziegenhein, 144 Mo. 283, 45 S. W. 1099, 66 Am. St. Rep. 420; Mahon v. Board of Education, 171 N. Y. 263, 63 N. E. 1107, 89 Am. St. Rep. 810; People ex rel. v. Partridge, 172 N. Y. 305, 65 N. E. 164*.

The first of these cases goes even farther than this, and holds such a law invalid, even as applied to those performing services after the passage of the law. As, however, in the case before the court, there was no new term, and no new employment of the claimant after the passage of the law, this part of the opinion is merely obiter, and it is authority only upon the point to which it is cited. Upon this point the court, among other things, said:

"It is conceded that the legislature cannot, under the constitution of this state, authorize a city to give money out of its treasury simply as a gratuity in recognition of past services rendered by public officers."

In the *Mahon Case* the court, among other things, said:

"The * * * counsel * * * contends: 'The act of 1900 is as though the state said to the worn-out and decrepit teachers, You have not been paid enough for your services, and we will now pay you what you deserve.' It is exactly such action on the part of the legislature that the constitutional amendment was intended to prevent. Extra compensation is compensation over and above that fixed by contract or by law when the services were rendered. * * * The legislature might well think that in a large city, where teaching is adopted as a calling to be pursued for years, and often for life, it would be wise to provide a system of pensions as an inducement both to service at low wages and also to good conduct in service. But these considerations have no application to the case of officers or employees who are not in service at the time the pension system is established or in force. As to such persons the grant of a pension is a mere gratuity."
The third case cited follows the decision in the Mahon Case.

In my opinion any law authorizing the granting of pensions or gratuities in recognition of services performed prior to the passage of the act would be in violation of the constitutional provision above referred to, and therefore void. The same would, in my opinion, be true as to a bill authorizing any board, commission, body or officer to grant such pensions or gratuities for services performed after the passage of the law, if such board, commission, body or officer was authorized to determine, in its or his discretion, to whom and under what circumstances such pensions or gratuities should be awarded. To be valid, in my opinion, such a law must not only provide that it is only in consideration of public service rendered after the passage of the law that such public bounty would be bestowed, but also must prescribe the conditions entitling any person to become a beneficiary. Of course it may provide for some competent tribunal authorized to determine when the required facts exist.

This opinion seems to conflict with two opinions found on pp. 745 and 919, Biennial Report & Opinions of Attorney General 1908, but neither of these opinions cites any of the cases herein referred to nor any case in which a constitutional provision similar to ours was involved.

Constitutional Law—Education—Counties—Subsec. 10, sec. 702–10, authorizing the county board of education to take charge of the county training school upon a favorable vote by the county board, is not unconstitutional.

Sec. 702–4, Stats., making the term of office of the members of the county board of education five years, and providing for their election by the voters of the district, is not unconstitutional.

That part of subsec. 3, sec. 702–10, authorizing the county board of education to allow children to attend school in an adjoining district is not in conflict with our constitution.

The appropriation from the state funds of $500 to each such board is valid.
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The appropriation from the state funds of $500 to each such board is valid.

David Bogue,
District Attorney,
Portage, Wis.

In your letter of Jan. 22nd you request an opinion as to whether ch. 751, laws of 1913, known as the County Board of Education Law, is constitutional, and in that connection submit several statements as to the law and its effect which will be considered separately in the order in which you have stated them.

"1. This law makes residents of the cities ineligible to membership on such board and also denies to residents of the cities all voice in the election of and in matters dealing with the duties of such board and at the same time provides means by which against the wishes of the representatives of the city, this board may be placed by the county board of supervisors in charge of our county training school. By this means the law would allow the election of a board to take charge of the training school, one-sixth of the support of which is paid by the two cities of Portage and Columbus, and yet the residents of these cities, while paying the taxes, have no voice or voice in the control of the school, directly or indirectly."

Ch. 751, laws of 1913, creates thirteen new sections of the statutes numbered from 702-1 to 702-13, inclusive. Sec. 702-1 creates a board of education of five members for each county in the state. Sec. 702-2 provides that the county board of education district shall include the entire county, except those portions included in any city having a board of education, a superintendent of schools, or other board or officer vested with power to examine and license teachers. If there be more than one superintendent district in any county, each such district is made a board of education district. The electors of the excluded portions of the county have no vote in electing the county board of education, and the county supervisors from such portions have no voice in any matter relating to said board or the members thereof, "nor shall any tax be levied in such city to pay any part of the expense, compensation or allowances of such board, the members thereof or the county superintendent or assistant county superintendent or the clerk for the superintendent, or examiners for common school diplomas."
Subsequent sections provide that any elector in the district is eligible to membership on the board, and that members shall be elected by vote of the qualified electors of the district.

So far there would not seem to be any conflict with any constitutional provision. Those who pay the expenses choose the members of the board, and receive the benefits therefrom.

Sec. 702–10 prescribes the powers and duties of the board, and subsec. 10 provides:

“The county board of education is hereby authorized to exercise all the powers and privileges conferred by law upon the county training school board by sec. 411–1 to 411–11, inclusive, of the statutes, and upon the county school board by sec. 553c to 553m, inclusive, of the statutes, if the county board of supervisors shall so determine.”

Thus it would appear that insofar as this law confers jurisdiction over county training schools upon these county boards of education it shall not go into effect in any particular county until the happening of a certain event, that is, a favorable vote by the county board of supervisors.

Such laws have frequently been held valid. Adams v. City of Beloit, 105 Wis. 363; State ex rel. Williams v. Sawyer Co., 140 Wis. 634; State ex rel. Van Alstine v. Frear, 142 Wis. 320; Johnson v. Milwaukee, 147 Wis. 476.

If necessary to the validity of the law, the court will construe the provisions of subsec. 10, sec. 702–10 as authorizing all the members of the county board of supervisors to vote on the question of placing the county training school affairs in the hands of the county board of education. Atkin v. Fraker, 32 Wis. 510; Johnson v. Milwaukee, 88 Wis. 383; State ex rel. Hicks v. Stevens, 112 Wis. 170; State ex rel. Northern Pacific Ry. Co. v. Railroad Commission, 140 Wis. 145.

It is by no means certain that it should not be so construed, even if not necessary to sustain the constitutionality of the law. When so construed it cannot be said that the people of the cities of Portage and Columbus have had no voice in thus transferring the control to the county board of education. Their representatives upon the county board of supervisors have had the opportunity to vote upon the question, and it is at least doubtful if the electors of those cities are in any position to complain because after such transfer of control they have no voice in the affairs of the training school.

In an opinion given to the district attorney of Winnebago county, under date of October 23, 1912, my predecessor said:

“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 Kas. 90, 91; 2 Cooley on Taxation, 3rd Ed., 1294, 1295, 1299, 1303.

“Judge Cooley says: ‘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.”

It thus appears that the legislature might, if it had so desired, provided absolutely that the training school should be placed under the control of the county board of education, and have required these cities to maintain, or assist in maintaining, it, although having no voice whatever, except through their representatives in the legislature, in either fixing the amount to be levied for that purpose or the manner of its expenditure.

The same opinion holds that requiring a city to levy such sum for the maintenance of an educational institution as should be determined to be necessary for that purpose by a board was not an unconstitutional delegation of legislative power. This would seem to settle any possible question as to the invalidity of subsec. 13, sec. 702–10.

An act of the legislature will not be declared unconstitutional unless its repugnance to the constitution is clear and
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And the court should be able to point out the particular part of the constitution which is violated. *State ex rel. Chandler v. Main*, 16 Wis. 398.

In a doubtful case the courts will sustain the validity of the law. *State ex rel. Brayton v. Merriman*, 6 Wis. 14; *Smith v. Mariner*, 5 Wis. 551; *In re Oliver*, 17 Wis. 681; *Northwestern National Bank v. Superior*, 103 Wis. 43.

In my opinion it is not clear that the provisions referred to by you conflict with any provision of our constitution, and I do not believe that either I or the court would be justified in pronouncing them, or either of them, unconstitutional.

Even though the provision relating to training schools should be found unconstitutional, I do not believe it would invalidate the rest of the law. *Lynch v. Steamer Economy*, 27 Wis. 69; *Zitske v. Goldberg*, 38 Wis. 216; *Bittenhaus v. Johnson*, 92 Wis. 588.

"2. Section 4, art. 6, Const., provides as follows:

"'Sheriffs, coroners, registers of deeds, district attorneys, and all other county officers, except judicial officers, shall be chosen by the electors of the respective counties once in every two years.'

"This law makes the term of this county board of education, five years and while it does not provide that they shall be made county officers directly, it certainly indirectly does make them county officers. Do you consider this in contravention of the section of the constitution cited?"

It is clear, of course, that members of this board are not among those specifically mentioned in the constitutional provision. Are they included in the term "all other county officers"?

Our court has said of this phrase:

"'We are constrained to hold that the term 'all other county officers' was used in the instance in question in harmony with the statutory division of officers into state, county, and town officers existing at the time of its incorporation into the fundamental law. In other words, in its particular sense—

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that of heads of the several major divisions of county government as then understood,—and without any thought of surrendering the legislative power mentioned in sec. 9, art. XIII, to create other county offices with duties other than those incident to those offices grouped under the special statutory treatment of the subject, and to provide for the manner of filling such offices, not of course invading the constitutional system of local self-government." *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 512.

That case holds that a law providing for the election by the county board of a county supervisor of assessments to hold an office for the term of three years does not violate this constitutional provision.

A later case holds that jury commissioners appointed by the circuit judge, are not county officers, and that this particular constitutional provision does not apply to them. *State ex rel. Gubbins v. Anson*, 132 Wis. 461.


Art. XIII, sec. 9, Const., provides:

"All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct. * * * * * All other officers whose election or appointment is not provided for by this constitution, and all officers whose officers may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct."

If the members of the county board of education are "officers", then their offices were created by law after the adoption of the foregoing section, as to which authority is reserved to the legislature "to provide for filling the offices either by election or appointment." *State ex rel Williams v. Samuelson*, 131 Wis. 499.

Their "appointment can be delegated by the legislature under this constitutional provision to such an appropriate agency as is not prohibited by the constitution and laws from executing such a legislative mandate." *In re Appointment of Revisor*, 141 Wis. 592, 624.
This last quotation is taken from the dissenting opinion of Mr. Justice Siebecker, but, as I understand it, there was no division of the court upon this particular point.

This board has jurisdiction only over certain portions of the county it does not include the entire county. The electors of that portion over which it has jurisdiction choose the members of the board. In my opinion this does not conflict with either of the constitutional provisions referred to.

Of course upon favorable action by the board of supervisors this board obtains jurisdiction over the training school, which, in a sense, is a county institution. That, however, is merely incidental to their other duties, and in my opinion does not render it necessary, in order to sustain the validity of the law, that the members be elected by vote of the electors of the entire county.

"3. This law gives the county board of education, the right, in their discretion, to send children from one district in the county into another district to attend school and does not limit this right to districts within the same town."

The portion of the law to which I assume that you refer is a part of subsec. 3, sec. 702–10, and provides:

"The county board of education shall have discretionary power to authorize parents or guardians living nearer to a school in an adjoining district, to send their children to the nearer school."

Sec. 3, art. X, Const., provides:

"The legislature shall provide by law for the establish-
ment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years. * * *

Under this provision:

"It is competent for the legislature to authorize the sev-
eral school districts to admit nonresident children to the privileges of their respective schools, or to exclude them therefrom." State ex rel. Comstock v. Joint School District, 65 Wis. 631, 637.

If the legislature may authorize school districts to do this, no good reason occurs to me why they may not require school districts to receive nonresident pupils. I have not
in mind any constitutional provision that is violated by this portion of the law. The question of whether the receiving of nonresident pupils may be required where it interferes with the proper school facilities for resident pupils is not involved, and therefore not decided.

"4. The law provides the sum of $500 shall be paid out of the general fund of the state to pay the salary and expenses of this county board of education while at the same time refusing to allow the people of the cities of the state any voice in electing said board and without giving the taxpayers of the said cities any benefit whatsoever. Is not this pretty near taxation without the right of representation?"

The inhabitants of every city in the state are represented in the legislature. It is the legislature that made the appropriation. This surely is not taxation without representation.

It has long been the policy of this state to require the schools to be supported in large measure by local taxation, but to give liberal aid from the state funds. This appropriation, in my opinion, is of the same character as such school aid. The long continued practice, showing the general belief that appropriations for such purposes are valid, supports my opinion that this appropriation to which you refer is not in contravention of any of the provisions of the constitution.

In replying to your inquiries I have not considered any other features of the law than those to which reference is specifically made herein. It may well be, too, that some particular constitutional provision has not occurred to me that might affect the questions asked.

**Constitutional Law—Prisons**—Secs. 4924 and 4925 do not require the preservation of the clothes worn by prisoners upon the arrival at the state's prison.

Such statutes are not a "forfeiture of estate" prohibited by sec. 12, art. 1, Const.

State Board of Control.

In your letter of the 12th inst., you state that on Jan. 20, 1913, one William J. Blue was sentenced to the Wisconsin
state prison for one year; that he was received at the prison on Jan. 24, 1913; that it is the custom to take from incoming prisoners all their personal effects, all of which, except shoes and clothing, are taken charge of by the record clerk, kept in the vault and restored to the prisoners upon their discharge; that it has been the custom to preserve a prisoner's clothing and shoes for him, but to permit outgoing prisoners to have a choice of either a new suit or a selection of the suits of incoming prisoners; that Blue was paroled October 6, 1913, and on Jan. 31, 1914, filed a verified claim against the Wisconsin state prison in the sum of $131 for one Irish frieze overcoat valued at $75.00, one Harris tweed Norfolk suit and cap valued at $50.00, and one new pair of shoes valued at $6.00; that all of these articles have been used in accordance with the custom stated and none is now on hand at the prison; that the board of control interprets sec. 2924, Stats., "to mean that as to clothing it is within the power of the board of control to destroy the same if deemed advisable, or, if warranted, to use such clothing as may be advisable for any purpose they may see fit; that it is not the duty of the board of control, nor are we liable, to reimburse an ex-convict for the value of the clothing which he wore upon entering the Wisconsin state prison;" and you request my opinion as to whether or not you are correct in this interpretation of sec. 4924.

Sec. 4924 provides:

"The money and effects, except the clothes, in possession of each convict when committed to the state prison shall be preserved by the warden and restored to the convict when discharged."

Sec. 4925 provides in part that "every convict, when discharged, shall be provided with a decent suit of clothes," etc. These statutes seem quite clearly to authorize the practice that you state has been followed. The requirement that the money and effects, except clothes, be preserved and restored to prisoners upon their discharge, coupled with the requirement that upon such discharge they shall be provided with a decent suit of clothes, is scarcely capable of any other interpretation than that a prisoner's clothes need not be preserved for him, but may be used in such a way as good management may dictate.
Reasons for such provision are readily discernible. The difficulty of caring for clothing, its almost necessary deterioration in value in the course of years and its very possible valuelessness to its former owner, owing to his increase or decrease in weight during his confinement, amply justify the policy of a provision permitting clothing to be used in accordance with the regulation or custom established and authorized by your board. Sec. 4887 and sec. 561j give the board ample power in the management of the state's prison to make such regulations.

The practice being thus in conformity with the statute, the only other question would seem to be as to whether the statute so interpreted violates any constitutional right of the prisoner. Sec. 12, art. I, Const. provides in part that "no conviction shall work corruption of blood or forfeiture of estate." While this provision may well render invalid an enactment which would deprive a convict of all or any considerable part of his property, I do not think it should be interpreted to prohibit the regulations in question, which are probably, in the great majority of cases, of distinct pecuniary advantage to the prisoners, in that clothes with which they are provided on discharge are worth more than their own would have been had they been preserved. I do not think that such statutes amount to a forfeiture of estate. See State v. Duket, 90 Wis. 272, 278.

It may be that particular clothes or garments possessed by a prisoner on his arrival at the state prison might be of such great and exceptional value that, at least on his request, they ought to be preserved for him, or possibly even disposed of at his direction. But in the absence of such request and when dealing with clothes of no more exceptional value than those here in question, I am convinced that your Board is not required to preserve the clothes of incoming prisoners, in order to restore them upon discharge, and is not liable to reimburse prisoners in case such clothes have been disposed of in the manner stated in your letter.
 Constitutional Law—Education—Public Officers—County Board of Education—Taxation—The County Board of Education Law, secs. 702-1 to 702-13, Stats., is not rendered unconstitutional by the provision authorizing such board to fix the salary of the county superintendent of schools.

Neither is it rendered unconstitutional by the provision giving such board power to authorize pupils to be sent to the school in an adjoining district. The fact that under this law some territory may be taxed twice for school purposes does not render it unconstitutional.

DAVID BOGUE
District Attorney,
Portage, Wis.

In your letter of the 13th ult. you ask some further questions as to the constitutionality of ch. 751, laws of 1913, which creates secs. 702-1 to 702-13, inclusive, Stats.

Your first question is:

"Any county superintendent by our constitution I believe is elected by the voters of the county. This law provides that the county school board shall have the right to fix the salary and expenses of the county superintendent, an elective office. Is this constitutional or not? This bill attempts to give this board power to make its own budget and compel the county board to allow the budget as made and levying a tax for the purpose of paying it. Can this power be thus delegated to such a board without breaking the uniform laws of town and county government?

Also can the school board compel the county board to allow the budget as made up by it regardless of what it may be and levy a tax for the same?"

The county superintendent of schools is elected by the same voters as are the members of the county board of education. Par. 2, sec. 698, Stats. As pointed out in my former opinion the maintenance of our public schools is a function of the state government. The state may properly require the locality in which any school is located to pay the cost of such maintenance, and for that purpose may levy a tax upon such locality. It may properly delegate to such a board or body as this the duty of ascertaining the amount necessary to be levied for such purpose. It seems to me that
that disposes of the question of compelling the county board
to levy the tax determined to be necessary by this board for
its purposes, it being a part of the public school system.

Long continued practice has given a practical answer to
your question as to the power conferred on this board to fix
the salary of the county superintendent. The members of
the county board of supervisors are not elected by the peo-
ple of the entire county, yet they are authorized to fix the
salaries of officers elected by such a vote. I know of no con-
stitutional provision that is violated thereby. In my opinoin
the legislature had the power to authorize this board to fix
the salary of the county superintendent.

This law operates uniformly throughout the state on all
counties similarly situated. Exact uniformity in every coun-
ty in the state, precluding all classification, is not called for
by art. IV, sec. 23, Const. Cathcart v. Comstock, 56 Wis. 609.

You also say:

“This law provides that the county board of education
may order children living nearer some other district school-
house than the schoolhouse of their own district to attend the
nearer school and compel the home district to pay the tuition
at the rate fixed by law. This rate cannot exceed one dollar
per month and in cities cannot exceed one dollar seventy-five
cents per month. Is such an arrangement legal and enforc-
able since in some school districts the cost of education may
total thirty to forty dollars per year per child while the dis-
trict can collect only twelve dollars a year, and where a
child happens to live nearer a city school than to the home
school, could the home school be compelled to pay the
eighteen dollars per year for this child while they in turn
must take in children from other districts likewise located at
a cost of twelve dollars per year?”

The provision to which you evidently refer is a part of
subd. (3), sec. 702-10, reading as follows:

“* * * The county board of education shall have dis-
cretionary power to authorize parents or guardians living
nearer to a school in an adjoining district, to send their chil-
dren to the nearer school. In such cases it shall be the duty
of the school board of the district in which the parents or
guardians of the children live to pay the district where the
children attend tuition at the rate not to exceed the max-
imum fixed by law.”
As pointed out before, the whole matter of education is a function of the state government. In performing that important function, the state may make such provisions as to it may seem best suited to secure to every child of school age the proper school facilities. It is only when the parents or guardians live nearer to the schoolhouse in an adjoining district that the board has power to authorize them to send their children to such nearer school at the expense of the home district. It is not to be presumed that the county board of education will abuse the power thus conferred on them. The adjoining district is bound to receive such pupils only when its facilities for seating and instruction will permit, and such attendance will not cause an enrollment in any one room to exceed sixty-five persons. (Sec. 4350, Stats.) It will cause such adjoining district no additional expense because of such nonresident pupils, so that even though the total cost of the school per pupil exceeds the rate of tuition thus paid, that tuition reduces the cost per pupil of the resident pupils. If the home district is getting some of its children schooled for less than the average cost in the district in which such schooling is given, can it complain? It is, of course, true that it is possible that some districts will thus be compelled to pay more for the tuition of its own pupils than it receives for furnishing schooling facilities for nonresident attendants, but as a rule that will be because its own pupils are enjoying the better school advantages. Exact equality in these matters cannot always be attained. As the state can impose the burden of maintaining educational establishments upon the minor subdivisions of the state, I see no reason for doubting the validity of this provision. Presumably the local schoolhouse will, as a rule, be nearer than the schoolhouse in the adjoining district. This may be one method for avoiding too frequent changes of district boundaries.

Attached to your letter is a postscript containing four additional questions, as follows:

"First: Is the county superintendent of schools a county officer?

"Second: Are the members of the county board of education county officers?

"Third: If the members of the county board of education are school district officers, and if the county superintendent
is held to be a county officer, can school district officers fix the salary of the county superintendent of schools?

"Fourth: If the county board of education are held to be minor county officials instead of school district officers, can they fix the salary of the principal county officer such as the county superintendent of schools?"

Within the meaning of a law authorizing the county board of supervisors to fix the salaries of all county officers, a county superintendent of schools, whether for a whole county or for a district or division thereof, is a county officer. O'Herrin v. Milwaukee County, 67 Wis. 142.

It does not necessarily follow that such superintendent is a county officer in the sense that a county officer is one elected by vote of the qualified electors of the entire county. It is well known that in many, if not most, of the counties of the state the electors of a portion of the county have no voice in the selection of county superintendent of schools.

However, I do not deem it necessary, in order to answer your real inquiry, to determine whether either the county superintendent of schools or the members of the county board of education are county officers. The question of whether or not the power to fix the salary of the county superintendent of schools may validly be conferred upon the county board of education, can, I believe, be determined irrespective of the other questions.

The individual members of the county board of supervisors are each elected by the electors of a town, village or ward of a city. They are not voted for throughout the county. While properly spoken of as county officers in connection with some statutory provisions, they are not such in the sense of being elected by the voters of all the county. Yet they have for many years been empowered to fix the salaries of county officers who are elected by vote of the electors of the entire county.

It should be remembered, in this connection, that the members of the county board of education are voted for throughout a greater part of the county than are the members of the county board of supervisors.

I know of no constitutional provision requiring that the salaries of county officers be fixed by the county board of supervisors, nor that the salaries of officers cannot be fixed by officers of a lower grade.
Counties have no private powers or rights as against the state. They hold their powers from the state, and the state may take them away at pleasure. *Richland County v. Richland Center, 59 Wis. 391.*

They owe their creation to the general statutes of the state, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. *Frederick v. Douglas County, 96 Wis. 411.*

So, a county board of supervisors has only such powers as are conferred upon it by the legislature. *Northern Trust Co. v. Snyder, 113 Wis. 516.*

Certainly the power to fix the compensation of an officer is no greater than the power to select the officer. Statutes providing for the selection of certain officers by private associations or societies, not being in any way boards or bodies chosen as a part of the state government, are not infrequent. Thus the Wisconsin State Dental Society recommend to the governor persons to be appointed upon the state board of dental examiners, and at least three of the members of that board must be members of that society. Section 1410e. The members of the state board of pharmacy must be appointed from lists supplied by the Wisconsin Pharmaceutical Association. Sec. 1409b. The members of the Wisconsin state board of medical examiners are chosen from lists submitted by certain medical societies. Sec. 1435. Long continued practice shows a general belief in the validity of such provisions.

In speaking of the power to appoint officers, the supreme court of California has said:

"Such officers may be appointed by the legislature itself, or the duty of appointment may be delegated and imposed upon some other person or body. * * * There is no limitation to any particular person or class of persons upon whom alone the legislature may impose this obligation. * * * The societies named, by receiving this power of appointment, are constituted agencies of the state to perform a part of the duty pertaining to the sovereign power of the state, and they are not, in that respect the recipients of private rights or privileges." *Ex parte Gerino, 143 Cal. 412, 77 Pac. 166, 65 L. R. A. 249.*
The power to fix salaries of public officers is one that may be delegated by the legislature. *People v. Harper*, 91 Ill. 357; *Doherty v. Ransom County*, 5 N. D. 1, 63 N. W. 148.

In my opinion the delegation to the county board of education of the power to fix the salary of the county superintendent of schools is not unconstitutional, whether the superintendent be regarded as a county officer or not, and regardless of whether the office of member of the county board of education be of the same or of a lower grade than the office of county superintendent of schools.

You further state:

"Whereas in several places in the state the school district comprises more territory than the city, will not this bill result in taxing the outlying territory twice for school purposes—once for maintaining city schools and in the second place for maintaining the county board of education?"

I am not aware of any constitutional provision prohibiting double taxation. The presumption is against the intention of the legislature to impose double taxation on the same property, and if possible to give this statute a construction that will not result in double taxation, that is the construction the court will adopt. 37 Cyc. 755; *First National Bank v. Douglas Co.*, 124 Wis. 15.

Duplicate taxation of the same property is not to be entirely avoided in practice, and is within the power of the legislature unless specifically restrained by the constitution. 37 Cyc. 752.

In my opinion this law is not rendered unconstitutional by any of the provisions to which you have called my attention.

Constitutional Law—Municipal Corporations—Sec. 931a, Stats., providing for a referendum vote as provided for in sec. 39j, Stats., on the question of levying a tax for the support of a library is not rendered inefiectual by the decision of the supreme court holding sec. 39j, Stats., unconstitutional.

March 9, 1914.

MATTHEW S. DUDGEON, Secy.

*Wis. Free Library Commission.*

In your letter of March 5th you request my opinion as to whether the decision in *Mead v. Dane County*, 145 N. W.
(Wis.) 239, holding that sec. 39j, Stats., is unconstitutional, renders inoperative that portion of sec. 931a, Stats., which provides that an ordinance levying a tax for the support of a public library or library building donated to a city, village or town, "shall be subject to the referendum provided for in sec. 39j."

Sec. 931a, Stats., as originally enacted by ch. 310, laws of 1901, provided in part that:

"If a gift be offered to any city, village or town for a public library or a library building, in consideration thereof such city, village or town may obligate itself, by an ordinance, to levy and collect an annual tax for the support and maintenance of such library or building of not to exceed fifteen per cent of such gift, and if such gift be accepted such ordinance shall not be repealed."

As originally enacted the section contained no provision for any action by the electors of such city, village or town.

Ch. 379, laws of 1913, amended sec. 931a, Stats., to read that

"such city, village or town may obligate itself, by a vote of the majority of the electors at a regular election or at a special election called for that purpose, to levy and collect an annual tax," etc.

Ch. 565, laws of 1913, further amended sec. 931a, Stats., to read that

"such city, village or town may obligate itself, by an ordinance adopted by a two-thirds vote, to levy and collect an annual tax * * *. Such ordinance shall be subject to the referendum provided for in sec. 39j."

Sec. 39j, Stats., was held invalid because it attempted to delegate to the electors of a county the legislative power which sec. 22, art. IV, Const. authorizes to be delegated to county boards of supervisors, and because as to certain matters, such as the allowance or disallowance of claims against counties, it attempted to delegate to the electors of a county the judicial power conferred on courts by sec. 8, art. VII, Const. A strong argument can be made that the section is not separable so that being invalid as to a referendum on the action of county boards it is also invalid as to a referendum on the action of town and village boards and city councils;
and furthermore that it is just as much an invalid delegation of judicial power as regards the allowance and disallowance of claims against cities, towns and villages as to such claims against counties.

But even if sec. 39j, Stats., be invalid as to a referendum vote on ordinances and resolutions of the common council of a city, I see no reason to doubt the validity of the amendment to sec. 931a made by ch. 565, laws of 1913, in that it was clearly within the power of the legislature to provide that an irrepealable ordinance levying an annual tax for the support and maintenance of a donated library or building should not go into effect within twenty days from the time of its passage, nor in case a certain petition be filed, until submitted to and favorably voted upon by a majority of the electors of the city. This, it seems to me, is what is provided by sec. 931a, as amended by ch. 565, laws of 1913, and the fact that such referendum is provided for by reference to sec. 39j, Stats., instead of by embodying at length the provisions of that sec. in sec. 931a, does not make section 931a, as so amended ineffectual even though section 39j be void in toto.

Thus it has been held that


It seems to me that the same principle must be applicable to a statute which adopts the provisions of another statute which is subsequently held unconstitutional, where, as here, such statute is held unconstitutional because including within its terms certain matters which could not constitutionally be so included. I see no reason why a statute otherwise valid may not embody matters of procedure by reference to another statute even though such other statute be invalid on grounds other than the method of procedure therein provided. This, I am convinced, is all that is done by sec. 931a as amended by ch. 565, laws of 1913. The legislature might have provided in terms for a referendum vote on the question of the adoption of an irrepealable annual obligation for the maintenance and support of a library and I
do not think their action invalid because instead of so providing in terms in the statute in question, the legislature has accomplished the same result by providing for such referendum vote as provided in another section, even though the latter section be unconstitutional.

Should I be in error in this conclusion, and that part of ch. 565, laws of 1913, which adds the requirement that the ordinance shall be subject to the referendum vote provided for in sec. 39j is invalid under the decision in *Mead v. Dane County*, the entire amendment to sec. 931a, made by ch. 565, laws of 1913, must evidently fall as it is quite plainly inseparable. Sec. 931a would then stand in the form in which it was placed by ch. 379, laws of 1913, and would thus authorize a city, town or village to irrevocably obligate itself to levy an annual tax for the support and maintenance of a donated library or building only "by a vote of the majority of the electors."

I see no reason to doubt the validity of the section as so amended so that in any case the creation of such an obligation is subject to the vote of the electors of the city, town or village, the only difference being that under ch. 379, laws of 1913, the vote is obligatory, while under ch. 565, laws of 1913, it is not necessary unless petitioned for, but, as previously stated, I am of the opinion that ch. 565, laws of 1913, is valid and effective even though it embodies matters of procedure by reference to sec. 39j, Stats., which has been held unconstitutional.

Constitutional Law—Board of Accountancy—Certificate—
The resident qualification embodied in par. (c), sec. 1636–204, is constitutional.

June 3, 1914.

John B. Tanner, Pres.
State Board of Accountancy.

On March 5, 1914, you forwarded to this office a brief from James T. Drought, of Milwaukee, relative to the constitutionality of the provision in sec. 1636–204, Stats., specifying the qualifications necessary to be entitled to C. P. A. certificate without examination. You requested me to consider
this question and give you an opinion as to the constitution-
ality of the resident qualification embodied in par. (c), sec.
1636–204.

This matter has had careful consideration and Mr. Drought
has been heard on the subject and also filed a supplemental
brief on the question.

Ch. 336, laws of 1913, is a statute relating to certified pub-
lic accountants and sec. 1636–203 provides that no certifi-
cate to a certified public accountant shall be granted to a
person who shall not have passed an examination in com-
mercial accounting, governmental accounting, auditing, com-
mercial law as affecting accountancy, and in such other sub-
jects as the board may deem necessary. Sec. 1636–204
provides in part as follows:

"The state board of accountancy may in its discretion
waive the examination of and issue a certificate to any per-
son possessing the qualifications mentioned in subsection 1
of section 1636–203, who

(c) Shall have had more than three years experience as a
public accountant, and who shall have practiced as a public
accountant in, and been a resident of this state for not less
than one year prior to the passage of sections 1636–202 to
1636–211, inclusive, and who shall apply in writing to the
board for such certificate within six months after the ap-
pointment of the first board," etc.

The words "and been a resident of" after "as a public.
accountant" in the second line, par. (c), were inserted by the
amendment in ch. 772, laws of 1913. It is contended by
Mr. Drought that this amendment contains a provision which
is unconstitutional and that it is violative of sec. 2, art.
14, U. S. Const., which declares that

"The citizens of each state shall be entitled to all the priv-
ileges and immunities of the citizens of the several states"

and the 14th amendment to the federal constitution,
which provides, among other things:

"No state shall make or enforce any law which shall
abridge the privileges or immunities of the citizens of the
United States," etc.
Mr. Drought contends that it is clear that the classification was made upon a basis which had nothing to do with the qualification or fitness for the practice of a certified public accountant; that it is a discrimination solely on the ground of residence and that the qualification of having been a resident of this state for one year while practicing the profession, has no bearing whatever on the qualifications for such work.

In the case of State ex rel. Kellogg v. Currens, 111 Wis. 431, our court had under consideration the law requiring all persons commencing the practice of medicine and surgery in this state to submit to an examination by the board of medical examiners, and it was provided also that any student who was matriculated in any medical college of this state which requires certain courses of study might be licensed without an examination. The court said:

"Relator complains that he is denied the equal protection of the laws and is deprived of his liberty unequally, because others who have not passed such examination are by the same law to be admitted to practice. This complaint is of force, unless those so permitted to practice without an examination are distinguished as a class from the class to which the relator belongs by some condition or characteristic which at least may, in the sound and honest opinion of the legislature, tend to mark them as having superior qualifications to safely practice medicine in this state."

I think it is fairly clear, as shown by Mr. Drought, in his brief, that unless it can be said that the provision requiring a year's residence in this state tends to qualify a man for the practice of accountancy, the provision is void.

The question is: Is a person who has resided in Wisconsin for one year while practicing accountancy better qualified than if he had practiced accountancy in this state and resided in another? May the resident qualification, in the sound and honest opinion of the legislature, tend to show that the person has a superior qualification to practice accountancy? If this question can be answered in the affirmative, the law is constitutional. If in the negative, it would be unconstitutional.

It is common knowledge that public accountants extend their practice over a great territory. They often have a
center office in a great city like Chicago, New York, or Cleveland, and branch offices in large cities of other states. The practice of a public accountant will be the greatest, as a general rule, in the place where he resides. That will generally be the place of his main office and the location of most of his business. A public accountant who is not a resident of the state may have practiced more or less in the state for a period of time and the volume of his business may not have been such as to familiarize him with the local laws and conditions that a certified public accountant should have.

You will notice that under sec. 1636–203 a public accountant is required to be familiar with commercial law as affecting accountancy. The commercial law varies in a great many particulars in the different states. I believe that the legislature may have thought that the provision in said law requiring a year's residence in this state while practicing the profession, would have some bearing upon the person's qualifications for a certified public accountant.

This office should not declare a law unconstitutional unless it clearly appears that the same is violative of some provision of the constitution. All reasonable doubts should be construed in favor of the validity of the law. Similar provisions in laws have been sustained by the courts. See State ex rel. Walker v. Green, 112 Ind. 462, 470; Ex parte Spinney, 10 Nev. 323.

I am of the opinion that this provision in the law should be treated by all administrative officers as a valid enactment.
Corporations—Coöperative Associations—Coöperative corporations organized under ch. 86, Stats., may become subject to secs. 1786e-1 to 1786e-17 (ch. 368, L. 1911) in the manner provided by sec. 1786e-16.

Jan. 21, 1914.

JOHN S. DONALD,
Secretary of State.

In your letter of Jan. 15th you request my opinion as to whether the Door County Fruit Exchange, a Wisconsin corporation, organized under ch. 86, Stats., may become subject to the provisions of ch. 368, laws of 1911, (secs. 1786e-1 to 1786e-17) in the manner prescribed by sec. 1786e-16.

The Door County Fruit Exchange appears by its articles of incorporation to have been organized "to buy, sell, market and exchange, to hold for storage and to dispose of all kinds of fruits; to deal at wholesale and retail in all products and material used in the growing, packing and shipping of all kinds of fruits; to acquire and hold real estate and fruit lands; and to do and perform any and all acts to promote the growing of fruits within Door county, Wisconsin".

I am informed that such corporation has been engaged in selling fruits for its members on the mutual or coöperative plan.

Sec. 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 this act, 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 this act."

At the time of the enactment of ch. 368, it appears that there were two classes of corporations doing business in Wisconsin on the mutual or coöperative plan. Those organized under sec. 1786e between the time of its enactment by ch. 126, laws of 1887, and its repeal by ch. 562, laws of 1907, and those incorporated under the general laws relating to corporations. Two questions are thus presented: (1) Whether sec. 1786e–16 includes any corporations other than those organized under sec. 1786e, and if so, (2) whether the Door County Fruit Exchange is a “coöperative corporation” within the meaning of those words as used in sec. 1786e–16. The section was evidently inserted in ch. 368 for the purpose of affording coöperative corporations “heretofore organized and doing business under prior statutes” an easy method of amending their articles by a majority vote of the stockholders so as to obtain the benefits and be subject to the provisions of ch. 368. No question is raised as to the power of the legislature to authorize the adoption in this manner of an amendment to the articles of a corporation which results in materially changing the rights of its stockholders, etc. In view of the constitutional reserve power to alter and amend corporate charters probably the legislative power so to do could not be successfully challenged. See 2 Cook on Corporations (7th ed. sec. 201).

The important change made in a corporation by becoming subject to ch. 368 is that while a stockholder in a corporation organized under ch. 86, Stats., may own as many shares as he pleases and is “entitled to one vote for each share of stock held and owned by him” (sec. 1760, Stats.), a stockholder in a corporation subject to ch. 368 may not own more than one thousand dollars par value of the stock and is not entitled to more than one vote. (Sec. 1786e–8.)

A similar provision that “members, and not shares of stock, shall vote” etc., was contained in sec. 1786e, so that in this most important particular corporations organized under sec. 1786e would not make any change in their organization by voting to become subject to ch. 368. The provisions as to profit sharing with nonstockholders and employes probably add nothing to the powers possessed by any corporation. And other minor differences such as permitting an amendment to the articles by a majority vote (sec. 1786e–6) in-
stead of by a two-thirds vote (sec. 1774) of the stockholders; permitting voting by mail, (sec. 1786e-12); and prohibiting the use of the word "coöperative" as part of the corporate or other business name or title (sec. 1786e-17), unless the corporation has complied with the provisions of ch. 368, could hardly have been the reasons for authorizing other coöperative organizations to make themselves subject to ch. 368. The vital and essential characteristic of coöperative corporations subject to ch. 368 is that no stockholder is entitled to more than one vote, which characteristic, as has been seen, was possessed by corporations organized under sec. 1786e.

In view of this situation I am convinced that the purpose of sec. 1786e-16 was not to extend the privilege of becoming subject to ch. 368 merely to corporations organized under sec. 1786e, but rather to extend it to all coöperative corporations organized under any law of the state.

While the articles of organization of the Door County Fruit Exchange do not show that it was organized to do business on the mutual or coöperative plan, I think that sec. 1786e-16 should be given a liberal construction in aid of its evident purpose and should be construed to include any corporation having power to conduct its business on the coöperative plan, and which had, in fact, so carried on its business prior to the enactment of sec. 1786e-16. I do not think that the term "coöperative corporations" in that section was used in any strict or technical sense but that the purpose was "to encompass the physical situation" as was said to have been the purpose of the public utilities act (Calumet Service Co. v. Chilton, 148 Wis. 334, 348), and that any validly organized corporation that was, in fact, doing business on the coöperative plan was intended to be included and to be given the privilege of coming under ch. 368, laws of 1911. So, while the question is not free from doubt, I am of the opinion that the Door County Fruit Exchange is such a coöperative corporation as is entitled to become subject to ch. 368, laws of 1911, in the manner pointed out by sec. 1786e-16.

In any case the question is primarily one for the corporation and its legal counsel to determine, and I think that where a corporation offers for filing a declaration provided for by sec. 1786e-16 and thus asserts that it is a coöperative corp-
Corporations—Foreign Corporations—A foreign corporation created solely for religious or charitable purposes need not obtain a license as provided by sec. 1770b, in order to transact business or hold property in this state.

JOHN S. DONALD,
Secretary of State.

In your favor of Feb. 16th you enclose certain correspondence, from which it appears that the American Sunday School Union, a nonstock, foreign corporation, created solely for religious and charitable purposes, desires to transact certain business and acquire title to and dispose of real estate in this state and you request my opinion as to its right so to do with or without a compliance with sec. 1770b, Stats.

Sec. 1770b, Stats., provides in part that no foreign corporation,

"except railroad corporations, corporations or associations created solely for religious or charitable purposes, * * * shall transact business or acquire, hold or dispose of property in this state until such corporation shall have caused to be filed in the office of the secretary of state a copy of its charter," etc.

It appears that the American Sunday School Union is within the exception above quoted, so that compliance with sec. 1770b, Stats., is not required as a condition precedent to doing business in this state. It is well settled that

"corporations created in one state may transact such business as their charters authorize in another state, provided the business so transacted be not inconsistent with the laws or policy of that state." (Connecticut Mutual Life Ins. Co. v. Cross, 18 Wis. 109, 112);

and that

"it is the policy of this state, settled from its earliest existence, to accord to foreign corporations, by comity, full
and complete privilege to exercise their corporate franchises within this state except so far as limitation is imposed by express legislation." (Chicago Title & Trust Co. v. Bashford 120 Wis. 281, 284.)

Since sec. 1770b is not applicable and there is, so far as I know, no other statute that imposes any conditions on the right of such a corporation as the one in question to do business in this state, it seems clear that it has such right and that no steps on its part are necessary to enable it to make contracts or to acquire, hold and dispose of real estate in this state.

Corporations—Foreign Corporations—Foreign corporations, not required by sec. 1770b, Stats. to obtain a license to do business in this state, may do such business without a license.

JOHN S. DONALD,
Secretary of State.

In your letter of Feb. 17th you enclose a copy of a letter which you state is a form letter that you have used in writing to foreign nonstock corporations applying for licenses to do business in this state.

In this form letter you quote portions of an opinion rendered by the attorney general under date of July 30, 1908, and found in the Biennial Report & Opinions of Attorney General 1910, on pp. 171 and 172. It seems to me that this opinion is open to misconstruction, insofar as you construe it to hold that there is a class of foreign corporations which are prohibited from transacting business in this state and which are not entitled to a license to do such business.

As you will see from my letter of yesterday, I do not construe sec. 1770b to prohibit any foreign corporation from doing business in this state, except as it provides may obtain a license so to do, and I am writing you this opinion in order to correct any possible misconstruction on your part of the opinion previously referred to.
Corporations—Foreign Corporations—Under subsec. 5, sec. 1770b, Stats., a decrease in the capital stock of a Missouri corporation is an amendment to its articles of association, which must be filed in the office of the secretary of state of Wisconsin within thirty days after the same was filed with the secretary of state of Missouri, under penalty of $25.00.

February 21, 1914.

JOHN S. DONALD,
Secretary of State.

In your letter of Feb. 18th you enclose copy of statement of decrease of capital stock of the Anglo-Superior Land & Investment Co., certified by the secretary of state of the state of Missouri to have been filed in his office on July 29, 1913. You request my opinion as to whether under subsec. 5, sec. 1770b, Stats., a penalty of $25.00 must be exacted for failure to file this copy in your office within thirty days after the same was filed with the secretary of state of the state of Missouri.

Subsec. 5, sec. 1770b, provides that all amendments to the articles of association or incorporation of a foreign corporation, which has filed a copy of its charter of articles of association, etc., in the office of the secretary of state, shall be certified to and filed in the same manner within thirty days after the same have been filed with the secretary of state or other proper officer of the state wherein the corporation is organized. It also provides that "In case of failure to file amendment, as above stated, the corporation shall pay to the secretary of state, on filing said amendment, a penalty of twenty-five dollars."

The papers in question show that at a meeting of the Missouri corporation held July 25, 1913, a proposition to decrease the capital stock of the company from $375,000 to $50,000 was submitted, and that all of the stock of the company voted in favor of such decrease. In a letter to you under date of February 16th, the company states that "Our lawyers advise that in no way can these proceedings be interpreted or construed as constituting an amendment to the company's articles of association, and consequently no penalty can be exacted."

Sec. 2975, R. S. Mo. 1909, provides for the organization of a corporation by filing with the secretary of state, "a
copy of the articles of association or incorporation.” I do not find any statutory provision expressly declaring what shall be contained in such articles, although the supreme court of Missouri has said, speaking of a certain corporation, that “It is a corporation organized under a general law which required that the amount of its capital stock should be stated, as well as the number and denomination of its shares.” Haskell v. Worthington, 7 S. W. (Mo.) 481, 486.

But it seems to me that the articles must fix the amount of the capital stock, for on the papers submitted the company plainly has capital stock, and that must be because the articles fix it. It, therefore, would seem to follow that a change in the capital stock makes a change in the articles. This is clearly contemplated by sec. 2977, R. S. Mo. 1909, which provides in part that, “All amendments to articles of association of corporations organized under the laws of this state, made and filed in the office of the secretary of state, are and shall be and become a part of the articles of association of the corporation adopting and filing the same; * * * and any corporation, company or association which may increase its capital stock under the provisions of this article shall pay the additional amount provided by law for such increase.”

Without determining the matter finally, it seems to me that on the facts presented the decrease in the capital stock was an amendment to the articles of incorporation and should, therefore, have been filed within thirty days after the filing with the secretary of state of the state of Missouri, and that, because of such failure, the penalty prescribed by subsec. 5, sec. 1770b, has accrued.

Corporations—A corporation organized by special act of the legislature may, pursuant to sec. 1790, Stats., amend its charter in the manner provided by sec. 1774, Stats.

John S. Donald,
Secretary of State.

In your letter of Feb. 16th you enclose copy of amendment to the articles of incorporation of the Wisconsin &
Michigan Construction & Manufacturing Co., and you request my opinion as to whether this amendment should be filed in your office.

It appears that the corporation in question is one organized by special act of the legislature, ch. 315, Private & Local Laws of 1871. This chapter contains no provision as to the amendment of such charter.

Sec. 1790, Stats., expressly provides that corporations organized under special charter may amend such charter in the manner provided by sec. 1774, Stats. The amendment in question appears to have been validly adopted in compliance with the latter section and should, therefore, be accepted and filed by you.

_Corporations—Foreign Corporations—_A decrease in the capital stock of a Missouri corporation is an amendment to its articles of association, and can be filed after the time prescribed by subsec. 5, sec. 1770b, Stats., only on payment of a penalty of $25.00.

John S. Donald,
Secretary of State.

In your letter of March 20th you enclose letter from the attorneys for the Anglo-Superior Land & Investment Co. in regard to which I wrote you under date of Feb. 21, 1914. The attorneys argue that a change in the amount of capital stock is not an amendment to the articles of incorporation because such a change may be effected by a majority vote of the stockholders, while it is claimed that amendments to the articles can only be made by unanimous vote of the stockholders. It now appears that the corporation in question is organized under secs. 3339 et seq., R. S. Mo., 1909. The first mentioned section provides that "The articles of agreement shall set out * * * third, the amount of the capital stock of the corporation, * * * seventh, the purposes for which the corporation or company is formed."

Secs. 3354–6, R. S. Mo., 1909, provide for increasing the capital stock and for extending the company’s business to

March 24, 1914.
other purposes than those specified in the original articles by a vote of a majority of the stock and by recording and filing the certificate that such vote has been had. While these changes in the articles are not designated amendments by the statutes, they are, to my mind, quite clearly such in that they make changes of a fundamental character in the articles. That the statute authorizes such changes to be made by a majority vote of the stock, while other changes can only be made by an unanimous vote, is far from conclusive that both kinds of changes are not amendments. Sec. 2977, R. S. Mo., 1909, as pointed out in my previous letter, does speak of an increase of the capital stock as an amendment and in the absence of some further authority I must so hold. This is the ruling of our own supreme court. State ex rel M. St. P. & S. S. M. Ry. Co. v. Railroad Commission, 137 Wis. 80, 91.

Furthermore, the only requirement or authority for filing the document that has been offered to you to be filed is subsec. 5, sec. 1770b, Stats. 1913, so that if the document in question is not an amendment there is no authority under our law for filing the same.

In the absence of some further showing I must adhere to my original opinion and hold that the statement in question can be filed by you only upon receipt of the penalty prescribed by subsec. 5, sec. 1770b, Stats.

Corporations—Preferred Stock—Under sec. 1759a, Stats., an amendment to the articles of incorporation providing for preferred stock must specify the rate of dividends to be paid on such preferred stock.

John S. Donald,
Secretary of State.

In your letter of April 20th you request my opinion as to whether a proposed amendment to the articles of incorporation of the Turner Manufacturing Co., of Milwaukee, which provides for the issuance of preferred stock upon which "dividends shall be paid at the rate of six percent per annum and may be paid to ten per cent per annum, but not in excess thereof" is in compliance with the statutes.
Sec. 1759a, Stats., provides that any corporation may provide for preferred stock and may "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."

I am convinced that the quoted provision from the proposed amendment is not in conformity with the statute in that it does not provide for the payment of dividends "at a specified rate." Quite plainly a specified rate is a definite fixed per cent and a rate is not specified when it is left to the directors to fix any rate between six and ten per cent.

While it may be argued that the language of sec. 1759a is permissive, I think it clear from other provisions in the section that the intent was to require that all the privileges accorded to and restrictions imposed on the preferred stock should be definitely stated in the articles. Thus it is provided that:

"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 a three-fourths vote of the holders of all the outstanding stock, both preferred and common."

A reading of the section as a whole convinces me that in spite of the use of the word "may" the intent clearly was to require that the rate of dividends to be paid on preferred stock should be specified in the articles of incorporation. It, therefore, follows that the amendment in question is not in compliance with the statutes.

Corporations—Coöperative Associations—Telephone Companies—A telephone company is not organized to conduct a mechanical business, so as to permit of its organization pursuant to secs. 1786e–1 to 1786e–17, Stats.

April 21, 1914.

John S. Donald,
Secretary of State.

In your letter of April 18th you request my opinion as to whether a telephone company may organize under secs. 1786e–1 to 1786e–17, Stats.
The sections in question are those that provide for the organization, etc., of coöperative associations. Sec. 1786e–1 provides that such an association may be organized "for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing or mechanical business on the coöperative plan."

Sec. 1786e–7 provides that such an association shall have power to conduct the same kinds of business. The purpose of this enumeration was evidently to limit the kinds of business for which cooperative associations might be formed. Had it been intended to permit them to engage in any line of business it would undoubtedly have been provided that they might be formed to engage in any business for which a corporation might be organized under ch. 86, Stats. While the statute should probably not be so strictly construed as to exclude any line of business reasonably within the kinds enumerated, I think that the express enumeration must be given some effect and be held to exclude such kinds of business as cannot reasonably be said to be included under some one of the kinds enumerated.

It is of course apparent that the telephone business is neither an agricultural, dairy, mercantile, mining or manufacturing business. Nor do I think that it is, under any fair construction of the word, a mechanical business. It has been held that the word "mechanical" used in connection with the word "manufacturing" means such kind of mechanical business as is incidental to or closely allied with some kind of manufacturing business. Cowling v. Zenith Iron Co., 68 N. W. (Minn.) 48, 49. It seems to me that it is used in some such sense in the sections quoted. If telephone companies are to be deemed included under the head of "mechanical business" then I see no reason to exclude telegraph companies, street railways, railroads, gas, water and electric light companies, for each of them may be said to be a mechanical business in almost the same sense that a telephone company may be said to be such. Furthermore, a telephone company is by statute declared to be a "public utility", sec. 1797m–1, and is subject to special provisions as regards exemption from taxation, the payment of license fees, etc. See subd. (27), sec. 1038, Stats., and sec. 51.35, Stats.

Altogether, I am convinced that the telephone business is not to be deemed a "mechanical business" within the
meaning of those words as used in secs. 1786e–1 to 1786e–17. From this it follows that a telephone company may not be organized under those sections.

_Corporations—Public Officers—_A resolution of dissolution of a corporation certified by the proper officers to have been duly adopted should be filed by the secretary of state pursuant to sec. 1789, Stats. and he has no authority thereafter to rescind such action.

An amendment certified to have been subsequently adopted by less than the vote required by the articles should not be filed.

April 24, 1914.

JOHN S. DONALD,
Secretary of State.

In your letter of April 22nd you enclose duplicate copies of an amendment to the articles of incorporation of the Servian Orthodox Church which are certified to have been adopted at a meeting of the corporation held April 15, 1914. You also enclose certificate of the officers of such corporation which was filed in your office March 24, 1914, which certificate certifies that a resolution dissolving the corporation pursuant to the provisions of sec. 1789, Stats., was adopted at a meeting of the corporation held Nov. 16, 1913. You also enclose correspondence and other papers from which it appears that certain members of the corporation claim that no meeting of the corporation was held Nov. 16, 1913, and that no resolution of dissolution was, in fact, ever adopted. You request my opinion as to what action should be taken by you under the circumstances.

Pursuant to sec. 1789, Stats., you had evidently no discretion as to accepting and filing the resolution of dissolution and the certificate of the officers of its proper adoption. The statute vests you with no authority to go behind such official certificate and to refuse to file the same because you believe the statements therein contained are not in accordance with the facts. Still less have you any authority, after such a certificate and resolution have been filed in your office, to rescind the same because it is

10—A.G.
claimed that the resolution was not, in fact, validly adopted. The certificate of the officers is, I think, final so far as you are concerned. I do not mean to infer that the corporation or its members may not have some remedy to cancel the record of the dissolution of the corporation if, in fact, no such dissolution was ever effected, but it seems clear to me that such remedy must be in the courts and not by way of an ex parte application to you.

The fact that the corporation is thus, so far as you are concerned, dissolved and no longer in existence would seem to be a valid reason why you should refuse to accept and file the proposed amendment to the articles, but you will note further that the certificate of the adoption of the amendment states that the number of members of the corporation at the time of the adoption thereof was two hundred and that the number who voted for such adoption was one hundred twenty-eight, while article eleventh of the original articles of incorporation provides for the amendment thereof "by an aye and nay vote wherein two-thirds of the whole number of members entitled to vote, and voting, shall vote in favor thereof." Of course one hundred twenty-eight is not two-thirds of two hundred so that the amendment in question does not appear to have been validly adopted in any case.

Corporations—amendment of Articles of Incorporation—A corporation incorporated under ch. 91, for religious, charitable and educational purposes, may amend its articles pursuant to sec. 1790, Stats.

April 29, 1914.

John S. Donald,
Secretary of State.

In your letter of April 27th you enclose certified copies of an amendment to the articles of incorporation of the First Presbyterian Church of West Superior, together with certified copy of certificate of incorporation and correspondence relating to the filing of the amendment. It appears that the First Presbyterian Church of West Superior was organized pursuant to the provisions of ch. 91, Stats. which makes no provision for recording the articles or a certified copy
thereof in the office of the secretary of state but only in the office of the register of deeds of the county in which the corporation is located. Furthermore, that chapter makes no provision for the amendment of the articles of corporations organized thereunder. You request my opinion as to whether or not under such circumstances the proposed amendment to the articles should be accepted for filing in your office.

Sec. 1790, Stats., provides that "Any corporation organized under any special charter or general law for any of the purposes for which corporations may be formed under this chapter (86) may amend its charter or articles of organization, according to the provisions of sec. 1774," etc.

The corporation in question was organized, as appears from the certified copy of its articles, for "religious, charitable and educational purposes". These are purposes for which a corporation might have been organized under ch. 86, Stats., and sec. 1790 is therefore applicable to this corporation and authorizes amendment of its articles according to the provisions of sec. 1774, Stats. The amendment in question appears to have been adopted in conformity to sec. 1774 and should, therefore, be accepted and filed by you.

Corporations—Coöperative Corporations—Amendment to Articles.—An amendment to the articles of a coöperative corporation providing that not less than two per cent of the gross earnings shall be set aside for a sinking or reserve fund is in conflict with the provisions of sec. 1786e–13, Stats.

May 8, 1914.

John S. Donald,
Secretary of State.

In your letter of the 7th you enclose copies of proposed amendment to the articles of incorporation of the Progressive Coöperative Creamery Co., an association organized under secs. 1786e–1 to 1786e–17, Stats., and ask my opinion as to whether or not the proposed amendment relating to the amount to be set aside for a sinking or reserve fund is in conformity with sec. 1786e–13.
Sec. 1786c–13, Stats., relating to corporations of this kind, provides in part:

"The directors, subject to revisions by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid up capital stock not exceeding 6 per cent per annum, then setting aside not less than 10 per cent of the net profits for a reserve fund, until an amount has accumulated in said reserve fund equal to 30 per cent of the paid up capital stock," with provisions as to the disposal of the balance of the earnings.

The proposed amendment provides:

"Not less than 2 per cent of the gross earnings shall be set aside for a sinking or reserve fund."

In a letter from J. J. Jeffrey he states that 2 per cent of the gross earnings are equal to, if not greater, than 10 per cent of the net profits. That, of course, is a matter that cannot be determined in advance. In my opinion the amendment is in conflict with the statutes.

As I view it, sec. 1786c–13 absolutely requires the directors to dispose of the earnings, so far as such earnings are sufficient therefor, by first providing for dividends on the paid up capital stock of not to exceed 6 per cent per annum, and next setting aside not less than 10 per cent of the net profits for a reserve fund. Setting aside 2 per cent of the gross earnings might be equivalent to setting aside 10 per cent of the net profits or it might not be. In my opinion the articles ought to conform to the statutes and provide for setting aside a certain per cent, not less than 10, for this reserve fund, if that is provided for in the articles at all. It is not necessary that the articles should state the amount to be set aside.

The provision in this section that the action of the directors is subject to the revision by the association at any general or special meeting, as I view it, does not permit the association to so revise the action of the directors as to provide for a dividend upon the paid up capital stock in excess of 6 per cent nor so as to provide for setting aside less than 10 per cent of the net profits for a reserve fund. Such revision cannot conflict with these express provisions of the statute as to the percentages to be paid as dividends and the per
cent to be set aside as a reserve fund. They may so revise the action of the board of directors as to provide for any dividend they see fit so long as it does not exceed the 6 per cent per annum, and they may provide for setting aside for a reserve fund more than 10 per cent of the net profits.

Corporations—A corporation may provide in its articles of incorporation for dissolution by a majority of its stockholders.

JOHN S. DONALD,
Secretary of State.

Under date of May 13th you ask to be advised whether or not a corporation may provide in its articles of incorporation for dissolution by a majority vote of its stock?

Sec. 1789, Stats., provides:

"Any corporation organized under any law may, when no other mode is specially provided, dissolve by the adoption of a written resolution to that effect, at a meeting of its members specially called for that purpose, by a vote of the owners of at least two-thirds of the stock in the case of stock corporations and of one-half the members in other corporations; but when a mode or process of dissolution shall have been provided in the articles of organization, it shall be conducted accordingly."

It is evident from the wording of this statute that the incorporators are authorized to provide in the articles of incorporation a mode or process of dissolution. They have a right, therefore, to provide that the corporation may be dissolved by a majority vote of the stock.

Your question must, therefore, be answered in the affirmative.

Corporations—Foreign Corporations—The commencement of suit in Wisconsin is not transacting business therein within the prohibition of sec. 1770b, Stats.

JOHN S. DONALD,
Secretary of State.

In your letter of May 16th you enclose letter from the Note Bond & Mortgage Co., of New York, in which they ask
whether a foreign corporation must be licensed under sec. 1770b, Stats., in order to bring an action in this state on promissory notes which the company has purchased and which are signed by residents of this state.

The Wisconsin supreme court has held that the mere commencement and prosecution of a suit is not transacting business within the prohibition of sec. 1770b, Stats. (Chicago Title & Trust Co. v. Bashford, 120 Wis. 281, 285.) Whether the contract by which the company purchasing the notes in question is one prohibited and made void by the statute is possibly a question (see American Food Products Co. v. American Milling Co., 151 Wis. 385, 395–6), but is a matter which I understand is not involved in your inquiry for the taking out of a license as a foreign corporation at this time would not tend to cure such defect if it be one.

Corporations—Preferred Stock—A provision in articles of organization or an amendment thereto providing that in event of any liquidation, dissolution or winding up of the corporation the holders of the preferred stock shall have a preference in the assets, other than profits, to the amount of its par value and the unpaid cumulative dividends, violates sec. 1759a, Stats.

June 2, 1914.

JOHN S. DONALD,
Secretary of State.

In your letter of the 29th ult. you enclose drafts of proposed amendments to the articles of organization of the La Crosse Gas & Electric Co. and ask if these amendments are in acceptable form.

The first amendment amends art. I of the articles of incorporation by adding to the purposes of the corporation. All of the several purposes so added seem to be such as are contemplated by sec. 1771, Stats.

Under date of Feb. 4, 1913, I gave you an opinion upon a proposed amendment to the articles of incorporation of the Central Wisconsin Construction Co. in which I held that a corporation could include in its articles all of the purposes specified by sec. 1771 together with any other lawful purpose or purposes except such as are specifically excepted by
that section. In my opinion the proposed amendment to art. I does not offend against any of the laws of this state. Neither do any of the other amendments in the first draft sent.

The second draft sent proposes among other things to increase the capital stock to $5,250,000, to be divided into preferred and common stock. Among other provisions contained therein is the following:

"In the event of any liquidation, dissolution or winding up, whether voluntary or involuntary, of the corporation, the holders of the preferred stock shall be entitled to be paid in full both the par amount of their shares and the unpaid cumulative dividends accrued thereon before any amount shall be paid to the holders of the common stock."

Sec. 1759a, Stats., relating to preferred stock, provides that any corporation may, either by its original articles of organization or by amendment thereto adopted by a three-fourths vote of the stockholders, provide "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."

In my opinion, insofar as the proposed amendment authorizes the payment to the holders of preferred stock, out of the assets of the corporation other than profits, of unpaid cumulative dividends, in addition to the par value of such stock, it violates the provisions of this section.

I do not find any other provisions of the proposed amendments which violate any of the statutory provisions.

Corporations—Articles of Incorporation—A corporation may by amendment to its articles provide that insurance shall be carried on the life of its president in favor of the corporation.

June 3, 1914.

JOHN S. DONALD
Secretary of State.

In your letter of June 1st you enclose proposed amendment to the articles of incorporation of the Harsh & Edmonds
Shoe Co. and request my opinion as to whether there is any objection to the provision therein reading as follows:

"Until all the outstanding Class A preferred stock is purchased or redeemed as aforesaid, the corporation will carry life insurance on the life of its president, Geo. R. Harsh, the face value of said policy of life insurance to be in the sum of one hundred thousand dollars ($100,000)."

A corporation quite clearly has power to effect insurance on the life of its president and I know of no reason why the articles may not contain a provision requiring such insurance. Such a provision clearly does not make the corporation engaged in the business of insurance but is intended as additional security for the holders of preferred and common stock. I think that it is no more objectionable than a provision requiring the corporation to insure and keep insured its property against loss or damage by fire, etc.

Corporations—Land Mortgage Associations—Public Officers

An assignment of the mortgages given to a land mortgage association is not a trust deed such as is required by sec. 2024-133, Stats.

It is not the duty of the state treasurer to collect principal and interest on the mortgages deposited with him by a land mortgage association.

The state treasurer is the proper officer to approve of the exchange of securities deposited by such an association.

Land mortgage associations cannot loan money on land in other states.

Henry Johnson,
State Treasurer.

June 6, 1914.

In your letter of June 4th you state that you have received from the commissioner of banking, three mortgages to be deposited in the state treasurer's department under ch. 666, laws of 1913, relating to land mortgage associations. That with each mortgage is an assignment to the state of Wisconsin, and you enclose such assignments together with the mortgages for my inspection. You ask if this assignment can be considered as a trust deed, and if it
will be the duty of the state treasurer to put such assignment on record with the county register of deeds, and if so who is to pay for the recording of the same.

You also ask if under this act it will be the duty of the state treasurer to collect interest and principal, as the mortgage and note provide that the interest and principal shall be paid together.

You call my attention to sec. 2024-134, Stats., and state that that seems to leave it to the state treasurer to approve and release the securities deposited, whereas in the matter of trust companies the commissioner of banking approves and orders the securities returned on application. You ask for my opinion upon this point.

You also state that this section seems to deal with certificates of deposit signed by any incorporated association located in the United States, and you ask if these land companies are limited to doing business on real estate in Wisconsin.

Sec. 2024-118, Stats., being a part of ch. 666, laws of 1913, provides:

"The mortgages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately protect all parties thereto. The trustees shall provide the forms subject to the joint approval of the commissioner of banking and the attorney general."

Sec. 2024-133 provides:

"1. To secure the payment of such bonds the land mortgage association shall issue a collateral deed of trust to the state treasurer, pledging as security for such bonds the notes and mortgages taken as provided herein in an amount equal to or exceeding the aggregate amount of bonds issued or to be issued.

"2. The total amount of bonds actually outstanding shall not at any time exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and moneys as may be on deposit with the state treasurer under the provisions hereof."

Sec. 2024-134 provides:

"All mortgages pledged to secure the payment of the bonds issued hereunder shall be deposited and left with the state
treasurer. The land mortgage association may, with the approval of the state treasurer, remove such mortgages from the custody of the state treasurer, substituting in place thereof other of its mortgages, or money or State of Wisconsin government bonds or certificates of deposit, endorsed in blank, issued by incorporated associations located and doing business in the United States, in an amount equal or greater than the amount unpaid upon the notes secured by the mortgages withdrawn."

It appears clear to me that this ordinary assignment of the mortgages is not such a trust deed as is contemplated by sec. 2024-133. Certainly this is not a form that has been approved by the attorney general, and so far as I am aware it has not been approved by the commissioner of banking. In my opinion the trustees of this land mortgage association should, before attempting to deposit any securities with you comply with the provisions of sec. 2024-118, by submitting forms of proposed bonds and trust deeds to the commissioner of banking and the attorney general for their joint approval.

I do not find any provision for recording the trust deed nor for paying for such recording. Under those circumstances, certainly the state treasurer would have no authority to pay for the recording. The statute does not seem to contemplate that these trust deeds shall be recorded.

Neither do I find anything in the law providing for the collection of principal and interest by the state treasurer. In my opinion it is not his duty to make such collection. It is true that the statute provides that the outstanding bonds shall not at any time exceed the amount unpaid upon the notes secured by the mortgages. I take it this means the unpaid amount of principal. It seems to me that in determining this the state treasurer and the commissioner of banking will necessarily have to work together. Sec. 2024-113 provides that a number of the statutes relating to banks shall apply to these land mortgage associations. Among other sections made applicable is sec. 2024-20. This requires that at least five reports shall be made to the commissioner of banking each calendar year at such times as he shall require and according to the forms which he shall prescribe and furnish. Such reports are required to exhibit in detail and under proper heads the resources and liabilities,
and at least once in each year each association is required to report to him a list of its stockholders, their residences and the amount of stock held by each. The associations are specifically placed under the jurisdiction and supervisory control of the commissioner of banking. He can require them to make periodical statements showing the amount that has been paid upon the mortgages deposited with the state treasurer as security, and may also require statements of the amount of bonds outstanding, and by cooperating with the state treasurer, it will be an easy matter to see that the provisions of subsec. 2, sec. 2024-133 are not violated.

It is true that in exchanging securities, the state treasurer is the one to approve of such exchange. In that respect these associations differ from the trust companies. It is also true that sec. 2024-134 authorizes the deposit of certificates of deposit, endorsed in blank, issued by incorporated associations located and doing business anywhere in the United States. Such certificates, however, can be deposited only with the approval of the state treasurer.

These associations are not authorized to loan money upon real estate anywhere in the United States, but by sec. 2024-100 are expressly limited, in the making of loans, to securities upon agricultural lands, forest lands, and dwelling houses within this state.

_Corporations—Preferred Stock—Suggested form for provision giving preferred stock a preference in the assets of the corporation._

_John S. Donald_
_Secretary of State._

I am in receipt of your letter of June 10th again submitting draft of proposed resolution of amendment to the articles of incorporation of the Wisconsin-Minnesota Light & Power Co. with a copy of suggested alterations. You ask whether or not these modifications would meet with my approval.

The proposed amendment has not been changed since it was here before. There appears, however, a copy of a telegram which states:
"In view of attorney general's ruling suggest striking out in last sentence of second paragraph of article three the words quote both the par amount of their shares and the unpaid cumulative dividends accrued thereon quote and substitute therefor the words quote out of the corporate assets the par amount of their shares and out of any surplus or undistributed profits the unpaid cumulative dividends accrued upon their shares quote."

The change suggested would make the particular part of the proposed amendment read as follows:

"In the event of any liquidation, dissolution or winding up, whether voluntary or involuntary, of the corporation, the holders of the preferred stock shall be entitled to be paid in full out of the corporate assets the par amount of their shares and out of any surplus or undistributed profits the unpaid cumulative dividends accrued upon their shares, before any amount shall be paid to the holders of the common stock, and after such payment in full to the holders of the preferred stock of its par value and the unpaid cumulative dividends thereon, the remaining assets and funds shall be divided between and paid to the holders of the common stock according to their respective shares."

As the corporation would not gain any rights by inserting in its articles provisions contrary to law, I do not know as it is very important just what form this amendment takes, so far as the state is concerned. However, the state seems to have adopted the plan of refusing to file articles or amendments which are deemed to be contrary to the provisions of the law. That part of sec. 1759a, which is important here, provides that the articles or any amendment thereof may provide "for a preference to such preferred stock, not, however, exceeding the par value thereof, over the common stock in the distribution of the corporate assets other than profits."

It appears to me that the provision for cumulative dividends sufficiently provides for the payment out of the profits of any unpaid portion of such cumulative dividends. I would suggest that a better reading of this portion of the amendment would be:

"In the event of any liquidation, dissolution or winding up, whether voluntary or involuntary, of the corporation, the holders of the preferred stock shall be entitled to be paid
in full the par value of such stock out of the corporate assets other than profits, before any amount shall be paid to the holders of the common stock, and after such payment in full to the holders of the preferred stock of its par value, the remaining assets, other than profits, shall be divided between and paid to the holders of the common stock according to their respective shares; the holders of the preferred stock shall be entitled in addition to the foregoing preference, to be paid, out of any profits of said corporation, the unpaid cumulative dividends upon such stock, the balance of such profits to be divided among the holders of the common stock according to their respective shares."

Corporations—Foreign—License—Investment Companies—
Agent transacting business for unlicensed investment company guilty of criminal offense.

F. W. Grogan,
Assistant District Attorney.
Appleton, Wis.

In your communication of the 1st inst. you ask whether or not an agent of the National Mercantile Co., Limited, of Vancouver, Canada, can solicit business for this company and secure their land and home purchasing contracts without violating the law of this state. You also inclose a form of contract which they desire to secure, as well as a booklet issued by the National Mercantile Co., which fairly indicate the nature of the business desired to be transacted by that company.

This company is not authorized to do business in the state of Wisconsin and in an opinion addressed to the secretary of state under date of May 13th, I held that it could not be licensed to transact business in this state under our statutes, for the reason that it is not a corporation of a sister state, and in my opinion the statutes provide no way for a corporation organized in a foreign country to secure a license to do business in this state; but whether this corporation is entitled to a license to transact business in this state is not material for the purposes of your inquiry. The fact is that it is not licensed to do business in this state and the question is whether an agent of the company may sell their
so-called land and home purchasing contracts without violating the law of this state.

I have carefully examined the provisions of the contract submitted by you and in my opinion it clearly falls within the language of sec. 2014-27, which provides:

"No person and no copartnership, association or corporation, whether local or foreign, heretofore organized or which may hereafter be organized, doing business as a so-called investment, loan, benefit, coöperative, home, trust or guarantee company, for the licensing, control and management of which there is no law now in force in this state, and which such person, copartnership, association or corporation, shall solicit payments to be made to himself or itself either in a lump sum or periodically, or on the installment plan, issuing therefor so-called bonds, shares, coupons, certificates of membership or other evidences of obligation or agreement, or pretended agreement to return to the holder or owners thereof money or anything of value at some future date, shall solicit or transact any business in this state unless such person, copartnership, association or corporation, shall have first complied with all the provisions prescribed in chapter 93 of the statutes required of foreign building and loan associations authorized to do business in this state."

And any agent of the company seeking to sell that contract in this state or to secure applications therefor or to transact any business in connection therewith, will incur the penalty provided in sec. 2014-29, which provides:

"Any person, copartnership, association or corporation who or which shall act as principal or agent in doing such business or in soliciting business for, or membership or participation in, any such copartnership, association or corporation, or solicit business for such person or persons doing business as such companies, not authorized to do business in this state, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail of not less than three months, nor more than one year, or by both such fine and imprisonment."

It is, therefore, my opinion that any one assuming to sell this contract in this state may be successfully prosecuted under the provisions of the sections of the statute above quoted.
Corporations—Articles of Incorporation—Amendment—A resolution changing the date of the annual stockholders’ meeting from the date fixed by the articles, where the articles permit such change to be made, is not an amendment of the articles.

JULY 17, 1914.

JOHN S. DONALD,
Secretary of State.

In your letter of July 17th you enclose the articles of incorporation with amendments of the Rust-Owen Lumber Co., together with certain correspondence between you and the company. You request my opinion as to the question presented by the correspondence, i. e., whether it is necessary for this corporation to amend its articles of incorporation in order to change the date of its annual stockholders’ meeting.

Sec. 7 of the articles in question provides in part that the “annual meetings of the stockholders shall be held at the principal office of the company at two o’clock P. M. of the first Wednesday in June in each year beginning with the year A. D. 1882 * * *. The stockholders may by resolution at any meeting change the time of holding the ensuing annual meetings.”

Our supreme court has held that a railroad company whose special charter fixing its capital stock at a certain sum was changed to give the corporation power to increase its capital stock to any extent deemed advisable as expressed by the holders of a majority of all stock outstanding must, nevertheless, file evidence of such increases of stock with the secretary of state as amendments to the articles, even though the special charter contained no such requirement. State v. Northern Pacific Ry. Co. 147 N. W. (Wis.) 219, 228. State ex rel M. St. P. & S. S. M. R. Co. v. Railroad Commission, 137 Wis. 80, 92-3.

But a change in the amount of the capital stock of a corporation is a change of a fundamental character—a change in one of the particulars that the statute requires to be set forth in the articles. The cases cited go no further than to hold that such changes cannot be made except by amendment to the articles and that such changes made in the manner permitted by the articles are, in fact, amendments thereof and must be filed accordingly.
The date of the annual meeting of the stockholders of a corporation is a matter that is authorized but not required to be set forth in the articles (See subsec. 7, sec. 1772, Stats.), and is a matter that the corporation has power to fix by by-law or in any other suitable manner. Thus subsec. 5, sec. 1748, Stats., provides in part that every corporation "when no other provision is specially made by law or by its articles of organization" shall have power "to make, amend, and repeal by-laws and regulations, not inconsistent with law or its articles of organization, for its own government, for the orderly conducting of its affairs and the management of its property, for determining the manner of calling and conducting its meetings," etc.

Where the articles of a corporation absolutely fix the date of the annual meeting it seems to me that it might well be held that a change in such date, however made, is a change—an amendment to the articles. But where, as here, the provision in the articles fixing the date of the annual meeting is qualified by a provision that the stockholders may, by resolution, change the date of holding such meeting, I think that the articles should be construed merely as fixing the date until different action be taken by the stockholders and that such action by the stockholders does not change the articles nor amount to an amendment of them but is merely the exercise of a power granted by the articles.

Of course the cases previously cited are authority to the proposition that changes in the amount of the capital stock of a corporation made in the manner authorized by the charter or articles are, nevertheless, amendments to the articles of incorporation, but I think that a distinction must be made between such matters of a fundamental character and which the statutes require the articles to set forth and matters such as the one under consideration which the law does not require to be stated in the articles. Consequently I do not think that the state could proceed by mandamus (as in the Northern Pacific Railway Company case) to compel the corporation in question to file as an amendment to its articles a resolution changing the time of its annual meeting.

To avoid any question it seems to me that it would be well for the corporation to adopt the suggestion made by
you that the articles be amended so as to strike out the provisions relating to the time of the annual meeting and thus leave the matter to be regulated by the by-laws of the company.

Corporations—Articles of Incorporation—The certificate required by sec. 1774 to be affixed to copies of an amendment to articles of organization of a corporation where filed with the secretary of state must be signed by the officers designated in that section, and must state, in the case of stock corporations, the number of shares voted in favor of such amendment.

JOHN S. DONALD,
Secretary of State.

In your letter of the 25th you enclose articles of incorporation and proposed amendment thereto of the Urbanek and Wattawa Co., together with certain correspondence with Kelley & Ledvina, attorneys for said corporation, in which you say is stated the question upon which you request a ruling from me.

From these enclosures it appears that the original articles of incorporation were filed in your office June 1, 1914; and were signed by four persons as incorporators; that this company was organized under ch. 86, Stats. and has an authorized capital of $25,000, consisting of 250 shares of stock; that, on June 30, 1914, and before any election of officers was held, the incorporators met and adopted resolutions purporting to amend the articles of incorporation. The certificate attached to the copy of such resolutions sent you for filing is signed by the incorporators and recites that they are all of the stockholders of the incorporation. The certificate recites, as to the vote on such amendments:

“We do further certify that such amendment was adopted at said meeting by the affirmative vote of all of the undersigned, being all of the stockholders and the owners of all of the stock of said corporation.”

The question, as I understand it, is, as to whether this certificate complies with the provisions of sec. 1774, Stats. That section, so far as material here, provides:

11—A. G.
"When adopted, duplicate copies of such amendment, with a certificate thereto affixed, signed by the president and secretary, or if none, the correspondent officers, * * * stating * * * if a stock corporation, the total number of shares voting in favor of such amendment."

Clearly this certificate was not signed by the president and secretary of the corporation, but it is claimed that the incorporators are "the correspondent officers," by force of the provisions of sec. 1775, which provides in part:

"Until the directors or trustees shall be elected, the signers of the articles of organization shall have direction of the affairs of the corporation and make such rules as may be necessary for perfecting its organization, accepting members or regulating the subscription of the capital stock."

I must confess I fail to see wherein this provision makes of the incorporators "correspondent officers" to the president and secretary. They are charged with the duties that, after complete organization and election of officers, devolve upon the directors or trustees, but not with those of the presiding officer and recorder. The term "correspondent officers," as used in this statute, in my opinion means officers designated in the articles of organization, whose duties are such as are ordinarily performed by the president and secretary of a corporation having such officers. The statute does not require all corporations organized under this chapter to have a president and secretary, but sec. 1776 provides for the choosing by the directors of a "president and such other officers as the corporate articles and by-laws require", in case of stock corporations, with no similar requirements, I believe, as to nonstock corporations.

By sec. 1773 the articles must contain:

"(4) The designation of general officers."

The articles of organization of this corporation provide for a president and a secretary. In my opinion this corporation has no "correspondent officers", and there is no authority for filing an amendment to its articles, the certificate to which is not signed by its president and secretary.

It is also claimed that the statement in the certificate that the amendment was adopted by the affirmative vote of the
RELATING TO CORPORATIONS.

owners of all of the stock of said corporation is equivalent to the statement required by the statute showing "the total number of shares voting in favor of such amendment."

The articles authorize 250 shares of capital stock. These incorporators may have subscribed for all of such authorized stock or they may have subscribed for only one share each. How is any one to tell from this certificate how many shares were voted in favor of the amendment?

The statutes relating to the procedure to be followed in the organization of corporations must be substantially and strictly complied with. Bergeron v. Hobbs, 96 Wis. 641; Slocum v. Head, 105 Wis. 431.

No good reason occurs to me why the same strictness should not be observed in the amendment of the articles. In my opinion the certificate in question does not comply with the statute in either of the respects mentioned.

Corporations—Coöperative Associations—The fee for filing an amendment to articles of organization of a corporation organized under secs. 1786e-1 to 1786e-17, inclusive, which increases its capital stock from $25.00 to $4,000, is five dollars.

September 29, 1914.

JOHN S. DONALD,
Secretary of State.

In your letter of the 25th you say:

"Sec. 1786e-4, Stats. provides in part, 'For filing the articles of incorporation of corporations organized under sections 1786e-1 to 1786e-17, inclusive, there shall be paid the secretary of state ten dollars, and for the filing of an amendment to such articles, five dollars; provided, that when the capital stock of such corporation shall be less than five hundred dollars such fee for filing either the articles of incorporation or amendments thereto shall be one dollar.'

"The Maple Grove Cheese Producer's Association, which was incorporated for a fee of $1.00 now makes amendment to its articles of incorporation increasing its capital stock from $25.00 to $4,000.

"Will you kindly advise this department what, in your opinion, should be the fee collected by this office for filing of this amendment?"
Had this association first been incorporated with a capital stock of $500.00 the fee for the filing of the articles would have been $10.00 and for filing an amendment increasing the capital stock, $5.00, making the total amount to have been paid $15.00. By first incorporating with a capital stock of less than $500.00, it reduced the amount of the filing fee to be paid for the original articles from $10.00 to $1.00. It will thus be seen that any association organized under sec. 1786e-1, et seq. can, if it sees fit, by first incorporating with a capital stock of less than $500.00 materially reduce the filing fee required to be paid by it.

In my opinion as soon as the association adopted the amendment increasing its capital stock it became a corporation with a capital stock of more than $500.00 within the meaning of sec. 1786e-4, and for filing such amendment is required to pay the five dollar fee. Any other construction would enable a corporation of this kind to first organize with a capital stock of less than $500.00 and then at any time thereafter increase its capital stock to any amount it might see fit, and the total fee for filing the original articles and the amendment would be only $2.00. I do not believe the legislature intended to permit anything of that kind.

Foreign Corporations—Articles of Incorporation, Filing—Banks and Banking—A foreign mutual banking corporation should file and obtain a license under sec. 1770b, Stats., before making loans in this state.

Foreign mutual banking corporation not prohibited to use word “bank” in making such loans. Sec. 2024-50 construed.

Nov. 28, 1914.

John S. Donald,
Secretary of State.

I have your request for opinion of recent date, in which you enclose a letter from Luse, Powell & Luse of Superior, and ask to be advised whether a foreign nonstock mutual savings bank is required to secure a license under sec. 1770b, Stats.

From the letter which you enclose, it appears that the corporation in question is a mutual savings bank “which
proposes to make loans within the state of Wisconsin.” Further than this, the character of the business proposed to be transacted is not stated.

Sec. 1770b, subsec. 2, provides that no foreign corporation, with certain exceptions, “shall transact business or acquire, hold or dispose of property in this state until such corporation shall have caused to be filed in the office of the secretary of state a copy of its charter * * *”. etc.

There is some conflict of authority and considerable refinement of judicial reasoning as to what constitutes doing business under such a statute. Thus, it has been held that a foreign corporation lending money to residents of a state through brokers of another state was not doing business within the state of the borrower’s residence, within the meaning of such a statute. *American Freehold Land Morg. Co. v. Pierce,* 21 So. 972; *Scruggs v. Scottish American Morg. Co.*, 16 S. W. 563.

Where a loan made to a resident by a foreign corporation is made payable in the foreign state, it is held in some jurisdictions to constitute the doing of business within such a statute. *Chattanooga Bldg. & Loan Assn. v. Dennson*, 189 U. S. 408; *Hoskins v. Rochester Savings & Loan Assn.*, 95 N. W. 566.


It is suggested by our supreme court that the phrase “transact business”, used in the statute in this state, may be somewhat broader than the more usual expressions, “doing business” or “carrying on business.” *Catlin & Powell Co. v. Schuppert*, 130 Wis. 642, 649.

The foregoing is sufficient to indicate that there may be some doubt, depending upon the manner in which the loans in question are negotiated and made and where the same are made payable, whether the doing of such business would constitute “transacting business” in this state within the meaning of sec. 1770b.

While the decisions of the supreme court of Wisconsin do not define all transactions which may constitute transacting business in the state within the meaning of this statute,
I find no case in which the court has held the statute not to apply, except cases involving interstate commerce. Catlin & Powell Co. v. Schuppert, supra; Loverin & Browne Co. v. Travis, 135 Wis. 322; U. S. Gypsum Co. v. Gleason, 135 Wis. 539; Elwell v. Adder Machine Co., 136 Wis. 82; Ady v. Barnett, 142 Wis. 18; S. F. Bowser & Co. v. Schwartz, 152 Wis. 408; St. Louis C. P. Co. v. Christopher, 152 Wis. 603.

It may be said that the decisions of our court do not except from the operation of the statute transactions of business in the state upon the ground that the same are isolated or independent transactions, held in some jurisdictions not to constitute the doing of business in the sense of the statute. The Wisconsin decisions have applied the statute in such isolated transactions. Independent Tug Line v. Lake Superior L. & B. Co., 146 Wis. 121; Indiana Road Machine Co. v. Town of Lake, 149 Wis. 541; Southwestern Slate Co. v. Stephens, 139 Wis. 616; Duluth Music Co. v. Clancy, 139 Wis. 189.

In view of the foregoing, I am of the opinion that our court would hold that a foreign corporation making loans in this state should comply with sec. 1770b. The question is not, perhaps, entirely free from doubt, and is probably one which is more important for the corporation than for the state to answer correctly, as the corporation which has transacted business without complying with this statute cannot enforce its contracts or obtain any affirmative relief in the courts of this state with respect to the business so transacted. Rib Falls Lbr. Co. v. Lesh & Mathews Lbr. Co., 144 Wis. 362; Southwestern Slate Co. v. Stephens, supra.

Of course, if the loans in question are to be secured by real estate mortgages upon land in this state, then the corporation would come within the prohibition against acquiring or holding property in the state. Especially so should it seek to enforce its rights by the foreclosure of such a mortgage. Except in a case where the mortgage was obtained as an incident to an interstate transaction, F. A. Patrick & Co. v. Deschamp, 145 Wis. 224, it is held that a foreign corporation which has not complied with this section cannot acquire title to real estate in this state. Hanna v. Kelsey Realty Co., 145 Wis. 276; Mortenson v. Murphy, 153 Wis. 389.

I judge from the manner in which the case is stated that the foreign corporation in question proposes to enter upon
the making of loans in this state as a continuing and recurrent business and not merely as an isolated and independent transaction. With reference to such a business, I am of the opinion that I should hold, until a court of competent jurisdiction rules otherwise, that the same constitutes the transaction of business within the meaning of this statute, and that the corporation should file its articles and obtain a license as a foreign corporation under the provisions of sec. 1770b, Stats.

The question has been raised—presumably in view of a decision of this department rendered to the commissioner of banking, under date of June 4, 1914, in which it was held, under sec. 2024-77p, that no person or corporation can lawfully use in this state the word "trust" in its name or in the conduct of its business unless incorporated as a trust company under the statutes of this state—whether the provisions of sec. 2024-50, Stats., prohibiting the use of the word "bank", except by corporations organized under the banking laws and subject to supervision of the commissioner of banking, would not apply with the same effect in a case of this kind. In short, it is suggested that, by reason of sec. 2024-50, a foreign banking corporation cannot make loans in this state and use the word "bank" as a part of its corporate name or in the transaction of its business because not subject to the supervision of the banking commissioner in this state.

A comparison of sec. 2024-50 with sec. 2024-77p will show that the former section, relating to the use of the term "bank", is not as broad in its scope as the latter section, relating to the use of the word "trust", which is the section dealt with in the former opinion of this department, above referred to. The pertinent language of sec. 2024-77p reads as follows:

"All persons, partnerships, associations, or corporations not organized under the provisions of this subchapter are hereby prohibited from using the word "trust" in their business, or as portion of the name or title of such person, partnership, association, or corporation."

This language is broad enough to prohibit absolutely the use by any person or corporation of the word "trust" in the
conduct of any business in this state, unless they be organized as a trust company under the laws of this state.

The prohibition of sec. 2024-50, on the other hand, is expressly limited to persons, copartnerships or corporations "engaged in the banking business in this state", viz:

"No person, copartnership or corporation engaged in the banking business in this state, not subject to supervision and examination by the commissioner of banking * * *, shall make use of any office sign at the place where such business is transacted, having thereon any artificial or corporate name or other words indicating that such place or office is the place or office of a bank, nor shall such person or persons make use of or circulate any letterheads * * *, having thereon any artificial or corporate name or other word or words, indicating that such business is the business of a bank."

As this prohibition is expressly limited to concerns "engaged in the banking business in this state", it would have no application in the present case, unless the foreign corporation in question engages in the banking business in this state. What constitutes the doing of banking business within the meaning of our statutes upon that subject is expressly defined in sec. 2024-781, Stats. Under this definition, the mere making of loans in this state by a foreign banking corporation would not constitute doing a banking business or being engaged in the banking business in this state, within the meaning of our statutes. Therefore, the prohibition of sec. 2024-50 would not apply in such a case.

Corporations—Articles of Incorporation—Amendments—A register of deeds must record amendments to articles of incorporation when presented, although thirty days have elapsed since the same were filed with secretary of state.

JOHN S. DONALD,
Secretary of State.

I have your letter of Dec. 19th in which you enclose a letter from W. J. McElroy, of Milwaukee, and also an amendment to the articles of organization of the Kopmeier-Clough

December 29, 1914.
Co. Mr. McElroy states that the register of deeds of Milwaukee county has refused to file the amendment because the certificate of the secretary of state attached thereto bears a date which has elapsed more than thirty days. You ask to be advised whether the register of deeds ought to record these papers when presented at this time.

It appears from Mr. McElroy's letter that the said amendment to the articles was mislaid by him and offered to the register of deeds as soon as it was found.

The material part of sec. 1774 is as follows:

"When adopted duplicate copies of such amendment, with a certificate thereto affixed, signed by the president and secretary, or if none, the correspondent officers, and sealed with the corporate seal, if there be any, stating the fact and date of adoption of such amendment; and if a stock corporation the total number of shares voting in favor of such amendment, and if a corporation organized without capital stock, the total number of members and the total vote in favor of such amendment, and that such copy is a true copy of the original, shall be forwarded to the secretary of state, one copy to be filed by him, and the other copy to be returned with certificate of the secretary of state attached, showing the date when such amendment was filed and accepted by the secretary of state, which said copy shall be recorded by the register of deeds of the county in which said corporation is located, within thirty days after filing with the secretary of state, and in case of failure so to do, such officers shall forfeit twenty-five dollars, and the register of deeds shall note on the margin of the record of the original articles, the volume and page where such amendment is recorded, and no amendment shall be of effect until so recorded, and such amendment shall be void until so filed and recorded."

It is true that this statute says the articles shall be recorded within thirty days after the same have been filed with the secretary of state by the register of deeds. This, of course, he cannot do when the articles are not presented to him for the purpose of being recorded. If, however, they are presented to him after the lapse of thirty days it is still his duty to record the same. In the case of Werle v. Northwestern Flint & Sand Paper Company, 125 Wis. 534, our court has recognized the validity of the amendment to the articles of incorporation which was filed after the lapse
of the thirty days provided for in sec. 1774. The court said that the delay was a mere inadvertence. The same is true under the facts presented by you.

I am of the opinion that the register of deeds should record the amendment to the articles at the present time, although the thirty days have already expired.
OPINIONS RELATING TO COUNTIES.

Counties—Public Officers—Claims for traveling expenses of a county highway commissioner may not be paid by the county treasurer until audited and allowed by the county board.

March 2, 1914.

WISCONSIN HIGHWAY COMMISSION.

In your letter of Feb. 26th you call my attention to that part of subd. (c), subsec. 3, sec. 1317m-6, which provides that: "The salary and the necessary traveling expenses of the county highway commissioner and his assistants shall be paid out of the general fund of the county." You state that the county board of Pierce county has made no provision for the monthly payment of the salary and expenses of the county highway commissioner; that the county treasurer has paid such commissioner his January salary but refuses to pay his necessary traveling expenses incurred during the month, and you ask my opinion as to whether, in the absence of any action by the county board providing for the payment of the whole or any part of such expense accounts, such expenses should be paid monthly by the county treasurer.

There seems to be no provision in the state aid highway law providing for the audit and allowance of the expense claims of the county highway commissioners, so that I think such claims must stand on the same basis as any other claims against a county. If this be true, then the county board alone has authority to examine, settle, and allow such claims and the county treasurer would be without authority to pay them until there had been such an allowance by the board. See subsec. 7, sec. 669, and subsec. 1, sec. 677, Stats.

I am therefore of the opinion that the county treasurer is correct in refusing to pay such claims until they have been audited and allowed by the county board.
Counties—Statutes of Limitations—Insane Persons—sec. 604q, as amended by ch. 624, 1907, provides that estates of insane persons shall be liable for their support in a county asylum, including past support, but does not take claims for such support out of the statutes of limitations. Former opinion (1908 opinions, p. 134) that statutes of limitations apply against counties adhered to.

March 5, 1914.

GAD JONES,
District Attorney.
Wautoma, Wis.

I have your request for opinion under date of March 4th, in which you refer to an opinion of a former attorney general (1908 opinions, p. 134), to the effect that the claim of a county against an insane person for support and maintenance is barred by the statutes of limitations after six years, and in which you state that since this opinion was rendered sec. 604q, Stats. was amended by ch. 624, L. 1907. You ask to be advised whether, in view of the amendment of this statute subsequent to the opinion of the attorney general above referred to, a county may recover from the estate of a deceased person for support furnished more than six years prior to the death of such person where no attempt to collect was made until after the death of such person.

In the opinion of the attorney general above referred to it was held that the right of action against a person for support furnished by state and county is barred by the statutes of limitations in six years as against the county and in ten years as against the state. The reasoning and authorities upon which the conclusion was reached are stated in the opinion and I see no reason, and you suggest none, for modifying that conclusion unless it be found in some subsequent legislation.

The only amendment of sec. 604q, which has been enacted since the opinion above referred to was rendered, is the amendment by ch. 624, L. 1907. An examination of that statute as it existed prior to this amendment shows that the statute provided that 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 his
support and maintenance and chargeable for the payment thereof; provided for an order by the county judge fixing the liability of the insane person’s estate, and provided for an action in the circuit court to recover in the case of the failure of the estate of the insane person to pay for such support and maintenance in accordance with the order of the county court. The statute apparently contemplated recovery by the county or the state only for support furnished after the making of such order.

As amended by ch. 624, Laws of 1907, the statute provides:

“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 and the property and estate of any deceased person who shall have been a patient of such hospital or asylum shall be liable for the continuing and past support, maintenance of such person or patient and chargeable for the payment thereof,”

with certain provisions added for the prosecution of such claims.

The important changes in the statute effected by this amendment are the express provisions for recovery from the estate of deceased persons and for past support. The statute contains nothing either expressly or directly repealing or limiting the statutes of limitations as applied to such claims. Nor does it indicate any legislative intention to take such claims out of the statutes of limitations by implication. Under the act as it existed prior to amendment, it was at least doubtful whether any recovery could be had except for support furnished subsequent to the entering of an order by the county court fixing the liability for such support upon the estate of the person to whom such support was furnished.

It appears to have been the principal purpose of the amendment in this respect to have fixed definitely the liability of the insane person’s estate for past support, that is, support furnished prior to the time that the claim for such compensation is asserted, and to include cases where the person to whom the support was furnished was deceased prior to the making of such claim. The subject dealt with by the amendment has no necessary relation to the statutes of limitations, but is a distinct subject matter. A statute fix-
ing the liability for past support does not, in my opinion, either by necessary or even fair implication, relieve the authorities of the county from the duty of making claim within the period of the statutory limitation.

The doctrine of repeal by implication is not favored and is generally disclaimed under the decisions of the supreme court of this state. Attorney General ex rel. Taylor v. Brown, 1 Wis. 513; Attorney General v. Railroad Cos., 35 Wis. 425; Bradley v. Cramer, 61 Wis. 572; First Natl. Bank v. Baker, 68 Wis. 442; Chase v. Oshkosh, 81 Wis. 313; Bentley v. Adams, 92 Wis. 386; State ex rel. M. T. & W. R. Co. v. City of Tomahawk, 96 Wis. 73; Milwaukee County v. Halsey, 149 Wis. 82; State ex rel. Hayden v. Arnold, 151 Wis. 19.

Accordingly, I am of the opinion that the amendment of sec. 604q by ch. 624, Laws of 1907, should not be construed as affecting the application of the statutes of limitations as applied to claims arising under that section, and that the opinion of the attorney general above referred to is correct, and the same is adhered to.
OPINIONS RELATING TO COURTS.

Courts—Municipal Courts—Jurisdiction—Criminal Law—Abandonment—The municipal court of Oneida county has jurisdiction under sec. 4587d to try cases of abandonment.

The procedure of the circuit courts should be followed, including trial by a jury of twelve men.

The municipal court may in such cases appoint counsel for indigent defendants.

Feb. 7, 1914.

A. J. O'Melia,
District Attorney,
Rhinelander, Wis.

In your letter of Feb. 4th you state that ch. 63, laws 1895, as amended by ch. 135, laws 1913, provides that the municipal court of Oneida county shall have "the criminal jurisdiction of the justices of the peace in the State of Wisconsin; in addition thereto shall have jurisdiction of all offenses within said county which are not punishable by commitment to state's prison," and you ask whether, in view of this language and the provisions of sec. 4587d, such court has jurisdiction to try persons accused of desertion of wife or child under sec. 4587c, the punishment for which may be imprisonment in the state's prison.

Sec. 4587d provides in part that:

"The several county and municipal courts shall have concurrent jurisdiction with the circuit courts of offenses arising under the preceding section," etc.

This language quite clearly gives power to the several county and municipal courts to try the offense described in sec. 4587c. In Robertson v. Parker, 99 Wis. 652, it was held that the judge of the municipal court of Douglas county, a court having no power to try criminal actions the punishment for which might be imprisonment in the state's prison, had no jurisdiction upon the conclusion of the preliminary
examination provided for by sec. 4587d to sentence the defendant. The court said that the judge erroneously decided "That the proceedings before him have been equivalent to a trial" and acted "upon the assumption that the law giving the municipal courts of the state authority to try and determine such cases gave him such authority". The case does not hold nor intimate that the above quoted language of sec. 4587d is ineffective to give county and municipal courts jurisdiction to try cases arising under sec. 4587c. The head-note of the case is somewhat misleading but a careful study of the opinion and of the briefs of counsel, to be found in vol. 574, Cases and Briefs, in the state law library, clearly shows that the decision goes no farther than to hold that the judge of such court, when acting as an examining magistrate, had no jurisdiction to sentence a defendant at the conclusion of the preliminary examination. The case is in no sense authority for the proposition that the plain language of sec. 4587d is not to be given full effect.

You also ask as to the procedure to be followed in such cases. The section provides in part that:

"If, upon examination, the accused shall be bound over or held for trial the court or officer who conducts the examination shall forthwith transmit the record thereof to the county or municipal court of the county in which the examination was held, and shall order the accused forthwith to appear before the court to which it has been held, there to stand trial. The district attorney shall file an information against him as soon thereafter as practicable, and the defendant shall be arraigned upon the same. If he pleads guilty sentence shall be immediately awarded; if a plea of not guilty be interposed a jury shall forthwith be empaneled and the defendant put upon trial, unless a continuance be granted for cause."

You will thus see that although the statute gives the municipal court power to try the case the steps indicated must be taken before the sentence may be imposed; i. e., there must be a preliminary hearing, the accused must be bound over or held for trial; the district attorney must file an information and the defendant be arraigned upon the same. That these steps are necessary before sentence can be pronounced is ruled by the Robertson Case. The practice should be that of the circuit court as is required by the
final sentence of sec. 4587d so that if a plea of not guilty is made a jury trial should be had unless it be waived. The jury to which the defendant is entitled is evidently a regular circuit court jury, that is, a jury of twelve men, since "The trial and all proceedings therein and subsequent thereto shall be, as near as may be, in conformity with the practice in the circuit courts in criminal cases." (Sec. 4587d). See also In re Staff, 63 Wis. 285, 295; and Jenness v. State, 103 Wis. 553, 557.

You also ask whether the municipal court is to be deemed a court of record within sec. 4713, Stats. so as to be authorized to appoint counsel for an indigent defendant at the expense of the county.

Under sec. 7, art. I, Const., providing that "In all criminal prosecutions, the accused shall enjoy the right to be heard by himself and counsel" the supreme court has held that in the absence of any statute the county in which a criminal prosecution is had is liable to pay for the services of an attorney appointed by the circuit court to defend the accused. Carpenter v. Dane County, 9 Wis. 274; Dane County v. Smith, 13 Wis. 585.

These cases go on the ground that the courts of record of this state have implied power to appoint counsel to defend indigent persons and to bind the county by such appointment. I think that the case presented is within the reason of these decisions and that where it is expressly provided, as here, that municipal and county courts shall have concurrent jurisdiction with the circuit courts in the trial of certain crimes and that the trial and all proceedings therein shall be in conformity with the practice in the circuit courts, such municipal and county courts have authority equally with the circuit courts to appoint counsel for indigent defendants. The municipal courts may not be, strictly speaking, courts of record even for the exercise of this special jurisdiction (though you will notice that in these trials the clerk of the circuit court is required to act as clerk of the county court so as to give to such court one of the indicia of a court of record), but I think that the jurisdiction granted must be held to carry with it the power possessed by the circuit courts in this regard. Of course it is the duty of such courts, still more than of the circuit courts, in view of their more
limited powers "to exercise the power of appointing attorneys to defend criminals with proper caution, and only in cases where the circumstances of such criminals are such that they are unable to secure counsel for themselves." Carpenter v. Dane County, 9 Wis. 274, 278.


2. Right to trial by jury cannot be taken away.

February 9, 1914.

CHARLES E. BRIERE,
District Attorney,
Grand Rapids, Wis.

Under date of Feb. 6th you state that the city of Marshfield has a municipal court founded under ch. 160, laws of 1891, and you submit the following questions:

"First. Does this section in question take away the right to have a preliminary examination before a court commissioner for an offense committed in the city of Marshfield under the rule announced in Weiden vs. The State, 141 Wis. 585?

"Second. Has a defendant, arrested before a municipal court, a right to a trial by a jury?"

In answer to your first question I will say that sec. 8, art. VII, Const., contains the following provision:

"The circuit courts shall have original jurisdiction in all matters, civil and criminal, within this state, not excepted in this constitution, and not hereafter prohibited by law; and appellate jurisdiction from all inferior courts and tribunals and a supervisory control over the same."

Under this provision the legislature is manifestly authorized to confer exclusive jurisdiction of criminal offenses upon some inferior court. The supreme court has held, however, that nothing but a clear expression that an offense
created by statute shall be cognizable only by some inferior court can deprive the circuit courts of jurisdiction thereof. See Faust v. State, 45 Wis. 273; Lannon v. Hackett, 49 Wis. 261; Wieden v. State, 141 Wis. 585.

Sec. 2, subch. 6, ch. 160, laws of 1891, Vol. 2, contains the following provision concerning the jurisdiction of the municipal court of the city of Marshfield:

"* * * and the said court and judge thereof shall also have exclusive original jurisdiction of all offenses and actions under the charter of said city and ordinances, rules and by-laws of said city, and exclusive jurisdiction of all criminal trials and examinations for offenses committed within said city subject to appeal to the circuit court of said county, and the statute of removal of causes, either civil or criminal, applying to justices of the peace, shall not apply to said judge or said court, and there shall be no removal therefrom * * * ."

Under this provision the municipal court of Marshfield is given exclusive jurisdiction of the examination of offenders of the criminal law committed in the city of Marshfield by clear and unmistakable language. I am, therefore, constrained to answer your first question in the affirmative.

Your second question, of course, must be answered in the affirmative as the legislature has no right to deprive any person who is accused of a crime of the right to a trial by a jury as this right is secured to him by sec. 5, art. I, Const., which provides as follows:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."

Courts—Jurisdiction—The municipal court of Winnebago county has exclusive jurisdiction of criminal cases.

August 12, 1914.

Daniel E. McDonald,
District Attorney,
Oshkosh, Wis.

In your letter of Aug. 11th you request my opinion as to whether in view of the provisions of the law establishing the
municipal court in and for the city of Oshkosh and county of Winnebago, circuit court commissioners have power to issue warrants for the purpose of arresting offenders and binding them over for trial in the circuit court.

It seems to me that if I correctly understand your question it has been directly passed upon by our supreme court and decided in the negative. See Goyke v. State, 136 Wis. 557, 559-60.
RELATING TO CRIMINAL LAW.

OPINIONS RELATING TO CRIMINAL LAW

Criminal Law—Charitable and Penal Institutions—One must have a license under sec. 1786d-1 in order to place children in homes even temporarily.

Jan. 21, 1914.

STATE BOARD OF CONTROL.

In your letter of Jan. 12th you state:

“Prior to 1911 there was an institution at Green Bay known as the Wisconsin Home Finding Association. That association was a corporation or created for the purpose of finding homes for children and the investigation showed that its principal duty was to collect money.

“The legislature of 1911 enacted a law providing that no corporation could act as a home finding society until a license was secured from this Board. That society made an application for license but after making an investigation of the methods of the society the Board refused to grant a license. Rev. P. Peterson was an active officer of the society and after the Board refused to grant a license he continued to solicit subscriptions in various parts of the state. Many complaints were made from different parts of the state that he was soliciting money. We advised the district attorneys of some of the counties from which the complaints had come and finally Peterson was arrested at Green Bay and was tried for violation of the law. He was found not guilty.

“We have done everything we could to prevent this man from soliciting subscriptions but since the court has found him not guilty, we are at a loss to know what to do to put him out of business.

“Mr. Francis McManamy was employed to make an investigation of the complaints which were made against Peterson and report to the Board. He has made a report and has also sent a transcript of the testimony taken at the hearing of the Peterson matter.

“We enclose herewith the literature which was sent to us for your examination and consideration. After you have examined it will you kindly communicate with us and give us such advice as you think we should have in the matter.”
In an opinion to M. E. Davis, district attorney of Brown county, to be found on page 185 of the Biennial Report and Opinions of the Attorney General 1912, this department ruled that an association formed "to temporarily relieve and care for orphans and neglected, ill-treated, abandoned and dependent children; to find employment for mother and child without separation; to care for unfortunate mothers and fallen women, and for these purposes to secure the cooperation of churches, societies and institutions working in harmony with these objects" was not a home finding corporation which must be licensed pursuant to sec. 1786d-1. You will see that the attorney general did not rule as stated in the newspaper clipping that the Orphans and Rescue Home Association is at liberty to place children temporarily in homes without the need of a state license. No such question was presented but only the question whether a corporation organized for the purposes stated, none of which was to place children in homes, need have a license. The question was not raised or considered as to whether such a corporation could legally place children in homes without first having obtained a license so to do. Of course if such a corporation violates the statute the declared purposes of its organization would not protect it.

The evidence in the prosecution referred to in your letter seems to show that Peterson or the corporation of which he is president, had violated sec. 1786d-1 by placing a child in a home without having a license so to do. I agree in the construction placed on sec. 1786d-1 outlined in the letter from Mr. Francis McManamy, dated Dec. 23, 1913, and think that the evidence would have justified binding Peterson over for trial. The district attorney may be correct in his view that no jury would convict Peterson on such evidence, for it is frequently difficult to get a verdict of guilty from a jury even in cases where the evidence leaves no substantial doubt as to the guilt of the defendant. The nature of Peterson's work is such as to enable his attorney to create sympathy for him with a jury and it may well be doubtful whether a jury would convict him even in a clear case.

It might be well in case Peterson continues to act in violation of the statute to institute a prosecution in some other county than the one where he lives and in as flagrant a case of violation of the law as can be found.
RELATING TO CRIMINAL LAW.

Criminal Law—Abandonment—Requisition—Physical presence in state at time of abandonment necessary to secure requisition for such crime, but not necessary for conviction.

Jan. 21, 1914.

E. P. Gorman,
District Attorney,
Wausau, Wis.

I have your communication of Jan. 20th, 1914, in which you state:

“One Bertha Wieland has complained to me that her husband, one Albert Wieland, has abandoned her and has not supported her. The facts of the case are that Albert Wieland and his wife were married in Marathon county, on the 4th day of Oct. 1911. That on or about the 1st day of Sept., 1912, Albert Wieland went to North Dakota and his wife followed him there Dec. 22, 1912. He and his wife lived in North Dakota until Nov. 3, 1913, when they left there, he staying in Minneapolis, and she coming on to visit with her parents in Marathon county. The understanding when she left Minneapolis was, that he was to send for her in a short time. He has never written to her since.”

You ask whether, under these circumstances, the courts of Marathon county have jurisdiction of the matter and whether a warrant could issue from your county for his arrest on a charge of desertion and nonsupport.

I judge from your letter that Albert Wieland is not now in this state and that should a warrant issue for his arrest it would be necessary to make application for a requisition.

This department has ruled that under such circumstances a requisition cannot issue for the reason that upon the application for a requisition it must appear that the accused person was actually in this state at the time the crime is alleged to have been committed. Constructive presence is not sufficient. Report and Opinions of Attorney General 1912, p. 961.

In view of this situation it seems to me that it would be an useless proceeding to cause the issuance of a warrant for his arrest as there is no reasonable ground to suppose that he could be apprehended and brought before the courts of your county from a foreign jurisdiction. If, how-
ever, he can be apprehended in this state then I think the courts of your county would have jurisdiction and that he might be convicted of the crime of abandonment. See Report and Opinions of Attorney General 1912, p. 320. Physical presence of the defendant in the state at the time of the abandonment is not necessary to convict him of the crime, although it is necessary in order to secure his requisition from a foreign jurisdiction.

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_Criminal Law—Sentence to Hard Labor_—A justice of the peace has discretion under sec. 4726 and sec. 697c, Stats., ch. 625, L. 1913, as to whether a sentence shall be to the county jail or to the workhouse, but no discretion as to whether the sentence shall be at hard labor.

Jan. 22, 1914.

CHARLES E. LOVETT,
District Attorney,
Park Falls, Wis.

In your letter of Jan. 19th you request my opinion as to whether under sec. 4726, Stats., and ch. 625, laws 1913, a justice of the peace has discretion in imposing a jail sentence as to whether or not it shall be at hard labor.

Sec. 4726 provides in part that:

"Whenever any person shall be convicted * * * * and sentenced therefor to imprisonment in the county jail or to any workhouse, the court shall also sentence such person to hard labor during the term of his imprisonment, either within or without said jail or workhouse as further provided in the next following section; * * * *"*

Sec. 697c, Stats., as amended by ch. 625, laws 1913, provides in part, the portions in parentheses being added by the 1913 amendment:

" * * * * * and thereafter whenever any male person over sixteen years of age shall be convicted within such county of any offense of which a justice of the peace under the general law has jurisdiction to hear, try and determine (or any person convicted in any court of any felony, where jail sentence is imposed by the court) he shall be punished
by imprisonment in the workhouse (or in the county jail as provided in the next subsection in the discretion of the court), at hard manual labor, and the commitment shall be to such workhouse at hard manual labor."

It seems to me that the discretion intended to be given to the justice is merely as to whether the sentence shall be to the workhouse or to the county jail. This brings sec. 676c into full agreement with sec. 4726. This is the natural import of the language and I am convinced that there was no intention to give the justice discretion as to whether the sentence should be at hard labor or not.

You suggest that it is often impracticable in your county, where you have no workhouse, for the sheriff to keep prisoners who are sentenced for short terms at hard labor, and that sometimes the sheriff is compelled to find work for a prisoner outside the jail at the same employment in which he was engaged before he was sentenced, so that it results that he receives no punishment at all. In the case of very short sentences it seems to me that the law cannot require more than that the sheriff keep the prisoner engaged in such labor as he may be able to find for him around the jail. The law certainly does not require an impossibility and the sheriff must be conceded a certain amount of discretion in determining what, under the circumstances, is hard labor. You will note that sec. 4727 provides that the county board shall adopt rules in relation to convict labor and that the sheriff shall be governed thereby. Also that subsec. 2, sec. 697c, provides that the court sentencing such persons shall have power at the time such sentence is imposed or at any time thereafter to direct the kind of labor at which such person shall be employed, etc., and that such direction shall be based, among other things, upon the ability of the person to perform labor of various kinds and the ability of the sheriff to find and furnish various kinds of employment.

It seems to me that this language vests enough discretion in the county board, the sheriff and the justice, so that in any particular case a solution can be reached whereby the purpose of the statute will be carried out and the prisoner kept at hard labor and yet be so employed so that his sentence will amount to a real punishment.
Criminal Law—Fish and Game—Justices of the Peace—Jurisdiction—The penalty of $5.00 for every game bird had in possession in excess of the legal limit is part of the punishment prescribed by sec. 4560a-22 for the offense and should be imposed in the criminal prosecution.

Such prosecution cannot be had before a justice of the peace where the fine and penalties exceed $100.00.

Clive J. Strang,  
District Attorney,  
Grantsburg, Wis.

In your letter of Jan. 30th you state that complaint has been made against a party for violating sec. 4560a-22, Stats., which prohibits the having in possession of more than a specified number of game birds and provides that a person violating the same “shall be punished by a fine of not less than twenty-five nor more than one hundred dollars and the costs of prosecution, or by imprisonment for not less than ten or more than ninety days, and in addition thereto shall pay a penalty of five dollars for each bird or part thereof * * * had in possession in violation of the provisions of this act.”

You also state that the accused had enough birds in his possession to make the fine and forfeiture, together, $350.00 and you ask whether the fine and penalty can all be inflicted in one case before a justice of the peace and if not what procedure should be followed.

Sec. 2394, et seq., prescribes the method of collecting forfeitures but the definition contained in sec. 2394 as interpreted in State v. Hamley, 137 Wis. 458, 461, makes it clear that the penalty prescribed by sec. 4560a-22 of five dollars for each bird had in possession above the legal limit is not a forfeiture within sec. 2394, Stats., but is a part of the punishment prescribed for the misdemeanor. See also Biennial Report and Opinions of Attorney-General for 1912, pp. 1016–1027, 9. The five dollar penalty is thus to be inflicted in the criminal proceeding along with the fine as part of the punishment prescribed for the criminal act. The jurisdiction of a justice of the peace to hear, try and determine charges for criminal offenses is limited to those where the punishment

Feb. 2, 1914.
"does not exceed six months imprisonment in the county jail or a fine of a hundred dollars, or both such fine and imprisonment, except where otherwise provided." Sec. 4739, Stats. in the absence of some other provision (and I know of none) extending the jurisdiction of a justice of the peace to include such a case as that under consideration, a prosecution for having possession of more than the legal number of game birds cannot be tried before a justice of the peace but should be brought in the proper circuit or municipal court.

A. J. O'MELIA,
District Attorney,
Rhinelander, Wis.

In your letter of Feb. 2nd you state that three years ago a man then living in your county abandoned his wife and children without just cause, leaving them in destitute circumstances; that a warrant for his arrest was issued on the complaint of the wife but that the sheriff was unable to make service for the reason that defendant had left the country; that about a year thereafter the wife secured a divorce and the custody of the children; that shortly thereafter the wife died and the children were given to others; and that defendant has now returned to your county. You request my opinion as to whether action on the warrant issued three years ago will be proper at this time.

Defendant's guilt or innocence of the crime of desertion must be determined by the facts as they existed at the time of the alleged desertion. The subsequent divorce and death of the wife cannot have any effect in determining whether the husband did or did not commit the crime at some date prior to such divorce and death. Such facts seem entirely immaterial on the issue of his guilt or innocence. Of course the death of the wife may deprive the state of valuable evi-
dence but I can see no other effect that it can have on the prosecution.

If the warrant has been returned by the officer to the magistrate issuing it you may find it necessary to issue a new warrant or even to institute a new proceeding on a new complaint, but the divorce and death of the wife cannot, it seems to me, have the effect of preventing prosecution for the alleged crime.

Criminal Law—Abandonment—Husband and Wife—An agreement of separation between husband and wife, by the terms of which the wife releases her husband from all his martial liabilities to her, is no bar in this state to a criminal prosecution for abandonment.

Jos. T. Sims,
District Attorney,
Wabeno, Wis.

In your letter of Jan. 22nd you enclose certain papers and make certain statements from which it appears:

May F. Morse and Fred Morse were married at Chicago, Ill., Feb. 19, 1896, and resided there for some time. One child, Lillian, was born May 8, 1897. At the request of Mr. Morse his wife went to Whitehall, Mich., in May, 1899, where she lived for some time. For several years she and the child lived a part of the time at Chicago and a part of the time in Michigan. It appears there was considerable trouble between Mr. and Mrs. Morse, which finally resulted in April, 1910, in some kind of a contract being entered into between them, the terms of which are not definitely stated. Mrs. Morse says that as she remembers it it provided for the payment to her by Mr. Morse of $500, in installments, for which Mr. Morse gave his notes, and that she released him from any obligation to her and the child. Only about $60 of the agreed amount has been paid, although the time agreed upon for payment of the balance has long since expired. They had not been living together for some time prior to entering into this contract. In an action for separate maintenance in an Illinois court, judgment was rendered in favor of Mr. Morse, based on this contract. Mrs. Morse says in her statement that after waiting one year “I was compelled to
get a decree from a Chicago court and go to Crandon, Wis., where I prosecuted him for child abandonment. He plead guilty and was sentenced for one year." It appears that Mr. Morse has lived in Forest county, Wisconsin, at various periods, and that Mrs. Morse and the child have also lived in that county, and are now living there. In Oct. last Mrs. Morse made complaint, in the usual form, charging her husband with abandonment and failure to support his wife and said child, leaving them in a destitute condition.

You ask if a criminal offense has been committed under sec. 4587c, Stats.

The child, Lillian, is, and at the time charged in the complaint was, more than sixteen years of age. Under the terms of sec. 4587c, no punishment is prescribed for failure to support a child over sixteen years of age. As to her, then, no offense has been committed under that section.

I do not quite understand what Mrs. Morse means in saying she "was compelled to get a decree from Chicago court." What was that decree? Was it one of divorce? If so, what is said hereinafter may need modification. The statement as to the contract that was made, and as to the proceeding for separate maintenance, is very meagre and unsatisfactory. For the purposes of this inquiry I am assuming that the contract provided for payment of $500 to Mrs. Morse, in the nature of a division of property, and that by its terms Mrs. Morse released her husband from all liability to her for the support of herself and their child, Lillian. That the judgment in the proceeding for separate maintenance was, in effect, that her separate maintenance was already provided for by this contract. That no divorce has ever been granted. That both Mr. and Mrs. Morse resided in Wisconsin at the time the offense is alleged to have been committed. That Mr. Morse has unreasonably refused to provide for the support of his wife, leaving her in destitute circumstances, and has not made the payments provided for by the contract.

The contract was not, necessarily, void under the laws of this state. Rolette v. Rolette, 1 Pin. 370. Such contracts, however, are not favored. Baum v. Baum, 109 Wis. 47.

It should be remembered, however, that while marriage is, in some phases, a civil contract, it is, in fact, something more. The ordinary civil contract may be terminated at any time by agreement of the parties. This is not true of the
marriage contract. A third party—the public—is interested in every marriage contract. The laws of this state require every married man to support his wife. This is entirely independent of any contract husband and wife may make. The wife has no authority to bargain away or waive any of the rights of the state.

Thus it has been held that:

“If husband and wife live separately by consent, and the wife becomes destitute to the husband’s knowledge, and he thereafter, though of sufficient ability, refuses to provide for her or go near her or make any arrangements for her support in any way, either at his own home, or elsewhere, he has just as effectually abandoned her as though he had departed from the state leaving her in a destitute condition.” *Spencer v. State*, 132 Wis. 509, 519.

In that case there was no agreement for separate maintenance.

It is not necessary that the abandonment or physical separation, and the failure to support, should coincide as to time. *State v. Witham*, 70 Wis. 473.

In Rhode Island it has been held that an agreement of separation between husband and wife, the provisions of which have been fully complied with by the husband, in which, for a money consideration, the wife releases the husband from all liability to her arising out of or incidental to the marital relation, is no bar to a criminal prosecution for abandonment. *Inter alia* the court said:

“If the respondent should be found guilty and fined, no portion of that fine would go to the wife, but all of it would go to the state. The wife is not enriched thereby, nor has she obtained from the husband anything which she released to him in the agreement aforesaid. But the legal obligation of the husband to support the wife according to his means or ability is an inseparable incident of the relation of husband and wife, which cannot be contracted away in such manner as to release the husband from liability to criminal prosecution at the instance of the state, any more than, by any agreement between husband and wife, either can be released from criminal liability for the commission of adultery, although either one may condone the offense and thus be precluded from maintaining a civil action for divorce.” *State v. Karagavoorian*, 70 Atl. 1111, 32 R. I. 477.
I believe that our court would follow the decision in this case. It is therefore my opinion that an agreement of separation between husband and wife, by the terms of which the wife releases her husband from all his marital liabilities to her, is no bar, in this state, to a criminal prosecution for abandonment.

It is, perhaps, only fair to say that the Illinois appellate court has come to a different conclusion. It says:

"It could not be reasonably contended, we think, that where the wife was willing to or desirous of the separation, and for a valuable consideration paid, entered into a written contract with her husband without coercion or fraud, to live separate and apart from him, that the husband would be subject to criminal prosecution for abandonment. While husband and wife are not permitted to release themselves by contract from their marital obligations, yet they may live separate and apart by mutual consent, and when they do so, neither could maintain a bill against the other for divorce on the ground of desertion. The statute was intended to provide for the punishment of husbands who wilfully and wrongfully desert and abandon their wives, and live separate and apart from them without justification either in the fault or consent of the wife. Whether the provisions of the contract releasing plaintiff in error from future liability to support his wife is valid or not, is not involved in this case. What we hold is, that if Mrs. Virtue willingly and without coercion or fraud, agreed to her husband living separate and apart from her, he is not guilty of the criminal offense of wife abandonment. Of course if it should appear that she was induced to sign the contract by a course of conduct that amounted to coercion, or that she was procured to sign it by fraud and for the purpose of avoiding the penalty of the statute, then it would not be a defense." Virtue v. People, 122 Ill. App. 223.

I believe, however, that the Illinois statute differs from ours, and that in that state the act of abandonment or separation and the failure to support must coincide as to time to constitute the offense. Furthermore it appears to me that the court did not take into consideration the distinction between a civil action by the wife seeking to compel support, and a criminal proceeding by the state for failure to perform a duty imposed by statute, independent of all contracts.
Criminal Law—Workhouse—Ch. 625, laws of 1913, must be construed with sec. 4726 as applying to persons convicted under municipal or village ordinances.

Feb. 11, 1914.

ROBERT C. BULKLEY,
District Attorney,
Whitewater, Wis.

In your favor of February 9th you ask to be advised as to whether or not ch. 625, laws of 1913, applies to persons convicted under a municipal or village ordinance. Said chapter amends sec. 697c, Stats., relating to the employment of persons committed to jails and workhouses at hard labor and the payment of their earnings to those dependent upon them.

Said sec. 697c, in subsec. 1, as amended, contains the following:

"Upon the completion of any such workhouse the county clerk shall notify in writing each justice of the peace, police justice and the judge of every court held in his county of the fact and thereafter whenever any male person over sixteen years of age shall be convicted within such county of any offense of which a justice of the peace under the general law has jurisdiction to hear, try and determine or any person convicted in any court of any felony, where jail sentence is imposed by the court, he shall be punished by imprisonment in the workhouse or in the county jail as provided in the next subsection in the discretion of the court, at hard manual labor, and the commitment shall be to such workhouse at hard manual labor."

While it would be possible to construe this language as authorizing a conviction only in cases of offenses under the general law, it must be borne in mind that this section is part of the statute relating to the erection of workhouses by county boards and that there is another statute under ch. 193 relating to judgments in criminal cases and the execution thereof which contains the following under sec. 4726:

"Whenever any person shall be convicted in any court for vagrancy, intoxication in a public place, indecent exposure of the person, disorderly conduct or of any criminal
offense and sentenced therefor to imprisonment in the county jail or to any county workhouse the court shall also sentence such person to hard labor during the term of his imprisonment, either within or without said jail or workhouse as further provided in the next following section; and any person who shall be convicted of any offense in any court and sentenced therefor to pay a fine and costs and shall, in default of payment of such fine and costs, be committed to the county jail, may be sentenced to be kept at such hard labor, within or without the jail, as further provided in the next following section, during the continuance of such imprisonment. The provisions of this section shall apply to convictions under city or village charters or ordinances as well as to convictions under these statutes.”

Here it is expressly provided that this section shall apply to convictions under city or village charters or ordinances as well as to convictions under the statutes. There is nothing in the provisions of ch. 625 which could be construed as repealing this part of said sec. 4726. The two statutes may be read together and sec. 697c can be given a construction that is consistent with the provisions of sec. 4726.

I am therefore of the opinion that the provisions of ch. 625 must be construed in connection with said sec. 4726 as applying to persons convicted under municipal or village ordinance.

Criminal Law — Abandonment — An abandonment case should not be dismissed because the prosecution is unable to prove that the defendant had no legal excuse. This is a negative allegation peculiar within the knowledge of the defendant who must prove that he had a legal excuse.

Feb. 27, 1914.

A. J. O'Melia,
District Attorney,
Rhinelander, Wis.

In your letter of Feb. 19th you inquire what would constitute “lawful excuse” as used in the fourth line of sec. 4587c. You ask what is necessary for the state to prove to make a prima facie case on the following statement of facts:

18—A.G.
"Defendant left the state and we are unable to find where he was at the time alleged that his minor children were found in necessitous circumstances. We cannot show that he was able to work and properly care for the said children, in fact about all we can show is the circumstances of the children. Would failure to show that the defendant was able to provide for them be grounds for dismissing the action?"

Sec. 4587c provides in part as follows:

"Any person who shall, without just cause, desert or willfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances; or any person who shall, without lawful excuse, desert or willfully 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, and, on conviction thereof, shall be punished by fine not exceeding five hundred dollars, or imprisonment in the state prison, county jail or in the county workhouse not exceeding two years, or both, in the discretion of the court."

This statute does not define the terms “lawful excuse” as used in this section. It would seem that any facts or circumstances which, if shown to exist, will absolve the defendant from the duty of support and maintenance of his children, would be a lawful excuse in contemplation of this statute. In the state of Michigan under a statute (How. Ann. St. Par. 3228), providing a penalty against the railroad company for failing to stop at station to let off passengers, except for a legal and just excuse, it was held, in the case of Reed v. Duluth S. S. & A. Ry. Co., (Mich.) 59 N. W. 144, that it was a legal and just excuse, within the meaning of this statute, that it was after dark, that the snow was deep and drifting and that the engineer and conductor knew a freight train was close behind and the only place near the station where a passenger train could stop, without danger of being stalled by snow, was on a bridge and elevated track.

Any evidence which would show that the defendant was sick and unable to provide for the children in question would, in contemplation of this statute, be a lawful excuse. I do not think that the case should be dismissed simply because the state cannot prove that the defendant at the time when the
children were in necessitous circumstances was able to provide for them. You can undoubtedly show the condition of the defendant when he left the state. It will also appear by the presence of the defendant and by proof, that you probably are able to show, that he is at present able to support the children. From these facts and circumstances the jury is authorized to infer that the defendant in his absence was able to provide for the children. I believe that the following rule stated in Greenleaf on Evidence, Vol. I, sec. 79, under the heading Negative Allegations, is here applicable:

“But where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.”

In cases, such as the one stated by you, full and conclusive proof is not required. See Hepler v. The State, 58 Wis. 46, 51. The court, using the language of Mr. Wharton, said:

“But when the prosecution has the burden of proving the negative, full proof is not required, but even vague proof, or such as renders the existence of the negative probable, is in some cases sufficient to change the burden to the other party.”

In the case of Lam Yee v. State, 132 Wis. 527, our court used the following language:

“Where there is evidence tending to show that an accused person is guilty or to establish some circumstance bearing on the question and he may readily produce witnesses who can disprove the incriminating evidence, or give testimony tending to disprove it, if the same be untrue and he fails to do so, such failure may be considered by the jury and may properly be referred to by the prosecutor as was done in this case.”

The law makes it the duty of every father to provide for the maintenance of his minor children. It was the duty of the defendant to inform himself as to the needs of his minor children. I believe that you have made a prima facie case although you may not be able to show that the defendant during all the time of his absence was able to work and properly care for them. This would be a fact peculiarly with-
in the knowledge of the defendant and the law requires of him to produce the evidence establishing those facts.

Criminal Law—Venue—Subornation of Perjury—A prosecution for subornation of perjury should be brought in the county in which the perjury was committed.

March 2, 1914.

FRANK H. HANSON,
District Attorney,
Mauston, Wis.

In your letter of Feb. 21st you say that A was arrested in Juneau county for violation of the game law by unlawfully killing a deer and that after his arrest and before trial he went to Wood county and saw B, who was a material witness for the state, and procured him to commit perjury; the entire arrangement, including the contract for pay on the false testimony being made in Wood county. That the perjury was actually committed at Mauston, in Juneau county, and the payment of five dollars was made by A to B at Mauston. You ask whether or not A should be prosecuted in Juneau county or in Wood county.

Sec. 4471, Stats., provides in part:

"Any person who shall wilfully and corruptly incite or procure another to commit the crime of perjury shall be deemed guilty of the crime of subornation of perjury, and in either case he shall be punished, if the perjury or subornation of perjury was committed on the trial of any person for a crime punishable by imprisonment for life, by imprisonment in the state prison not more than fifteen years nor less than three years; and if committed in any other cause, proceeding or matter he shall be punished by imprisonment in the state prison not more than five years nor less than two years."

To constitute the offense, perjury must be actually committed. Clark's Criminal Law, Section 143; Bishop on Criminal Law, 7th Ed., Sec. 1197; 22 A. & E. Ency. of Law (2nd Ed.) 697; 30 Cyc. 1423.

It thus appears that the complete offense was not committed until the giving of the false testimony in Juneau
county. The rule as to prosecutions is stated thus in 12 Cyc. 236:

"Where inducements to perjure are offered in one county, but the perjury itself and the preparations for it take place in another county, the venue of the crime of subornation of perjury as well as of the perjury is in the latter county."

The case of *State v. Byam*, 54 Ia. 409, 6 N. W. 594, is cited in support of this statement. It appears, however, that that case was one in which no suggestion of the commission of perjury was made in any other county than that in which the perjury was actually committed. It therefore is not authority upon the point to which it is cited. Neither have I been able to find any case in which this particular point has been passed upon. It appears to me clearly, however, that Juneau is the proper county in which to prosecute. The commission of the perjury in Juneau county was a necessary element of the offense, and I do not see how it could be claimed that the offense was committed in Wood county merely because the inducement for the commission of the perjury took place there.

*Criminal Law—Contracts*—Under the facts stated a contractual relation existed between parties and embezzlement was not committed.

March 3, 1914.

THOMAS C. DOWNS,
District Attorney,
Fond du Lac, Wis.

In your letter of Feb. 28th you request my opinion upon the following:

"Some time in Dec., 1913, 'A,' acting as agent for a third party, entered into a contract with 'B' for exchange between the parties of certain described lands, conveyances to be made on or before Dec. 31, 1913. On the same day that said contract was executed between 'A' and 'B,' 'B' entered into a contract with 'C' for the sale of a part of the land, he ('B') expected to receive from 'A,' at which time 'C' paid to 'B,' the sum of $200 as part purchase price to bind the bargain."
On Dec. 31, 1913, ‘A’ and ‘B’ met pursuant to contract but failed to carry out their agreement. On the day that ‘B’ was to execute conveyance to ‘C,’ he (‘B’) stated to ‘C’ that owing to ‘A’ not having his papers in shape it would be impossible for him to go through with the deal, but that things would be fixed up in a few days.

The contract between ‘A’ and ‘B’ has never been carried into effect, for the reason, as it developed afterwards that ‘B’s’ principal would not live up to its condition.

Although ‘C’ has demanded the return of his $200 from ‘B,’ he (‘B’) has failed to return the same.

The question therefore upon which I would request your opinion is as follows:

‘Is ‘B’ under the facts stated guilty of any offense, or are his actions to be construed as a mere breach of trust and does the relationship of debtor and creditor arise?’

The relation between “C” and “B” was a contractual relation and the $200.00 paid by “C” to “B” was paid in pursuance of an agreement for the purchase of land by “C” from “B.” It was paid for the purpose of binding the contract and as part of the purchase price for the land. The failure of “B” to carry out the agreement makes him guilty of breach of contract and “C” undoubtedly has a civil action against him for the $200.00 paid him and for other damages that he may have caused by such breach. But the relation between them is that of debtor and creditor only. I am of the opinion that “B” is not guilty of embezzlement, nor of any other offense under the statement of facts submitted by you.

Criminal Law — Abandonment — Requisition — A person guilty of abandonment in this state who has not been in the state cannot be brought here on a requisition. He may be prosecuted here, however, if he can be apprehended here.

March 10, 1914.

FRANK H. HANSON,
District Attorney,
Mauston, Wis.

In your letter of March 5th you submit the following:

“Twelve years ago A, who was married to B, the latter having been a resident of Wisconsin at the time of marriage,
sent B to Wisconsin with two children, the issue of the marriage, to visit her parents as A stated. During the visit A, a resident of Iowa, disposed of all his property and left for parts unknown, so when B went back to Iowa she was left destitute and had to come back to Wisconsin, where she has since resided with her parents and her people, herself laboring whenever possible and contributing as much as possible to the support and education of the children. A has not to the knowledge of B ever been in Wisconsin since he left Iowa, except that he may, of course, have traveled through this state."

You state that B has discovered the whereabouts of A and you inquire as to what action you can take to punish him for the offense he has committed.

It appears that A has not been in the state of Wisconsin since the commission of this offense. Should a warrant be issued against him in this state it would be necessary to make application for a requisition. This department has ruled that under such circumstances a requisition cannot issue for the reason that upon the application for a requisition it must appear that the accused person was actually in this state at the time the crime is alleged to have been committed. Constructive presence is not sufficient. (See Report and Opinions of Attorney General 1912, p. 961.)

In view of this situation it would be a useless proceeding to have a warrant issued against him at the present time. If, however, he can be apprehended in this state, then I think the courts of the county where B. has lived would have jurisdiction and he might then be convicted of the crime of abandonment. (See Report and Opinions of Attorney General 1912, p. 320.) Physical presence of the defendant in the state at the time of the abandonment is not necessary to convict him of the crime, although it is necessary in order to secure his requisition from a foreign jurisdiction.

It would seem, however, under the facts stated by you that a prosecution for abandonment in the state of Iowa, where he originally abandoned his wife and children, might result in his apprehension and conviction as a requisition from the state of Iowa could be honored by the governor of the state in which he may be found, under the laws of the United States.
Criminal Law—District Attorney—1. District attorney may file any information for any offense which the preliminary examination shows to have been committed, whether it be the offense charged before or not.

2. The offense of rape in one court and fornication in another may be joined in one information. It is in discretion of trial judge to compel district attorney to elect between these.

C. J. STRANG,
District Attorney,
Grantsburg, Wis.

In your letter of April 2nd you state that a party was recently brought before a justice of the peace of your county on the charge of rape and was bound over to the circuit court to answer thereto; that you have given the evidence produced at the preliminary hearing careful attention and you are convinced that the defendant cannot be convicted of the charge of rape. You inquire whether you can change the charge in the information and file a charge of a lesser offense as fornication or bastardy or whether you can bring two counts, one for rape and one for fornication and if the evidence warrants a conviction for rape, have him convicted on that charge, and if the evidence only warrants a conviction for the lesser offense, have him sentenced on that charge.

You also ask whether, if you bring the information in two counts, you can be compelled to elect between the two before going to the trial of the issues.

In answer to your questions I will say that in the case of Secor v. State, 118 Wis. 621, 628, our courts held that the district attorney "may file an information for any offense which the preliminary examination shows to have been committed, whether it be the offense charged before the examining magistrate or not. If it be ascertained before trial that the information so filed be defective or does not charge the proper offense, no good reason occurs to us now why the prosecuting officer may not, with the consent of the court, amend the information or substitute a new one; due care being taken that the accused is not taken by surprise, or otherwise deprived of any substantial right. Doubtless where, as here, an amended information is filed, it must be considered as superseding and taking the place of the original information."
In regard to your question whether the information can contain two counts, one for rape and one for fornication, I will say that our supreme court has answered this question in the affirmative. See *Porath v. State*, 90 Wis. 527.

In that case it was also held that where the joinder in information of the charge of rape in one count and of incest in the other count was intended merely to meet the different legal aspects which the evidence might give the case, that the trial court rightly in its discretion refused to require an election between the counts. The question as to whether the trial judge will compel you to select between the two counts will be in his discretion.

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*Criminal Law—Public Officers—Pure Seed Law—District Attorney—Attorney General—Under sec. 1494x-1, Stats., not every sack of seed sold as one lot need be labeled.*

The provision of subsec. 5, sec. 1494x-1, Stats. that all seed shall be labeled with a statement of the state or locality where grown is not unconstitutional as being impossible of performance.

A criminal prosecution under the pure seed law may be brought against all the members of a firm, although only one member is actively engaged in making sales of such seed.

The pleadings in such a prosecution considered.

The district attorney should bring prosecutions for violations of such law without being assisted by the attorney general.

May 8, 1914.

A. L. STONE,  
*State Seed Inspector.*

In your letter of the 7th you ask if, under sec. 1949x-1, Stats., the sale of each illegally labeled sack in a shipment of several sacks constitutes a separate offense.

The section referred to provides in part:

"No person, firm or corporation shall, by himself, his agent, or as representative of any other person, firm or corporation, sell or offer for sale or distribution within the state for seeding purposes any lot or package of agricultural seeds exceeding one pound in weight unless the same, when put up in either open or closed packages, shall have at-
tached thereto a label on which is plainly printed or written in the English language," the information specified in such section.

You will note that the section uses the phrase "any lot or package." The term "lot" may well include several packages. In my opinion the sale of several sacks of seed, none of which is labeled as required, constitutes but one offense. See 12 Cyc. 389.

You further say:

"It has been claimed that par. 5, of the section above mentioned, which requires that seed be labeled with the state or locality where the seed was grown, is unconstitutional because impossible of performance. Please give us a decision on this."

Of course it is not impossible to place upon the label a statement of the state or locality where the seed was grown. It may be that it is difficult to place this statement on the label, but to say that it is impossible is of course a gross exaggeration. In my opinion this requirement is not unconstitutional.

You also enclose a letter from James Kirwan, district attorney of Calumet county, and ask that we answer the questions asked by him. Mr. Kirwan's letter relates to a request from your department that he bring criminal prosecution against a firm located in his county for selling impure clover seed to some dealers in Marinette, Wis. Mr. Kirwan's first question is:

"In a criminal prosecution under this law are all the members of a copartnership or corporation legally liable to arrest and prosecution, or is only the member who actually did the selling liable to such arrest and criminal prosecution?"

You will note from the quotation given above from the section in question that it expressly provides for liability upon the part of any person, firm or corporation who shall by himself, his agent or as representative of any other person, firm or corporation sell seed not properly labeled. If the sale is made by a corporation, of course not all of the stockholders would be liable. A corporation may be prosecuted criminally. In such case the corporation itself would be prose-
Cut out and also the particular servant or agent making the sale. In the case of a copartnership, the statute itself provides that the firm shall be liable. Each member of a copartnership is agent for every other member of that copartnership. Consequently the partner actively engaged in making the sale is liable and also the other persons by whom the sale was made through an agent or servant, that is, through the member of the firm actively engaged in making the sale.

Mr. Kirwan's next question is as to how the prosecuting officers are to know whether the seller does not come under one of the classes named in sec. 1494x-8, Stats., exempted from the provisions of the law.

That, of course, is a question of fact. The prosecuting officers would know that the same as they would know any other necessary fact in connection with the prosecution. Sec. 1494x-8 provides:

"The provisions of sections 1494x-1 to 1494x-16, inclusive, shall not be construed as applying to:

"(1) Any person growing, possessing for sale, or selling seeds for food purposes only.

"(2) Persons selling or offering for sale to a seed dealer uncleaned seeds to be recleaned and tested by him before being exposed for sale upon the general market.

"(3) Seed that is in store for the purpose of recleaning, and which is not possesed, sold or offered for sale for seed purposes.

"(4) Mixture of seeds for lawn, pasture, or meadow purposes except that the sale of such mixtures is subject to the restrictions of sections 1494x-3 and 1494x-4 of the statutes."

I understand that the prosecution Mr. Kirwan is requested to institute is for the sale of impure clover seed. Very clearly this does not come within the first class of exemptions. Clover seed is not usually sold for food purposes only.

The second exemption, as I view it, relates to the sale, by one not a dealer in seeds, of seed to a dealer to be recleaned and tested by the latter before being exposed for sale. As I understand it the firm Mr. Kirwan has been requested to prosecute are seed dealers, and therefore the second class of exemptions would not apply.

As this is a prosecution for selling the seed, it is very clear that such seed was not in store for the purpose of recleaning,
and not possessed, sold or offered for sale for seed purposes. Therefore the third exemption does not apply.

It was clover seed, and not a mixture of seeds for lawn, pasture or meadow purposes, and therefore the fourth class of exceptions does not cover.

Mr. Kirwan also asks if the state, in such prosecutions, must allege in the complaint and warrant that defendants do not fall within any of these exceptions and prove the same on the trial.

It appears to me that the necessary allegation for a prosecution would be that the person, firm or corporation prosecuted did sell for sale or distribution within the state for seeding purposes the alleged impure seed. This, of itself, would appear to me to necessarily imply that none of these exceptions applies. It further appears to me that the fact that it comes within the provisions of sec. 1494x-8 would be a matter of defense.

Mr. Kirwan suggests that you have the attorney general's department draw the complaint and warrant in this case.

This department does not wish to avoid performing its full duty in every respect, but there are some duties incumbent upon a district attorney. One of these duties is drawing papers in all criminal prosecutions. Not all of the facts are before this department and for that reason, if for no other, it should not be called upon to prepare the papers. There is enough work to keep every member of this department fully employed, without its being called upon to do the work that the district attorneys are paid for doing.

Mr. Kirwan also asks whether the prosecution should be brought in Calumet county or Marinette county. Because all of the facts in connection with the sale are not before this department it is not possible to give advice upon this question that would be of any value. It would appear clear to me that a prosecution could be brought in Calumet county for offering such seed for sale there. A prosecution for the sale itself should be brought in which ever county the sale was made. Whether the sale was made in Calumet or in Marinette county can only be determined when all of the facts are known. The mere fact that the seller may have paid the freight would not necessarily show that the sale was made in Marinette county.
Mr. Kirwan also says that he sees that you can ask the attorney general for aid in these prosecutions, and he suggests that I appear with him and assist in the prosecution.

Subsec. 2, sec. 1494x-11 provides:

"Prosecutions for violation of this act shall be brought in the proper court by the district attorney of the county in which said violations occurred, upon the complaint of the seed inspector or his assistants."

Subsec. 3, of the same section provides:

"The seed inspector shall have power whenever he shall deem it necessary to call upon the attorney general for aid in the prosecution of all cases arising under the provisions of secs. 1494x-1 to 1494x-16, inclusive."

Clearly it is the duty of the district attorney to look after this prosecution. It was not the intention of the legislature that the attorney general should be called upon to bear the brunt of every prosecution under this law. District attorneys ought not to attempt to cast the burdens of their offices upon this department. I feel that any person who is elected to the office of district attorney ought to be competent to carry on an ordinary prosecution under this law. Of course when cases of unusual difficulty arise it would be perfectly proper for you to call upon me for assistance. I desire to thank you for refraining from following Mr. Kirwan's suggestion in this respect. I do not understand that you have requested me to assist in this prosecution.

Criminal Law—Pure Seed Law—Sales—Under the pure seed law, both the corporation handling the seed and the particular person actively engaged in the sale may be prosecuted for a violation thereof.

Question of where sale was made considered.

May 13, 1914.

A. L. Stone,
State Seed Inspector.

In your letter of this date you refer to my former opinion regarding the proposed prosecution against Knauf & Tesch
of Chilton, Wis., and state that upon investigation you learn that this is a corporation. You further state that Frank Tesch is the concern’s selling agent and made the sales in question. You ask if the action should be brought against the corporation or against Frank Tesch, or both, and if against both if separate suits must be brought and separate penalties imposed if guilt is proved and convictions secured.

It lies very largely in the discretion of the district attorney as to whether he will prosecute both the corporation and also the particular agent making the sale. In my opinion both are subject to the provisions of the law and both could be successfully prosecuted. If it is determined to prosecute both, then in my opinion the better way would be to bring separate prosecutions.

You further state that upon investigation you have secured from Lauerman Bros., Marinette, a written statement that the seed in question was purchased of Knauf & Tesch April 3rd. That Lauerman Bros. paid the freight but had not yet paid for the seed when it was discovered by the assistant inspector. You ask if the sale was complete before remittance had been made by Lauerman Bros. to Knauf & Tesch at Chilton. You further state:

“As the order was delivered through the mail to the firm at Chilton and remittance was to be mailed to the same place, was not the sale made and should not prosecution be brought in Calumet county?”

You do not state sufficient facts so that a definite answer can be made.

“A contract of sale is considered as made at the place where the transaction is finally consummated by delivery and acceptance. A sale is deemed to be made at the place where it is executed by a transfer of the property in the goods from the seller to the buyer. Accordingly, if an order is given for goods and is accepted by delivery of the goods to a carrier for shipment with the intention of transferring the property therein to the buyer, the sale is governed by the law of the place of shipment; but if it is the intention that the property shall not pass until delivery by the carrier to the buyer at the place of destination, the sale is governed by the law of that place.” 35 Cyc. 94, and cases cited.

In a case arising in this state it was held under the circumstances that although the purchasers were to pay the
freight upon the goods, yet, that the sale was not complete until the goods were delivered to the consignees and payment made therefor. *Conger v. Railroad Co.*, 17 Wis. 477.

It does not follow from this, however, that payment is always necessary before the sale is complete. In many cases credit is extended to the purchaser and in such cases the sale is complete when the title to the property passes. Presumably where goods are ordered by mail and the order accepted by mail the contract is made at the place of acceptance and where the purchaser is to pay the freight ordinarily the sale would be complete upon delivery of the goods to the common-carrier for delivery to the purchaser. So much depends, however, upon all of the circumstances of any particular case, that I cannot give you definite advice upon the very meager statement of facts given in your letter.

*Criminal Law—Procedure—* The defendant in a criminal case is not entitled to a copy of the evidence taken in a proceeding under sec. 4776.

L. Olson Ellis,

District Attorney,

Black River Falls, Wis.

May 26, 1914.

In your letter of May 22nd you state that the attorney for the state fire marshal and yourself held a so-called John Doe proceeding in an arson case and that one of the witnesses at that investigation has since been arrested charged with the crime of arson; that the attorney for the defendant has made a demand that the state file with the magistrate who presided at the hearing, the testimony that was taken. You inquire:

"First, must the state file the testimony with the magistrate and thus make it public?"

"Second, can the state be compelled to furnish the defendant with a copy of the testimony taken at said proceedings?"

This proceeding was under sec. 4776, Stats. It provides as follows:
"Upon complaint made to any such magistrate that a criminal offense has been committed, he shall examine, on oath, the complainant and any witness produced by him, and shall reduce the complaint to writing and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offense has been committed the magistrate shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the said magistrate, or before some other magistrate of the county, to be dealt with according to law; and in the same warrant may require the officer to summon such witnesses as shall be therein named to appear and give evidence on the examination."

This section was considered by our supreme court in the case of State ex rel. Long v. Keyes, 75 Wis. 288. You will notice that this section does not provide that the magistrate shall take notes of the testimony given, nor is there any provision in the statute that any phonographic reporter shall take the testimony. It seems this is left within the discretion of the magistrate. Speaking of this section in our court, in the case of State ex rel. Long v. Keyes, supra, said, on page 192:

"In that there is no limit of time or of the number of witnesses. These are left by the statute within the reasonable discretion of the justice."

Our court has held in the case of Santry v. State, 67 Wis. 65, that in the absence of statute the district attorney is not bound to furnish the defendant with a copy of his confession. It seems to be also well-settled that a defendant is not entitled to a copy of the testimony take before a grand jury by which he has been indicted. See Howard v. Commonwealth, 118 Ky. 1; Merrick v. State, 63 Ind. 327; Cannon v. People, 141 Ill. 270.

The second question submitted by you was considered by the supreme court of Minnesota in the case of State ex rel. Robertson v. Steele, 135 N. W. 1128. In this case the testimony was taken before the state fire marshal under the Minnesota statute instead of a magistrate as in your case. The question was answered in the negative. From this case and the authorities therein cited it is evident that under the common law the defendant was not entitled to such evidence.
There is no statute in this state which gives a defendant in a criminal case a right to demand a copy of such testimony. I believe that both of your questions should be answered in the negative.

Criminal Law—Pure Seed Law—Corporations—Public Officers—Attorney General—In prosecuting a corporation criminally, no complaint and no arrests need be made. In such a prosecution the individual stockholders need not be named. The attorney general does not prepare criminal complaints or informations for district attorneys. The circuit court has jurisdiction of criminal prosecutions for misdemeanors.

June 2, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of the 29th ult. you say:

"Two men and their wives compose a Wisconsin corporation residing here in this city. Complaint is made that this corporation has violated the pure seed laws of Wisconsin, secs. 1494x-1, et seq.; Stats. 1913. I ask you these questions for an early reply, viz:

1. How draw criminal complaint in such a case charging such corporation with such criminal offense? Must it allege the corporation did it, or that Mr. Brown, Mr. Jones and their wives, naming all forming said corporation committed said crime, and is a corporation arrested by arresting its stockholders?

"Give me the form of complaint please in such a case. I have never yet prosecuted a corporation criminally.

2. Can the two husbands be legally arrested and brought into court and the two wives let alone, as they are mere figure heads in the matter and have nothing to do with the management of the corporation?"

In an opinion given you under date of Oct. 14, 1911, and published on page 178 of the Biennial Report of this department for 1912, you were given information regarding the criminal prosecution of corporations. That opinion referred to another, found on page 902, Biennial Report for 1908. The latter states:

14–A.G.
"Under sec. 4654, Stats. 1898, a district attorney may file an information without preliminary examination against corporations and fugitives from justice."

See also pages 171, 293 and 308, Report for 1912, and page 282, Report for 1908.

It follows that no criminal complaint is needed in prosecuting the corporation. The prosecution may be begun by the filing of the information. The method of service and further procedure is fully discussed in the opinion on page 902 of the report for 1908.

In an opinion to A. L. Stone, state seed inspector, under date of May 8th last, you will find this sentence, with reference to prosecutions under the section of the statutes to which you refer:

"If the sale is made by a corporation, of course not all of the stockholders would be liable. A corporation may be prosecuted criminally. In such case the corporation itself should be prosecuted and also the particular servant or agent making the sale."

In prosecuting the corporation it is not necessary to speak of the stockholders at all. Simply allege that the corporation sold, or offered for sale, as the case may be, the seed in question, in accordance with the facts. The prosecution against the officer, agent or servant of the corporation actively engaged in offering for sale, or selling, as the case may be, would be a separate prosecution, and should allege that the offering or the sale, was by him as representative of the corporation. So there is no need of bringing in the wives of these men, if the wives are mere stockholders and had nothing to do with the offer or the sale.

In an opinion given you under date of Nov. 3, 1910, and published on page 247 of the Biennial Report for 1912, this was said:

"It is not made the duty of this department by law to draft criminal complaints for district attorneys. * * * The department is kept very busy attending to those matters that are specifically prescribed for the attorney general to do, and we cannot do for district attorneys work that under the law it is their duty to do."

Owing to the vast amount of work pressing for attention, I must adhere strictly to the rule thus stated.
I have had referred to me for reply as to the legal questions asked, your letter to Dean Russell, dated May 25th last. The first of these propositions is:

"We have only justice of the peace courts here to try misdemeanors before, and their subpoenas are of force inside of Calumet county only. So if on such trial here we want to subpoena Lauerman Brothers, or anyone from outside the county on such trial we are at law powerless to do so, as justice’s subpoena is by law territorially limited to our county. How to get the legal, competent evidence here, if sale made here, I am at a loss to know if they will not voluntarily come."

The circuit court has jurisdiction also, (Report for 1908, p. 282), and its subpoenas are not limited territorially to an extent that should embarrass you at all in this prosecution.

The other questions of law referred to are quite fully covered by what I have already said.

I am indeed gratified that my letter to inspector Stone, to the effect that you ought to handle this case without my help, has amused you. You call attention to the fact that, if I am requested by the state seed inspector to do so, it is made my duty to enforce the provisions of this law. I commend your industry in carefully studying the provisions of the law, and would suggest that the same painstaking work in the conduct of prosecutions will doubtless lead to victory, without the need of sharing the honors with this department.

So, too, your caution in hesitating to put your county to the expense of these trials, without first being thoroughly prepared on every possible phase of the case, is praiseworthy. It is possible, however, to carry that caution too far. The ends of justice demand that prosecutions be brought promptly upon discovery being made that an offense has been committed. You are on the ground, and presumably are familiar with all of the facts. You should be able to determine where the prosecutions should be brought, and what evidence is required to sustain it. If prosecution is brought in the wrong county, because of lack of knowledge of the details of the sale, it ought at least to bring out such evidence as will enable the bringing of successful proceedings in the proper county. Furthermore, it seems likely that there was at least an offering for sale in Calumet county.
I am not convinced yet that you are right in your contention that the deputy inspectors cannot testify as to the contents of the labels. It would seem to me that as these labels, so far as they relate to the seed offered for sale, are in the possession of the accused, if he, or it, fails to produce them, the evidence of the deputy inspectors would be admissible.

To love one's neighbor as one's self is a divine command. Of course it is not pleasant for you to prosecute your next door neighbors, "the elite of the city," but one who takes a public office takes it *cum onere*, and a district attorney is in duty bound to prosecute all offenders, regardless of friendship or social standing. We all have disagreeable duties to perform, but the more vigorously we go at them, the sooner they cease to annoy us.

Nor do I feel that you need worry about a civil action for false imprisonment. Certainly if you proceed first against the corporation, which involves neither arrest nor imprisonment, there is little to fear from that source.

*Criminal Law*—When under sec. 697c, Stats., any person is sentenced to jail for an offense against the general laws of the state, such sentence must include the condition of hard labor.

June 10, 1914.

*Albert H. Smith,*  
*District Attorney,*  
*Merrill, Wis.*

In your letter of the 9th you state that you are having difficulty in getting a uniform interpretation of sec. 697c, Stats. That you have contended that the courts in sentencing persons to county jail under this section of the statutes must sentence them to such jail at hard labor as provided in par. 2 (a). That some of the courts in your locality have been interpreting the law to the end that where they fine the prisoner and then sentence him to the county jail until such fine and costs are paid, the sheriff is without power to place such prisoner out at work under the statute. You ask for my opinion upon the proper interpretation of this section.

Subsec. 1, sec. 697c, provides that upon the completion of a workhouse in any county the county clerk shall notify
each justice of the peace, police justice and the judge of every court held in the county, and "thereafter whenever any male person over sixteen years of age shall be convicted within such county of any offense of which a justice of the peace under the general law has jurisdiction to hear, try and determine or any person convicted in any court of any felony, where jail sentence is imposed by the court, he shall be punished by imprisonment in the workhouse or in the county jail as provided in the next subsection in the discretion of the court, at hard manual labor, and the commitment shall be to such workhouse at such hard manual labor."

Subsec. 2 (a) provides in part:

"In any county, having no workhouse, such sentence shall be to the county jail at hard labor. * * * * The court sentencing such persons shall have power at the time such sentence is imposed or at any time thereafter during the term of such sentence, to direct the kind of labor at which such person shall be employed and the nature of the care and treatment such person shall receive during such sentence. Such direction of such court shall be based upon a reasonable consideration of the health and training of such person and his ability to perform labor of various kinds and the ability of the sheriff to find and furnish various kinds of employment. The county jail of such county is extended to any place within the county where such work is so provided by the sheriff."

It would seem to me that this section is perfectly plain in its provisions. It provides that whenever any person is sentenced to jail the sentence shall include the condition of hard labor. Certainly one who is sentenced to jail in lieu of the payment of a fine, is sentenced to the county jail within the meaning of this section. In my opinion, whenever a person is sentenced to jail for the commission of any offense, the judge has no discretion in the matter but must sentence him to hard labor, even though such sentence to jail be in lieu of the payment of a fine.

In an opinion given to the district attorney of Price county, under date of Jan. 22nd, last, I held that when a justice of the peace sentenced an offender to the county jail, he had no discretion, but that such jail sentence must be at hard labor. The inquiry, which was the occasion of that opinion, did not raise the particular question that you raise, but
merely whether or not, generally, the justice had any jurisdiction. It seems to me, however, that the same line of reasoning is applicable here as there.

**Criminal Law—John Doe Proceeding—Witnesses—Privileged Communications—Physicians**—Under sec. 4776, Stats., the magistrate before whom complaint is made that an offense has been committed, may examine any witnesses supposed to have knowledge of the facts, to ascertain whether any offense has been committed, and, if so, by whom.

In such a proceeding a physician can not legally be permitted to testify the facts ascertained by him in his professional capacity, except in those prosecutions specifically referred to in secs. 4075 and 4078d, Stats.

**June 11, 1914.**

**JAMES KIRWAN,**

**District Attorney,**

Chilton, Wis.

In your letter of the 9th you state that a doctor who attended a case of childbirth says it is a married woman who gave birth to such child. That the town officers suspect that an unmarried female relative visiting said married woman is the mother of such child, and they ask you how to learn the facts, etc. You ask if a doctor attending such a case can be made to tell in a prosecution which woman is the mother of the child, he being the attending physician. You state that you do not think a doctor is privileged from answering about a crime even though he learn facts professionally as in this case.

Sec. 4776, Stats., provides:

"Upon complaint made to any such magistrate that a criminal offense has been committed, he shall examine, on oath, the complainant and any witness produced by him, and shall reduce the complaint to writing and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offense has been committed the magistrate shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before
the said magistrate, or before some other magistrate of the county, to be dealt with according to law; and in the same warrant may require the officer to summon such witnesses as shall be therein named to appear and give evidence on the examination."

In the case of State ex rel. Long v. Keyes, 75 Wis. 288, our supreme court held that this section authorizes the magistrate, upon complaint being made to him that an offense has been committed, to examine the complainant upon oath, and to subpoena such other witnesses as may have knowledge of the facts, or are supposed to have knowledge of the facts, and examine them for the purpose of discovering whether or not any offense has been committed, and if so, by whom. This authorizes the magistrate to proceed in this manner, although the person first complaining may not charge the offense to any particular person.

Sec. 1075, Stats., provides:

"No person duly authorized to practice physic or surgery shall be permitted to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon; but as a witness in his own behalf, he may disclose such information in any civil action brought by such patient or his legal representatives to recover damages for malpractice in such professional attendance, and also in any criminal prosecution for such malpractice, whenever such patient or his legal representatives shall have first given evidence relating to such information."

You will note that the physician is prohibited generally from testifying as to information acquired by him in his professional character. The section makes an exception of a certain class of civil actions and also makes an exception of a certain class of criminal prosecutions, neither one of which, as I understand it, is material to your query. The fact that such exceptions are made, strengthens the idea that would prevail without them, that the section is a general one, and applies both to civil actions and criminal prosecutions. Sec. 4078d provides that in prosecutions for certain offenses therein specified no person shall be excused or privileged from testifying fully under oath. I do not understand that this section has any application to your inquiry.
In my opinion the doctor in question is privileged from disclosing any information acquired by him in his professional character, in such an inquiry as you suggest.

Criminal Law—Courts—Juvenile Courts—Witnesses—Witnesses in proceedings in juvenile court under secs. 573-1, et seq., Stats., are to be paid the same fees, and in the same manner as witnesses in criminal proceedings.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

You state that a proceeding was brought under the juvenile court statutes against some minors for moral delinquency and ask whether or not the witnesses are entitled to be paid as witnesses in a criminal case.

Secs. 573-1, et seq., Stats., provide for juvenile courts. It is very clear from a reading of these sections that they contemplate a proceeding in court for the commitment of delinquent children. Sec. 573-2 provides for the designation of one of the judges of the several courts of record in each county whose duty it shall be to hear the cases coming under these several sections. The court may be known as the juvenile court or as the juvenile branch of the court. It is very evident that it is still the same court, but that a special proceeding is provided when the judge is sitting as judge of the juvenile branch. Secs. 4058 and 4059 provide for payment of witness fees to any witness appearing on behalf of the state in any civil action, matter or proceeding. Secs. 4060, 4061 and 4062 provide for payment of witness fees in criminal actions or proceedings. While the proceedings for commitment by the juvenile court are, perhaps, not strictly criminal proceedings, yet it appears to me that they are in the nature of criminal proceedings and I am satisfied that the witnesses in such proceedings are entitled to the same witness fees and are to be paid in the same manner as witnesses in criminal proceedings.
Criminal Law—Corporations—Information—Costs—An information charging a corporation with a violation of a criminal statute need not be sworn to.

Neither is it necessary that such information contain, or have served with it, a notice to appear within twenty days, under sec. 4734, Stats.

There is no state tax in criminal cases.

The costs to be taxed in a criminal prosecution of a corporation are the same as in a prosecution of an individual.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of the 9th you again refer to the prosecution of the Knauf & Tesch Co. under the provisions of secs. 1494x-1 to 1494x-16, Stats., inclusive. You ask if such information should be sworn to by any one, and also ask if it should contain in it or have attached to it any notice that the defendant must appear and answer within twenty days after service of such information upon it, or if an information in the usual form charging the offense, signed by you as district attorney, is all that is necessary to serve in such cases.

Sec. 4654, Stats., provides that an information may be filed against a corporation without first having a preliminary examination. Sec. 4657 gives a form for informations and sec. 4658 provides when these informations shall be considered sufficient. None of these sections seems to contemplate that the information shall be verified. Sec. 4734, Stats., provides:

"Whenever any corporation, private or municipal (which) shall have been indicted or informed against under the common law or under any statute of this state shall fail to appear after notice of such indictment or information, given and served by leaving a true copy of such indictment or information with the officers or persons upon whom the summons in a civil action against such corporation may be served, and twenty days shall have elapsed thereafter, the default of such corporation may be regarded, and the charges in such indictment or information shall be taken as true and judgment shall be rendered accordingly."

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You will note that this specifically provides that serving a true copy of the information is the giving of the notice required. No other notice need be given.

You also ask if there will be any state tax in such case. There is no state tax in criminal proceedings and this would be a criminal proceeding. You also ask if all of the costs will be the sheriff fees, clerk fees and fine, upon a plea of guilty. The costs will be the same as in any other criminal case in which the defendant pleads guilty. There will be no other or additional costs because the defendant happens to be a corporation.

Criminal Law—Physicians—Public Health—Sec. 4431b, Stats., was intended to prevent all splitting, or division, of fees by physicians and surgeons.

Such section construed as to its effect upon various practices by hospitals, physicians and surgeons.

June 15, 1914.

JAMES H. HILL,
District Attorney,
Baraboo, Wis.

In your letter of the 10th you enclose a letter written you by Ed. C. Gottry, attorney, of Reedsburg, in which he asks you to get my opinion upon a number of questions submitted by him upon the proper construction of sec. 4431b, Stats.

Ordinarily I do not give official advice upon matters that do not come before a district attorney in his official capacity. Where, however, the questions submitted relate to matters of public importance, and call for the construction of a statute that a district attorney is likely to be called upon at any time to enforce, I feel that it is not only proper but my duty to give him such aid as is in my power.

The first question submitted by Mr. Gottry is:

"Under the law as it now stands, can a surgeon, not a member of the regular staff of a hospital operate at such hospital for stated fee for the institution, and let the hospital collect the surgical fee from the patient according
to ability to pay with other hospital fees; the hospital paying the surgeon the fee agreed upon whether larger or smaller than the fee charged the patient by the hospital, or must the surgeon under the circumstances, charge the fee for the operation direct to the patient?"

Subsec. 1, sec. 4431b provides:

"Any physician or surgeon who shall claim or demand and collect and receive any money or other thing of value as compensation for his professional services in treating or operating upon a patient who was induced or advised by another physician or surgeon to submit to such treatment or operation, and who shall have previously paid or delivered, or shall thereafter pay or deliver, any money or other consideration to such other physician or surgeon or his agent, as compensation for such inducement or advice, or as compensation for assistance in the case, shall be guilty of a criminal fraud and upon a conviction thereof shall be punished," etc.

The object of this law, as I understand it, was to prevent the practice, which was alleged to have grown up in this state, of physicians and surgeons in the larger cities, paying fees or commissions to the country physicians and surgeons for inducing or advising patients to submit to operations or treatments by such city physicians and surgeons. Such fees or commissions were not for any services rendered to the patient, but purely a service rendered to the other physicians or surgeons in the way of sending them this business. Generally it was not known to the patient that this fee or commission was being paid. It was felt that this was an abuse, as it made it an inducement for the physician or surgeon first consulted to induce or advise the patient to submit to treatment or operation by the city physician or surgeon offering the largest fee or commission, regardless of his ability or skill. It would seem that it was intended not only to prevent the paying of these fees or commissions, but also to prevent the employment by one physician or surgeon of another, except, possibly, that one physician may employ another upon salary, and not to be paid a separate compensation for each case.

While the law does not specifically make it an offense for a hospital to employ a surgeon, not a member of its regular staff, to perform a particular operation, the hospital to make
its charge to the patient for such operation or treatment, and to make its charge for such service irrespective of the amount paid by it to the surgeon, yet it would seem to me that the evils incident to such a practice would be as great as in the case of fees splitting between two physicians or surgeons. It appears to me that this comes very close to the line, and I certainly should not want to advise any surgeon or hospital that it was not a violation of the law. I realize, however, that it might be a hard matter to secure conviction in such a case, unless it could be shown that some consideration was paid to the physician or surgeon bringing the patient to the hospital, with the knowledge of the physician or surgeon giving the treatment or performing the operation.

Mr. Gottry's second question is:

"Where a surgeon operates at a hospital in which he has a financial interest or in which he is part owner or sole owner but conducts the business in the name of the hospital must he make a separate charge for operation or may the whole charge be made by and in the name of the hospital?"

It would appear to me that the hospital may employ a physician or surgeon upon salary, and then make a contract with the patient to furnish him both medical or surgical treatment and hospital service. If this is done the entire charge could be made in the name of the hospital. If, however, the physician or surgeon is not paid a salary, but charges separately for each treatment or each operation, then, in my opinion, the safer practice is to make the charge direct to the patient and let the hospital make this charge to the patient.

The third question asked is:

"Can a surgeon who is not a resident of the city where the hospital is located and who does not hold himself out as a member of the staff of such hospital operate at such hospital and make a charge direct to the hospital under the existing law?"

The section referred to is a penal one and would be strictly construed. Such strict construction, however, should not be carried to the length of so construing the statute as not to carry out the purpose for which it was enacted. As was said by the court in the case of State v. Oredson, 105 N. W.
RELATING TO CRIMINAL LAW.

188, 96 Minn. 509, in speaking of a law prohibiting the practice of medicine or surgery without a license:

"The act is a beneficial one, and is entitled to a reasonable construction."

As stated above I believe the safer practice under such circumstances would be for the surgeon to make the charge direct to the patient.

Mr. Gottry's fourth question is:

"Where a country physician engages a surgeon to assist him in an operation at the home of the patient or at the residence of the country physician can the surgeon make his charge direct to the country physician engaging him or must he make a special contract with the patient?"

Here, too, it would appear to me that the safer practice would be for the surgeon assisting in the operation to make his charge direct to the patient. The statute specifically forbids the surgeon performing the operation to pay the physician or surgeon who induced or advised the patient to submit to the operation any money or other consideration either as compensation for such inducement or advice, or as compensation for assistance in the case. It would appear to me that the same reasoning would apply where the physician or surgeon advising or inducing the operation collects the entire fee and then pays the surgeon performing the operation.

This would seem to also answer the fifth question asked by Mr. Gottry, which is:

"Under conditions named in question 4, can the country physician make the contract with the surgeon or must the contract be made directly with the surgeon by the patient?"

It would seem that the only safe practice is for each physician or surgeon to contract direct with the patient. This would not prevent another physician or surgeon acting as agent of the patient in negotiating such a contract.

The sixth question is:

"Is a physician who brings a patient to a hospital for an operation or to a surgeon for an operation entitled to a
fee for assisting in such operation or for time spent in accompanying the patient to the hospital or place of operation?"

In my opinion the physician could make a charge for such services, but such charge should be made direct to the patient and not the surgeon or to the hospital.

This also answers the seventh question, which is:

"If the above question is answered in the affirmative, how can the charge be made and who should present the bill—the local physicians or the surgeon performing the operation?"

The eighth question is:

"Can a surgeon make a regular fee for operations to a physician, including fee for operating room, dressings, anaesthetic, etc., say from $5.00 to $100.00 for each case—irrespective of ability of the patient to pay and the physician in charge of the case collect his fee including such operating fee as he thinks right, the surgeon performing the operation doing the work for and on contract with the physician, the same as physicians frequently do work for factories and other employers of labor, charging a regular fee irrespective of ability of patient to pay?"

It appears to me that under this law it is illegal for one physician or surgeon to employ another physician or surgeon to treat a certain patient or perform a certain operation. If this is not the case, then the doors are wide open for evasion of the statute. It should be distinctly understood that for the treatment given or operation performed, the patient pays the only compensation that is received by the physician or surgeon giving the treatment or performing the operation, and that he pays no more than is received by such physician or surgeon. No intermediate physician or surgeon should either profit or lose by the services performed by such other physician or surgeon.

The ninth question is:

"If the surgeon or hospital charges a regular fee for operation to physicians, must the same fee be charged to patients who come for operation not accompanied by their physician, or can the surgeon or hospital make a charge suited to the ability of the patient to pay?"
As to the amount that may be charged by a surgeon or hospital, that relates purely to the civil liability of the patient to the hospital or surgeon, and in no way involves a construction of this statute and is not a question upon which I feel it my duty to give you advice. However, as stated above, no part of the fee received by the surgeon or hospital should be paid to the physician or surgeon inducing the patient to take such treatment or submit to such operation. Neither should the hospital charge the patient for such treatment or operation except where the surgeon performing the operation is a regular member of the staff of the hospital, and is compensated by it by a salary. In other cases the charge should be made direct to the patient by the surgeon performing the operation.

The tenth question is:

"If surgeons are permitted to contract with physicians for operations must they also contract for care after the operation, as when the surgeon runs a hospital, or may they charge according to the time patient remains and what services are rendered the patient?"

In my opinion surgeons are not permitted to contract with physicians for operations, and therefore this question does not call for any further answer.

The eleventh question is:

"In the above named case must the charge be made direct to the patient or can the charge be made to the physician who was the regular medical adviser of the patient?"

In my opinion the only safe practice is for the charge to be made direct to the patient.

The twelfth question is:

"Can a hospital make and collect for a surgical operation a fee for use of operating room, dressings, anaesthetic, services of nurses, etc., say from $5.00 to $25.00 for each case, and can attending physician later collect fee for operation when no fee was charged directly to the patient by the operating surgeon?"

I believe this question is answered by what has already been said herein. Neither physicians or surgeon can charge
the patient for services performed by the other. Each must make his own contract with the patient.

_Criminal Law—Corporations_—A stockholder in a corporation may also be an agent or servant of such corporation.

Where sec. 1636, Stats. is violated by a corporation, both the corporation and the person acting for it in making the sale are subject to criminal prosecution.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of the 11th you state that the dairy and food commissioner has made application to arrest one of the stockholders of a certain corporation for violation of sec. 1636, Stats.

You ask if this person is legally liable to arrest and criminal prosecution personally in justice court for such offense, notwithstanding that he is one of the stockholders in said corporation, and further ask if the corporation itself alone may be legally proceeded against. You further ask if such corporation is liable. You also ask if the said stockholder, if liable to arrest at all, must be arrested as "the agent and servant of said" corporation. Also how can a member of a corporation be the servant and agent of such corporation? You also ask if under sec. 1636 both the person making the sale and the corporation itself are liable and you ask if this would not be two prosecutions for the same offense and barred.

In the opinion found on page 308 of the Report of the Attorney General for 1912, to which you refer, it is expressly held that the corporation itself would be liable in a case of a sale of this kind. The very last sentence of that opinion states:

"However, it is the safer, and the more effective plan in ordinary cases when the guilt is personal, to proceed against the individual."

There is absolutely nothing to prevent the prosecution of the person actually making the sale. The section expressly
prohibits the sale of adulterated linseed oil by any "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."

There can be no question that a stockholder of a corporation, who is actively engaged in the business of the corporation, is the servant or agent of such corporation. That is fundamental. The corporation is one entity, each individual stockholder a different entity. It would be an offense for the individual making the sale, and it would be a separate offense for the corporation, as that also makes the sale through its agent or servant.

In the opinion given to you under date of June 2nd, last, I quoted from an opinion to A. L. Stone, state seed inspector, as follows:

"If the sale is made by a corporation, of course not all of the stockholders would be liable. A corporation may be prosecuted criminally. In such case the corporation itself should be prosecuted and also the particular servant or agent making the sale."

This, perhaps, was stating the matter a little bit strongly. In many cases I can see that it might not be advisable to bring two prosecutions for the one sale. Perhaps in most cases, if the person making the sale is prosecuted criminally, it is not advisable to also prosecute the corporation. This is especially true where the person prosecuted is one of the principal officers and stockholders of the corporation.

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*Criminal Law—Bail*—Upon default of a person charged with crime, and under recognizance, the magistrate should record such default.

His failure so to do, and proceeding to bind the defendant over, would not, however, release the bondsman.

June 26, 1914.

L. Olson Ellis,
District Attorney,
Black River Falls, Wis.

In your letter of the 20th you state that a party was arrested for the crime of arson and that when he was brought
before the magistrate he asked for a week's adjournment and gave bail in the sum of $400.00. That he failed to appear on the adjourned day and as yet has not been found. That with the consent of his attorney the examination of the state's witnesses was proceeded with, and the case was adjourned until the 22nd day of July, in order to give the bondsman an opportunity to find him. You ask if, in the event that he is not brought into court on the next adjourned day, the bond must not be declared forfeited before he is bound over. Also if the binding over without forfeiting the bond releases the bondsman.

Sec. 4804, Stats., prescribes the procedure where any person under recognizance in any criminal prosecution fails to perform the condition of such recognizance.

Sec. 4807, Stats., provides:

"No such action brought on a recognizance as mentioned in the preceding section shall be barred or defeated nor shall judgment thereon be arrested by reason of any neglect or omission to note or record the default of any principal or surety at the term when such default shall happen, nor by reason of any defect in the form of the recognizance, if it sufficiently appear from the tenor thereof at what court the party or witness was bound to appear and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance."

In my opinion the magistrate should record the default of the defendant before binding him over to the circuit court. His failure to do so, however, would not, in my opinion, release the bondsman.

The only case I have found in which these sections are referred to is that of the State v. Wettstein, 64 Wis. 234. A reading of this case will probably give you some idea of how to proceed in the matter.
Criminal Law—Abandonment—Requisitions—Where, in divorce proceedings, the custody of a minor child is awarded to the mother, with a provision for payment by the father of fixed amounts for its support, failure to pay such support money constitutes abandonment under sec. 4587c, Stats.

Where such judgment provides for custody of the child by the father upon the happening of certain events, failure of the father to demand such custody does not constitute abandonment.

If the father is not in the state when failure to pay the support money occurs, requisition will not be issued.

June 30, 1914.

GAD JONES,
District Attorney,
Wautoma, Wis.

In your letter of the 29th you state that in the year 1905 a divorce was granted to one Lulu Darling against her husband, Albert E. Darling, and the custody of the minor child was awarded to the wife, and the husband was directed to pay to the wife for the care and support of the child the sum of two dollars per week. That Mr. Darling has, subsequent to the granting of the divorce judgment, sought to regain possession of the child and has offered to provide a home for it in his own home or in the home of his father. That there is no question but that the child will be provided with the necessaries of life if delivered to the husband.

That in 1908 the court denied the application of Mr. Darling for a modification of the judgment and the custody of the child was again awarded to the mother. That at the time this last order was made the child was staying with Mr. Darling’s parents. That at the hearing it appeared that the mother of the child was at times insane and confined in the Northern Hospital for the Insane at Winnebago, and that at times she was permitted to go at large on parole. That the court ordered that the mother be granted the custody of the child during the times that she should be out from the institution on parole, but that while she should be confined in the insane asylum, the custody of the child should belong to the father. That immediately after this judgment was entered the mother demanded that the child be given to her as she was out from the hospital on parole and the child was
surrendered by the defendant's parents to her. That the husband has neglected and refused to pay the money ordered by the court to be paid to the mother for the support of this child, and that in the year 1911 he left the state of Wisconsin and went to the state of Minnesota. That in March, 1913, the mother was returned to the Northern Hospital and the child remained with her mother's relatives. That the father has made no effort to get possession of the child since the mother was returned to the Northern Hospital nor have the relatives offered to surrender the child to the father. You ask these questions:

"First: Is the neglect and refusal of the father to pay the $2.00 per week as ordered by the court for the support of this child, a violation of sec. 4587c, conceding that the father was, at the time of such refusal, ready and willing to provide the necessaries of life for the child in his own home or in the home of his parents?

"Second: Did the father commit the crime of abandonment under sec. 4587c by neglecting to send for his child when the mother was returned to the hospital in 1913; and assuming that he was in Minnesota at the time and has remained there ever since, can he be brought back to Wisconsin on requisition for such crime committed while he was in the state of Minnesota?"

You are referred to an opinion to Governor McGovern under date of Sept. 25th, 1913, which answers your first question in the affirmative. I see no reason at this time for coming to a different conclusion.

Your second question is not altogether free from difficulty. It appears to me, however, that it was not made the duty of the father to send for his child when the mother was returned to the hospital. That fact, alone, in my mind would not constitute the offense of abandonment.

It is a fundamental principle of the law of interstate extradition that the person demanded must be a fugitive from justice. To constitute him such fugitive he must have been in the state demanding him at the time the offense is alleged to have been committed. If in this case Mr. Darling was in the state of Minnesota at the time the abandonment is alleged to have occurred, then, in my opinion, he cannot be returned to this state upon the extradition proceedings.
Criminal Law—Embezzlement—Where one of the joint owners of a debt collects the entire debt and converts it to his own use he is guilty of embezzlement. One charged with the offense of embezzlement may be prosecuted in any county in which he had possession of the property embezzled.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

July 2, 1914.

In your letter of the 1st you state that B gave a chattel mortgage to A to secure the payment of $500.00 to A and of certain interest on a real estate mortgage to C. That A foreclosed the chattel mortgage, sold the property and kept all of the money derived from such sale, refusing to pay B the amount of money that is due him as interest. That such sale was held in Chippewa county on the 15th of April. That A on that day took all of the money and went to Eau Claire with it. That the interest on the real estate mortgage became due on the 15th day of June. That the owner of the real estate and B [C] demanded of A that he pay the money to one of the parties, and that A refused to do so. You state that the mortgage ran to A, he apparently having the right to hold the money until the interest was due on the real estate mortgage, and the matter was so held by all the parties, but that when he failed to pay the money that rightfully belonged to C they came to you and asked that criminal prosecution be instituted. You ask what criminal offense, if any, A is guilty of, and where he should be prosecuted, whether in Eau Claire or Chippewa county.

It would appear to me from your statement of facts that the money realized from the sale of the personal property was a joint fund, in which both A and C had an interest. In my opinion it is not a case of mere breach of contract on the part of A. I do not believe that the relationship of debtor and creditor was created between A and C, but that A was either a bailee for C, or held the entire fund by virtue of his interest in it, C also having an interest.

Sec. 4418, Stats., provides in part:

"Any person who is a member of any copartnership or one of two or more beneficial owners of any property speci-
fied in this section, or of any property or thing which is the subject of larceny, who shall embezzle or fraudulently convert to his own use or to the use of any other person, except the other members of such copartnership or the other beneficial owners of such property or thing, or who shall take, carry away or secrete with intent to convert to his own use or to the use of any other person, except as afore-said, any such property or thing, shall be punished as provided in this section the same as if he had not been or was not a member of such copartnership or one of such beneficial owners."

In my opinion this section is applicable to the facts stated by you, and A would be guilty of embezzlement.

The same section contains the following provision:

"The offense of embezzlement may be prosecuted and punished in any county in which the person charged had possession of the property or thing alleged to have been embezzled."

I believe that A could be prosecuted in either of the two counties. According to your statement of facts he had possession of the money in Chippewa county, and also had possession of it in Eau Claire county.

_Criminal Laws—Arrest—Under sec. 4974, Stats., one may be convicted under sec. 4416, Stats., for a crime committed when that section was in force even though it has since been repealed._

One about to be discharged from the state prison may be arrested for another crime as soon as he is discharged, even within the confines of the prison.

_James Kirwan,_
_District Attorney,_
_Chilton, Wis._

In your letter of July 6th you state that on Dec. 2, 1910, a man stole a horse valued at $200.00 in Calumet county, at which time sec. 4416, Stats. 1898, was in force. This section was repealed by ch. 173, laws of 1913, and you request my opinion as to whether such person may now be prosecuted under the section referred to.

Sec. 4974, Stats., provides in part that:
"The repeal of a statute hereafter shall not remit, defeat or impair any civil or criminal liability for offenses committed under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal."

You also ask where the sheriff can legally arrest a man who is about to be discharged from the state's prison having fully served his present term therein—whether he may be so arrested as soon as the warden in his office tells him he is discharged or as soon as the convict steps out of the state prison into the yard around the building, or whether the sheriff must wait until the convict is outside the prison grounds gate.

While a hasty search reveals no authority on the question, I am of the opinion that as soon as the convict is discharged he is subject to arrest for another crime. While he may be, in fact, within the walls of the state prison, it seems clear that he is a free man from the moment of his discharge and no more immune from arrest than any other person charged with crime who might be temporarily within the confines of the state prison. The sheriff would have no right to take the prisoner from the custody of the warden of the state prison but as soon as the warden has relinquished his authority there can be no objection on the part of anyone to the prisoner being immediately retaken pursuant to some other authority.

Criminal Law—Pure Food—Penal and Charitable Institutions—Sec. 4607e does not apply to the industrial school for girls in Milwaukee.

JOHN S. DONALD,
Secretary of State.

In your letter of Aug. 12th you say that you are in receipt of bills from the Wisconsin industrial school for girls at Milwaukee; that among other claims there is one of $93 for butterine; you direct my attention to sec. 4607e, Stats., and you inquire whether it applies to the Wisconsin industrial school for girls at Milwaukee.
Said sec. provides as follows:

"Any person who shall knowingly or negligently buy or procure for use as food in any of the charitable, correctional or penal institutions of this state any butter or cheese not made wholly and directly from pure milk or cream, salt and harmless coloring matter shall be fined not exceeding fifty dollars nor less than twenty-five dollars for the first offense, and for each subsequent offense shall be punished by imprisonment in the county jail not more than ninety days nor less than ten days, or by fine not exceeding one hundred dollars nor less than fifty dollars, or by both fine and imprisonment."

The Wisconsin industrial school for girls is a private institution to which courts may commit girls for the offense of vagrancy, under sec. 1547, and juvenile courts may commit children, under sec. 573-6. The state makes appropriations to this institution and all its receipts are paid into the state treasury and all bills of the institution are paid as other bills of the state in accordance with secs. 145 and 146, Stats. Nevertheless, this institution is a corporation duly incorporated under our laws and is considered a private institution and was so designated by our supreme court in the case of Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651.

Sec. 4607e, above quoted, applies to "charitable, correctional or penal institutions of this state." This is a penal statute and must be strictly construed against the state. I believe it applies strictly to state institutions. Had the legislature intended to make it applicable to private institutions it would have used the words "charitable, correctional or penal institutions in this state," using the preposition "in" instead of "of."

The fact that public funds are donated to this institution is not a determining factor; neither is the fact that girls may be committed to the institution by our courts. Private institutions are often used as an appropriate means to perform a public function and appropriations are often made to private institutions to be used for a public purpose. You are, therefore, advised that said sec. 4607e does not apply to the Wisconsin industrial school for girls.
Relating to Criminal Law.

Criminal Law—A party who shot two boys who trespassed on his land for the purpose of stealing a few apples should be charged with assault regardless of life, under sec. 4374a.

Clive J. Strang,
District Attorney,
Grantsburg, Wis.

In your letter of the 8th inst. you submit the following:

“A short time ago two boys entered a neighbor’s orchard to steal a few apples. The owner was expecting boys around about that time as his apples were getting ripe so he placed himself under one of the trees and waited for anybody that might come to take his apples. The boys came up to the very tree that the owner was under and before they had touched an apple he began shooting at the boys and they immediately broke and ran for home. Five shots were fired at them by the owner of the apples, one striking one boy before he had reached the highway, the last shot hitting the other boy after he was in the highway running for home. Under the circumstances that the boys were bent on stealing was the owner of the apples justified in shooting, while the boys were on his land and if so was he after they reached the highway?”

From the foregoing it appears that the boys in question were trespassers on his land with the intention of committing a misdemeanor and he had the right to use reasonable force necessary to eject them from his premises, but he must be careful not to exceed the bounds of reasonable force for if he does he will be guilty of an assault. See 2 Am. & Eng. Ency. of Law (2nd ed.) p. 987, and cases cited under note 1. I believe the party in question should be charged with assault regardless of life under sec. 4374a, Stats., which reads as follows:

“Any person who shall assault another in a manner evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person assaulted and under such circumstances that if death had resulted the assailant would have been guilty of murder in the second degree, shall be punished by imprisonment in the state prison not more than eight years nor less than one year.”
Criminal Law—Eight Hour Law—A contractor on public work cannot permit the men to work more than eight hours per day even though they are anxious to do so.

September 11, 1914.

A. J. O'Melia,
District Attorney,
Rhinelander, Wis.

In your communication of the 9th inst. you call attention to sec. 1729m and state that:

"A contractor is erecting a public building for the state under a contract which provides that he shall not violate sec. 1729m. The building is being erected in the country where the men are removed from everything but their work. The contractor would like to have the men work more than eight hours a day and is willing, of course, to pay for every hour. The men are very anxious to work more than eight hours. They could earn about $30.00 more a week if permitted to work 10 hours a day; they would prefer to work for many other reasons."

You ask whether the contractor may permit his men to work more than eight hours per day where they so request and are paid for such extra time.

Subsec. 1, sec. 1729m, provides as follows:

"1. 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 a 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."

Subsec. 3, sec. 1729n, provides as follows:

"3. Any contractor, subcontractor, corporation, copartnership, firm or person, or any agent thereof, who after executing a contract under the provisions of sections 1729m and 1729n of the statutes shall allow or permit any laborer, workman or mechanic in his, its or their employ, or in the
employment of any contractor, subcontractor, agent or other person under his, its or their control or direction, to work more than eight hours in any one calendar day, except in cases of extraordinary emergencies, shall be deemed to have violated the provisions of sections 1729m and 1729n of the statutes and shall be subject to the punishment herein provided for."

The sections above quoted clearly and explicitly prohibit any contractor from permitting his men to work on the class of public buildings therein enumerated more than eight hours per day. His liability to the penalty therein denounced would not be affected by the fact that the men were willing and anxious to work. The law is a declaration of state policy and was not intended merely for the benefit of the men working on that particular job. In my judgment it was passed in recognition of the contention made by a considerable portion of the laboring men of the state for an eight-hour day. Not only the men working on this particular job, but all other men in the state are interested in having this statute enforced and it was passed as much for the benefit of the laboring men generally as for the benefit of the laboring men engaged on the specific job.

Of course, the language of the statute is not at all susceptible to the construction suggested. It is explicit and imperative that no contractor shall "allow or permit any laborer, workman or mechanic in his, its or their employ * * * to work more than eight hours in any one calendar day," etc. It was not intended that the matter should be left to private arrangement between the immediate parties affected. If such were to be the construction of this law, then the women's hours of labor law and the child's hours of labor law would be susceptible to the same sort of construction and the evils sought to be remedied by those laws would not be reached at all because women will always be found who are willing to work longer than the law prescribes and so with many parents of children. These laws are prescribed for the benefit of the race and they cannot be nullified by private agreement between employer and employee.

It is my opinion, therefore, that upon the state of facts submitted in your communication, the contractor would incur the penalties of this law were he to permit the men to work on this job more than eight hours a day, which lia-
bility cannot be evaded by any private contract or arrange-
ment between him and the men employed.

Criminal Law—Fraud—Confidence Game—Obtaining money under false pretenses. Facts held not sufficient to warrant prosecution. Secs. 4423, 4430, 4568m.

ALEXANDER WILEY, District Attorney, Chippewa Falls, Wis.

Sept. 15, 1914.

Your letter of the 8th inst., addressed to this office, and submitting a form of special dealer’s contract and appoint-
ment and special dealer’s agreement, together with facts stated in your letter, has been given careful attention and every effort has been made to find some reported case in the state law library which might assist you should you de-
cide that the facts recited warrant a prosecution under sec. 4568m, relating to confidence games, or sec. 4423, relating to the obtaining of money by false pretenses, or sec. 4430, relating to criminal frauds.

Sec. 4568m, the one referred to in your letter, was enacted in 1913. See ch. 476, laws for that year. It has not received any judicial construction by our supreme court, and I can-
ot refer you to any prosecutions under this section by any of the district attorneys of this state.

This statute, sec. 4568m, was copied literally from the criminal code of the state of Illinois and is known there as sec. 3655, and while numerous prosecutions thereunder are reported in the reports of that state, I have not found any case which is at all similar to the facts stated in your inquiry.

It has been held by the Illinois court that this statute “is violated whenever one, by his conduct, leads another to repose confidence in him and obtains his money or property by a betrayal of confidence.” Hughes v. People, 223 Ill. 417; People v. Poindexter, 243 Ill. 68.

In Hughes v. People, supra, it was further held that a “confidence game includes advertising schemes whereby a victim is being employed in a legitimate business.”
"The fact that dealings have assumed a form of business transaction does not preclude a conviction."  *People v. Weil*, 243 Ill. 208, 134 Am. St. 357.

"Fact that contract is legally binding is no defense if it was designed to perpetrate fraud."  *People v. Depew*, 237 Ill. 574.

In  *People v. Poindexter*, supra, a "confidence game" was defined as "any scheme whereby a swindler wins the confidence of his victim, and swindles him out of his money by taking advantage of such confidence."

In a Colorado case,  *Elliot v. People*, 138 Pac. 39, that court said:

"A confidence game means, generally speaking, a swindling operation by which advantage is taken of the confidence reposed in a swindler; the obtaining of money by the means or use of something false. * * * It includes all swindles perpetrated by any fraudulent device which is used to gain the confidence of the person defrauded."

A confidence game is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler, and the fact that the transaction is made to assume the form of a legitimate contract is not material, if in fact it is a swindling operation.  *People v. Depew*, supra.  See also  *People v. Talmadge*, 233 Ill. 560, 84 N. E. 655;  *People v. Turpin*, 233 Ill. 452, 84 N. E. 679.

On the other hand it has been held that this "statute does not cover business transactions between parties on equal footing."  *People v. Turpin*, 233 Ill. 452, 17 L. R. A. (N. S.) 276.

From the investigation made, I have reluctantly reached the conclusion that the facts mentioned in your letter cannot form the basis of a successful prosecution against the parties who secured the signature of some of your citizens to said form of contract; at least not under sec. 4568m. I would suggest, however, that you investigate further and see whether you cannot secure additional evidence which will warrant a prosecution for obtaining money by false pretenses under sec. 4423.
In your letter of the 11th inst. you refer to the statutes relating to fish and game and your inquiries are here restated as follows:

1. Has a deputy state game warden the legal right to appear in justice's court for the state, represent the state and enter into stipulations with the defendant in the action (a) for a number of adjournments, and (b) take the note of the defendant made payable to the justice of the peace instead of a bond of the defendant to secure his future appearance in said court?

2. In case the defendant does not appear on the adjourned day what, if anything, can be done with said note?

3. Is such game warden legally entitled to travel fees on a warrant served by him the same as a constable in a prosecution for violation of the fish and game laws?

In answer to the first proposition it is my opinion that it is the duty of the deputy state game warden to appear and prosecute all violations of the criminal statutes relating to fish and game, and that it is not necessary for him to be represented by an attorney, although it is made the duty of the district attorney to appear and prosecute such actions if his presence at the trial shall be deemed necessary by the magistrate before whom it is pending. See secs. 1498 and 1498g.

In answer to 1 (a) it is my opinion that he has the right to stipulate that the defendant have an adjournment or adjournments of the trial, and 1 (b) that he has not the right to agree to take the note of the defendant instead of the bond or cash deposit prescribed by law under sec. 4745, 4746 and 4816.
As to the second proposition it is my opinion that the state is unable to bring any action on the note.

As to the third proposition it is my opinion that a game warden is entitled to the same fees as constables are entitled to when rendering similar services, and that a game warden comes within the meaning of sec. 844, which reads as follows:

"When the services in the last section mentioned are performed by any other person except a party to the action, the same fees shall be allowed as constables are entitled to receive and no more."

I understand that it is the practice of the deputy game warden to remit to the state game warden all fees taxed, allowed and collected by him in rendering such official services, and that said fees are by the state game warden turned into the state treasury—all of which conforms to an opinion rendered by this department to John A. Sholts, state fish and game warden, Oct. 10, 1913.

_Criminal Law—Security for Costs_—A complaint in a criminal prosecution under sec. 4438b for "jumping a board bill" is required to give security for costs so as to prevent him from settling the case without paying them.

Sept. 23, 1914.

CHARLES KIRWAN,
District Attorney,
Ladysmith, Wis.

In your letter of the 21st inst. you refer to sec. 4438b, Stats., and you state that a justice of the peace in your county has issued his warrant for the arrest of a person accused of what is popularly called "jumping his board bill;" that the justice has required the complainant to give security for costs; that the defendant was fined and sent to jail, as he did not pay or offer to pay the costs of the board bill. You submit the following questions:

"1. Is not the complainant liable for the costs under the security given by him?"
“2. Cannot the complainant also be compelled to pay the county for the board of the defendant while he is in jail?”

Said sec. 4438b provides as follows:

“Any person who obtains any food or accommodation at any hotel or inn without paying therefor, except when credit is given by express agreement, with intent to defraud the proprietor or manager thereof, or who obtains credit at any hotel or inn by the use of any false show or pretense, or who, after obtaining credit or accommodation thereat, absconds or surreptitiously removes his baggage therefrom without paying for his food and accommodation, shall be punished by fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding three months. The complainant shall be required to give security for costs, and if he neglect or refuse so to do no warrant shall be issued. Actions commenced under this section shall not be settled or compromised in any manner unless the costs incurred up to the time of such settlement or compromise are fully paid and discharged, and if any settlement or compromise be made without such costs being so paid the court before whom such action is brought or pending shall enter judgment against the complainant for the full amount of any costs remaining unpaid.”

This statute describes a criminal offense and a criminal prosecution may be had to convict the person who violates its provisions. Originally the section did not contain the provision requiring the complainant to give security for costs. This was inserted in ch. 197, laws of 1897.

I believe that the purpose of the provision requiring the complainant to give security for costs is to prevent him from making a settlement or compromise with the defendant without the costs incurred being paid. I believe the only reason for inserting this provision requiring a security for costs is the one mentioned in the statute. Undoubtedly it was found by experience that hotel keepers would make settlements with the defendant and accept the board bill after the prosecution was commenced and this provision aims to prevent this. There is no reason why a complaining witness in an offense mentioned in sec. 4438b should be required to pay the costs, as a general rule, any more than a complaining witness in any other criminal case. I am, therefore, constrained to answer both of your questions in the negative.
RELATING TO CRIMINAL LAW.

Criminal Law—Public Officers—Appeal from justice's court. Fees of justice or officer, how paid on a settlement. Secs. 677; 678; 679; 680; 681; 740; 4717, Stats.

Sept. 25, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

I have your request dated the 24th inst. for an opinion on a state of facts, restated substantially as follows:

Three months ago a man was convicted in a justice's court of Calumet county on a charge of assault and battery and was sentenced to pay a fine and the costs of prosecution. The man took an appeal to the circuit court according to law. Last week he appeared in the office of the clerk of court and paid the fine and costs imposed by the judgment and sentence of the justice of the peace and also the fees of the clerk of said court incurred since the filing of the appeal. The clerk of court took out his own fees and paid said fine and other costs to the county treasurer and took duplicate receipts therefor, one of which said receipts he filed with the county clerk.

I am assuming that the defendant gave a recognizance for his appearance in the circuit court, and that there was no new judgment and sentence by the circuit court.

Upon these facts you desire an opinion on the following proposition: Was it the duty of the clerk of the court to pay over to the justice, the sheriff and the witnesses, respectively, the fees allowed to them and taxed to them in justices court, or must they await the action of the county board, and is it the duty of said justice to file an itemized statement of his claim for fees and certify to the lawful fees of the sheriff and of the witnesses in said action?

Before giving an opinion upon these queries I must state that the clerk of said court had no authority to accept from the defendant the fine and costs imposed by the justice, and the defendant by paying said fine and costs to the clerk of said court has not been legally discharged and must answer according to the recognizance given by him or be judged in default. See sec. 4717. What further action is to be taken in the case will rest with you and the court. Assuming that
you and the court are satisfied to leave the matter rest
where it is, then it is my opinion that the clerk has properly
and legally disposed of the fine and costs in compliance with
his own bond. See sec. 740.

The justice and sheriff must each file a claim for their fees
in said action with the county clerk of said county at least
ten days before the annual meeting of the county board,
said claims to be audited and allowed by said board accord-
ing to sec. 678. See also sec. 4715.

The justice must present and file his claim for fees accord-
ing to sec. 679.

The sheriff must file an itemized statement of his claim
with said clerk according to sec. 677, and the justice of the
peace must make out a statement of the sheriff's fees in
said action and certify thereto according to sec. 680.

It is the duty of the justice of the peace to certify to the
fees of the witnesses in said case according to sec. 681.

Criminal Law—Prisoners—A person who has been ad-
judged guilty under sec. 4761, Stats., may be committed be-
fore he has filed his appeal bond.

A person who serves part of his sentence in jail and then
pays fine and costs need not pay for jail board as part of the
costs.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of Sept. 24th you direct my attention to
sec. 4761, Stats. and you inquire whether a party who has
been found guilty in a criminal prosecution before a justice
of the peace may be committed to the jail before he has filed
his notice of appeal, for which he has five days, under said
section.

Said sec. 4761 provides in part as follows:

"Any person desiring to appeal from any sentence or
judgment of conviction against him shall give said justice
notice thereof in writing, within five days, and thereupon the defendant shall be committed or enter into recognizance, and further proceedings shall be had upon such appeal as provided in chapter 192."

Sec. 4759 to which you also refer provides as follows:

"Whenever the accused shall be tried under the preceding provisions of this chapter and found guilty, either by the court or by the jury, or shall be convicted of the charge made against him upon a plea of guilty, the court shall render judgment thereon and inflict such punishment, either by fine or imprisonment, or both, as the nature of the case may require; but such punishment shall in no case exceed the limit fixed by law for the offense charged."

Sec. 4714, being part of ch. 192, to which reference is made in said sec. 4761, provides as follows:

"Every person convicted before a justice of the peace of any offense may appeal from the sentence to the circuit court then next to be held in the same county, and such appellant shall be committed to abide the sentence of said justice until he shall recognize to the state of Wisconsin in such reasonable sum, with such sureties as said justice shall require, with condition to appear at the court appealed to and there to prosecute his appeal and to abide the sentence of the court thereon and in the meantime to keep the peace and be of good behavior."

It has been the universal practice in this state, and I believe the correct practice, to sentence a person after conviction without reference to the time when the defendant served his notice of appeal. It is true that sec. 4761 says that after the notice is given "thereupon the defendant shall be committed or enter into recognizance," etc., using the word "thereupon" which might give color to the contention that the defendant could not be committed to jail prior to his notice of appeal, but I find that the history of the section shows that in sec. 21, ch. 121, Stats. 1858, the word "thereupon" is not used, but the statutes at that time required the recognizance to be made within twenty-four hours of the sentence. The revisers in 1878 changed the wording of the statutes to the effect that the notice was required to be made within twenty-four hours, but the recognizance could be made thereafter, and for that purpose used
the word "thereupon" as we find it in the statute at this time.

I am of the opinion that the defendant may be committed under the above quoted sections of the statutes immediately after he has plead guilty or after he has been found guilty by the verdict of a jury or by the court.

You also inquire whether a defendant who after being in jail some five weeks and who pays up his fine and costs imposed upon him, from which he did not appeal, may legally be charged for his board as a part of the costs, to reimburse the jailer for keeping him in jail.

I believe this question must be answered in the negative. The county has no additional costs by reason of the fact that the defendant was boarded at the jail for five weeks. The jailer is compensated for boarding the prisoners and he has already been compensated or will be compensated by the county under the contract entered into with the jailer or sheriff.

Criminal Law—Escape of Prisoners—A prisoner in state's prison who while out of prison on a writ of habeas corpus ad testificandum escaped is guilty of escape from prison under sec. 4490, Stats.

Sept. 30, 1914.

M. J. TAPPINS, Secy.,
State Board of Control.

In your communication of the 28th inst. you state that one George Ladusire was sentenced to the state prison on June 18, 1912, by the county court of Oneida county for the term of one year for larceny; that on Sept. 23, 1912, the circuit court of Oneida county issued a writ of habeas corpus ad testificandum; that in obedience to the order Ladusire was sent to Rhinelander in the custody of Charles Clover, an officer of the prison; that on Sept. 26th Ladusire escaped from the officer, but was apprehended at Richmond, Cal., and returned to the prison on Feb. 17, 1914; that deducting good time earned at the time of his escape his term will expire on Oct. 27, 1914.

You inquire whether Ladusire could be prosecuted and convicted for escaping from the prison.
In answer I will say that Ladusire could not be convicted under sec. 4494 for breaking prison for he is not guilty of breaking prison under the facts stated by you. The question is, can he be convicted under sec. 4490. This section provides:

“Any convict committed to the state prison or house of correction of Milwaukee county convicted of a crime punishable by imprisonment in the state prison, under sentence for a limited time, who shall escape therefrom, or attempt by violence to escape, or assault the warden or other officer or person employed in the government or custody of, or in any other capacity in said prison or house of correction of Milwaukee county shall be punished by imprisonment in said prison or house of correction of Milwaukee county not more than ten years in addition to his former sentence, and also by solitary confinement of not more than one year, at such time or times as the court shall direct, and if said convict is under sentence of imprisonment for life he shall be punished by solitary confinement at such time or times as the court shall direct.”

Under the facts stated by you, Mr. Ladusire was lawfully taken by the prison officials under a writ of habeas corpus ad testificandum away from the prison proper, but he was still in the custody of the prison official, and he was serving part of a sentence in the state’s prison at the time when he escaped. I believe, in contemplation of this statute, it can be said that he escaped from the prison.

Under sec. 4927 a convict who is put to work outside of the prison yard and escapes “shall be deemed to have escaped from prison proper.” I believe this law is simply affirmative of the common law and that the same rule will apply to Mr. Ladusire under the facts submitted by you.

In the case of Saylor v. Commonwealth and Smith v. Commonwealth, 93 S. W. (Ky.) 48, it was held that where prisoners in custody of a jailer fled from him while being worked on a highway, as the jailer was authorized to do, such flight constituted an escape to the same extent as though he had escaped from jail.

The statute of Kentucky provides that:

“If a prisoner confined on a sentence of imprisonment escapes jail, or if a person lawfully arrested under a charge
for a violation of the criminal or penal law forcibly effects his escape from the officer or court, he shall be confined in jail,” etc.

The court said:

“The appellants though not in jail were in the custody of the jailer and when they escaped from the guard by running away from him they escaped from jail. The jailer is authorized by the statute to work the prisoners on the highway and while there they are as fully in his custody as when actually in jail. To escape from the custody of the jailer is to escape from jail within the meaning of the statutes.”

In the case of State v. Wright, 81 Vt. 881, 59 Atl. 761, it was held that in a prosecution for an escape it was no defense that defendant left the jail under orders to work at a certain place and that being without a guard he left such place.

In the case of Jenks v. State, 39 S. W. (Ark.) 361, it was held that a convict who is serving his term of imprisonment and is required to remain within certain bounds and obey prison rules, is guilty of escape in fleeing from the state, though he had been made a “trusty” and was not confined within the prison walls or kept under guard.

Our court has not passed upon this question, but under the above authorities I believe that your question must be answered in the affirmative.

Criminal Law—Foreign Corporations—A foreign corporation may be criminally prosecuted and its agent also for the same act.

DAVID BOGUE,
District Attorney,
Portage, Wis.

October 7, 1914.

Under date of the 5th inst. you state that a corporation organized under the Illinois law and operating in Illinois ships oil billed to itself to Portage, Wis.; that the agent of the corporation at Portage resells this to local parties, claiming that the gasoline sold by him tests 70 when in fact it actually tests only 50; that this oil is sold by the agent in
the name of the corporation and is sold without the inspector's
tag required by law. You submit the following questions:

“A. Is there any method of reaching the corporation?
  “B. Is its agent criminally liable?
  “C. Can the oil sold without inspection be seized and held?
  “D. If the oil sold without inspection and not paid for
is seized by the officers who would have a right to take it
away from the officer? Would the foreign corporation
through breaking the law have any standing in our court
on such a question?”

In answer to your first question I will call your attention
to sec. 4654 in which a district attorney is authorized to
file an information against a corporation and fugitives from
justice without a preliminary examination. Sec. 4734, Stats.
provides:

“Whenever any corporation, private or municipal,
(which) shall have been indicted or informed against under
the common law or under any statute of this state shall
fail to appear after notice of such indictment or information,
given and served by leaving a true copy of such indictment
or information with the officers or persons upon whom a
summons in a civil action against such corporation may be
served, and twenty days shall have elapsed thereafter, the
default of such corporation may be recorded, and the charges
in such indictment or information shall be taken as true and
judgment shall be rendered accordingly.”

The judgment so secured against the corporation may be
collected in the same manner as a corporation in civil actions.
A corporation cannot be arrested in the sense of having its
body brought into court, but by proceeding in the manner
indicated in this section, jurisdiction may be acquired of it.
Subsec. 13, sec. 2637, Stats. states upon whom service
may be made when serving upon a foreign corporation. An
affirmative answer must, therefore, be given to your first
question.

In Vol. 8, Am. & Eng. Ency. of Law (2nd ed.), p. 299, the
following rule is laid down:

“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, and one who is acting as agent for another cannot
escape the consequences of a criminal act by stating that he did the act for and under the direction of his principal."

This is the general rule and applicable to the question submitted by you and this question must, therefore, be answered in the affirmative.

In answer to your third and fourth questions I will say that I find no provision in the statute authorizing the seizure and holding of the oil inspected if it is found that the law has been violated, and I am of the opinion that such oil cannot be seized or held except when seized under an execution to satisfy the judgment in the criminal prosecution against the corporation.

Criminal Law—Larceny—Amendment of information; ownership, how alleged; counts. Secs. 4415, 4703, Stats.

October 15, 1914.

CHARLES KIRWAN,

District Attorney.

Ladysmith, Wis.

I have your letter of the 12th inst. requesting my advice as to the sufficiency of the information drawn by you and enclosed with your letter in the case of State v. John Bronsky, charging defendant with larceny as bailee under sec. 4415. You state the facts as follows:

"Bronsky was employed by R. A. Austin in the real estate office of the latter. Austin is an officer of the Austin Land Co. The company sold land to Jones, who gave his note in payment. Bronsky was not employed by the Austin Land Co., and had no authority to receive money for the Austin Land Co. Jones went to Austin's office to make Austin a payment of interest on note to Austin Land Co. Austin was absent and Bronsky received the money from Jones stating he would give it to Austin, and gave a receipt to Jones.

"This money was no doubt in the constructive possession of Austin. As he is an officer of the Austin Land Co., would his constructive possession be also the constructive possession of the Austin Land Co.? Sec. 4621, Stats. provides it is sufficient to prove that the actual or constructive possession of the general or special property was in the person alleged to be the owner."
I fear that the allegation of ownership under the information as it now stands may, after the proof is in, give rise to much argument. In a civil action on the note Jones could not successfully plead payment to Bronsky unless he could prove that Bronsky was the agent of the Austin Land Co. Even proof that Bronsky was the personal employe of Austin would not help out Jones. 30 Cyc. 1183; Parr v. Northern Elec. Co., 117 Wis. 278.

If this is true, then can it not be urged with great show of confidence that the ownership of the money was in Jones and that Bronsky was his bailee?

Ownership of course must be alleged, but

"Ownership in a particular person is not an essential element in the crime, the allegation is merely part of the description and identification of the goods." 25 Cyc. 88.

"In order that the servant shall be guilty of larceny of his master's property, the property must have been, up to the time of the wrongful taking by the servant, in the possession of the master; so that, as to goods given to the servant by another to be delivered to his master, it is said that the servant cannot commit larceny, the possession of the property not having yet attached." McLean on Criminal Law, 556.

I would suggest, under all the circumstances, that you draw three counts covering the offense. In the first allege ownership of the money in the Austin Land Co. In the second in R. A. Austin, and in the third, in ...............Jones.

"Where ownership is laid in one person in one count and in another person in another count, the indictment is not defective, as such practice is permissible at common law and under the statute." 11 Ency. of Forms 12801, citing People v. Connor, 17 Cal. 354; State v. McNally, 55 Md. 559; Sherman v. State, 34 Tex. Crim. Law Rep. 69; McLaughlin v. State, 34 S. W. Rep. 280.

"It is proper, however, to allege ownership of the same property in different persons in different counts, and if the evidence supports the allegation of one count it will authorize a conviction." 17 Cal. 354; People v. Thompson, 28 Cal. 214.

If you do allege the same offense in three separate counts the court would not compel you to elect. "The court will only listen to the request to compel the prosecution to elect in felonies, when they can see that the charges are actually
distinct, and may confound the prisoner or detract the attention of the jury.” *State v. Gummer*, 22 Wis. 441. See also *State v. Leicham*, 41 Wis. 565, 577, and note what is there said.

Very likely you would be permitted to amend your information to conform with the proof as provided by sec. 4703. In this connection see *State v. Baker*, 88 Wis. 140, 154.


October 15, 1914.

CHARLES KIRWAN.

*District Attorney,*

Ladysmith, Wis.

I have your letter of the 12th inst. enclosing copy of proposed information in the case of *State v. Alfred Haag*, charging defendant with the sale of adulterated milk under sec. 4607, and you state the facts and you inquire as follows:

“I also enclose another information in the case of *State v. Alfred Haag*. The defense is that Mrs. Haag was the owner of the dairy farm and milk route, and that Haag was merely her agent and it was Haag’s son who drove the wagon and sold the milk in question. I have therefor drawn one count charging Haag with having sold by his agent, the boy; another count charging Haag with being the agent of his wife, and having sold by his servant, the boy.”

I think your information containing two counts is correctly drawn under said section, but I would suggest that after the word “agent” in the fourth line of the first count you add the words “and servant” and add the name of the son who, it seems, was the agent and servant of the defendant.

In the second count after the word “servant” I suggest that you insert the name of the servant.

I would further suggest that you add a third count charging the defendant directly with the offense.

This, it seems to me, will corner the defendant on every proposition and will save considerable argument on the trial.
Criminal Law—False Pretenses—Confidence Game—Embezzlement—To convict of the offense of obtaining money or property by false pretenses, the false representation must relate to existing facts or past events.

To convict of confidence game there must be proof that through some false representation, or some trick or device, the victim was induced to and did repose confidence in the swindler, and was thereby defrauded.

Under the facts stated the accused was guilty of embezzlement.

November 24, 1914.

E. P. GORMAN,
District Attorney,
Wausau, Wis.

In your letter of the 18th you say that one R. H. Grotefeld came to your county from Chicago about April 15, 1914. That he represented to the farmers that he was a partner in the Standard Basket Company and in the John M. Train & Co. of Chicago. That he agreed further to furnish seed to the farmers and take the payment for the same out of the first shipment of the goods raised from the seed that the farmers sold to him. That most of the seed consisted of peas and the farmers were to sell him the green peas as picked, which were to be shipped to the Chicago markets. That he told them he would notify them when the peas were ready to ship, which he did. That he first represented that he would pay for the goods when delivered at Edgar, but when the farmers brought the goods in, he told them he would pay for them when the goods were sold in Chicago and he got his returns for what they brought, that is, that he would pay for the goods, less his commission, although he did not state what his commission would be. That after the goods had been shipped and after a considerable time had elapsed some of the farmers pressed him for their pay, and he told them then that he would go to Chicago and arrange to pay them when he came back, which would be in the course of several days. That he never showed up again, and never paid anybody except some small amounts paid to temporarily placate certain farmers. That you are somewhat in doubt as to what criminal action, if any, would lie, and you ask for my advice.
You do not state whether or not the representations made as to the connection with the Standard Basket Company and the John M. Train & Co., were true or false. Those appear to be the only representations that were made as to existing conditions or past events. Your letter also leaves it somewhat in doubt as to whether the agreement was that he would purchase the peas, or that he would act as a broker or commission merchant and sell the peas for the farmers, accounting to them for the proceeds. I think a fair inference from your letter is that the latter was the agreement that was made.

To sustain a conviction for obtaining goods under false pretenses, the pretense must be a representation as to an existing fact or past event, and not a representation as to something to take place in the future. 19 Cyc. 394.

A mere promise to do something, relating as it does to a future event, is not within the statute. 19 Cyc. 395.

It appears clear to me that no prosecution for obtaining property by false pretenses will lie under the statement made by you.

Sec. 4568m, which was enacted by ch. 476, laws of 1913, provides:

"Every person who shall obtain, or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus checks, or by any other means, instrument or device, commonly called the confidence game, shall be punished, * * * ” etc.

This statute was copied literally from the Illinois statutes. There have been a number of prosecutions in that state under the statute, but I have not found any case there in which the facts were similar to those stated in your letter. This offense is defined in Cyc. as: "Any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler." 8 Cyc. 564.

The Illinois court has said:

"We think it clear, where a party has by a course of conduct led his victim to repose confidence in him with a view to take advantage of such confidence and to obtain the money or property of his victim by a betrayal of such confidence, and advantage is taken of the confidence reposed by the victim in the swindler, and the swindler obtains, by
RELATING TO CRIMINAL LAW.

reason of the betrayal of such confidence, the money or property of his victim, the statute has been violated. In this case plaintiff in error, by a notice published in a newspaper, represented that a manufacturing company desired to employ a manager, and that such employment would net the person obtaining the situation $3,000 per year. Through that advertisement Foster was lured to the office of L. D. Abbott & Co. There he was led to believe that L. D. Abbott & Co., controlled a large amount of wealth,—that is, had a capital stock of $100,000 and $60,000 surplus,—and had, or was interested in, large manufactories in this and foreign states, and that the firm was handling the entire product of a large English woolen mill, and that the people in its employ were monthly making large sums of money. Clearly these representations were made with a view to inspire confidence in Foster that L. D. Abbott & Co. had the ability to perform their contract, and that the proceeds of the $200 check which Foster was finally induced to part with would be safe in the hands of L. D. Abbott & Co., and would be returned to him. *That said statements were clearly false and served the purpose of enabling the plaintiff in error and his co-defendants to obtain the money of Foster there can be no question.* We think, therefore, the means used in this case to obtain Foster's money fall within the inhibition of the statute, and in law amounted to what is commonly known as the confidence game." *Hughes v. People,* 223 Ill. 417, 421.

In another case the prosecuting witness had advertised in a Chicago paper that he had money to loan. He was approached by the defendant who introduced himself under a false name and represented that his sister had answered the advertisement, but that she had obtained the loan elsewhere. That he had a letter from a brother in Colorado to the effect that the stock of a certain mining company could be sold for a certain price, and that one Bush had been furnished with money for the purpose of buying such stock. The defendant represented that he knew where some of the stock could be purchased for much less than its actual value, and induced the victim to invest in such stock. Before he invested he was introduced to one of the other defendants, who represented himself as Bush, and he represented that he was ready and willing to purchase the stock at a certain price. He was also told where to find the supposed owner of the stock, and the latter, pretending to be sick, offered the stock for half of what Bush had offered to pay for it.
In sustaining a conviction for obtaining money under false pretenses the court, among other things, said:

"Any scheme whereby a swindler wins the confidence of his victim and swindles him out of his money by taking advantage of such confidence, is a confidence game. These three defendants, apparently strangers, co-operating under false names, so won the confidence of Suseminl that, relying upon the statement that the mining company had placed in Bush's hands money to buy this stock, and that Bush was a reputable member of the stock exchange and customer of the Metropolitan Trust & Savings Bank and had the money ready to pay for it, he parted with $3,000 of his money. No sooner had he done so than all three disappeared, the one who was to take the stock, without paying for it, as he had agreed, and the one who was to divide his profits, without calling for his share. Under these circumstances, it is a fair inference that the whole of Poindexter's and of Bush's statements were false and the mining company itself a figment of their imagination."  

People v. Poindexter, 243 Ill. 68, 90 N. E. 261.

Where the victim was induced to enter into a contract, by which he was to be employed, and to give to defendant $25.00, which defendant falsely pretended to enclose in an envelope addressed to his supposed principal, and it appeared that the principal, although advertising for men to sell goods, etc., in fact had a stock of goods amounting to only about $25.00, and a letter from defendant to one Carter stated that he had landed one today and expected to land another tomorrow, in which event he would send Carter $15, a conviction was sustained.

"The fact that the transaction was made to assume the form of a legitimate contract is not material, if, in fact, it was a swindling operation."  

People v. Depew, 237 Ill. 574, 86 N. E. 1090, 1092.

Where defendant represented that his name was Watson, and that he was in the employ of the American Wire Fence Company, and that he was a friend of Mr. Schmidt, who was also a friend of the victim, all of which statements were false, and by means thereof, and by leaving with his victim a worthless watch and his I. O. U. which he never intended to pay, obtained $30, he was guilty of obtaining money by means of the confidence game, and the fact that it was in

There is a very comprehensive note to the above case on pages 363-368 of 134 Am. St. R.


"The confidence game is most frequently practiced by the use of cards, dice or other means, instruments or device, in which game the victim gets nothing, but is simply swindled out of his money."

Here a false letter and false telegrams were used. *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. R. 183.

"Inducing men to bet on top and bottom of dice, and procuring money from a man for the purpose of betting, even though fear is aroused in him for the loss of his money, is enough of a confidence game to sustain his conviction, and distinguish it from robbery." *Van Eyck v. People*, 178 Ill. 199, 52 N. E. 852.

If parties are on an equal footing the statute does not apply. There must be some false or deceitful means employed for the purpose of obtaining the confidence of the victim, and he must repose such confidence in the swindler as to constitute the offense. *People v. Turpin*, 233 Ill. 452, 84 N. E. 679, 17 L. R. A. (N. S.) 276.

It will be noted that in every one of the cited cases there was some false representation as to an existing fact, or some trick or device. In each of these cases the victim was induced to repose confidence in the swindler by means of such trick or device, or by means of such false representations. It appears to me that under the facts stated by you there could be no successful prosecution for this offense. If, however, the statements as to the connection with these Chicago concerns were false, and if by reason thereof the farmers were induced to enter into this arrangement, and to part with their goods, probably a conviction could be secured.

It occurs to me, however, that a prosecution for embezzlement would probably be successful. If, as is a fair inference from your letter, the peas were delivered to this man at
Edgar, and he then shipped them to Chicago in his own name, and when he received returns at Edgar failed to pay the farmers, but converted such proceeds to his own use, then clearly he was guilty of embezzlement in your county. If, on the other hand, he himself accompanied the shipment, and at Chicago pocketed the proceeds, it seems to me there is sufficient evidence for a jury to find that he never intended to pay for the peas, and that he converted them to his own use when they were delivered to him at Edgar. The whole scheme "smells of fraud," and would warrant such a finding.

Criminal Law—Fraud—Venue—Fraud in sale of wood in carload lots. Venue of action. Facts held insufficient to warrant prosecution. Sec. 4432–1, Stats.

E. P. GORMAN,  
District Attorney,  
Wausau, Wis.

November 25, 1914.

In your letter of the 16th inst. you make the following statement of facts:

The Athens Implement & Manufacturing Co., of Athens, Marathon county, Wis., shipped a quantity of wood of different lengths and sizes to one Swanson of Stevens Point, Portage county. The Athens Implement & Manufacturing Co. billed the car as containing nineteen and one-eighth cords of wood. The city sealer of weights and measures of Stevens Point, one E. H. Flentie, measured the wood when it arrived at Stevens Point and claims there were only sixteen cords in the car. Mr. Hass, ex officio sealer of weights and measures, called up the Athens company in regard to the matter and they told him that they had filled the car full at Athens, the car being of the following dimensions in size: 8 x 8½ x 36 feet. This, you will find, figures out nineteen and one-eighth cords. This wood, I believe, was not piled in the car, but being of different lengths, was thrown in and the car filled as the Athens company claims, or part was piled and part thrown in. When the car got to Stevens Point the wood had undoubtedly settled and adjusted itself so that it did not fill the car, it having settled about fifteen inches.
You further state that the consignee sent twenty dollars with the order and was notified that before the car would be delivered to him he would have to pay the balance due which he did by depositing the same in the bank at Stevens Point several days before the car was delivered to him.

You ask for an opinion as to whether, upon the above facts, a criminal prosecution could be based for a violation of the statutes relating to false weights and measures, and if so, in what jurisdiction ought the proceedings to be commenced, in Marathon county where the car was filled, or in Portage county where the car was delivered?

That part of sec. 4432-1, which it may be claimed has been violated, reads as follows:

"Any person who, by himself or by his agent or servant, or as the servant or agent of another, shall sell or offer or expose for sale or keep for the purpose of sale, less than the quantity he represents * * * shall be punished by imprisonment in the county jail," etc.

In my opinion the facts stated do not warrant a prosecution in your county under this section. It affirmatively appears that it was at Athens, Marathon county, where the wood was sold and where the car was billed out, and that said car contained sufficient space to hold nineteen and one-eighth cords of wood, and that the car was filled full. Plainly there was no violation of any law at Athens.

When the car reached Stevens Point it was not full. Presumably the wood had shaken together and did not measure in the car nineteen and one-eighth cords. If, after taking out the wood, it had then been thrown back again into the car and the car found to be full, then, according to the dimensions given there would have been nineteen and one-eighth cords of wood.

In my opinion the sealers of weights and measures should have applied the foregoing test in order to make their evidence competent to dispute the assertions of the consignors.

There is another point not to be overlooked in arriving at my conclusion upon these facts. The laws of this state do not fix a standard for a cord. While our arithmetics say that a cord of wood should contain one hundred twenty-eight cubic feet, and while such is the common understanding, yet I take it that in different localities the word "cord" may have
different meanings, depending upon the usage and custom at said localities.

It is evident that the wood shipped was in different lengths and that it could not be conveniently ranked up in order to determine the actual cords therein, and if there were no specifications in the contract other than stated in your letter, I take it that usage and custom would control as to what constitutes a cord in the locality from which the wood is shipped. I infer that the Athens company, in selling and shipping wood of the character described, was following a custom in that vicinity of piling or throwing the wood into a car and then determining the number of cords from the inside dimensions of the car.

I may add that there is a vast difference in the cubic measure between a cord of what is known as "cordwood" and a cord of what is known as "stove length wood," and I have often discovered a considerable difference in the length of what is called "stove-wood". In view of the fact that the law does not prescribe the dimensions of a cord of stove length wood, I cannot see how any one could be successfully prosecuted for fraud in selling a cord of stove length wood which, as is usually the case, is cut short.

_Criminal Law—Larceny—Criminal Trespass_—Where a number of young men secretly take a plow belonging to another and hide it so that the owner is permanently deprived of its use, the jury would be justified in inferring the criminal intent necessary to constitute the crime of larceny.

Under such circumstances, the offense described in sec. 4440a would seem to have been committed.

November 30, 1914.

James Kirwan,
District Attorney,
Chilton, Wis.

In your letter of the 27th you state that you have been asked to arrest a number of young men who, on last Halloween, took a farmer's plow out of his field where he was using it and hid it so he has been unable to find or recover
same and had to buy a new plow. You ask if this is any criminal offense under the Wisconsin laws, and if so, what. You state that it was done in a prank and with no criminal intent, which they will testify to if arrested.

Sec. 4415, Stats., provides in part:

“Any person, who shall commit the crime of larceny, * * * shall be punished,” etc.

“Of course the felonious intent to deprive the possessor of the thing taken must be present in order to constitute larceny.” Farrell v. Phillips, 140 Wis. 611, 616.

In the case of Stoddard v. State, 132 Wis. 520, an instruction that the jury “must be convinced by the evidence, beyond a reasonable doubt, that at the time” the accused “took it, intending wholly to deprive the owner of this property and without an intention to return it,” was as favorable as the defendant could demand.

“An essential element in the crime of larceny is that the thief should have the felonious intent, the intent to steal or *animus furandi*, that is, the intent to deprive the owner feloniously and permanently of his property, at the time of taking of possession.” 25 Cyc. 45.

“Taking openly, as a mere joke, without criminal intent, is not larceny.” 25 Cyc. 48.

On this latter point see also Jackson v. State, 116 Ga. 578, 42 S. E. 750; State v. Shepherd, 63 Kas. 545, 66 Pac. 236; Black v. State, 46 Tex. Cr. 107, 79 S. W. 311.

In all of the cases above referred to the taking was done openly, and the owner was not permanently deprived of his property. If I correctly understand the facts in your case the owner has been permanently deprived of his property and I believe a legitimate inference to be that the taking was not done openly. So far as appears from your statement no offer has been made to return the plow to the owner. The question of intent is always one to be inferred from all of the surrounding facts and circumstances. The subsequent actions of the accused very often throw considerable light upon the intent accompanying the act claimed to have been criminal. It seems to me that, under all the facts as you have stated them, a jury might well
infer an intent to permanently deprive the owner of his property, and that is the intent required to establish the offense of larceny.

In this connection, too, I desire to call your attention to sec. 4440a, Stats., which provides in part:

"Any person who shall, individually or in association with one or more others, wilfully * * * remove any part or parts of any * * * machine, implement, or machinery, for the purpose * * * of preventing the useful operation thereof or any other purpose, or who shall in any other way wilfully or maliciously interfere with or prevent the running or operation of any * * * machinery shall be punished as provided in the preceding section."

Clearly, one who removes the entire implement, in this case the plow, removes the parts thereof. The jury certainly would be justified in inferring that in this case the removal of the plow was for the purpose of preventing the running of it or its operation, at least for the time being. It is true that in criminal law the term "wilful" involves evil intent or legal malice, (State v. McAlloon, 142 Wis. 72), but it appears to me that this intent can well be inferred from the acts of the parties. In my opinion you would be justified in beginning a prosecution under either one of these two sections.

Criminal Law—Embezzlement—Partnership—A copartner may be convicted of embezzlement for appropriating the money of the copartnership.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of Dec. 4th you state that you have been asked to arrest a person who is a copartner and as such copartner is said to have embezzled money belonging to the partnership. You say that A and B formed a copartnership business and in the business made some money. That B is allowed to receive and handle the books and money in the business. That at the end of each year they are to settle up and pay over half the profits to A. That they did this for
two years and that the first year A's share of the profits was $682.72; the second year his share of the profits was $1,572.14, but that B kept all of A's share each said year and spent it for his private use and has never paid A any part thereof, and that he has done this against A's will, but that the partnership still exists and is not dissolved. You inquire whether B can be prosecuted for embezzlement.

Sec. 4418, Stats. provides in part as follows:

"* * * Any person who is a member of any copartnership or one of two or more beneficial owners of any property specified in this section or of any property or thing which is the subject of larceny, who shall embezzle or fraudulently convert to his own use or to the use of any other person, except the other member of such copartnership or the other beneficial owners of such property or thing, or who shall take, carry away or secrete, with intent to convert to his own use or to the use of any other person except as aforesaid, any such property or thing shall be punished as provided in this section the same as if he had not been or was not a member of such copartnership or one of such beneficial owners."

Under the provisions of this statute, and the facts as presented by you, B may be prosecuted for embezzlement.

Criminal Law—No crime committed under facts stated.

December 29, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of the 23rd inst. you state that B. living at Chilton, Wis., owned four horses and G. from Milwaukee bought said horses on Dec. 5, 1914, for $360, but that no agreement as to how or when the payments were to be made was entered into; that B. supposed he was to get cash for them; that G. took the horses to the depot there and with the aid of B. loaded them on the railroad car to be shipped to Milwaukee; that after the horses were loaded B. and G. went to a hotel in Chilton and talked matters over and G.
said he would give B. his note for $360 due in thirty days; that B. at first refused, but G. told him that if he did not want to wait so long he could take the note to the Second Ward Savings Bank in Milwaukee and that that bank would buy it of him any day; that B. went to said bank early last week and the bank refused to buy it and he was informed that Mr. G. had no money in said bank whatever; that G. has sold one of the horses for $160 and B. has engaged a lawyer and replevied the other three horses from G.; that the note comes due Jan. 5, 1915.

You inquire whether under these facts Mr. G. is guilty of obtaining money or property under false pretenses or whether he can be punished for any other offense in this state.

Under your statement of facts the only thing that Mr. G. stated was that the Second Ward Savings Bank in Milwaukee would buy the note from Mr. B. any day if Mr. B. did not wish to wait until the time when the note matured. I do not believe that an offense for obtaining property under false pretenses can be predicated upon this. False pretenses, to constitute a criminal offense, must be false representations of a material fact or facts as they then exist. It seems to me the court would construe the statements made by Mr. G. as a statement expressing his opinion that the bank would buy the note at any day. In fact, it might be construed as meaning that the bank would buy the note if properly endorsed by Mr. B.

From the statement presented by you there is nothing to show that there was any doubt in the mind of B. that G. was not perfectly good for the credit which he extended to him. It is a well recognized principle that false representations as to a future event is not a false pretense within the statute, and it must also be considered, as specified by you in your letter, that the horses were already delivered to G. before any representations were made whatever.

I am of the opinion that no offense has been committed under the facts stated by you.
OPINIONS RELATING TO DAIRY AND FOOD.

*Dairy and Food—Creamery*—The practice of a creamery to pay one cent less per pound of butter fat for all cream testing below 20% is lawful.

February 19, 1914.

J. Q. Emery,
*Dairy & Food Commissioner.*

Under date of Feb. 9th you submit to me a question for my official opinion, which was presented to you by C. H. Anderson, a butter maker of the Eau Galle Farmers' Creamery Co. of Woodville.

It appears that the directors of the creamery have voted to pay 1c less per pound butter fat for all cream testing below 20%. This is done for the purpose of trying to raise the test for the cream which is delivered at the creamery. You inquire whether the practice of the creamery in question is an unlawful action.

Cream is defined in subsec. 6, sec. 4601-4a, as follows:

"Cream is that portion of milk, rich in milk fat, which rises to the surface of milk on standing, or is separated from it by centrifugal force, is fresh and clean, and contains not less than 18% of milk fat."

Under this provision of the law the minimum test for cream is 18% milk fat. Anything above 18% will still be within the law. I find no provisions in the statutes which is violated by a creamery company who refuses to pay as much for a pound of cream when testing below 20% than they do when it tests above 20%. If a cream that has a high test is worth more than cream that has a low test, why should it not be permissible to pay less for the low testing cream than is paid for cream that has a higher test? I am, therefore, of the opinion that the practice of the creamery in question is lawful.
Dairy and Food—Whey Cream—The fat of milk obtained from whey may be lawfully used in the manufacture of butter.


In your letter of Feb. 25th you state that you are receiving numerous inquiries as to whether or not the fat obtained from whey may be mixed with cream in the manufacture of butter and the same be legally saleable as butter or creamery butter. You state that there are no known methods whereby a chemist can determine that any part of the fat which enters into the composition of butter is obtained from whey. You describe the various methods by which the fat is obtained from the whey and you say that recently cream separators or separators made especially for the separating of the fat from the whey have been used while the whey was fresh, and such butter fat referred to in common parlance as "whey cream" is now being used in very considerable quantities in this state to mix with cream at creameries for the manufacture of butter. You call my attention to the following definitions and standards for milk, cream, milk fat, butter, cheese and whey as given in sec. 4601-4a, Stats.:

"(5) Milk is the fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows, properly fed and kept, excluding that obtained within eight days before and four days after calving, and contains not less than eight and one half (8.5) per cent of solids not fat, and not less than three per cent of milk fat.

"(6) Cream is that portion of milk, rich in milk fat, which rises to the surface of milk on standing, or is separated from it by centrifugal force, is fresh and clean, and contains not less than eighteen per cent of milk fat.

"(7) Milk fat, butter fat, is the fat of milk and has a Reichert-Meissl number not less than twenty-four and a specific gravity of not less than nine hundred five thousandths (0.905) at forty degrees Centigrade compared with water at the same temperature.

"(8) Butter is the clean, nonrancid product made by gathering in any manner the fat of fresh or ripened milk or cream into a mass, which also contains a small portion of the other milk constituents, with or without salt or added coloring matter, and contains not less than eighty-two and five tenths (82.5) per cent of milk fat."
"(9) Cheese is the sound, solid, and ripened product made from milk or cream by coagulating the casein thereof with rennet or lactic acid, with or without the addition of ripening ferments and seasoning or added coloring matter and contains, in the water-free substance, not less than fifty per cent of milk fat.

*(11) Whey is the product remaining after the removal of fat and casein from milk in the process of cheese making."

You inquire whether the fat of milk derived from whey, as indicated, may be lawfully used in the manufacture of butter for sale.

Under the above definition butter is made by gathering in any manner the fat of fresh and ripened milk or cream into a mass. It appears that some of this fat of milk is left in the whey after the removal of the fat and casein, from which cheese is made. This fat of milk remaining in the whey cannot be distinguished by chemists from the fat of milk which has already been removed, or which is taken from milk. This being the case, it seems to me that it is proper to use this so-called whey cream in the manufacture of butter under the present provisions of our statute. This fat of milk may be gathered in any manner under the definition of butter as given in our statute. It follows that it is lawful to first obtain that part used for cheese and later to gather the remaining fat of milk. Had the legislature intended to prohibit the use of whey cream in the manufacture of butter it would have been an easy matter to have said so by plain and unambiguous words in the statute. Under the present provisions of our statutes I believe the whey cream may be lawfully mixed with other cream in the manufacture of butter so long as the milk and whey is fresh and clean, as the definition of milk requires.
OPINIONS RELATING TO EDUCATION.

Education—Appropriations and Expenditures—Counties—
Under the provisions of ch. 751, laws 1913, a county board of education may incur expenses from the time of its organization in May, 1914, to be paid out of the special fund created for that purpose when it becomes available.

Feb. 13, 1914.

C. P. Cary,
State Superintendent of Public Instruction.

In your letter of February 9th you refer to the following provisions of ch. 751, laws 1913, which is the law providing for county boards of education.

"Section 702–8. On the first Tuesday in May, after the election in April, 1914, and annually thereafter, such board shall meet at the county seat and organize by electing one of the members as president. * * * The clerk for the county superintendent whose appointment is herein-after provided shall be ex officio secretary of the board, but in case no such clerk is serving then the county board of education shall elect one of its members secretary."

Sec. 702–10, subsec. 2:

"The county board of education, upon the nomination of the county superintendent, may appoint a clerk, subject to removal by the board, for the county superintendent of schools, fix his salary, and define his powers and duties."

Other sections provide for compensation to be paid the members of the board, and authorize it to incur other expenditures in connection with the matters entrusted to it.

Sec. 702–10, subsec. 13:

"The county board of education shall, at its meeting to be held on the last Friday in October of each year, determine the amount of money which will be necessary for the purpose
of carrying out the provisions of sections 702-1 to 702-12, inclusive, for the ensuing year. On or before the first Monday in November, in each year, the county board of education shall report the total amount required to the county clerk who shall report the same to the county board of supervisors at its annual meeting in November, and such amount shall be levied in the county tax and collected as other taxes, and shall be set aside by the county treasurer as a separate fund to be paid out by him upon the orders of the county clerk issued in accordance with schedules submitted to him by the county board of education, which schedules shall give the names of persons, the amount due each and the purposes for which issued."

As to this provision you say:

"This being the case, there will be no funds available for this board until the tax has been levied and collected in 1914-15."

You ask:

"Until such time as the money has actually been collected and placed at the disposal of the county board of education, can it lawfully incur any obligations, and if such obligations are incurred, is there any way by which such obligations can be paid prior to the time the taxes have been levied and the money collected?"

The legislature, it will be noted, has made it the absolute duty of the county board to levy the amount determined by the county board of education to be necessary for the purpose of carrying out the provisions of the act. This is, in effect, a levy of the tax by the legislature. See opinion to D. E. McDonald, district attorney for Winnebago county, Vol. I Opinions, Bancroft-Owen, p. 93.

It is true that the determination is to be of the amount needed "for the ensuing year." I believe, however, that the courts would, for the purpose of carrying out the provisions of the act, give this a liberal construction, and hold that the determination made in October of this year should include a sufficient amount to cover also any expenditures incurred in the current year not otherwise provided for.

It is manifestly intended that these boards of education shall incur some expense prior to the collection of taxes in
1914–15. It is made the duty of each board to meet and organize in May, 1914. It is to hold regular meetings in May and Oct., and is authorized to hold special meetings. These meetings are to be held at the county seat, involving traveling expenses on the part of at least some of the members. The members are entitled to the same mileage and per diem as members of the county board of supervisors. It is authorized to appoint an assistant superintendent of schools, as well as the clerk, and fix the salaries of the superintendent and his assistant. It is authorized to appoint a board of examiners for common school diplomas and fix a compensation of the members thereof. Each of its members is required to devote not less than two days per year to visiting and inspecting the rural schools. On or before August 15th it must make and transmit to the state superintendent of public instruction such report as he may require regarding the business and educational administration of the schools within its district.

At the regular meetings in May and October it is required to audit and allow the expenses of the county superintendent and his assistant, audit and allow to the members of the board of examiners for common school diplomas their per diem and mileage, and audit and allow the mileage and per diem of its own members. At its meeting to be held in October it is made the duty of the board to determine the amount of money necessary for the purpose of carrying out the provisions of the act, which amount is to be levied in the county tax and made a special fund for the purpose of carrying out the provisions of the act. Clearly all this cannot be done without incurring expense. It is equally clear that it was the intention of the legislature that this expense should be met from the special fund provided for by the act. Without meeting, and thus incurring expense, there is no provision by which the amount of the fund can be determined and included in the tax roll.

The law should be so construed as to carry out the legislative intent, if that can be done without violating any of the mandates of the constitution, and without doing too great violence to the language of the act itself. I believe that can be done, and it is my opinion that the board may perform the duties imposed upon it, including the appointment of the clerk referred to in your inquiry, and incur the expense.
necessarily incident to the performance of such duties, such expense to be paid from the fund provided for that purpose when it becomes available.

Education—County Board of Education—Cities that have no city superintendent or board of education or other office or board that certifies teachers are a part of the county board of education district.

All villages are a part of such district. Only residents of such districts can vote for members of the board.

March 27, 1914.

THORWALD P. ABEL,
District Attorney,
Sparta, Wis.

In your letter of March 25th you refer to ch. 751, laws of 1913, which creates a county board of education and you submit the following questions:

“1. The high school of the city of Tomah is under the management of a board of education elected the same as school boards of townships. Is such city included in the county board of education district?

“2. The high school of the city of Sparta is under the management of a board of education elected the same as school boards of townships. Is such city included in the county board of education district?

“3. The village of Wilton maintains a high school under the direction of a board of education elected in the same manner as school boards in townships are elected. Does this village come within the county board of education district?

“4. Can residents under the foregoing situation in Tomah, Sparta or the village of Wilton, vote for the members of this county board of education?”

Sec. 702–2, as created by said chapter, contains the following:

“The county board of education district shall include the entire county, excepting only such portion thereof as is included within any 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, and in counties now having more than one superintendent district each such district shall constitute a county board of education district. * * *"
In answer to your first two questions I will say that the cities in question have not a board of education or a superintendent of schools or other board or officer who is authorized under the statute to license teachers. Both cities are within the county superintendent’s district and the teachers therein are licensed by the county superintendent. In view of said fact under the provisions of the above quoted section the answers to your first two questions must be in the affirmative.

In answer to the third question I will say that only certain cities are exempted from the county board of education district and, therefore, it includes all villages. The third question must, therefore, be answered in the affirmative.

Sec. 702–3, as created by said chapter, provides as follows:

“Any person resident within the county board of education district, qualified to vote at elections pertaining to school matters, shall be eligible to membership on said board.”

In view of the answers given to the first three questions the answer to the fourth question, under the provisions of this statute, must be in the affirmative also.

Education—Industrial Schools—Sec. 1728c–1, Stats.—Minor between ages of 14 and 16 years must attend continuation school even though he has graduated from eighth grade of common schools.

April 13, 1914.

Industrial Commission of Wisconsin.

In your communication of the 8th inst. you submit the following state of facts:

“A child between 14 and 16 years of age is working under permit as now provided by law. Such child has completed the course of study for the common schools of this state or the first eight grades of work as taught in state graded schools or other graded schools of Wisconsin, and can furnish the proper diploma, certificate, or credential showing that he has completed one of said courses of study, or its equivalent.”
You ask whether such child is subject to the provisions of sec. 1728c–1, Stats., which requires attendance at day continuation schools, or whether it is exempt from the provisions of said section under the provisions of sec. 439a, Stats.

Subsec. 1, sec. 1728c–1 reads as follows:

"1. Whenever any day continuation classes, industrial school or commercial school shall be established in any town, village or city in this state for minors between the ages of fourteen and sixteen, working under permit as now provided by law, every such child, residing within any town, village or city in which any such school is established, shall attend such school in the daytime not less than five hours per week for six months in each year, until such child becomes sixteen years of age, or four hours per week for eight months, as may be determined by the local board of industrial education, and every employer shall allow all minor employees over fourteen and under sixteen years of age a reduction in hours of work of not less than the number of hours the minor is by this section required to attend school."

That portion of sec. 439a material to be considered here reads as follows:

"Any person having under his control any child between the ages of fourteen and sixteen years not regularly and lawfully employed in any useful employment or service at home or elsewhere, shall cause such child to be enrolled in and to attend some public, parochial or private school regularly in cities of the first class during the full period and hours of the calendar year (religious holidays excepted) that the public, parochial or private school in which such child is enrolled may be in session; in all other cities not less than eight school months; and in towns and villages not less than six school months in each year: provided that this section shall not apply to any child who shall have completed the course of study for the common schools of this state or of the first eight grades of work as taught in state graded or other graded schools of Wisconsin, and can furnish the proper diploma, certificate, or credential showing that he has completed one of said courses of study, or its equivalent."

It will be noted that the provisions of sec. 439a apply.

—First, to "any child between the ages of seven and fourteen years."
Second, to "any child between the ages of fourteen and sixteen years not regularly and lawfully employed in any useful employment or service at home or elsewhere."

The provisions of section 1728c-1 apply to minors between the ages of fourteen and sixteen working under permit as now provided by law."

It will thus be seen that there is no over-lapping of the provisions of these two sections as sec. 1728c-1 deals with a class of children excluded by express terms from the provisions of sec. 439a. Sec. 439a deals with children "between the ages of fourteen and sixteen years not regularly and lawfully employed in any useful employment or service at home or elsewhere, while sec. 1728c-1 applies to "minors between the ages of fourteen and sixteen working under permit as now provided by law, and while children affected by the provisions of sec. 439a are by the express terms of that section exempted from attending school as required by the provisions of that section, after they "shall have completed the course of study for the common schools of this state," etc., children to which the provisions of sec. 1728c-1 apply are not similarly exempted, and my conclusion is that a child between the ages of fourteen and sixteen years working under permit, as now provided by law, is not exempt from attending day continuation classes, industrial schools or commercial schools in towns, villages or cities where such schools are established.

When it is considered that the nature of the instruction given in these continuation classes, industrial and commercial schools supplements rather than parallels the work of the grades, no absurdity can be ascribed to these provisions.

Education—School District—Where the electors of a joint free high school district authorize the purchase of a schoolhouse site, the site may be designated by the school board.

April 24, 1914.

C. P. Cary,

State Superintendent of Public Instruction.

In your letter of the 22nd you ask my opinion as to whether or not the school board of a joint free high school district
has power to designate a site for a union town free high school where the electors of such district at the annual meeting pass a resolution that a suitable site be purchased and a new high school building be erected thereon and provide the funds for carrying out such purpose.

Sec. 491, Stats., provides for the creation of joint high school districts. Sec. 495a provides that the electors of any such high school district are authorized at any annual town meeting to levy a tax for the purpose of purchasing a site and erecting a suitable school building thereon. I do not find any provision of the statutes specifically providing that the board shall have authority to designate the site nor yet that the electors have such power.

In an ordinary school district the electors of the district designate the site. See sec. 430, Stats., subd. (4). The board of an ordinary school district is authorized to purchase or lease a site for a schoolhouse only when such schoolhouse site has been designated by the district. See sec. 434, Stats.

However, it appears that the meetings of the electors of joint free high school districts are quite different from the meetings of an ordinary school district. In the case of joint free high school districts the annual meetings are held in connection with the annual town meetings, and all voting is done by ballot.

Under these circumstances it would seem that it would not be practicable to have the electors designate the schoolhouse site. While the question is by no means free from doubt, I am inclined to think that where the electors of a joint free high school district authorize the purchase of a site that the designation of such site may be made by the school board.

_Education—Schoolhouses—Public Officers—_A school board cannot be compelled, under sec. 435d, to open the schoolhouse for the use of a nondenominational Sunday school to which the general public are invited._

Edward W. Miller,
_District Attorney_,
Marinette, Wis.

In your letter of the 24th you ask:

April 25, 1914.
"Under sec. 435d, Stats., upon application of not less than one-half of the voters residing in the district, is it compulsory upon the school board or any other body having charge of schoolhouses or other public buildings in the district which are capable of being used as public meeting places for gatherings of citizens, to open such school buildings for the purposes of a nonsectarian Sunday school where all the public are invited to attend?"

Under the provisions of sec. 435d, upon proper application being made, the school board "shall allow the use of such buildings or grounds for the open presentation and free discussion of public questions, and may allow the use of such buildings or grounds for such other civic, social and recreational activities as in the opinion of the controlling board do not interfere with the prime purpose of the building or grounds."

They may also be required to allow the use of such buildings by nonpartisan, nonsectarian, nonexclusive associations for the presentation and discussion of public questions or for the promotion of public health by giving instruction in any topic relating thereto or in physical culture and hygiene or by the practicing of physical exercises and the presentation and discussion of topics relating thereto.

In my opinion the conducting of a Sunday school would not constitute the presentation and free discussion of public questions, and neither would it constitute promotion of public health by giving instruction in any topic relating thereto or in physical culture and hygiene, nor would it constitute the presentation and discussion of topics relating thereto.

In my opinion the school board cannot be compelled to open the school buildings for the purpose of a Sunday school. It is very doubtful if it would be possible to have a Sunday school, in the ordinary acceptation of that term, which would be nonsectarian. Our supreme court has held that the reading of the Bible unaccompanied by any comments thereon is sectarian instruction. *State ex rel. Weiss v. District Board*, 76 Wis. 177.
*Education—Schools—School Districts—The notice required by sec. 418, Stats., may be given by mail but proof of the mailing merely would not prove that the notice has been received.

For services in giving the notice, a member of the county board of education may be paid a per diem and mileage pursuant to sec. 702-9, Stats., but the district clerk is not entitled to any fees for giving notice to the other members of the school board.

May 20, 1914.

C. P. Cary,
State Superintendent.

In your letter of May 18th you ask my opinion on the following question:

"Must notice be served personally or may it be served by mail upon the school officers under the provisions of subd. (3), sec. 702–10, ch. 751, laws 1913?"

Subd. (3), sec. 702–10, Stats. 1913, gives the county board of education "the power and authority now exercised by town boards, village boards of trustees and city councils, in the formation and organization of districts, and in the consolidation and alteration of them" and provides that in exercising such authority the county board of education "shall follow the procedure as now provided in the law for the organization, alteration or consolidation of school districts." This language makes applicable to the county board of education the provisions of sec. 418, Stats., which provides:

"Whenever the town board shall contemplate an alteration of a district they shall give at least five days' notice in writing to the clerk of the district or districts to be affected thereby, stating in such notice when and where they will be present to decide upon such proposed alteration; and such clerk or clerks shall immediately notify the other members of the board."

The supreme court has held that the giving of the notices required by sec. 418 to the clerks of the districts affected by the proposed alteration is a jurisdictional prerequisite to the making of a valid order by the town board, and that the records must show that the statute in that regard was complied with. *State ex rel. Foster v. Graham*, 60 Wis. 395, 399; *State ex rel. Stengel v. Cary*, 132 Wis. 501, 508–9.
The court has also held that the town board need not have on file proof that the school district clerk has notified the other members of the school board. *State ex rel. Tayler v. McKinny*, 146 Wis. 673, 675-6.

Whether the failure to give such notice to the other members of the school board would render the action of the town board void has been questioned but not decided by the supreme court. See *State ex rel. Bidgood v. Clifton*, 113 Wis. 107, 109; *State ex rel. Stengl v. Cary*, 132 Wis. 501-5.

In view of the doubt as to this question it would certainly be unwise for the county board of education to proceed to alter a school district without having before it proof that the clerk had performed his duty in notifying the other members of the school board.

A notice sent by mail would undoubtedly be sufficient to satisfy the statute if it were actually received by the person to be notified and if proof of such receipt were made by filing his written admission of service, but mere proof of the mailing of the notice would be clearly insufficient to show that the notice was received and in case of a contest would be of little value where the person to whom it was sent testified that he did not receive it. If notices are sent by mail there should be written proof by way of admission of their actual receipt. The safer way is to have some person deliver a written copy of the notice to the persons required to be notified and file his affidavit showing the time and place of such delivery.

You also ask who may be authorized to serve such notices, what fees may be collected for so doing, and from what fund payment should be made therefor.

Sec. 418 requires the town board to give the notice to the clerk of the district or districts affected and under subd. (3), sec. 702-10, Stats., this duty would evidently fall on the county board of education. They may perform such duty in person or may authorize one of their number or any responsible person to perform it for them, but since no fees are prescribed by law for the service any person not a member of the county board of education would have to be paid, if at all, by the members of the board who employed him since there is no provision for the payment for such service out of any public funds. But sec. 702-9, Stats., expressly provides a per diem and mileage for members of the county
board of education for the "days necessarily spent in performing the duties as outlined in subd. 3, sec. 702-10." The giving of the notice to the clerk of the district or districts affected is quite plainly one of such duties and I think that the member of the county board of education who performs such service would be entitled to a per diem and mileage therefor.

Sec. 418 also requires the district clerk to immediately notify the other members of the school board. This he may do in person or he may authorize some one to give the notice for him. In the latter case no compensation could be paid because none is provided for by law. In the former case the clerk could not receive any compensation for the additional service required of him for none is provided. Par. seventh, sec. 462, Stats., fixes his compensation and for the compensation so provided he must perform all services that are lawfully required of him. The principle is that "Officers take their offices cum onere, and services required of them, for which no specific fee is provided, are considered to be compensated by the fees allowed for other services." McCumber v. Waukesha Co., 91 Wis. 442, 4.

Public Officers—Education—For the school year ending in June, 1914, the salary to which the clerk of a district having a school census of less than two hundred, and not containing any part of an incorporated city, was ten dollars, subject to the conditions named in sec. 462, Stats.

Subject to the conditions named in that section the clerk of a school district having a school census of not more than one hundred, and not containing any incorporated village or city, and maintaining school in only one building, is now ten dollars.

June 6, 1914.

Henry H. Hinrichs,

Town Clerk,

Bailey’s Harbor, Wis.

In your letter of the 3rd you state, in substance, that at the annual meeting in 1913, the electors of school district No. 1, of the town of Bailey’s Harbor, voted the director and treasurer salaries of five dollars each, and the clerk a salary of
fifteen dollars. That the county superintendent of schools rules that the clerk is entitled to only ten dollars, and you ask my opinion as to whether or not that is correct.

You state that the district maintains a two room school in one building.

You also state that at the annual meeting held June 1, 1914, no vote was taken on clerk's salary, and you ask if, under these circumstances, the clerk will be entitled to any compensation.

I am not authorized to give official advice to school district or town officers. Whatever is said herein, therefore, must be understood to be wholly unofficial, and in no way binding upon any person, and is given you merely as a matter of courtesy.

Subd. (18), sec. 430, Stats. 1911, provides that the inhabitants of any school district qualified by law to vote at a school district meeting, at each annual meeting, should have power:

"To vote a tax to compensate the clerk, treasurer and director, which in districts supporting graded and high schools shall be such sums as may be voted, and in other districts not more than ten nor less than five dollars to each or any of the above officers."

You will note that under this statute the officers of the district were entitled to only so much salary as might be voted by the district, and that the amount that might be voted by the district, except where it supported graded and high schools, was limited. The district was not required to vote any salary at all.

By sec. 2, ch. 448, laws of 1913, this subsection was amended so that the portion above quoted should and now does, read:

"To vote a tax to compensate the treasurer, and director, which in districts supporting graded and high schools shall be such sums as may be voted, and in other districts not more than ten nor less than five dollars to each of the above officers."

This amendment took effect by publication on June 9, 1913, prior to the school meeting for that year. You will note that it omits the clerk entirely. It follows that there was no authority for voting a salary to the clerk at the annual meeting in 1913.
The same section of ch. 448, laws of 1913, amends sec. 462, Stats., and provides for certain reports to be made by the clerk to the county superintendent between the 10th and 25th days of July of each year, and continues:

"Upon filing with the county superintendent within the time set by law, a complete and satisfactory annual report setting forth all the facts required by law to be reported to the county * * * superintendent, and such other information as may be called for by * * * the county * * * superintendent, the school district clerk in a school district having a school census of two hundred persons or less shall be paid from any moneys in the school district treasury of which he is the clerk, the sum of ten dollars, and in all other districts not embracing in whole or in part an incorporated city, twenty-five dollars, and in school districts embracing in whole or in part a city, such sum as the body electing the school board of such school district may direct; provided, such school clerk shall file with the district treasurer a certificate signed by the county * * * superintendent of schools setting forth that the school census for the year was properly taken, and that all reports required by law to be made by school district clerks have been filed and approved."

The provisions above quoted are what would govern the compensation to be paid your school district clerk for the year just ended. You do not state whether or not your school district contains any part of an incorporated city, nor what the school census is. I am assuming, however, that it does not contain any part of an incorporated city, and that it had, in 1913, a school census of less than two hundred persons. If my assumption is correct, your clerk was entitled to a salary of ten dollars, provided she complied with the conditions of the section from which I have quoted, regardless of whether the district voted any salary for the clerk or not, and regardless of the amount it may have voted for such salary.

By ch. 765, laws of 1913, which was published and went into effect Aug. 9, 1913, sec. 462, Stats., was again amended, so that, subject to the same conditions as those provided by ch. 448, laws of 1913, the provision as to salary now reads:

"The school district clerk in a school district maintaining one or more schools in one or more separate school buildings and not containing an incorporated village or city, and having a school census of one hundred persons or less shall be paid
from any moneys in the general fund of the school district treasury of which he is the clerk, the sum of ten dollars for each one room school maintained by the district; provided, that such schools are more than a mile and a half apart, the distance to be measured by the nearest traveled highway. In a school district maintaining one or more separate schools in separate buildings and not containing an incorporated village or city and having a school census of more than one hundred persons and less than two hundred persons, twenty dollars for the first school and an additional ten dollars for each separate school maintained in a separate building by the district, provided, that such schools are more than a mile and a half apart, the distance to be measured by the nearest traveled highway. In a school district maintaining one or more separate schools in separate buildings and not containing an incorporated village or city and having a school census of more than two hundred persons and less than three hundred persons, thirty dollars for the first school and an additional ten dollars for each separate school maintained in a separate building by the district; provided, that such schools are more than a mile and a half apart, the distance to be measured by the nearest traveled highway; and in school districts having a school census of more than three hundred persons of school age, or containing an incorporated village or city, such sum as the body electing the school board of such school district may direct * * *.

These latter are the provisions that would govern as to the salary of the clerk elected at the annual meeting held June 1st, last. As you held your annual school meeting June 1st, it is safe to assume that your district does not contain an incorporated village or city. (Sec. 425, Stats.) Assuming that it has a school census of one hundred persons or less, the clerk, if he complies with all of the conditions referred to in sec. 462, Stats., will be entitled to a salary of ten dollars, regardless of any action or lack of action on the part of the district. You expressly state that your schools are all held in one building, so that the additional compensation providing for additional schools in separate buildings is not applicable.
Education—Public Officers—County Board of Education—
The county board of education has exclusive jurisdiction of
the division of school districts.

June 15, 1914.

A. J. O'Melia,

District Attorney,

Rhinelander, Wis.

In your letter of the 11th you state that the town of Hazelhurst split at the spring election into Hazelhurst and Tomahawk Lake, but that nothing was said about the division of the school district. That, according to the old law, as you understand it, it would be a matter for those towns to settle, but that there is some doubt as to the breadth of the new law. You ask if it is necessary for the county school board to meet and divide the school district into two school districts with boundaries corresponding with the new towns in order to separate the school district, or if this may be done in the same form as before. That there seems to be some disagreement as to the interpretation of the new school law, as to whether the county school board simply takes up cases by request or upon its own initiative about which there might be some discussion, or whether this board has to form all new districts in the county. That as conditions stand the town boards of the two new towns took it for granted that there were two school districts corresponding with the boundaries of the new towns and the officers in the town of Tomahawk Lake made their entire town a single district and at the annual school meeting the school officers were elected. You ask if this is proper or if the district is not divided until the new county school board divides it.

Subd. (3), sec. 702-10, Stats., provides in part:

“The county board of education shall have full power and authority to form, organize, alter or consolidate school districts, and shall be vested exclusively with all the power and authority now exercised by the town boards, village boards of trustees and city councils, in the formation and organization of districts, and in the consolidation and alteration of them, with the right of appeal by any person aggrieved thereby to the state superintendent from its decision as now provided by law.”
In my opinion, under this section, the town boards no longer have any authority in the formation or alteration of school districts. Those powers are vested exclusively in the county board of education. Until it acts, the district remains as it was before.

I know of no provision by which the division of a town effects a division of the school district. It follows that there has been no valid division of the district to which you refer, and can be none until the matter is acted upon by the county board of education.

_Education_- A boy may not be excluded from the public school of the district in which he resides solely because he is on parole from the Wisconsin industrial school for boys.

June 20, 1914.

**State Board of Control.**

In your letter of June 16th you enclose letter from Prof. A. J. Hutton, Supt. Wis. industrial school for boys, at Waukesha, in which he states that he has been advised that the voters of a certain school district have voted to exclude boys paroled from the industrial school living in that district from the privileges of the school and you ask my opinion as to whether boys of suitable age out on parole from the Wisconsin industrial school have the right to attend the public schools of the districts in which they have their homes.

The constitution of this state provides that the legislature shall provide for the establishment of district schools and that "Such schools shall be free and without charge for tuition to all children between the ages of four and twenty years." Sec. 3, art. X, Const. This provision must be interpreted to give to children residing in a district the absolute right to the privileges of the public schools therein. See _State ex rel. Comstock v. Joint School District_, 65 Wis. 631, 636. Such right is, of course, subject to such reasonable rules and regulations as the school board may make pursuant to sec. 439, Stats. "for the organization, graduation and government of the school," but rules made by the board "must be reasonable, otherwise they cannot be enforced." 35 Cyc. 1111; _Morrow v. Wood_, 35 Wis. 59; _State ex rel.
RELATING TO EDUCATION.

*Bowe v. Fond du Lac,* 63 Wis. 234, 7. By the express terms of sec. 439, Stats. the school board has power to suspend or expel any pupil “guilty of persistent refusal or neglect to obey the rules of the school.” Such grant of power is valid and may be lawfully exercised. *State ex rel. Burpee v. Burton,* 45 Wis. 150, 155; *State ex rel. Dresser v. District Board,* 135 Wis. 619, 627.

In the case last cited the action of the school board in suspending pupils who had been instrumental in causing the publication of a poem, which act was found to be detrimental to the interests of the school in that it tended to set at naught the discipline of the school and impair the authority of the teachers, was held valid and the principle laid down that “The school authorities must necessarily be invested with a broad discretion in the government and discipline of the pupils and the court should not interfere with the exercise of such authority unless it has been illegally or unreasonably exercised.” (135 Wis. 628).

Under such ruling there seems to be no doubt but that the school board may suspend or expel from the school any pupil whose behavior is such as to warrant such action, but I am constrained to believe that no general rule can be validly adopted which excludes a class of pupils against some of whom there may be no valid objection. It has frequently been decided that negroes and Chinese may not be excluded from school privileges and I am thoroughly convinced that a pupil whose conduct in school is not otherwise objectionable cannot be excluded from the school of the district in which he resides solely because he is on parole from the Wisconsin industrial school. It is inconceivable that such fact alone can make his presence detrimental to the school. If he is well behaved, obedient and studious it may well be that his presence and the fact that he has suffered punishment for past misconduct may be an aid in maintaining order and discipline in the school. In any case I am convinced that a rule which would exclude a boy from school solely because he is on parole from the industrial school is, on its face, unreasonable as applied to a boy who is otherwise unobjectionable.

There may be some question as to the right of a district to take action on such matter in view of the express delegation of power to the school board by sec. 439, Stats., to con-
trol such matters, but I have dealt with the question broadly so as to cover action either by the school board or the district itself.

_Education—County Board of Education_—The reports required from county boards of education by sec. 702-10, Stats., need contain only such facts as the state superintendent required.

C. P. Cary,

_ State Superintendent of Public Instruction.

In your letter of July 23rd you request my opinion as to the duties of your department in calling for reports from the county boards of education at this time in view of the provisions of subd. (6), sec. 702-10 and sec. 702-11, Stats.

You state that the county boards of education were organized pursuant to the provisions of sec. 702-8 on May 5, 1914; that the school work for the year was practically completed by the first part of June; that the members of the board of education after organization on May 5th had but little time or opportunity to familiarize themselves with the school work for the year and that consequently it would seem that there was but very little for them to report unless such report was largely a duplicate of the report of the county superintendent for the same year.

Subd. (6), sec. 702-10, Stats., provides:

"The county board of education shall, on or before August fifteenth, make and transmit to the state superintendent of public instruction an annual report dated June thirtieth of each year showing such facts regarding the business and educational administration of the schools within the county board of education district as he shall require."

Sec. 702-11 provides for state aid to each county board of education district "only after the state superintendent shall have certified to the secretary of state that the annual report of the county board of education has been received and accepted by the state superintendent of public instruction; and that the county superintendent of schools shall have furnished the state superintendent his annual report at the time required by law" etc.
Subsec. 1, sec. 464, Stats., provides:

"Each county superintendent shall, on or before the fifteenth day of September in each year, make and transmit to the state superintendent a report in writing, setting forth the whole number of districts, the schoolhouses of which are in his county or superintendent district, distinguishing those from which the required reports have been made to him by the district clerks, and containing an abstract of their reports, and also embracing an abstract of the annual report of the secretary of each free high school in such district, and such other facts and statistics as may be required by the state superintendent."

It seems to me very doubtful whether in the face of the express prohibition of sec. 702-11 state aid may be granted to any county board of education district except after an annual report has been received from the county board of education of such district. The statute quite clearly contemplates a report by the county board of education as well as a report by the county superintendent. The receipt of both reports is expressly made a condition precedent to state aid. It is therefore evident that some report must be made by the county board of education.

But subd. (6), sec. 702-10, quite plainly gives the state superintendent discretion as to what facts regarding the business and administration of the schools he shall require to be shown by the report of the county board of education. In view of the situation existing this year, as stated in your letter, I am of the opinion that you have authority to require only such facts to be stated as may seem to you to be advisable. If, in your judgment, no public purpose will be subserved by requiring detailed reports from the various county boards of education it seems clear that while you have no authority to absolutely dispense with such reports you may require them to be only in such short form and in general terms as may seem to you best. The purpose of giving you discretion as to what such report shall contain must evidently have been to cover such a situation as now exists. I am therefore of the opinion that you need require the reports to be no more comprehensive or detailed than is necessary to set forth "such facts regarding the business and educational administration of the schools within the county board of education district as" you shall, in your discretion, deem advisable.
Education — Elections — School Meetings — A substantial compliance with sec. 476a is all that is required in voting upon authorizing a loan at a special school meeting.

That the ballots read "against" instead of "against the loan" does not invalidate the result.

That votes were cast by persons not qualified electors does not invalidate the result of the vote, unless the result of the vote would have been different if such invalid votes had not been cast.

STANLEY G. DUNWIDDIE,
District Attorney,
Janesville, Wis.

In yours of the 5th inst. you enclose what purports to be a statement of facts concerning a school meeting recently held in your county, which statement of facts reads as follows:

"At the regular annual school meeting called and held in accordance with the provisions of the law bearing on this subject the following resolution was presented and adopted by the voters of joint school district No. 4 Orfordville, Spring Valley and Plymouth:

"'Resolved that it is the sense of the said district represented in this meeting that we proceed to build a schoolhouse.'

"The meeting then took a recess or adjournment for four weeks or until the evening of Aug. 3 at eight o'clock.

"At the last mentioned meeting the following resolution was presented, its adoption moved and seconded; The vote was by ballot, the ballots reading 'For the loan,' and 'Against.' (The one word).

"'Resolved that we authorize the board of the said district No. 4 Orfordville, Spring Valley and Plymouth, to borrow from the state fund the sum of 1500 dollars.'

"Does the fact that one of the ballots was not worded in accordance with the form prescribed in sec. 476a invalidate the vote?"

Sec. 476a provides that the ballots shall read: "For the loan," and "Against the loan." It is a general rule of statutory construction that a substantial compliance with the statute is all that is required. The word "against" as plainly indicates the intent of the voter as do the words "against the loan." In my opinion the mere fact that the
ballots do not literally correspond with the statutory requirement does not invalidate the vote.

I presume that the resolution was not given by you in full. Of course, the adoption of a resolution exactly as you have given it here is not sufficient to authorize a loan in that it does not fix the time and manner of payment of the loan, nor fix the rate of interest.

The fact that votes were cast by persons not qualified electors would not invalidate the result unless such result would have been different if no such invalid votes had been cast. You do not state what the vote was upon the resolution and I presume that the throwing out of the invalid vote would not change the result. If I am correct in that supposition the vote is not invalidated by reason of that fact.

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Education—Municipal Corporations—Sec. 496j–1 applies to the city of Milwaukee. If that city does not comply with said section it forfeits its share in the seven-tenths mill tax.

Sept. 8, 1914.

C. P. Cary, State Superintendent of Public Instruction.

In your letter of Sept. 8th you say that the city school district of Milwaukee has not established a free high school according to the one prescribed in sec. 490, Stats., and that it maintains a graded system of schools of at least twelve in number and offers a course of study in the four upper grades equivalent to that offered in the free high schools of the state. You submit three questions which may be stated as follows:

1. Does sec. 496j–1 apply to the city of Milwaukee?
2. If in case the city of Milwaukee refuses to admit children to the four upper grades of its school system in accordance with the terms and provisions of sec. 496j–1, is it my duty to deprive the city of its right to share in the apportionment of the seven-tenths mill tax?
3. In case the first and second questions are answered in the affirmative is the fund created by the seven-tenths
mill tax to be distributed pro rata among all the other cities, towns and villages of the state, or in other words do the other towns, villages and cities gain by the amount withheld from the city of Milwaukee?

Said sec. 496j-1 provides as follows:

"The school board or board of education in any incorporated city maintaining a graded system of schools of at least twelve grades, but no free high school, the four upper grades of which contains substantially the same amount and character of work as adopted and offered in free high schools established according to the provisions of section 490 of the statutes, shall admit to the privileges of the four upper grades or high school department of such graded system of schools, whenever the facilities in the four upper grades or high school department will permit, nonresident pupils, whose parents or guardians live in a school district not maintaining a free high school or one equivalent thereto and who have completed the course of study offered in the home school district which must have been at least equivalent to the course of study provided for the common schools of Wisconsin, and who hold certificates or diplomas to that effect signed by the county superintendent of schools of the county in which the parents or guardians reside. In such cases the school board or board of education of such city school district shall be entitled, and is hereby authorized and directed, to collect from the town or village in which the parents or guardians of such persons reside a sum not to exceed one dollar per week as tuition, which shall entitle such persons to all the privileges accorded to the resident pupils of such school district and which shall be in full for all charges for the schooling of such persons. In case any such city school district shall not comply with the provisions of this section it shall be deprived of its right to share in the apportionment of the seven-tenths mill tax for the year in which the provisions of this section were violated."

This statute is clear and unambiguous and was evidently passed by the legislature for the purpose of applying to cities such as Milwaukee that do not maintain a free high school in accordance with the provisions of sec. 490, Stats., but maintain a high school department practically equivalent to those of free high schools.

Your first and second questions must be answered in the affirmative; and your third question must also be answered in the affirmative for the share that Milwaukee would have
had in the seven-tenths mill tax will stay in the treasury and will necessarily increase the amount to be divided among the other districts of the state.

* * *

Education—County Training Schools—Sec. 411, subsec. 3, and sec. 411-5, Stats., harmonized.

C. J. Te Selle,
District Attorney,
Antigo, Wis.

September 15, 1914.

In your letter of Sept. 11th you direct my attention to sec. 411-3, Stats., relating to the county training schools, which provides:

“All moneys appropriated and expended under the provisions of this act shall be expended by the county training school board, and shall be paid by the county treasurer on orders issued by said board.”

You refer also to sec. 411-5 which provides that the secretary of the county training school board upon making a report to the state superintendent, setting forth the facts relative to the cost of maintaining the school, the character of the work done and the number and names of the teachers employed, and such other matters as may be required that—

“* * * the secretary of state shall draw his warrant payable to the treasurer of such school for an amount equal to the sum expended for the wages of duly approved and qualified teachers employed in the school for at least ten months during the school year,” etc.

You state that your county superintendent of schools informs you that this is a rather awkward situation and inquires whether all the money of the training school cannot be paid into the county treasury or to the treasurer of the training school board.

In answer I will say that these statutes must be construed together and harmonized if possible. The only way I can suggest in which this may be done is that the money appropriated should be paid into the county treasury. The
money that is raised by local taxation is already paid into the county treasury. Then it can be expended by the county training school board upon orders issued by said board to the county treasurer. The orders issued by said board may be for lump sums and may be drawn by the treasurer of the board who may pay the small items to the different parties entitled thereto as the county training school board may direct, or if the board chooses, the amount may be paid out direct to the parties entitled thereto, by the county treasurer on orders of said board.

In view of the provisions of said sec. 411-3, as above quoted, I believe that would be the proper practice and permissible under the provisions of all the statutes relating to this subject.

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Education—County Board of Education—Mandamus—
Members elected on the county board of education of Grant county may be compelled by mandamus to organize and act.

September 22, 1914.

C. P. Cary,
State Superintendent of Public Instruction.

In your letter of the 16th inst. you state that at a non-partisan convention of the citizens from various parts of Grant county held in the city of Lancaster previous to the April election, five persons were nominated on the county board of education; that a resolution was accepted by said convention, having for its effect the practical annulment of ch. 751, laws of 1913, being the law creating the county board of education and prescribing its duties, inasmuch as the understanding was that the members so nominated when elected should fail to organize and should resign; that the five persons were duly elected at the April election; that they met in May and for the purpose of transacting business they elected a chairman and a secretary, but did not organize in compliance with the laws of the state.

You state that a question arises as to the status of this board and the duties of the members so elected, whether in my opinion they should at this time get together, organize and prepare themselves for taking charge of the duties imposed upon them by ch. 751.
This question must certainly be answered in the affirmative. The language used in prescribing the duties for said board is plain and without ambiguity and they are such that the people of Grant county have a right to require said board to perform its duties. Our supreme court has held that where the duty sought to be enforced is a positive and plain duty mandamus will lie to compel the performance of the same, and in the case of *State ex rel. Burnham v. Cornwall*, 97 Wis. 565, 567, the court said concerning an action for mandamus that

"Any citizen was competent to bring the action; for it is a settled rule in this state and is in accord with the great weight of American authority that where the relief sought is a matter of public right the people at large are the real party and any citizen is entitled to writ of mandamus to enforce the performance of such public duty. It is sufficient if he is a citizen and as such interested in the execution of the law."

It is not necessary to repeat in this opinion the duties prescribed for said board in ch. 751 as you are well aware of them. I am of the opinion that it is the plain duty of the five members elected to said board to organize and perform the duties imposed upon them by said section and if they continue to refuse to do so I believe a suit may be brought by any taxpayer residing in Grant county who is otherwise competent to bring a suit.

*Education—Teachers—School teacher must teach all scholars lawfully attending her school. School board may discharge a teacher who refuses to teach a scholar who is over twenty and not over thirty years, but lawfully attending school.*

December 3, 1914.

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

*In your letter of December 2nd you refer to subd. (12), sec. 430, Stats., and you inquire whether a school teacher*
in a district school is required, under the law, to teach, without extra compensation, a pupil between the ages of twenty-one and thirty years who has been admitted to said school by the board, and who pays tuition.

Said statute provides as follows:

"The inhabitants of any school district qualified by law to vote at a school district meeting when assembled at the first and at each annual meeting in their district or at any adjournment thereof in their district, shall have power: * * * (12) To authorize the district board to admit to the privileges of the school persons over twenty years of age and persons not residing in the district, whenever such admission will not interfere with the accommodation or instruction of the scholars residing therein, and to fix a fee for tuition per term, quarter or year to be charged to the persons thus admitted."

Your question must be answered in the affirmative. The teacher has been hired to teach the school for a certain period of time and she, of course, must teach all the scholars authorized by law to attend said school. The tuition is not a part of her salary but is a fee paid by the scholar admitted for the privilege of attending the school, and it is paid to the district.

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December 7, 1914.

JAMES KIRWAN,

District Attorney,

Chilton, Wis.

In your letter of Dec. 4th you state that you did not intend to cite the section referred to in my opinion of Dec. 3, 1914, but that sec. 439, Stats., is the one you intended to refer to. You inquire whether a teacher who has been hired to teach a district school may refuse to teach a person residing in that district between the ages of twenty-one and thirty years of age who has been authorized to attend said school by the board.

Sec. 439 provides in part as follows:

"The school board of any school district * * * may admit free of tuition any person between twenty and thirty years of age residing in the district to any school under their control when, in their judgment, it will not interfere with the pupils of school age."
The answer must be the same as the one given to you under date of December 3rd. The school teacher is required to teach every scholar who is lawfully attending the school, and she is not entitled to receive extra compensation for teaching any one over twenty years of age who is authorized by the board to attend school.

You also inquire whether, if the teacher refuses, the board has any remedy.

In answer I will say that the board will have the power to discharge said teacher under the ruling of our supreme court in the case of Scott v. Joint School District, 51 Wis. 554.

Education—Transportation—Distance from home to school house, how measured.

December 29, 1914.

C. P. Cary,

State Superintendent of Public Instruction.

Under date of the 21st inst. you state that a controversy has arisen over the best method of determining the distance that a parent lives from the schoolhouse under the provisions of subsec. 3, sec. 4350, and you ask for my interpretation thereof.

The statute to which you refer provides:

"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 a mile or more nearer to such home, the children of school age shall be privileged to attend the nearer school, and in such cases the school board, or board of education, of the school district in which such families reside is duly authorized by this section to pay, and shall pay, to the treasurer of the district in which the nearer school is located, and where such children attend school the sum per month fixed by said school board as tuition under the provisions of this section, upon filing with the clerk of the school district where the parents or guardians of such children reside a statement on or before the first day of July in each year, setting forth the residence, name, age, date of entrance to such school and the number of months' attendance during the preceding school year of each person..."
so admitted from such district; this statement shall show the rate per month of tuition and the amount of tuition due for each pupil."

The question is, how shall the distance from the home to the schoolhouse be ascertained?

While the word "home" is a term of varied significance and has been held, under certain circumstances, to mean the farm upon which a person resides, I think, as used in this statute, it refers to the dwelling in which children of school age reside and I shall consider the statute upon such hypothesis.

It is apparent that in prescribing the distance from home to schoolhouse it is necessary to provide by what course such distance shall be measured, whether on a direct line, by the nearest highway, by the usual traveled highway or some other course. Without such provision the statute would be meaningless and uncertain. The legislature, recognizing this, provided that the distance should be measured by the "nearest traveled highway." It was evidently considered that such provision made the statute definite and certain. By providing that the distance should be measured by the "nearest traveled highway" consideration of distances not on a highway is effectually excluded. Should such not be the case, the statute would be well-nigh as uncertain as though no course were specified, because contention would certainly arise as to the course to be followed in measuring the distance from home to highway and from highway to schoolhouse, and the legislature would completely fail in accomplishing that which it manifestly intended, viz., the specification of a definite route by which such distance was to be measured.

In my opinion the distance should be measured by commencing at a point on the highway where the school children naturally and ordinarily enter upon said highway in proceeding from their home to the schoolhouse and ending at the point where such school children naturally and ordinarily leave the highway in entering upon the school premises.
OPINIONS RELATING TO ELECTIONS.

Elections—Nominations—Judicial Nomination Papers—
Use of the words "A nonpartisan judiciary" on a judicial nomination paper not prohibited by sec. 31, Stats., as created by ch. 492, L. 1913. Secs. 30, 31, and 38, Stats. 1913, considered.

January 29, 1914.

JOHN S. DONALD,
Secretary of State.

I have your request for opinion under date of the 26th instant, in which you ask to be advised whether the words "Principle represented: A nonpartisan judiciary" may lawfully be used on nomination papers for judicial offices. You enclose a blank nomination paper for Honorable James C. Kerwin for justice of the supreme court, the last line of the caption of which reads: "Principle Represented: A nonpartisan judiciary." You call attention to secs. 31 and 38, Stats., as amended in 1913.

The statutes material to this inquiry, as amended, are:

"Section 30. 1. Independent or nonpartisan nominations may be made for any office to be voted for at any general, judicial, special or city election.

"2. Such nominations shall be made by nomination papers, containing the name of the candidate, the office for which he is nominated, his business or vocation, residence, post-office address, and except as otherwise provided by law, the party or principle he represents, if any, expressed in not more than five words."

"Section 31. No candidate for any judicial or school office shall be nominated or elected upon any party ticket, nor shall any designation of party or principle represented be used in the nomination or election of any such candidate."

"Section 38. * * * * * * *

"16. Ballots for judicial, school and city elections shall be printed upon the quality of white paper hereinafter specified and shall be of sufficient size to afford space for
the names of the several candidates for any office in the column under the proper office designation. The judicial and school ballots shall be in substantially the annexed forms marked ‘E’ and ‘F’. Such ballots shall have similar matter printed on the back and outside as other official ballots are required to have."

The sample form of ballot marked “E” and inserted in the statutes at sec. 38 as the sample ballot for judicial elections contains in the first column the words “For Justice of the Supreme Court,” and following, in brackets and in the second column under the caption “Individual Nominations,” the name “John Doe,” followed by the words: “A nonpartisan judiciary” in each instance. Otherwise than as provided in subsec. 2, sec. 30, above quoted, the form of the nomination paper is not prescribed and no sample nomination paper is printed in the statutes.

Sec. 31, above quoted, and the provision of subsec. 16, sec. 38, that “judicial and school ballots shall be in substantially the annexed forms marked E and F” were enacted as amendatory of the statutes by ch. 492, laws of 1913. As a part of ch. 492, there was likewise enacted a sample judicial ballot in the form above described, marked “E”.

Examination of the original records in the office of the secretary of state shows that this sample ballot was in this form as introduced in the original bill, senate bill No. 418, session 1913, and also in the original enrolled act. The form of this sample ballot has an important bearing on the construction of the language of sec. 31, for it will be observed that that section applies not only to the nomination papers by which, under the provisions of subsec. 2, sec. 30, judicial nominations are made, but applies also to the ballot to be used in the judicial election. The form of that ballot is expressly prescribed by sample by the legislature.

The question raised by your inquiry is, of course, whether the words “A nonpartisan judiciary” constitute a designation of principle represented by a candidate when printed upon a nomination paper circulated in his behalf. If sec. 31, as created by ch. 492, laws of 1913, were considered alone in this connection, it would probably be said that the words, “A nonpartisan judiciary” are expressive of a principle, are in the nature of a campaign slogan, and would, therefore, be prohibited by that section. But sec. 31, which
applies both to the nomination and the election, was enacted as a part of the same chapter as the new provision in sub-
sec. 16, sec. 38, prescribing the form of ballot to be used in a judicial election, and that form of ballot so prescribed in this act expressly prescribes that there shall be printed thereon, following the name of the candidate, the words, "A nonpartisan judiciary."

It would seem the legislature intended to indicate at least the propriety of the use of these words in the conduct of a judicial election under this law. It is a familiar principle of statutory construction that the provisions of a statute which are specific and relate directly to a particular thing will be applied rather than general provisions relating only in a general way to the particular thing. It is also a cardinal rule of statutory construction that the several parts of a statute must be construed in harmony with each other, so that all parts of the statute may be given effect.

Having in mind these principles, we must say that the legislature did not contemplate that the words, "A non-
partisan judiciary" should constitute "any designation of party or principle represented" by the candidate in conjunc-
tion with whose name they might be printed upon a ballot. Otherwise, the legislature could be said to have prescribed in subsec. 16, sec. 38, a ballot unlawful under the provisions of sec. 31, both contained in the same act.

In this situation it must be said that the legislature, in prescribing the form of ballot, intended to use the words in question, not as a declaration or designation of political principle, but as a renunciation and a disclaimers of both. In this manner the legislature has defined, for the purposes of this act, the meaning and effect of the phrase, "A non-
partisan judiciary."

The provision of sec. 31 is the same as to the nomination as to the election. If the phrase in question may be lawfully used as to one, it may be as to the other. In preparing a nomination paper under the provisions of subsec. 2, sec. 30, a question will be presented under the statutes in this form, whether in the caption of the paper all reference to party or principle represented by the candidate should be omitted, or
whether the candidate for nomination for a judicial office ought not perhaps go further and insert in the caption of his nomination paper an express renunciation and disclaimer of all affiliation with or adherence to political party or political principle as such candidate. If he should do so on his nomination paper, as by law he is required to do on the election ballot, then apparently he may do so on the nomination paper in the form in which he is required to do so on the election ballot.

In view of the statute, I think it may be said to be fairly clear that the words “Principle Represented: A nonpartisan judiciary” are not objectionable under the law; that the effect of such a phrase is the same under this statute as though the words “Principle Represented: None” had been used. I am, therefore, of the opinion that the nomination paper is proper.

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Elections—Towns—Town Caucuses—Subsec. 6, sec. 29, Stats., provides for only a single caucus to nominate town officers.

STANLEY G. DUNWIDDIE,  
District Attorney,  
Janesville, Wis.

Feb. 2, 1914.

In your favor of Jan. 31st you state that “It has been the custom in one or two towns in this county for both the republicans and democrats to hold separate caucuses in the same town under sec. 29, subsec. 6, Stats.” You request my opinion as to whether there may be, pursuant to said subsection, more than one caucus in each town or whether all political parties must participate in one caucus.

Ch. 686, laws of 1913, created sec. 35-30, subsec. 1 of which provides:

“At any election at which town or village officers are to be elected, candidates for any office shall be nominated either by caucus as provided in subsection 6 of section 29 or by nomination papers signed by electors of such town or village equal in number to ten per cent of all the votes cast in such town or village for all candidates for governor at the last
preceding general election. Such nomination papers shall conform to the provisions of subsections 2 and 5 of section 30 of the statutes. Such nomination papers shall be filed in the office of the town or village clerk at least five days prior to the holding of such election."

Ch. 686 amended subsec. 6, sec. 29, Stats., so as to read as follows, the portion added by the 1913 amendment being enclosed in parantheses:

"The electors of any town or village may assemble in caucus to make nominations of candidates for town and village offices, at which caucus only qualified electors of such town or village shall participate and, on the demand of any elector, the vote shall be by ballot. (Such caucus shall be held at least seven days prior to the day for holding the election.) At each such caucus a caucus committee of three qualified electors shall be elected, who shall give at least five days' notice, fixing the time and place of the next caucus to be held in such town or village."

In a recent opinion I had occasion to construe subsec. 6, sec. 29, Stats., and said, as to the caucus therein mentioned: "This is a caucus of all the electors of the town and, of course, is nonpartisan. There is only one committee to be appointed and that is a nonpartisan committee, the idea being that the caucus is a nonpartisan caucus as it is customary to hold in a great many towns in this state." The theory of the statute seems to be that there should be a caucus of all the electors of the town for the purpose of nominating candidates for town officers and that any other candidates than those so nominated may be nominated by nomination papers. You will note that the caucus must be held at least seven days prior to the election while the nomination papers need be filed only five days prior thereto. I do not think that the statute contemplates party nominations for town officers and my conclusion is that subsec. 6, sec. 29, Stats., provides for only a single caucus in each town and not for as many caucuses as there are parties or cliques that may desire them.
Elections—Sec. 35-5, although repealed, is still in force for all purposes mentioned in sec. 35-30.

Town clerks are required to cause to be printed official ballots for the annual town meeting irrespective of the manner in which the nominations have been made.

Feb. 12, 1914.

CHARLES KIRWAN,
District Attorney,
Ladysmith, Wis.

In your letter of Feb. 10th you direct my attention to sec. 35-30, Stats., created by ch. 686, laws of 1913, and especially to subsec. 2, which provides that officers to be voted for shall be arranged in the manner provided in sec. 35-5, Stats. You state that the Statutes of 1913 do not appear to have any section numbered 35-5, but that the Statutes of 1911 have such a section. You inquire whether this is a mere omission or whether sec. 35-5, as contained in the Statutes of 1911, is still in force.

Said ch. 686, laws of 1913, which created sec. 35-30, was approved July 30, 1913, and published July 31, 1913. Ch. 773, laws of 1913, in sec. 8 thereof, expressly repeals secs. 35-1 to 35-13, Stats., which, of course, include sec. 35-5. This chapter was approved Aug. 9, 1913, and published Aug. 14, 1913. It thus appears that at the time of the enactment of sec. 35-30, sec. 35-5, to which it refers, had not yet been expressly repealed.

In Sutherland on Statutory Construction, sec. 257, the following rule is laid down:

"Where a statute is incorporated in another the effect is the same as if the provisions of the former were re-enacted in the latter for all the purposes of the latter statute; and the repeal of the former statute does not repeal its provisions so far as they have been incorporated in an act which is not repealed, where the adoption was for the purpose of providing for a subject matter not within the original statute."

The same rule was stated in Shull v. Barton, (Nebr.) 79 N. W. 732, as follows:

"Where one statute refers to another which is subsequently repealed, the statute repealed becomes a part of the one
making the reference and remains in force so far as the adopting statute is concerned.” (Syllabus).

Our court has adopted this rule and in the case of Sika v. C. & N. W. Ry. Co., 21 Wis. 370, the specific application is stated as follows in the syllabus:

“Ch. 64, laws of 1859, provides that in all actions wherein any corporation shall be a party, the adverse party may be examined as a witness in his own behalf, by giving the notice required by sec. 3, ch. 134, laws 1858 (R. S. p. 818). Said sec. 3, ch. 134, was repealed by ch. 116, laws 1864. Held that the notice therein prescribed is still required in the cases provided for in ch. 64.”

This case was subsequently approvingly cited by our court in the case of Ernst v. Steamboat Brooklyn, 22 Wis. 649; Milwaukee Gas Light Co. v. The Schooner Game-Cock, 23 Wis. 144, 151; Delamatyr v. Milw. & Prairie du Chien R. R. Co., 24 Wis. 578, 582; Warner v. Supervisors of Outagamie County, 26 Wis. 310.

Under this rule of law I am constrained to hold that sec. 35-5, although repealed, is still in force for all purposes expressed in sec. 35-30, Stats.

You also inquire whether the town clerks are authorized to provide official Australian ballots for the town election under the newly created sec. 35-30, whether nominations are made by town caucus or by nomination papers.

In answer to this question I will say that subsec. 2 of said sec. 35-30 contains the following:

“The town or village clerk shall cause to be printed a sufficient number of sample and official ballots. * *”

It then provides the form of the ballot and the kind of paper to be used. Under this provision I am of the opinion that the town or village clerks are authorized to cause to be printed official ballots such as therein described, irrespective of the manner in which the nominations have been made.
Elections—School Boards—Women's right to vote—Law does not require that school boards be elected under special city charters providing for appointment by mayor and council. Ch. 211, L. 1885, extending suffrage on school matters to women, not self-executing. Secs. 926-1170 and 926-117p, enacted by ch. 494, L. 1913, provide for special election to adopt elective system. Women may vote at such special elections.

February 20, 1914.

R. A. BARNES,  
Mineral Point, Wis.

I have your letter of the 17th instant in which you state that in your city, under special charter, the mayor and common council appoint all members of the school board and that women, qualified electors in school matters, are thereby deprived of their suffrage rights under the general provisions of the state law. You say: "The citizens here want to know your ruling upon the right of the women to vote which involves of course the matter of the present method of appointment of school board in place of the usual method of election."

You are advised that the attorney general is neither authorized nor required to give legal advice or opinions except to state officers whom he is directed by law to so advise. You will, therefore, understand that what I may say here is not official and is merely by way of courteous, personal response to your inquiry.

Article III, Const., provides that male persons of certain classes and subject to certain exceptions shall be deemed qualified electors, and further provides "that the legislature may at any time extend by law the right of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election and approved by a majority of all the votes cast at such election; 

By ch. 211, laws of 1885, enacted by the legislature and submitted to and approved by the electorate, women, subject to the same qualifications and limitations as men, were made qualified electors on school matters. Our supreme court has said that this act is, in virtual effect, a constitutional amendment, but has also held in the case of
Gilkey v. McKinley, 75 Wis. 543, that this act is not self-executing, and that, unless the legislature provides the means by which the votes of women for school officers may be taken separately from the votes for other officers for which women are not qualified electors, the act of 1885 cannot be given effect.

At the time that case arose, there was no provision for separate ballot boxes and separate ballots for the election of school officers and it was held that where election officers provided separate ballot boxes without such express authority of law, the ballots cast by women voters for county superintendent of schools were illegally counted.

There is no provision of law which requires cities under special charters to elect their school boards by popular vote. Hence, it is lawful for your mayor and council, if authorized to do so by your city charter, to appoint the members of the school board. If these officers are appointed, there is, of course, no question of a denial to women voters of the right to participate in their election, for the reason that they are not elected. Of course, the fact that the school board is appointed by the mayor and council does not give women voters a right to participate in the election of the mayor and council.

Probably the legislature should, in conformity with the spirit of the act of 1885, adopted by the people, provide that all school officers shall be elected in order that the right of women to vote on school matters conferred by the act of 1885 shall be preserved to them. As the supreme court indicated, the legislature should have, at the time the case of Gilkey v. McKinley arose, provided for separate ballots and separate ballot boxes for elective school officers. The result of its not having done so was to defeat the right of women to vote under the act of 1885. I take it also that the failure of the legislature to provide that all school officers shall be elected has a similar effect where school officers are appointed as in your city under the charter.

In this connection it is proper for me to call your attention to the provisions of sec. 926-117o and 926-117p, Stats., as created by ch. 494, laws of 1913. This law provides that in special charter cities of the second, third, or fourth class the city council shall, upon presentation to the city clerk of a petition signed by electors qualified to vote on
school matters equal in number to thirty per cent of the votes cast in such city for all candidates for state superintendent of public instruction at the last preceding election of such officer, call a special election, as therein provided, to determine whether the school board shall be elected by the people, and further provides that, if a majority of the votes cast at such special election are in favor of that method of election, school boards shall be elected in such cities as provided in sec. 926-117p. This act would seem to provide a comparatively simple and easy method of changing the manner of selecting the school boards in your city.

Under the decision of the supreme court in the case of *Hall v. Madison*, 128 Wis. 132, I am of the opinion that women qualified under the act of 1885 are competent signers of such petition and qualified voters at such special election.

_Elections—Towns—Villages—Construction of ch. 686, relating to annual elections in towns and villages._

March 2, 1914.

WILLIAM W. STORMS,
District Attorney,
Racine, Wis.

I have your communication of the 28th ult., in which you propound a number of questions concerning the construction and effect of ch. 686, laws of 1913, amending sub-sec. 6, sec. 29, and creating sec. 35-30, Stats., relating to the nomination of candidates for town or village officers.

The questions you ask and numerous others have been, and are being, constantly propounded and I shall take occasion in this opinion to answer not only the questions you ask, but such others as have been raised, to the end that I may dispose of all questions relating to this law so far as the same reasonably may be anticipated.

Ch. 686, laws of 1913, discloses a plain intent on the part of the legislature to eliminate all party contests in town and village elections and substitute therefor a purely non-partisan election. This is but an extension of the principle of nonpartisan elections made applicable to cities by ch.
7, laws special session 1912, being sec. 35–20 to sec. 35–23, Stats., and in harmony with the legislative policy adopted at that time. The caucus referred to in subsec. 6, sec. 29, therefore, is to be a nonpartisan caucus of all the electors of the town, of whatever political affiliation, and it is the nominees of such caucus only that will be entitled to a place, as caucus nominees, on the official ballot at the election. It follows that there is to be no party designation of candidates on the official ballot.

The fact that the law does not provide any method of calling the first caucus is evidently due to an oversight on the part of the legislature and creates some uncertainty and confusion as to how the first caucus shall be called. Inasmuch as no method is provided in the law itself for the calling of the first caucus, it is apparent that such first caucus cannot be called under legal authority. It must consist of an informal getting together of the voters of the town, pursuant to a general call or understanding of which sufficient publicity has been given in the ordinary manner obtaining in the respective communities to reasonably warrant the presumption that a fair notice of the holding thereof has been given to the electors of the town. It is the custom in many towns of the state to hold these caucuses every year and where such custom obtains, the caucus, in my judgment, may be called in the manner in which such caucuses have heretofore been called. In some towns it has been usual to hold party caucuses and there is a caucus committee of each party. Under such circumstances it seems to me it would be proper for the caucus committee of each party to join in a call for a nonpartisan caucus and give notice thereof in the usual manner obtaining in that town.

In towns where caucuses have not been held it would seem proper for a reasonable number of the electors of the town to join in the call for a caucus to be held at a given time and place, giving reasonable notice thereof in the manner in which like notices are usually given in that community. It would also seem proper that the town chairman or the town clerk or the town board should give a notice of the holding of a caucus. In short, my idea is that it does not matter so very much how this first caucus is called as long as the voters of the town are notified of the time

20—A. G.
and place of holding the same in the usual manner in which notices of like nature are given and they are informed that at a given time and place the caucus will be held.

In this connection I call attention to the fact that the language of the statute with reference to the calling of this caucus is permissive and not mandatory. The statute says "the electors of any town or village may assemble in caucus." I construe this language to be permissive merely and imposes no obligations on the electors of the town to hold this caucus unless they choose so to do. When the caucus is held, however, it shall be held at least seven days prior to the day for holding the election.

In the case of Ward v. Walters, 63 Wis. 39, it is held that:

"In the absence of any statutory rule for computing time where an act is required to be done a certain number of days or weeks before a certain other day upon which another act is to be done, the 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 the days or weeks must intervene before the day fixed for doing the second act."

It seems to me that this furnishes the proper rule of construction of this provision of subsec. 6, sec. 29, and that seven days must intervene between the holding of the caucus and the election. Thus to make it plain: This year the election occurs on April 7th. The last day for holding the caucus will be on March 30th.

There also seems to be some uncertainty as to whether both those who are nominated at the caucus and others who are nominated by nomination papers are entitled to positions on the ballot. Upon this subject the law is plain. The names of those who are nominated at the caucus are to be placed on the official ballot. In addition to such names the names of those who are nominated by nomination papers signed by electors of such town or village equal in number to ten per cent of all the votes cast in such town or village for all candidates for governor at the last preceding general election, are to be placed on the ballot. The offices to be voted for shall be arranged on the ballot in the order in which they are named in the statutes creating such offices and the names of the candidates for each office are to be arranged alphabetically. A form of ballot will
be found on page 44 of the new election laws which will be in the hands of all town clerks prior to the town meeting.

I am often asked whether a defeated candidate at the caucus may be nominated by a nomination paper and have his name placed on the ballot. My answer is that any person who secures the requisite number of signers on the nomination paper, whether he be a defeated candidate at the caucus or any other person, is entitled to have his name placed on the official ballot.

It is but fair to you to say that I have covered many questions not propounded in your inquiry, but, as first above stated, I have done so with the purpose of answering, once for all, in an official way, the various questions that have been brought to my attention in connection with this law.

Elections—Coupon Ballots—The coupon ballot when adopted by a county is to be used at the general elections and not at the Spring elections.

The secretary of state must furnish the county clerk with samples.

J. S. DONALD,
Secretary of State.

I am in receipt of your communication of March 3rd, together with the notice to you from the county clerk at La Crosse county, to the effect that the county board has adopted the coupon ballot, under sec. 44a–2, Stats. It appears that the county board of La Crosse adopted this ballot in 1910, but that in Sept. 1913, the board of La Crosse county ordered the discontinuance of such ballot.

From the notice to you it appears that the county board of La Crosse county on the 10th day of this month, at an adjourned Sept. session, has again adopted the coupon ballot. You inquire whether it is your duty to furnish samples, under sec. 44a–18, and if so, whether this law applies to the spring election in the city of La Crosse or whether it only applies to general elections held in Nov. in La Crosse county.

Sec. 44a–2, subsec. 1, provides:
"After the passage and approval of this act it shall be lawful for the county board of any county, or the city council of any city or the commissioners of any city under commission form of city government, in this state to adopt the hereinafter described coupon ballot and its appropriate tally sheets for use in that county or city at general or city elections and when so adopted said hereinafter described coupon ballot shall be used at general or city elections in the counties or cities where thus adopted. Provided, however, that such county board or city council or the commissioners of any city under commission form of city government may order the discontinuance of such coupon ballot in its respective city or county after it has been used at one or more elections therein and return to the use of such other form of ballot as may be authorized by law."

Under the notice given to you the county board of La Crosse county has adopted the coupon ballot for use in the county. It is, therefore, to be used at the general elections in the county of La Crosse. A general election, as used in said section, is the one held on the Tuesday next succeeding the first Monday in Nov. at which the county, state and congressional officers are elected. (See sec. 1, art. XIII, Const., and sec. 14, Stats.).

Sec. 44a-18 expressly provides that the "secretary of state shall furnish each county officer with such samples as will enable him to properly procure the printing of the ballot."

I am of the opinion that it is your duty to furnish samples to the county clerk of La Crosse county and that the law does not apply to the spring election in the city of La Crosse, but only to the general election held in November.

Elections—Nomination of County Board of Education—Signatures to nomination papers for members of the county board of education need not be secured from any particular part of the county or number of precincts in said county.

March 6, 1914.

Edward W. Miller,
District Attorney,
Marinette, Wis.

In your letter of the 4th inst. you direct my attention to sec. 702-6, which provides:
"The candidates to be voted for as members of the county board of education shall be nominated as provided in section 30 of the statutes, and such election shall be noticed and held and returns thereof made in the manner now provided by law for the election of county judicial officers.

You state that sec. 30 does not state whether the entire number of signatures to such nomination papers may be secured from one precinct or whether they must be secured from a number of precincts throughout the county. You ask my opinion upon this question.

Said sec. 30 provides for the independent or nonpartisan nominations for any office to be voted for at any general, judicial, special or city election. In subsec. 4, sec. 30, we find the following:

"Such nomination papers shall be signed, if for a candidate to be voted for throughout the state, by at least one thousand voters thereof; if for a candidate to be voted for throughout a county, district, or other division less than the state, or within a city or ward, by at least three per centum of the whole number of votes cast therein for governor at the last preceding general election, but in no case by less than fifteen voters."

There is no other provision in this statute as to the places within the county or district from which these signatures are to be secured. Neither do I find any other provisions of the statute applicable. I am, therefore, of the opinion that the number of signatures to the nomination papers may be secured from one or more precincts, as there are no statutory requirements that they should be secured from a certain number of precincts.
Elections—County Board of Education—Women, Right to Vote on School Matters—By virtue of ch. 211, L. 1885, and sec. 702–5, Stats., women possessing the necessary qualification as to residence, age, etc., are qualified to vote on the election of county boards of education.

WM. H. McGrath,
District Attorney,
Monroe, Wis.

I have your request for opinion under date of March 17th, in which you ask to be advised whether, under the provisions of sec. 702–5, Stats., relating to the election of county boards of education, which provides: “Every person residing within the county board of education district, qualified to vote at elections pertaining to school matters, shall be qualified electors at elections for members of the county board of education,” women are entitled to vote at such elections.

Art. III, Const., provides that male persons, of certain classes and subject to certain exceptions, shall be deemed qualified electors, and further provides “that the legislature may at any time extend by law the right of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election and approved by a majority of all the votes cast at such election; * * *.”

By ch. 211, laws of 1885, enacted by the legislature and submitted to and approved by the electorate, women, subject to the same qualifications and limitations as men, were made qualified electors on school matters. Our supreme court has said that this act is, in virtual effect, a constitutional amendment, but it has also held, in the case of Gilkey v. McKinley, 75 Wis. 543, that the act is not self-executing, and that it remained for the legislature to provide the necessary machinery to enable women to vote at elections pertaining to school matters without voting or having opportunity to vote upon other questions. At the time that case arose, there was no provision for separate ballot boxes and separate ballots for the election of school officers.

It is now provided, under subsecs. 16, 17 and 18 of sec. 38, Stats., that school officers shall be voted for upon separate ballots, and that separate ballot boxes shall be provided
for each form of ballot. Sec. 702-5, Stats., above quoted, expressly provides that all persons, qualified electors on school matters, shall be qualified to vote at the election of county boards of education.

In the case of *Hall v. Madison*, 128 Wis. 132, the supreme court held that the right to vote in an "election pertaining to school matters" included not only the right to vote at school district meetings, and, as held in *Brown v. Phillips*, 71 Wis. 239, to vote for school officers and employees, but included also the right to vote upon the question of issuing municipal bonds to erect a schoolhouse. Under the broad construction given to the act in this decision of the supreme court, there can certainly be no question but that women having necessary qualifications as to age, residence, etc., are entitled to vote the same as men in the election of the county board of education, referred to in sec. 702-5, Stats.

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*Elections—Nominations of Candidates—City Offices—All such candidacies are nonpartisan. Sec. 35-20, Stats.*

Where primaries are held under secs. 35-20 to 35-24, only names of primary nominees to be printed on election ballot. In other cities nominations are by nomination papers under sec. 30, Stats., and names of all persons filing nomination papers complying with that section should be printed on the ballot.

March 26, 1914.

*William B. Collins,*

*District Attorney,*

*Sheboygan, Wis.*

I have your request for opinion under date of the 23rd inst., in which you call attention to the provisions of sec. 30, Stats., providing for nonpartisan nominations by nomination papers, and to sec. 35-23, relating to the nomination of nonpartisan candidates in cities by primaries, and suggest that there appears to be a conflict between these two provisions of the statutes, in that sec. 35-23 provides that the names of those selected at the primaries and none others shall be placed upon the official ballot. You ask to be advised whether or not the proper officials are warranted in placing upon the official ballot in municipal elections the
names of any candidates other than those chosen at the primaries held before such elections.

Secs. 35-1 to 35-13, Stats. 1911, enacted by ch. 670, laws of 1907, provided that cities might hold an election and adopt those sections of the statutes and thereby provide for the nomination of candidates for municipal offices in such cities by primaries. These sections of the statutes were repealed by sec. 8, ch. 773, laws of 1913.

By ch. 11, special session 1912, secs. 35-20 to 35-24, Stats., were enacted. The language of these sections, particularly the language of sec. 35-22, indicates that, while sec. 35-20 is general in its application, the rest of the act was intended to apply only to cities in which primaries were held for the nomination of municipal officers.

Prior to the repeal of secs. 35-1 to 35-13, several cities in the state had availed themselves of their provisions and voted to nominate candidates for municipal officers by primaries. The effect of sec. 35-23, Stats., is, therefore, to provide that in cities where nominations are made by primaries, "the persons equal in number to twice the number of persons to be elected to any office, receiving the highest vote for such office * * * * shall be the nominees for such office, and their names, and no others, shall be placed upon the official ballot at the ensuing municipal election in cities in which primary elections are held."

In cities in which the primary system of nomination has not been adopted, the nominations of candidates for city officers are, nevertheless, by virtue of sec. 35-20, nonpartisan nominations, and are to be made, therefore, under the provisions of sec. 30, Stats. In such cities it is the duty of the proper officials to place on the official election ballot the names of all candidates who have been nominated by the filing of nomination papers in compliance with the provisions of sec. 30, Stats. But in cities where primaries are held, only the names of the two persons receiving in the primaries the highest number of votes for each office may be printed on the official ballot.
Elections—County Board of Education—Nomination papers for the members of the county board of education must comply with subsec. 3, sec. 30, or they are fatally defective.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of March 25th you state that at the spring election five members of the county board of education must be elected in your county under ch. 751, laws of 1913. You call my attention to sec. 702-6 of said section, which provides that:

"The candidates to be voted for as members of the county board of education shall be nominated as provided in section 30 of the statutes * * ."

You state that nomination papers have been filed with the county clerk for one member, which are claimed to be so defective as not to entitle the party's name, in whose behalf they are circulated, to be placed upon the official ballot; that the county clerk has requested an official opinion from you and you submit the question to this department. You state that the names which are written in with lead pencil are followed by the town, city or village in which each one lives and the date when signed and the post-office address of each signer as required by law; that the affidavit thereto attached does not state that the signers are electors nor that the maker of the affidavit is personally acquainted with all the persons who have signed the foregoing nomination papers. The affidavit is in the following form:

"I, John Wagner, of the town of Stockbridge, most solemnly swear that the names above written were made by said parties.

John Wagner."

Then follows a jurat.

Subsec. 3, sec. 30, Stats., provides:

"To each separate nomination paper shall be appended the affidavit of a qualified elector to the effect that he is personally acquainted with all the persons who have signed the foregoing nomination paper, that they are electors and that their residence, post-office address and date of signing are truly stated therein * * ."
In view of the express provision of this statute the above affidavit must be considered as fatally defective, and unless there are enough other signers with a valid affidavit attached to make the required number I am of the opinion that the party in question for whom the nomination papers were circulated cannot have his name placed upon the official ballot.

Elections—A voter registered in one precinct and moving into another five days before election may vote in the latter precinct by virtue of par. 12, sec. 69, Stats., but may not vote in the first precinct because of the prohibition in sec. 13, Stats. If such a voter be not registered, he cannot vote because he cannot truthfully swear in his vote under sec. 61, Stats.

April 1, 1914.

ALEX. WILEY,
District Attorney,
Chippewa Falls, Wis.

In your letter of March 31st you request my opinion on a question which you state as follows:

"Where will an elector vote if he leaves one election precinct five days before election and moves into another. Not having lived in the new precinct ten days is he not still entitled to vote in the precinct from which he moved?"

Sec. 13, Stats., provides that:

"No elector shall vote except in the town, ward, village or election district in which he actually resides" etc.

This section evidently requires residence in the precinct where he offers to vote at the time he offers to vote and would therefore prohibit a man, moving under the circumstances stated in your question, from voting in the precinct from which he has moved.

Par. 12, sec. 69, Stats., points out a method whereby if he is registered in the precinct from which he has moved he may entitle himself to vote in the precinct to which he has moved. If he be not registered in the precinct from which he has moved, I find no provision of the statutes which will permit him to vote in either precinct.
RELATING TO ELECTIONS.

Sec. 13, Stats., prohibits him from voting in the precinct from which he has moved and he would be unable to comply with sec. 61, Stats., providing for swearing in the vote of a nonregistered elector.

Elections—Town Caucus—Majority necessary to choice at caucus unless different rule adopted.

April 3, 1914.

ROBERT C. BULKLEY,
District Attorney,
Whitewater, Wis.

In your communication of the 31st ult. you say:

"The question has risen under sec. 29, subsec. 6, election laws of this state, whether a majority or a plurality is necessary and which controls."

You ask my opinion thereon.

Subsec. 6, sec. 29, Stats., provides as follows:

"The electors of any town or village may assemble in caucus to make nomination of candidates for town and village officers, at which caucuses only qualified electors of such town or village shall participate and, on the demand of any elector, the vote shall be by ballot. * *"

Subsec. 1, sec. 35–30, provides as follows:

"At any election at which town or village officers are to be elected, candidates for any office shall be nominated either by caucus as provided in subsection 6 of section 29 or by nomination papers signed by electors of such town or village," etc.

And the other subsection of said section 35–30 makes it the duty of the town clerk to prepare the official ballot to be voted at the town or village election and to place thereon the names of candidates so nominated.

The statute is silent also whether a majority or a plurality of votes shall be necessary to nominate at the caucus. I think this was a question that the legislature did not intend to regulate, the object of the provision being to permit the electors to assemble in caucus according to custom and make nominations. It is my opinion that the question of whether
a plurality or a majority shall be necessary for choice at such caucus rests in the decision of the caucus itself.

Upon assembling, and before any business is done, the caucus may adopt a rule upon such question and provide whether a plurality or majority vote shall govern. If a caucus fails to adopt a special rule, then it is my opinion that a majority is necessary for choice, in accordance with what is practically a uniform custom obtaining in nominating bodies.

Sec. 30, as it appears in the revised statutes for 1898, provides that nominations may be made by a convention, and secs. 31 and 32 provide how and where such nomination shall be certified, but it is not provided in these statutes whether a majority or plurality vote of the convention shall be necessary to a choice. That matter was evidently left to the convention itself to determine and we all know that in this state it has been the universal custom in county and state conventions to have such nominations made by a majority vote. It is fair to assume that this custom was in the mind of the legislature when it passed this law and that in the absence of a statutory expression on the subject, it was assumed that a majority vote would be necessary for a choice, especially if the caucus itself did not adopt a different rule.

_Elections—Education—Public Officers_—The names of the candidates for membership on the county board of education should be rotated on the ballots, as provided by sec. 35, Stats., for candidates for county judge.

Where the failure to so rotate the names is the result of malice and a deliberate purpose on the part of the county clerk to defeat one of the candidates it constitutes “official misconduct” sufficient to authorize his removal from office under sec. 974, Stats.

The district attorney, in such removal proceedings, should advise the members of the county board, and take such part as the board may require.

_A. J. O'Melia,_
_District Attorney,_
_Rhinelander, Wis._

In your letter of the 21st you say that sec. 702-6 provides the method in which candidates for the county board of
education may be nominated and elected. That in so doing it refers to sec. 30 and indirectly to sec. 35. That the statutes clearly contemplate, in your opinion, that candidates for the county board of education shall have their names arranged upon the official ballot by the rotation method and that the names shall be rotated by precincts.

That your county clerk failed to so arrange the official ballot and that such failure, as appears from the evidence ready for production, was the result of malice and a deliberate purpose on the part of such official to defeat one of the candidates for said board. You ask if a showing before the board that such was the case would be sufficient "official misconduct" within the meaning of sec. 974, to empower the county board to remove the county clerk.

You further state that you take it that the clerk will be entitled to a trial or hearing before the board where he might be heard in person or by counsel and the decision of the board based upon the evidence adduced at such hearing. You ask my opinion as to the proper procedure to adopt at such a hearing. You also ask if the district attorney should take part on either side, or if he would act merely in an advisory capacity to the board and especially to the chairman as for instance of the admissibility of evidence, and state that the latter seems to you to be the proper and necessary position for you to take.

Sec. 702-6 provides:

"The candidates to be voted for as members of the county board of education shall be nominated as provided in section 30 of the statutes, and such election shall be noticed and held and returns thereof made in the manner now provided by law for the election of county judicial officers."

I do not understand that there is any question as to the proper nomination of candidates for these offices, and therefore sec. 30, Stats., becomes immaterial so far as this inquiry is concerned. Sec. 35 provides in part:

"For the purpose of determining the order in which the names of candidates for county judge shall be placed on the official ballot, the county clerk shall prepare a list of the election precincts in his county by arranging the various towns, cities, and villages of the county in alphabetical order and the wards or precincts of each city, village, or
town in numerical order under the name of such city, village, or town.

"** * * *

"The county clerk shall arrange the surnames of all candidates for county judge, and superintendent of schools, alphabetically for the first precinct in the list, and thereafter, in each succeeding precinct, the name appearing first for each office in the last preceding precinct shall be placed last."

I have no doubt that this is the provision the legislature intended to make applicable to the election of members of the county board of education, and that the names of the candidates should be rotated as therein provided.

Sec. 974, Stats., provides for the removal by the county board of the county clerk "when on charges and evidence it shall appear to such board that he has been guilty of official misconduct or habitual or wilful neglect of duty such as ought in their opinion to cause his removal."

The official neglect to do an act which ought to have been done will constitute official misconduct, although there was no corrupt or malicious motives. Mechem on Public Offices and Officers, sec. 457.

In a note to 29 Cyc. p. 1410, it is said that the phrase "misconduct in office" is broad enough to embrace any wilful malfeasance, misfeasance or nonfeasance in office, citing State v. Slover, 113 Mo. 202, 208, 20 S. W. 788. The same note states that misfeasance as a cause for removal from office is a default in not doing a lawful thing in a proper manner, citing Colburn v. Neufarth, Ohio Prob. 24.

It seems clear to me that the deliberate failure to rotate the names of these candidates would constitute official misconduct, and that would be especially true where such failure was the result of malice and a deliberate purpose to defeat one of such candidates.

Sec. 974 itself provides for a hearing upon any such charges. Sec. 752, Stats., is the one providing for the duties of the district attorney. It would appear to me that the particular part of this section applicable to the situation here is sub-sec. 3 providing that it shall be his duty "to give advice to the county board and other officers of his county, when requested, in all matters in which the county or state is interested, or relating to the discharge of the official duties of such board or officers."
It would appear to be your duty, if requested so to do, to advise the board and especially the chairman, and probably to take such part in the proceedings as the board requests you to do.

_Elections—Voters—Qualifications_—Person offering to vote must be a permanent resident of voting precinct.

M. R. Munson,
_District Attorney,_
Prairie du Chien, Wis.

In your communication of the 14th inst. you state:

"A. is a single man and boards and sleeps in the village B. and has done so during the last three months or more. He works in the town C, when the weather is such that he works at farm labor. When the weather is bad so that he cannot work, he spends his time with his mother who lives in the town H. His mother does not maintain a home, but lives with an aunt. His mother does his washing and he usually refers to that place in H. as his home. When election time is on hand he claims his residence to be in the village of B. He voted in said village of B. in the spring of 1913, and also again in the spring of 1914. During these last two years he has voted no where else that can be learned. This man owns no property, and claims to have no other home than what I have set forth herein."

You ask whether he is liable to prosecution for illegal voting.

So far as the legal question presented by the above statement of facts is concerned, I can do no better than to refer you to the case of _State ex rel. Small v. Bosacki_, 154 Wis. 475, wherein it was held that certain lumberjacks in northern Wisconsin could not vote in the town of Minocqua at the spring election, although they had lived in said town for a number of months prior to said election. In that case Judge Vimje said (p. 477):

"No extended discussion of the evidence is necessary to show that the trial judge correctly found that the men in question were not permanent residents of the town. True, they were all unmarried, had no other place which they claimed as a home and ate, slept and kept their clothing in the logging camp, but they had no intention of remaining in
the town longer than their logging job lasted. In fact, they were typical lumberjacks of northern Wisconsin whose 'home' followed their 'turkey.' Such men have no place of residence within any legal acceptation of the term.”

That case fully establishes the rule that it is entirely possible for a person to be a legal resident of the state of Wisconsin and yet have no residence in any voting precinct therein where he may enjoy the right to cast his vote. In order to entitle him to vote in a given precinct he must be a permanent resident thereof.

I feel that the above is a very safe and correct statement of the law applicable to the state of facts presented. Whether you will be able to secure a conviction may be quite another matter. In a prosecution of this man on a charge of illegal voting the question becomes largely one of fact, the fact being whether he was a permanent resident of the village of B. at the time he cast his vote. In such a prosecution he would no doubt testify to his intent in such respect, but it seems to me that his testimony to this fact would be very successfully impeached by proof of the facts which are stated in your letter and above quoted. It seems to me that any fair-minded jury would have to conclude that his mode of life, his business, his habits and opportunities for earning a living during the last two years were entirely inconsistent with the idea that the village of B. was his permanent place of residence. He is simply an unmarried man, without any home and as said by Judge Vinje "his home follows his turkey." There seem to be no binding ties to attract him to or keep him in the village of B.—no home, no relatives, no business, no trade. It appears that his presence there for three months prior to election is more of an accident than for any permanent purpose.

Of course, I am not unmindful of the fact that the result of a prosecution will depend considerably upon the personal sentiment of the jury, but I do not think that should dissuade you from undertaking the prosecution. If we are "to preserve the lawful exercise of the ballot and the right of self-government in local matters to the permanent residents of each locality," miscellaneous voting of this character must be discouraged, and I believe it the duty of the district attorneys to prosecute such offenders without too much regard to the question of the probability of conviction.
Elections—Primaries—Nomination Papers—Sec. 30, Stats., does not apply to nomination papers for candidates to be voted for at the September primaries. Such nomination papers should be in the form prescribed by sec. 11-5, Stats.

April 28, 1914.

L. Olson Ellis,
District Attorney,
Black River Falls, Wis.

In your letter of the 27th you ask if subsec. 2, sec. 30, Stats., wherein it requires nomination papers to give the post-office address of the nominee, applies to a nomination paper for an office to be voted at the September primaries, or if a nomination paper such as you enclose would be sufficient.

Sec. 30 relates to independent or nonpartisan nominations for any office to be voted for at any general, judicial, special or city election. Sec. 11-5, Stats., is the section prescribing the form of a nomination paper for candidates to be voted on at the September primary. Such nomination papers, if in conformity to this section, do not need to comply with the provisions of sec. 30. It appears to me that the form you sent is a substantial compliance with the section.

Elections—Citizenship—One who has declared his intention to become a citizen but who is not a full citizen is not an elector and may not hold the office of school director.

The marriage of an alien woman to a citizen of the U. S. makes her minor child a citizen.

July 8, 1914.

Alexander Wiley,
District Attorney,
Chippewa Falls, Wis.

In your favor of July 7th you request my opinion on the following question:

"Is an individual who has declared his intention to become a citizen of the United States eligible to the office of a school director?"
By the amendment adopted in Nov. 1908, to subsec. 2, sec. 1, art. III, Const., a declaration of intention to become a citizen of the United States no longer has any effect to give a person the right to vote in this state. This department has ruled that one must be a citizen in order to hold the office of school director. See Biennial Report and Opinions of Attorney General 1912, p. 386.

You also ask:

"If an individual is born in the old country, and he comes over here when he is three years old, after his father dies, and his mother marries a citizen of the United States, is he a citizen?"

Sec. 2172, R. S. U. S., provides in part that:

"The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered citizens thereof."

Under this language the federal courts have held that a boy born in a foreign country where his father dies and who comes to this country with his mother, who marries a citizen of this country, the boy being then a minor, becomes upon such marriage ipso facto a citizen of the United States. U. S. v. Kellar, 13 Fed. 82, 84; U. S. ex. rel. Fisher v. Rodgers, 144 Fed. 711, 712.

You do not state in your question that the mother's marriage to a citizen of the United States took place while the boy was still a minor, but assuming that such is the fact it seems clear, under the authority of the above cases, that he became, upon such marriage, a citizen of the United States.
Elections—Corrupt Practices—Whether the purchasing by a candidate of copies of a newspaper in which is published matter furnished by him favoring his candidacy constitutes such matter "paid advertisement" under sec. 94–14; also whether the publisher is paid for such publication under sec. 94–15 considered.

J. F. MALONE,
District Attorney,
Beaver Dam, Wis.

I have your request for opinion dated the 20th inst. in which you say:

"Would you kindly give me your opinion as to whether or not the following facts constitute a violation of sec. 94–14, 94–15 and 94–16 of the corrupt practices act? A candidate goes to a newspaper and gives them material for a write-up, the same not being headed or in any way labeled as a paid advertisement, the candidate not paying directly for the write-up but paying for a number of the papers which he orders."

Sec. 94–14, Stats. prohibits the publisher of a newspaper to insert therein "any matter paid for or to be paid for," which is intended or tends to influence voting at an election unless the same is marked "Paid Advertisement," and carries the additional notices therein required.

Sec. 94–15 prohibits the owner or publisher or employee of any newspaper to solicit or receive compensation or "promise to pay, or in any manner compensate any such owner * * * directly or indirectly" for influencing or attempting to influence through any printed matter in such newspaper any voting at any election, except by matter marked "Paid Advertisement."

It would not be possible to say from the statement of facts submitted by you that the publication of the matter referred to in a newspaper is a violation of these sections. If there was an agreement or understanding at the time the matter was furnished to the publisher or at any time prior to its publication that, in consideration of its publication, the candidate would purchase and pay for a number of copies of the paper, then I am of the opinion that such agreement and publication would be a violation of these sections and clearly a violation of sec. 94–15.
If, however, the matter is published gratuitously and without any understanding, express or implied, that there was to be any compensation, directly or indirectly, for the publication, then I am of the opinion that a conviction could not be obtained under these statutes. Of course, the fact that the candidate purchased a number of copies of the paper containing the publication and distributed the same would be evidence tending to prove the consideration, but would not be of itself sufficient evidence to support a conviction.

I am of the opinion that sec. 94-16 is not applicable. This section was apparently intended to apply to publications by circulars and the like and not to ordinary publications of news interest in a newspaper.

Elections—Nominations—Corrupt Practices Act—Failure to comply with sec. 94-9, Stats., by filing statements of disbursements for political purposes as therein required disqualifies the candidate to be certified as the nominee or to have his name printed on election ballot. Sec. 94-10, Stats.

Charles F. Morris,
District Attorney,
Iron River, Wis.

I have your request for opinion of the 24th instant, in which you state:

"Sec. 94-10, Stats., dealing with statements of accounts of candidates for public office contains the following:

"’The name of a candidate chosen at a primary or otherwise shall not be certified or printed on the official ballot for the ensuing election, unless there has been filed,’ etc.

"The county clerk of this county has asked my opinion, and I now request yours, as to whether or not a candidate for nomination for a county office, who files the requisite nomination papers, with a proper number of signers to entitle him to have his name placed upon the primary ballot but who has failed to file statements of his expenses as required by law, is a candidate whose name ‘shall not be certified or printed on the official ballot for the ensuing primary.’”

Sec. 94-10, Stats., 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 by or on behalf of said candidate and by his personal campaign committee, if any, the statements of accounts and expenses relating to nominations required by this act up to the time for such certification. The foregoing shall not prevent the placing of the name of a candidate upon the official ballot if such statement shall be filed 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, which is hereby authorized to be made by the presiding judge of any court of record of this state, upon his being satisfied of the truth of an affidavit made by the candidate or by a member of his personal or campaign committee, in his behalf and duly authorized by him, setting forth the facts with regard to the omission to file such statement and showing that such omission was not intentional, which affidavit shall accompany such order and both be filed with such statement. On the petition of any elector entitled to vote for or against such candidate such order may be reviewed and set aside in a proceeding as provided in section 94-30 of the statutes."

Sec. 94-9, Stats., requires the filing by every candidate and by the secretary of every personal campaign committee and the secretary of every party committee of sworn statements of political receipts and disbursements. Subsec. 2 provides that these statements shall be filed with the officer with whom the candidate is required to file nomination papers.

In subsec. 1 of this section the various times at which these accounts of receipts and disbursements shall be filed are prescribed. The first account is required to be filed "within four days ending on the second Saturday occurring after such candidate or committee has first made a disbursement or first incurred any obligation, express or implied, to make a disbursement for political purposes." This provision prescribes, therefore, a period of four days within which this account must be filed and the last day of said period is the second Saturday occurring after the first disbursement made.

This subsection then provides that an account shall be filed monthly thereafter, and "within the four days ending on the second Saturday of each calendar month." It also requires a final account to be filed within the four days ending on the Saturday preceding the election or primary. It
appears that the last day for filing any expense account required to be filed by this law is on the Saturday which terminates the four-day period prescribed by the law and within which such accounts may be filed; that is, the last day for filing the first account is the second Saturday following the first disbursement. The last day for filing subsequent accounts is the second Saturday in each calendar month, except the final account, and the last day for filing the final account is the Saturday preceding the election or primary.

This section further provides that "each statement after the first shall contain a summary of all preceding statements," etc. The effect of this is to require an account to be filed at each of the times prescribed, regardless whether any additional expenses have been incurred subsequent to the expenditures previously reported.

Any candidate, therefore, who has incurred any expense on account of political purposes, as defined in the law, must file an expense account not later than the second Saturday following such first disbursement, and thereafter not later than the second Saturday in each month, and also an account not later than the last Saturday preceding the election or primary. Failure to file any such account, as required by the law, is a violation.

Sec. 94–10, above quoted, prescribes, in addition to the penalties of the statute, that the failure of a candidate or the failure of a personal campaign committee to file expense accounts, as required in sec. 94–9, shall operate as a disqualification by declaring that no such candidate shall be certified or have his name printed on the official election ballot. The language is: "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 expense accounts have been filed as required by law up to the time for such certification. This rule, however, is not absolute and it is further provided that: "The foregoing shall not prevent the placing of the name of a candidate upon the official ballot if [1] such statement [of campaign expenses] shall be filed at least sixty days before the primary, or [2] within seven days after the latest time otherwise provided by law," when accompanied by an order of a judge of a court of record approving such filing.
It is to be observed that this statute does not prohibit the certifying of the name of a candidate for nomination in a primary or the printing of the name of such a candidate upon the primary ballot, but only the certifying of the candidate's nomination and the printing of his name "on the official ballot for the ensuing election." The result of this is that, so far as this statute is concerned, a failure to file expense accounts as required by law does not affect the right of the candidate to a place on the primary ballot, but only affects the right of the candidate, who receives the highest number of votes in the primary and who would otherwise be entitled to be certified, to have his name placed upon the election ballot as the nominee of his party.

This rule was doubtless prescribed in order to assure a more strict compliance with the corrupt practices act. To relieve against hardship which might result through mere inadvertence or accident, it was, however, provided that the disqualification should not apply.

(1) In case the candidate had filed a full statement at least sixty days prior to the primary, or

(2) In the case of failure to file any statement on the last day prescribed by law for filing the same; that is, on the second Saturday after the first disbursement, on the second Saturday of each month thereafter, or on the last Saturday before the primary, and the same was filed within seven days after such last day with a certificate of approval by a judge of a court of record.

But these are the only exceptions. If the candidate nominated in the primary has failed and neglected to file any statement of political receipts and disbursements at the time prescribed in sec. 94–9, the provisions of sec. 94–10 prohibit the certifying of such candidate as the nominee and the printing of his name on the election ballot, unless such failure has been cured in one of the two ways prescribed in sec. 94–10, as above explained.

In this connection it is proper to add that, in the absence of an official record in the office of the county clerk or the secretary of state or other official whose duty it is to certify to the nomination and to prepare the election ballot, showing clearly and positively that fact, no such official will assume to withhold such certification or to refuse to print the name of the nominee on the election ballot upon an assumption
or upon statements made to them that a candidate has made political disbursements without making report of the same as required by law. In the absence of any expense account being filed, the assumption will be that no disbursements have been made or obligated and no contributions received.

Of course, if a candidate has filed an initial sworn statement showing such receipts or disbursements, but has failed to file a subsequent statement required by law, then doubtless the filing officer may take notice of his record and refuse to certify the nominee and refuse to print his name on the official ballot. Otherwise, however, and generally, he should certify the nominee and print his name on the ballot, unless some proceedings are brought in a court of competent jurisdiction to establish the nominee’s disqualification and to prevent the certification and the printing of his name upon the ballot.

In the event of a nominee becoming disqualified in this manner, it would probably be held that a vacancy would thereby be created in the party ticket. Under the decision of the supreme court in Bancroft v. Frear, 144 Wis. 79, if the disqualification occurred under such circumstances and attended by such publicity that a number of voters, at least equal to the plurality received by such candidate in the primary, could be said to have voted for the candidate with knowledge of the disqualification, the candidate receiving the next highest number of votes would be the nominee. Otherwise, such vacancy would be one to be filled by the proper party committee, as provided in sec. 11–13 of the primary election law.

Elections—Citizenship—Indians—An Indian who has received an allotment of land from the United States is a citizen of the United States, and, if he possesses the other requisite qualifications, is a qualified elector of this state under sec. 12, Stats.

July 30, 1914.

GEORGE E. O’CONNOR,
District Attorney,
Eagle River, Wis.

In your letter of the 28th you state that in Vilas county is located the greater part of the Lac du Flambeau Indian
reservation. That the Indians on this reservation are Chippewas. That they are enrolled as members of the Lac du Flambeau band, are members of the Chippewa tribe and live upon the Lac du Flambeau reservation. That a few who belong on this reservation live away from the reservation in the surrounding country and go and come from the reservation as they wish. That the question is, are any of the members of this tribe, either of whole or mixed blood, who are enrolled and reside on the reservation electors. You state further that as you understand the provisions of sec. 12, Stats., none of these men can legally vote unless they make, subscribe and file the oath as provided in subd. (5), sec. 12. That unless these Indians have been declared by some act of Congress citizens, as provided by subd. (3), sec. 12, then subd. (5) of that section controls. That the question is important as there are a considerable number of these people who are intelligent and who vote understandingly and have been voting off and on for a long time. You ask for my opinion upon this question.

Sec. 12,_stats., provides in part that every male person of the age of twenty-one years or upwards belonging to either of the classes therein named who shall have resided in the state for one year next preceding any election and in the election district where he offers to vote ten days shall be deemed a qualified elector at such election. Subd. (3), sec. 12, gives as one of the classes:

"Persons of Indian blood who have once been declared by law of Congress to be citizens of the United States, any subsequent law of Congress to the contrary notwithstanding."

Subd. (4) and subd. (5) give as two of the classes:

"Civilized persons of Indian descent not members of any tribe."

"Any civilized person, being a descendant of the Chippewas at Lake Superior or any other Indian tribe, residing within this state, and not upon any Indian reservation, who shall make and subscribe to an oath before the clerk of the circuit court or his deputy of the county where such person resides that he is not a member of any Indian tribe, and has no claim upon the United States for aid and assistance from any appropriation made by Congress for the benefit of Indians, and that he thereby relinquishes all tribal relations, and all right to claim or receive such aid * * *."
I think you are right in your statement that unless these Indians have been declared by some act of Congress citizens, they are not entitled to vote unless they make and subscribe the oath provided by subd. (5).

By the act of Congress of Feb. 8, 1887, it was provided in part:

"That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use, either by treaty, stipulation or by virtue of an act of Congress or executive order, setting apart the same for their use, the president of the United States be, and he hereby is authorized whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause such reservation or any part thereof to be surveyed, and re-surveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon," etc.

Said act further provides:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal of the state, or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law, and every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or in any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It may well be that some of these Indians of whom you speak have received allotments of land from the United States. You will note that if this is true they are declared by congress to be citizens of the United States, and as such they would be entitled to vote, if they possess the other
RELATING TO ELECTIONS.

qualifications relating to residence and age. Of course that is a question I am not prepared to determine at this time. I assume that what is said herein will be sufficient for your purposes, however.

Elections—Candidate must file declaration that he will qualify if elected.

A. J. O' MELIA,
District Attorney,
Rhinelander, Wis.

In your communication of the 29th inst. you state:

"The democratic county committee has arranged a ticket for the coming fall primary. In doing so they placed on their list the names of men who, in some instances, are not democrats and in other instances men who refuse absolutely to be candidates. Regardless of the personal feeling of these particular men, however, the committee have circulated nomination papers for them, had them signed, and then filed with the county clerk."

You ask whether, under such circumstances, these men so nominated, can be forced to become candidates against their wishes, or whether they can file a declination to be candidates with the clerk, or whether they can withdraw. The real question presented by your statement of facts is whether the county clerk is authorized to place their names on the primary ballot.

Sec. 11-5, Stats., provides the manner in which candidates to be voted for at the primary election may be nominated. It provides that:

"The name of no candidate shall be printed upon an official ballot used at any September primary unless at least thirty days prior to such primary a nomination paper shall have been filed in his behalf as provided in this act in substantially the following form:"

Then follows a form of the nomination paper, provisions concerning the manner of signing, the time of circulating the same, the number of signers required, etc.

Subd. (b), subsec. 4, sec. 11-5, provides as follows:

"The affidavit of a qualified elector shall be appended to each such nomination paper, stating that he is personally
acquainted with all persons who have signed the same, and that he knows them to be electors of that precinct or county, as the nomination paper shall require; that he knows that they signed the same with full knowledge of the contents thereof and that their respective residences are stated therein, and that each signer signed the same on the date stated opposite his name, and that he, the affiant, intends to support the candidate named therein. Such affidavit shall not be made by the candidate, but 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."

I construe the words underscored above as a mandatory requirement to be complied with by every candidate in order to have his name placed upon the primary ballot. In other words the name of a candidate is not entitled to a place on the primary ballot unless all of the requirements of said sec. 11-5 are complied with. In my opinion it is as necessary for the candidate to file the declaration that he will qualify as such officer if nominated and elected as it is to file the nomination papers. Unless a person for whom nomination papers have been filed with the county clerk also files the declaration that he will qualify as such officer if nominated and elected, the county clerk is without authority to place his name on the primary election ballot.

I therefore advise that the persons mentioned in your letter are in no danger of becoming candidates against their will because, unless they take the personal affirmative action of making and filing the declaration required by the provision quoted, their names will not be entitled to a place upon the ballot at the primary election.
RELATING TO ELECTIONS.

Elections—Corrupt Practices Act—Political disbursements lawful only by candidate, his personal campaign committee or a party committee, except that persons may make certain of such disbursements only in county where they reside.

“Party committee” in this act means a party committee created under secs. 11-21, 11-22, Stats.

If a personal committee may act for several candidates, it must keep and report separately its receipts and disbursements on behalf of each candidate.

John S. Donald,
Secretary of State.

In your request for opinion, dated the 28th inst. you state:

“I enclose herewith a letter from the chairman of the Democratic state conference committee, who inquires concerning the status of said committee and its operations, and the obligation of individual candidates under the Corrupt Practices Act. As it would seem that this question is broad enough to merit official attention, I request your official opinion.”

The communication which you enclose is as follows:

“The candidates for state offices that were endorsed at the Democratic conference held in Milwaukee July 14th have appointed us as their campaign committee.

“Have you any financial statement blanks suitable for committee reports? If so, please forward some to us at once; also state if it requires a separate statement for each candidate or may we report our expenditures jointly. Also say if statement must show contributions from each individual. We certainly wish to comply with the law, but as it seems to be a matter of opinion between lawyers as to what is really required, we hope you will give us your advice in this matter.”

Your inquiry questions the status under the Corrupt Practices Act of a committee purporting to act for several candidates for primary nomination and the manner and form in which such a committee, if legal, may, under the act, file its statements of political receipts and disbursements. While these considerations are not perhaps completely answered, in the express provisions of the Corrupt Practices Act, it seems to me that the answer to them, in view of certain express provisions of the act and having regard to the
act as an entirety and its object and purpose manifested by its provisions, is made reasonably plain.

The Corrupt Practices Act is a comprehensive statute designed to prevent the improper and excessive use of money in primary and election campaigns. It prescribes the purposes for which political disbursements may be made and expressly prohibits such disbursements for any other purposes. It fixes the amounts which may lawfully be spent by candidates and those authorized to represent them and expressly prohibits disbursements in excess of the amounts so fixed. It designates those who may lawfully incur general political campaign expenses and expressly prohibits all other persons to make such expenditures, except that individuals may make certain expenditures properly incident to the holding of public meetings only in the counties wherein they reside.

In addition to limiting the amounts and purposes and restricting the persons by or through whom political disbursements may lawfully be made, the act provides for complete publicity of all such disbursements by requiring all persons making the same to file with the proper public official sworn statements of such disbursements. It prescribes the times when such statements shall be filed and what they shall contain. It is plain that these provisions of the act are designed not only to secure evidence for the enforcement of the act, but to secure publicity of matters which tend to influence elections to public offices and which the public has, therefore, a right to know. The act, in this respect, goes upon the recognized principle that publicity itself is a powerful corrective and restraint upon tendencies to corruption and wrongdoing.

But the act by no means depends wholly upon the restraints of publicity. All things which it prohibits it punishes with severe penalties. It moreover provides that conviction of any violation of the act by either candidate or his authorized personal campaign committee may be followed by judgment of forfeiture of office. In case of failure to file the statements of expenses as required by the act by any candidate or on his behalf, such candidate is disqualified to be certified as nominated and it is forbidden to print his name upon the election ballot.

Secs. 94-3, 94-4 and 94-5 are substantive statutes in clear and positive terms. The first of these sections provide that
no candidate shall make any disbursement for political purposes, except (1) by his own act, (2) through a party committee, or (3) through a personal campaign committee, whose authority to act shall be filed as provided in the next section.

The next section provides that a candidate may select a "single personal campaign committee"; that before any "personal campaign committee" shall make any disbursement or incur any obligation in behalf of a candidate, it shall file its authority "signed by such candidate" and giving the name and address of each member thereof; that every act of every member of any such personal campaign committee shall be presumed to be with the knowledge and approval "of the candidate".

Sec. 94-5 expressly 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 certain named expenses incident to the holding of public meetings may be contributed and paid directly by a person or group of persons residing within the county where such expenses are incurred, and except that a public speaker may pay his actual traveling expenses in going to and from meetings addressed by him.

These provisions of the act are fundamental and have a bearing upon the construction of all subsequent provisions. They prohibit all political disbursements by all persons whatsoever, saving local disbursements excepted in the section last above referred to, except disbursements by candidates and disbursements through personal or party committees. The purpose is obviously to limit the right to make general disbursements for political purposes to persons having official or quasi-official status and authority and answerable upon official or quasi-official responsibility.

The candidate, if nominated, attains under our primary election law an official status. A violation by the candidate of the Corrupt Practices Act works a forfeiture of that status, of the right to be certified and of the right to have his name printed upon the ballot. If elected, his violation of the act works a forfeiture of the office.
The personal campaign committee of a candidate is given semi-official status. It must be created as in the manner provided. Evidence of its authority must be filed with the proper public official and the candidate whom it represents is made personally responsible for its acts and omissions as for his own, unless he prove affirmatively that the acts in question were without his knowledge and approval and that he could not with due diligence have known of and had opportunity to disapprove the same.

The party committee referred to in the act is not therein defined, nor is there in the act any provision for its creation as in the case of a personal campaign committee. The reason for this is that the party committee referred to in the act is a party committee already existing under the laws of the state, a committee of legal and official status and whose creation and official authority and responsibility are already, under the law, matters of official public record, of which all are presumed to have knowledge. A party committee, as that term is used in the Corrupt Practices Act, is a party committee created and existing under and by virtue of sec. 11-21 and 11-22, Stats.

The idea that any group of persons, self-appointed and self-designated, as a party committee, without official responsibility and with no public record of their appointment or authority, might, by calling themselves a party committee, make general political disbursements as a party committee without violating this law, was not left readable out of the act. The many provisions of the act which precludes any such idea need not be referred to in detail. It suffices to say that no legislature will be presumed to have made it a criminal offense for any person in the state to make a political disbursement other than such as are incident to the holding of public meetings in the county of his residence, except through a party committee or a personal campaign committee, without adequately providing the means whereby every person may know from some official source the existence and authority and legal status of every such committee to whom he might lawfully make a political contribution or through whom he might make a disbursement for political purposes.

Obviously, any person making a political contribution to or making a political disbursement through any committee other than a personal campaign committee legally consti-
tuted under the Corrupt Practices Act, or a party committee lawfully existing under the primary election law, acts at his peril and is guilty of a criminal violation of this act, for which he may be fined or imprisoned or both.

Upon the foregoing considerations, it is clear that the only capacity in which any committee other than a party committee legally constituted under the primary law may conduct a campaign and make political disbursements on behalf of the nomination of any candidate, is as the personal campaign committee of such candidate and when lawfully appointed as such. As such committee, such persons and the candidate by and for whom they are appointed and authorized to act are, of course, bound to observe all of the requirements of the Corrupt Practices Act with respect to the purposes for which disbursements are made, the amount of such disbursements and the filing of statements required by the act.

The question arises in this connection whether the same person or group of persons may lawfully act and make disbursements as a personal campaign committee on behalf of more than one candidate; in other words, whether several candidates may have the same personal campaign committee. While the act plainly does not contemplate one personal campaign committee for several candidates, it does not in terms declare that one committee shall not be a personal campaign committee for several candidates, or that several candidates may not have the same personal campaign committee.

The answer to this question must, therefore, rest upon construction. Such construction must have in mind the act as an entirety, must be such as will meet and harmonize with all requirements of the act and such as will not produce absurd results or results which will tend to evasions of the act or to defeat its declared objects. These principles of construction are elementary.

The act provides that:

"Any candidate may select a single personal campaign committee to consist of one or more persons."

It provides:

"The acts of every member of such personal campaign committee shall be presumed to be with the knowledge and approval of the candidate."

22-A.G.
The committee is appointed and authorized by the candidate. The appointment of any member of such committee may be revoked at pleasure by the candidate. (Sec. 94-4.)

Each such personal campaign committee is required to file statements of receipts and disbursements. The personal campaign committee must file its expense accounts with the filing officer with whom the candidate appointing the committee is required by law to file his nomination papers.

Under sec. 94–10, the neglect of the personal campaign committee to file statements of receipts and disbursements, as required by sec. 94–9, works a forfeiture of the right of the candidate to be certified, if nominated, and to have his name printed upon the ballots, in all respects as though such neglect were the neglect of the candidate himself.

Sec. 94–28 fixes the maximum amount which may be spent “by or on behalf of any candidate.” Subsec. 2 thereof provides:

“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;”

but provides that the total disbursements by himself and by his personal campaign committee or his party committee on his behalf shall not exceed in the aggregate the amount so fixed.

These provisions of the act, and perhaps others might be mentioned, appear to indicate that the legislature intended, by authorizing the appointment by a candidate of “a single personal campaign committee”, to permit a candidate to have a committee to assist him in his campaign as his own, exclusive, personal agency. The work “personal,” as here used, is apparently intended in its primary, dictionary sense, as defined by Webster: “Of or pertaining to a particular person.”

The act manifests an intention that the individual candidate shall have full and exclusive authority over his personal campaign committee and full and exclusive control over their acts as such, and he is made directly responsible therefor. It was clearly never contemplated by the legislature that any
such authority or responsibility should be assumed jointly or shared by several candidates.

With respect to the amounts which may be disbursed by and on behalf of a candidate, the act applies clearly to each candidate individually and severally. The act clearly does not permit of the pooling by several candidates of an amount of money equal to the aggregate of the sums which each may lawfully spend and the disbursement of the total fund generally in behalf of all of the candidates. The statute permits a named maximum amount to be spent by and on behalf of an individual candidate and it requires the filing by such candidate and by his personal campaign committee, if he has one, of sworn statements of all moneys received and disbursed by and on behalf of the candidate.

Sec. 94-9 prescribes in detail what these sworn statements shall disclose. They shall disclose the amounts of contributions received and the time when received, and, in case of contributions in excess of five dollars, the name of each person from whom the same is received; likewise, all amounts disbursed, the dates of disbursements, the specific purpose of each disbursement, and, in case of each disbursement in excess of five dollars, the name of the person to whom the same is paid must be reported.

Clearly in the case of a candidate and in the case of a candidate’s personal campaign committee, these statements must show the receipts and disbursements by and on behalf of each candidate separately and individually and independently of any transactions by or on behalf of any other candidate. Any other construction would but invite gross evasions and violations of the law, and any pretended report or statement of receipts and disbursements filed that does not meet these requirements is not a compliance with this act.

It may be possible for a personal campaign committee to act on behalf of several candidates and so conduct their business that contributions on behalf of each candidate and disbursements on behalf of each candidate may be made, kept and recorded separate and distinct, so that it would be possible for such committee and the candidates whom it represents to comply with the requirement of the act in the making and filing of true and correct statements and in respect to the limitation upon the amount which may be spent by and on behalf of each candidate. If that can be
done, it may be that a single personal campaign committee may lawfully be appointed and act on behalf of several candidates. While the act does not contemplate it, such an arrangement is not so clearly prohibited by the act that it may be said unequivocally to be unlawful, provided it permits of and there is full compliance with the other provisions of the act above referred to.

In conclusion, therefore, I am of the opinion that the committee or proposed committee can have no legal status under the Corrupt Practices Act, except as a personal campaign committee when duly appointed and authorized as provided by law; that it is at least doubtful whether a personal campaign committee may lawfully act as such on behalf of several candidates; that if such committee undertake so to act they are required to conduct separately the campaign conducted by them on behalf of each candidate and to keep, record and report separately all receipts and disbursements on behalf of each candidate.

It is perhaps proper to suggest that the manifest difficulty, if not impossibility, of a full and good-faith compliance with the Corrupt Practices Act by a committee acting as a personal campaign committee for several candidates will properly challenge the closest scrutiny of all acts and filed statements of such committee by all officers charged with the enforcement of the Corrupt Practices Act.

Elections—Citizenship—Indians—An Indian who has received an allotment of land from the United States is a citizen of the United States, and, if he possesses the other requisite qualifications, is a qualified elector of this state under sec. 12, Stats.

GEORGE E. O’CONNOR,
District Attorney,
Eagle River, Wis.

I am in receipt of your letter in reply to my letter of July 30th, relating to the status of certain Indians as electors. Sec. 12, Stats., provides, in part:

“Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who
shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote ten days, shall be deemed a qualified elector at such election:

"(1) Citizens of the United States.

"(3) Persons of Indian blood, who have once been declared by law of Congress to be citizens of the United States, any subsequent law of Congress to the contrary notwithstanding."

The act of Congress of Feb. 8, 1887, to which I referred you in my former letter, provides, in part, that:

"Every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or in any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States."

It appears to me that, if the Indian has received an allotment of land, then very clearly he is a voter under either subd. (1), or subd. (3), sec. 12. By this act of Congress he is made a citizen of the United States, and under either of these subsections a citizen, who possesses the qualifications of age, sex and residence, is entitled to vote.

The act of Congress makes two different classes of Indians citizens. First, those who have received an allotment of land, and, second, those who have voluntarily taken up their residence separate and apart from any tribe of Indians and adopted the habits of civilized life. As I interpret this act, Indians who have received allotments of land are made citizens, regardless of whether they have taken up their residence separate and apart from the tribe or not, and the second class are made citizens, regardless of whether they have received any allotment of land or not.

While it is true that the mere fact that an Indian has been declared a citizen by congress might not entitle him to vote in the state, in the absence of statutory action by the state, yet it appears to me that our state, by the section quoted, has made a positive declaration upon this subject, and that those Indians who have received an allotment of land are clearly entitled to vote, if they possess the other requisites referred to in sec. 12.
Elections—Resignation of Candidate—A candidate for whom nomination papers are filed and who has filed declaration of acceptance under sec. 11-5, Stats., may lawfully decline to continue as such candidate and may have his name omitted from primary ballot.

JOHN BERGER,
County Clerk,
Hayward, Wis.

Replying to your inquiry of the 12th instant, I beg to advise that the district attorney of your county is your proper legal advisor. In view of the fact that the time is short and further that the question concerning which you ask an opinion concerns the office of the district attorney, I will in this case make an exception to the general rule of the office by which all inquiries from county officers are referred to the district attorney, and will answer your inquiry directly.

You ask to be advised whether a candidate running on the Democratic ticket for district attorney for whom nomination papers have been filed may withdraw and not have his name printed on the primary ballot. I find no express provision of the statute authorizing this.

While it is a general rule that a person holding a public office may not as a matter of right resign and be discharged of official responsibility on his own motion, it is, nevertheless, customary to permit such resignation whenever the public service is not affected.

A candidate placed in nomination before a primary is, in a qualified sense, a public officer under the laws of the state, but it would appear that the reasons for the rule above stated with reference to persons holding office would scarcely be applicable to one who is merely a candidate for office. The mere circulating and filing of nomination papers do not entitle the person nominated to have his name printed on the primary ballot.

Subsec. 4, sec. 11-5, Stats., requires that, in addition to the filing of nomination papers, the candidate shall "file a declaration that he will qualify as such officer if nominated and elected." So that it is clearly within the right of the candidate, although nomination papers have been circulated and filed in his behalf, by failure to file such declara-
tion, to keep his name off of the primary ballot. It would seem that no public interest would supervene which should operate to deprive him of this right between the filing of such papers and the printing of the primary ballot.

I find that sec. 11-13, relating to vacancies, provides in part:

"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 * * * and if he shall receive the greatest number of votes * * * the vacancy shall be filled by the party committee as aforesaid."

This section, as amended by ch. 54, laws of 1911, clearly contemplates that a candidate may withdraw and decline to be such candidate even after the primary ballots are printed, and provides that in that event and notwithstanding his declination, if he receive the highest number of votes at the primary, the result shall be to create a vacancy on the party ticket, to be filled by the party committee.

Upon the foregoing, I am of the opinion that you may lawfully act upon the declination of the candidate sent you by him, and omit the printing of his name upon the primary ballot.

Elections—Corrupt Practices Act—Secs. 94-1 to 94-38 do not require statements of political receipts and disbursements to be filed when none have been had or incurred, and failure to file any such statement will not justify filing officer in refusing to place candidate's name on ballot without proof aitundae that such receipts or disbursements have been had or incurred.

Duty of filing officer to notify candidates of noncompliance with sec. 94-9 arises at the end of time prescribed in sec. 94-10 for filing statement with judge's certificate.

A. J. O'Melia,
District Attorney,
Rhinelander, Wis.

Replying to your request for opinion of the 13th inst. supplemented by your inquiry of the 14th, you are advised as follows:

August 18, 1914.
The Corrupt Practices Act, sec. 94–1 to 94–39, Stats., defines "political purposes" and, among other things, requires that all persons disbursing or receiving money for political purposes shall make reports of the same. I am unable to find any requirement, either express or implied, in the statutes that a person not making any disbursement must make report of that fact. Mere failure, therefore, on the part of a candidate for office to file any expense accounts with his filing officer creates no presumption of violation of the law. In the absence of any such reports it will be presumed that the candidate had made no disbursements for political purposes; that he had made such disbursements, if such be the fact, would have to be shown by proof aliunde.

You are referred to the opinion of this department rendered to Charles F. Morris, district attorney of Bayfield county,* in which this matter is more fully considered and which also will answer several of the questions submitted by you.

You ask whether a candidate is excused from making any return where his expenditure for political purposes amount to less than five dollars.

Sec. 94–9, Stats., prescribes what shall be reported. Subd. (3), subsec. 3 of this section requires that the candidate's statement shall "give in full detail:"

"(3) Every disbursement over five dollars in amount or value made by such candidate or committee for political purposes during such period, together with the name of every person to whom the disbursement is made, the specific purpose for which each was made, and the date when each was made, together with the total amount of disbursements made in any amounts or manner whatsoever."

The language of this section is substantially the same in the provisions relating to receipts for political purposes and obligations incurred for political purposes. The fact of this language is to require a detailed statement in which each item of disbursement over five dollars in amount shall be stated separately and that the statements shall show for each such item the date of disbursement, the name of the person to whom and the specific purpose for which such disbursement is made.

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RELATING TO ELECTIONS. 345

But it is further required that such reports shall show "the total amount of disbursements made in any amounts or manner whatsoever." This requires that, in addition to an itemized statement of all items in excess of five dollars, the sum of all other disbursements shall be included and reported, so that the candidate's statement will show the entire amount disbursed by him, except that with reference to items of five dollars or less he is not required to report date of disbursement, the name of the person to whom or the specific purpose for which the disbursement is made. The fact that the candidate may have had no item of disbursement in excess of five dollars, or that his entire disbursements do not exceed five dollars does not relieve him from the requirement to report "the total amount of disbursements made in any amounts or manner whatsoever."

Referring to your question as to the duty of the filing officer to omit from the printed ballot the names of candidates who have not filed expense accounts, you are referred to the above cited opinion, which covers rather fully the duty of the filing officer in this respect. Of course, the statute does not provide for the omission of the candidate's name from the primary ballot, but only from the ensuing election ballot.

You ask to be advised when it becomes the duty of the filing officer under sec. 94-35 to notify candidates who have failed to file expense accounts, as required by law, that such expense accounts have not been filed, especially in view of the amendment of sec. 94-10 by ch. 10, acts of special session 1912. Sec. 94-35 provides:

"The officer with whom the expense account of any candidate for public office is required by any law of this state to be filed, shall notify such candidate of his failure to comply with such law, immediately upon the expiration of the time fixed by any law of this state for the filing of the same, and shall notify the district attorney of the county where such candidate resides of the fact of his failure to file, and said district attorney shall thereupon prosecute such candidate."

"The time fixed" by law for the filing of such statements by candidates is prescribed in subsec. 1, sec. 94-9, and the requirements of this section are considered in the course of the opinion above referred to.
Failure to file within the time prescribed in this section is a failure to comply with the law, and, coupled with the fact that a candidate or a committee has made a disbursement required by the law to be reported at the time so fixed, constitutes a violation of the act for which the person guilty is liable to the penalties provided in sec. 94-38, Stats.

Under sec. 94-10, as originally enacted in ch. 650, laws of 1911, the failure to file statements of receipts and disbursements for political purposes within the time fixed also worked a forfeiture of the right of the candidate to be certified if nominated and to have his name printed on the election ballot.

By ch. 10, acts of special session 1912, sec. 94-10 was amended by adding the clause to the effect that the provisions of this section

"shall not prevent the placing of the name of a candidate upon the official ballot if such statement shall be filed 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 * * * made by the presiding judge of any court of record * * *."

Sec. 94-35, imposing the duty upon the filing officer to notify delinquent candidates, and secs. 94-36 and 94-38, prescribing penalties for noncompliance with the act, including forfeiture of office, remain as enacted by ch. 650, laws of 1911. The amendment of sec. 94-10, in terms, relieves only against the disqualification to have the candidate's name placed upon the ballot in a case where the candidate has filed all delinquent statements sixty days before the primary or has filed within seven days after the time fixed, such filing being accompanied with a certificate of approval by a judge of a court of record. Following the statute literally, a failure to file at the time fixed in sec. 94-9 would subject the candidate to the penalties of sec. 94-38, including forfeiture of office, but under sec. 94-10 the candidate, by filing within seven days of the time fixed with judicial approval, may preserve his right to be certified, if nominated, and to have his name printed upon the ballot. The amendment of the special session of 1912 does not, in terms, relieve the candidate who files under sec. 94-10 with judicial approval from any other penalty of the act.
The question arises whether the amendment of 1912 should be construed to affect the liability of a candidate filing pursuant to that amendment and with judicial approval for the penalties of the act, including forfeiture of office. If we have in mind elementary rules of construction—that the several parts of a statute must be construed so as to harmonize one with the other, and must be construed together so as to avoid absurd results—it seems to me very clear that it must be held that the effect of the amendment of 1912 is not only to enable the candidate, by complying with the provisions of that amendment, to preserve his right to be certified, if nominated, and to have his name printed on the election ballot, but to relieve against all of the other penalties of the act as well. It would certainly be inconsistent and absurd to hold that a candidate may, under sec. 94–10, as amended, preserve his right to be certified and have his name printed upon the ballot, and that, as a direct result of the record which he must make to obtain the judicial approval required under that section and upon the evidence of that record, he may be prosecuted and convicted of violating the law and ousted from the office to which he has been elected.

I am, therefore, of the opinion that it was the purpose and intention of the legislature by the amendment of sec. 94–10, enacted in 1912, to modify conditionally and as therein prescribed the time fixed under sec. 94–9 for the filing by candidates and committees of the statements of receipts and disbursements required to be filed, and that sec. 94–10, as so amended, applies for all purposes of the act.

The result of this holding is that “the expiration of the time fixed by any law of this state,” as that language is used in sec. 94–35, means the expiration of the time fixed in sub-sec. 1, sec. 94–9, as extended and enlarged conditionally by the amended sec. 94–10. That time expires at the close of the last day of the seven-day period within which a candidate may, under sec. 94–10, file with a judge’s certificate. Upon the failure of the candidate then to file, it becomes the duty of the filing officer to immediately notify the candidate and the district attorney of such noncompliance with the law, “and”—in the language of sec. 94–35—“said district attorney shall thereupon prosecute such candidate.”
What will constitute immediate notice by the filing officer in such a case will depend upon circumstances. Ordinarily, a requirement to "immediately notify" means in law

"As soon as practicable under the circumstances of the case." Richardson v. End, 43 Wis. 316; Kentzler v. American Mutual Accident Assn., 88 Wis. 589; Cady v. Fidelity & Casualty Co., 134 Wis. 322.

Or, without material or unnecessary delay. Merrill v. Travelers' Ins. Co., 91 Wis. 329.

The failure of the filing officer, however, to notify the candidate, as required by this section, would not in any wise relieve the candidate from the penalties prescribed in sec. 94-38, including forfeiture of office. The candidate's liability to punishment for violation of the act accrues upon the violation, and can not be affected by any subsequent neglect of duty on the part of the filing officer. The purpose of requiring such notice was not as a warning to the candidate in order that he might make a delinquent filing with judicial approval under sec. 94-10, because the provision for such notice was enacted in sec. 94-35 as a part of the original act, and in the original act there was no provision in sec. 94-10 for a delinquent filing with a judge's certificate.

The purpose of the notice required by sec. 94-35 is doubtless to notify the candidate that he is held by the filing officer to be disqualified to have his name published on the official ballot, so that he may demand a hearing thereon before the filing officer or take such other legal proceedings as he may desire to protect his rights as a candidate and with reference to the ballot. The service of such notice upon the district attorney brings into operation the statutory duty of the district attorney to prosecute for the violation of the act of which he is notified. I take it, however, that the statute does not intend to relieve the district attorney from his ordinary duty to investigate as usual upon an information or complaint laid before him of a violation of law and to satisfy himself that an offense has been committed and that there is reasonable probability that a conviction may be secured before instituting a prosecution upon such notice.

You ask in effect whether a candidate who by violating the law has forfeited his right to have his name printed upon the ballot may lawfully become an independent candidate for
the office and have his name written in upon the ballots. My answer to this would be that, while there is no way to prevent the voters at an election writing upon the ballot the name of such candidate and thus voting for him, in my opinion such candidate would be liable to the penalties incurred by his violation of the act, including forfeiture of office if elected.

You also inquire whether one for whom nomination papers have been filed, but who fails to qualify by filing as required by subsec. 4, sec. 11–5, a declaration that if nominated and elected he will qualify for office, and hence is not entitled to have his name printed on the ballot as a party candidate, may be nominated as an independent candidate and thus become a candidate in the election. I am clearly of the opinion that he may. The situation of such a candidate is no different from that of any other person who is not a party nominee, but who desires to be an independent candidate in the election.

Nomination papers may be circulated in behalf of a person as a candidate without his consent and without binding him in any way, and such person is in no legal sense bound to accept a nomination so tendered to him. He is entirely within his rights in failing or refusing to file a declaration accepting such nomination, and this office has held (See opinion of Aug. 17th to John Berger, county clerk of Sawyer county,*) that, even after filing such declaration, such candidate may withdraw and decline to have his name printed on the primary ballot as a party candidate.

Hence, there is no reason why the failure to file the declaration required by subsec. 4, sec. 11–5, should operate to deprive one of the right accorded by the statutes to every person otherwise qualified to become an independent candidate for office at an election.

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Elections—Corrupt Practices Act—Filing statements under sec. 94–9. "Filing" requires that such statements be deposited in the office of or with the proper filing officer, except that the same may be filed by registered mail as expressly provided in subsec. 1, sec. 94–9, Stats.

J. F. Malone,
District Attorney,
Beaver Dam, Wis.

I have your request for opinion in which you state:

"A candidate for county office announces his candidacy in July and files his first expense account on Saturday, July 25th. Then on Aug. 11th, he next files an account sworn to on Aug. 8th. This second account is not accompanied with a certificate of a judge approving such filing, but is received by the county clerk and filed as of Aug. 11th. Under sec. 94–10 is such candidate entitled to have his name on the official primary ballot? Would it make any difference if such statement was mailed on the 8th, but not by registered mail and not received until the 11th?"

Upon the subject of the duty of a filing officer to exclude from the official election ballot the name of a candidate who has failed to comply with the corrupt practices act, I beg to refer you to the opinion of this department of July 27th to Charles F. Morris, district attorney of Bayfield county, upon this subject.*

The remainder of your inquiry is in substance whether a candidate may comply with the requirements of the Corrupt Practices Act by mailing the statements of receipts and disbursements required by that act to the filing officer within the time fixed by the act for filing such statements. Sec. 94–9, Stats. prescribes certain fixed times within which such statements are required to be filed. Subsec. 2 of that section provides:

"The statement of every candidate and the statement of his personal campaign committee shall be filed with the filing officer of such candidate."

The language of subsec. 1 of this section fixing the time for the filing of these statements is plainly mandatory. For illustration:

*Page 324 of this volume.
Every candidate shall within four days ending on the second Saturday occurring after such candidate has first made a disbursement file a financial statement,

It is clear from the purpose of the act that it is intended to be mandatory as to the time of filing. The provisions of sec. 94–10, as amended by ch. 10, laws of special session 1912, emphasize the legislative intent that the time prescribed and limited for the filing of these financial statements is mandatory. The enumeration by this amendment of two specified conditions upon which a filing subsequent to the time fixed in sec. 94–9 may constitute a compliance with the law excludes the idea that a delinquent filing may lawfully be made in any other manner.

The statute requires that the statement of every candidate "shall be filed with the filing officer." I am unable to find any authority under which it may be held that such a requirement is complied with by depositing the statement in a mail box or post office addressed to the filing officer. All references to cases dealing with laws requiring documents to be "filed" with a public officer or in a public office appear to assume that the least that will satisfy such a requirement is the actual depositing of the document with the officer or in the office designated. If such a requirement might be complied with by posting a candidate’s statement in ordinary mail, there would be no assurance—nothing more than a probability—that the statement would ever reach the proper officer or the proper office. Such a holding would invite in every case of noncompliance with the law the claim that such statement had been mailed within the time prescribed. It would open the door to evasion of the statute and put a premium upon perjury.

Obviously, it is not in harmony with the spirit of this law or in accord with public policy to enlarge by construction the privilege which the statute accords to candidates of transmitting their financial statements by mail to their filing officers. The statute restricts this privilege and safeguards it against abuse by the express requirements of subse. 1, sec. 94–9, as follows:

"The mailing of such statement within the required time, under registered mail, addressed to the proper filing office, shall be sufficient proof of the filing of such statement."
This provision relieves against any hardship to which candidates at a distance from a filing office might otherwise be subject. It secures the maximum of certainty that the statement will reach the filing office and provides a method of mailing such that the fact of mailing may be established by documentary evidence. Of course, a candidate may transmit his statement to the filing officer for filing by any method he may elect, but if he transmits it by mail otherwise than as expressly provided by the statute, obviously he does so at his own risk of loss and of failure of his statement to be filed within the prescribed time.

Except under the provision of the statute, in my opinion, a candidate has not complied with the requirements of the statute unless he has actually deposited or caused to be deposited with his filing officer the statement required by the law within the time prescribed in subsec. 1, sec. 94-9, except, of course, that he may make a delinquent filing under the provisions of sec. 94-10.

Where a law is mandatory as to the time within which nomination papers must be filed, the filing officer has no discretion to receive and file papers tendered after that time, In re McDonald, 54 N. Y. Supp. 690.

Of course, the statute does not disqualify a candidate failing to comply with the provisions of the Corrupt Practices Act from having his name printed on the primary ballot, but only upon the election ballot. Sec. 94-10, Stats. (Opinion to C. F. Morris, above cited.)

**Elections—Registration**—Elector not registered before primary day may register on that day, but is not entitled to vote except he make affidavit as to his qualifications and have the same corroborated by two freeholders.

M. E. Davis,
District Attorney,
Green Bay, Wis.

I have your request for opinion in which you ask to be advised whether or not a man may register on primary elec-
tion day and cast his ballot on the same day in the nomination of officers.

Sec. 11-14, Stats., contains the following provisions:

"1. No person shall be entitled to vote at any primary unless a qualified elector of the precinct and duly registered therein, if registration be required by law in such precinct at elections.

"2. Every primary election day and the Tuesday next preceding shall be registration days but no person shall be registered on or after the day of holding the primary without personally appearing before the inspectors. and 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.

"3. The inspectors shall register any person who shall on any registration day appear and file an affidavit to the effect that he is a qualified elector in such precinct, or when they personally know him to be such."

In view of these provisions of the statute, I am of the opinion that one whose name is not on the registry list in the hands of the election officers and party committee-men on primary election day may register and vote on that day, provided he make affidavit that he is a qualified elector and resident of the precinct and have his affidavit corroborated by two freeholders, electors, in the district.

Elections—Registration—Registration days, when.

Clarence Dennis,
Mayor,
Ashland, Wis.

I have your request for opinion in which you refer to the provisions of secs. 11-14, 25, 26 and 27, Stats., designating registration days for the registry of electors. You call attention to apparent inconsistencies in the provisions of these sections and ask to be advised when inspectors of election should hold meetings for registration purposes.

August 22, 1914.
The language to which you refer in sec. 11-14 reads as follows:

"Every primary election day and the Tuesday next preceding shall be registration days where registration is required *

The provision of sec. 25 to which you refer reads:

"The persons authorized by law to act as inspectors of election in each of such villages, towns, wards, or election districts, shall constitute the board of registry therefore. They shall hold their first meeting on Tuesday, four weeks preceding the general election, and may also meet if registration is to be had at municipal or judicial elections in towns having a population of three thousand or more, four weeks preceding such municipal or judicial election."

The provision of sec. 26 to which you refer occurs in sub-sec. 2 thereof, and reads:

"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."

Sec. 27 provides:

"The inspectors shall hold their second meeting at the place designed for holding elections on the Tuesday next preceding the election."

The want of harmony in these provisions of the statutes is only apparent and arises out of new legislation subsequent to the Statutes of 1898, by which additional registration days have been established without changing the phraseology of pre-existing statutes. The Statutes of 1898 provided for registration only in those years when general elections are held, and in connection therewith, (sec. 23, Stats. 1898). In the Statutes of 1898, sec. 25 provided that the board of registry should "hold their first meeting on Tuesday four weeks preceding the general election," etc., and the provisions of that section still stand, as above quoted, in sec. 25 of the present statutes.

Sec. 27, Stats. 1898, provided, as it still provides, in the language above quoted, for a second meeting or registration day on the Tuesday next preceding the election. So that, under the Statutes of 1898, there were two meetings of the
inspectors of election as a board of registry, the first on the Tuesday four weeks preceding the general election, and the second on the Tuesday next preceding such election. The provisions of the Statutes of 1898, establishing these registration days for the general election, continue and are still in force and require the inspectors of election to meet as a board of registry on those dates.

The first addition to the number of registration days occurred upon the enactment of the primary law, ch. 451, laws of 1903, sec. 14 of which provided for registration days in connection with the primary election in that act provided for. This section is now known as sec. 11-14 of the compiled statutes. It provided that the inspectors of election shall conduct registration and for that purpose shall have the powers prescribed by secs. 25 and 26, (with reference to registration for general elections) Stats. 1898, and that “every primary election day and the Monday next preceding shall be registration days.”

The quoted language is retained in sec. 11-14 of the compiled statutes, except that “Monday” is changed to “Tuesday”, and is in force, fixing registration days in connection with the September primaries. There is no inconsistency between the provisions of sec. 11-14, providing for registration days in connection with the primaries, and the provisions of secs. 25 and 27, Stats. 1898, fixing two registration days preceding the general election, except merely that sec. 25 designates a meeting of the board of registry therein provided for as the “first meeting,” and sec. 27 designates the meeting therein provided for as the “second meeting.”

Whereas sec. 11-14, subsequently enacted, provides for two meetings in connection with the primary at dates prior to the meetings theretofore provided for in the statutes, the designation of the meetings in connection with the general election as “first meeting” and “second meeting” is really immaterial, and the intent of the legislature is clearly expressed to require two earlier meetings in connection with the September primaries.

The result of these statutes is to require four registration days in the fall of each year in which general elections are held: First, on the Tuesday next preceding primary election day; second, on primary election day (sec. 11-14); third, the Tuesday four weeks preceding the general election (sec.
25); fourth, the Tuesday next preceding the election (sec. 27).

The provisions with respect to registration days in sec. 26 of the present statutes are not material at this time, as they do not relate to registration days in connection with fall elections. Sec. 26, as it stood in the Statutes of 1898, merely prescribed the powers of election inspectors as a board of registry, and the manner in which they should proceed to conduct registration and make up a registry list. It was first amended by ch. 400, laws of 1909, to require the printing of the registry lists, and upon this amendment the section was broken up into six subsections.

It was next amended by ch. 632, laws of 1911, by an addition to subsec. 2, the main purpose of which was to provide for a new registration of electors at the spring election of 1913. This amendment provided that at the meetings of the election inspectors held immediately preceding the April election for the year 1913 in cities of the second, third and fourth classes, and in villages and towns in which registry is required, "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 * * * ."

At the time of this amendment the only provision for registration in connection with municipal or judicial elections, i. e., spring elections, was that in sec. 25, Stats., which provided for a registration day "four weeks preceding such municipal or judicial election." It was apparently the thought of the legislature that upon the making of a new registry at which old registry lists were not to be used and at which all electors were to be heard in person, additional provision should be made for registration days. Accordingly, it was provided in the amendment of 1911:

"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."

Provision was thus made for four registration days preceding "such election," referring to "the April election for the
year 1913.” Any ambiguity which there may be in the language of this amendment as to the days designated for registration days is removed by referring to the provisions of sec. 11-3, fixing the days for primary elections.

Subsec. 1 of this section fixes the time for the September primary, and subsec. 2 provides:

“Any primary other than the September primary shall be held two weeks before the election for which such primary is held.”

The effect of the amendment of 1911 was, therefore, to provide for two registration days on Monday and the following Tuesday three weeks preceding the spring election, that is, three weeks preceding the first Tuesday in April, (sec. 925-24). A third registration day on primary election day, which, by subsec. 2, sec. 11-3, is on Tuesday, two weeks before the April election, and a fourth registration day on “the following Tuesday preceding such election,” that is, on the Tuesday following primary election day and preceding the first Tuesday in April.

By ch. 6, Laws Special Session 1912, the amendment of 1911 was changed, so that it was made to apply to “the first election requiring registration after the first day of Dec., 1912,” instead of “the April election for the year 1913.” This change was doubtless made so that the amendment would apply in cities where, under special charters, the spring election of 1913 might be held at some time other than the first Tuesday in April, and also to any special election occurring on any other date in the spring of 1913.

This amendment accounts for the peculiar wording of subsec. 2 of sec. 26 in its present form. This subsection, as amended in 1911 and at the special session of 1912, was again further amended by ch. 8, laws of 1913, in effect repealing the strict requirement that all persons desiring to be registered must appear personally upon some one of the registration days named before the board of registry. The effect of this amendment was substantially to repeal the statute by which it was sought to require new registration lists to be made at the spring elections of 1913 upon personal application of all electors for registration, which was the purpose for which four registration days were provided in connection with the spring elections of 1913.
The amendment of 1911, as originally enacted and in its present form, referred only and was applicable only to the spring elections of 1913, and, in my opinion, does not establish registration days in connection with any subsequent elections or primaries.

_Elections—Corrupt Practices Act_—Campaign circular must bear name and address of candidate and author or its publication and distribution is in violation of sec. 94-16, Stats., and the offender may be prosecuted for penalties provided in sec. 94-38, Stats.

J. Henry Bennett,  
_District Attorney_,  
Viroqua, Wis.

I have your letter of the 22d inst., in which you enclose a copy of a campaign circular of four pages which bears the following caption: “Howard Teasdale for State Senator for 31st District,” and at the end of which appears the name “Howard Teasdale.” The circular is for most part a statement in the first person, purporting to set forth Mr. Teasdale's record in public office, and concludes with two brief quotations from newspapers. It bears no express language stating who is the author of it or by whom it is authorized or circulated, nor does it give the post-office address of either the candidate, the author or the publisher.

Sec. 94-16, Stats., provides as follows:

“No person shall publish, issue or circulate or cause to be published, issued or circulated otherwise than in a newspaper, as provided in subsec. 1, of sec. 94-14, any literature or any publication tending to influence voting at any election or primary, which fails to bear on the face thereof the name and address of the author, the name and address of the candidate in whose behalf the same is published, issued or circulated, and the name and address of any other person causing the same to be published, issued or circulated.”

It may be that the caption of the circular above quoted is a sufficient statement that the same is issued in behalf of Howard Teasdale as a candidate for state senator, and that the name appearing at the foot of the circular might be
construed as a declaration of authorship upon the ground that the signing of a document of this sort generally implies an assertion of authorship of the same. It would seem, however, that the mere signing of such document would hardly be enlarged by any implication to import a declaration that the document is published, issued or circulated by the person so signing it.

However this may be, the section of the statutes above quoted expressly requires that such a document bear upon the face of it the address of the author and the address of the candidate in whose behalf the same is published. I do not find on the circular anywhere any post-office address purporting to be the address either of the candidate or of the author, and in this respect the circular clearly is not in compliance with the requirements of this section of the statute.

It is obviously a "publication tending to influence voting." It is, therefore, subject to this section and can not lawfully be published, issued or circulated except the requirements of this section be observed. To publish, issue or circulate it without complying with the requirements of this section is a violation thereof for which the offender is liable to the penalties prescribed in sec. 94-38, and may be prosecuted therefor.

If the offender be a candidate for office and be convicted under this section of having violated any of the provisions of secs. 94-1 to sec. 94-38, Stats., then, under sec. 94-36, it is provided with respect to legislative candidates that "the court, after entering such adjudication of guilty, shall forthwith transmit to the presiding officer of the legislative body * * * a certificate setting forth such adjudication of guilty." The legislative body will then take such action as may in its judgment be proper under the provisions of sec. 7, art. IV, Const., which provides:

"Each house shall be the judge of the elections, returns and qualifications of its own members; * * *."
Elections—Corrupt Practices Act—The furnishing of nomination papers and filing same with filing officer without knowledge or consent of candidate is not a contribution received by candidate for political purposes.

Cost of postage and stationery incurred by or for a candidate to file declaration of acceptance under sec. 11–5, Stats., is not a contribution or disbursement for "political purposes" as defined in sec. 94–1, Stats.

A. J. O'Melia,
District Attorney,
Rhinelander, Wis.

I have your request for opinion dated Aug. 22d, in which you refer to the opinion rendered you under date of Aug. 18th, in reference to the duty of the filing officer to refuse to certify a candidate nominated at the primary or to place his name on the election ballot in case the candidate has failed to file statements of receipts and disbursements for political purposes. In my opinion of the 18th inst., you were advised that the filing officer might not presume from the fact that no such statement was filed that the candidate had violated the law.

You now suggest that the filing of nomination papers in behalf of the candidate and the filing by the candidate of a declaration, as required in sec. 11–5, Stats., that if nominated and elected he will qualify for the office, may be taken by the filing officer as sufficient evidence that the candidate has received contributions for political purposes or has made disbursements for political purposes. You submit the following:

"The following are the facts at hand upon which both the clerk and I would like your opinion:

"(a) Nomination blanks were purchased for a proposed candidate, without the latter's knowledge or consent, by a friend, and circulated. After this they were filed and the friend notified the proposed candidate, and the latter filed an acceptance of the nomination within five days. Should the candidate have accounted for the thing of value received from said friend within the four days ending on the second Saturday after the filing of his acceptance?

"(b) After nomination papers had been filed the candidate signed his name to the declaration and gave it to his friend
to mail. The friend mailed the same to the clerk and purchased stationery and stamps to do so, or used these articles of value that he then had for that purpose. The letter was received by the clerk and he therefore has direct knowledge that the expenditure was made either by said candidate or by some one in his behalf. If by the third party, should the candidate be called upon to account for that thing of value received by him for political purposes? Can any distinction be made where the amount is very small?

"(c) If the two above cases, in your opinion, are answered in the affirmative, then are the facts that the clerk has direct knowledge that nomination papers have been filed on behalf of a candidate and that they of themselves represent value and the fact that he knows postage was used on behalf of such candidate warrant him in not certifying the name of such candidate on the official ballot without proof aliunde?"

Your suggestion is that the nomination blanks furnished under these circumstances would constitute a property or thing of value received by the candidate and for which, under sec. 94-9, Stats., the candidate is bound to file an account as for a contribution received for political purposes. By your statement these nomination papers were prepared and circulated without the knowledge or consent of the candidate. At the time they were circulated and at the time they were filed, he was not a candidate. It does not appear that they were ever delivered to him as such, but simply that they were circulated and filed in the proper public office.

When so filed they, of course, became a public record. The candidate acquired no right or interest in them superior to that of any other citizen. They became merely a public record filed pursuant to law. I am of the opinion that nomination papers so filed are not property or a thing of value received by such candidate for political purposes within the spirit and meaning of the statute. It must be remembered that the Corrupt Practices Act is a penal statute and is one in derogation of natural rights and will be strictly construed.

In view of the above suggestion, I believe it is reasonably clear that a conviction could not be secured under this statute and under the circumstances which you set forth as for a failure to file an account showing receipt of the nomination papers as a political contribution. If that is so, there has not been a violation of the act on the part of the candidate
by reason of his failure to file such statement of such receipt, and the filing officer would not be authorized upon that ground to refuse to certify the candidate or print his name on the election ballot.

Your further suggestion is that it is within the official knowledge of the filing officer that the candidate or some one on his behalf has made a disbursement for the necessary postage and stationery to transmit to the filing officer the candidate's declaration under sec. 11-5, and that this will constitute a receipt or disbursement for political purposes within the official knowledge of the filing officer, and one which has not been reported under sec. 94-9, so that the filing officer may act upon this information and decline to certify the candidate or place his name on the ballot.

This suggestion, also, I think untenable. Aside from the fact that such contribution or disbursement would be so insignificant as to bring the case properly within the principle that the law does not take account of trifles, it would not be, in my opinion, either a receipt or a disbursement for "political purposes," as that term is used and defined in the corrupt practices act, (sec. 94-1). This disbursement is one incurred merely for the purpose of filing a declaration with a public officer, as required by sec. 11-5, Stats., and would not be a disbursement of a nature or done with the intent or in such a way as to influence or tend to influence voting.

As both of these questions are answered in the negative, it becomes unnecessary to consider the third proposition which you submit.

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Elections—Registration—Duties of boards of registration in making up registry lists.

August 31, 1914.

J O H N S. D O N A L D,
Secretary of State.

I have your request for opinion in which you ask to be advised whether the board of registration shall be governed by the provisions of subsec. 2, sec. 26 or sec. 27, Stats., or both. Subsec. 2, sec. 26, prescribing the general duties to be performed by the election inspectors acting as boards of registration, provides as follows:
"They shall put thereon"—referring to the registry list—
"the names of all persons residing in their election district
appearing on the poll lists kept at the last preceding general
and municipal elections, and may take therefor such lists
from the office where kept, 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 * * * ."

Then follow additional provisions applicable only to the
"first election requiring registration after the first day of
December, 1912." I take it that there have been in every
place where registration is required at least one election since
Dec. 1912, so that these following provisions of subsec. 2,
sec. 26, no longer have any application. The above quoted
portion of this subsection, however, is general in its terms,
applying to all future elections until repealed by the legisla-
ture.

Sec. 27, Stats., is also general and prospective, and both
sections are in force. Subsec. 2, sec. 26, being, however, the
more recent statute on the subject, would be held to repeal
by implication conflicting provisions of sec. 27.

The answer to your inquiry, therefore, is that the provisions
of subsec. 2, sec. 26, above quoted, will govern the registra-
tion as to all matters for which it expressly provides, and as
to those matters supersedes the corresponding provisions
of sec. 27. As to matters not covered by the quoted portion
of subsec. 2, sec. 26, the provisions of sec. 27 will control.

Elections—Candidates—A person who has been defeated
at the primary for the nomination of a certain office may
nevertheless become an independent candidate for the same
office under sec. 30, Stats.

Clive J. Strang,
District Attorney,
Grantsburg, Wis.

In your letter of Sept. 8th you submit the following:

"Can a candidate for county office who has failed to file
his declaration of intention to qualify, if nominated and
elected, according to par. b, subsec. 4, sec. 11-5, have his
name placed on the general election ticket, *he being defeated at the primaries?* The above declaration was filed but not within the five-day limit."

I assume your question is whether he may have his name placed on the general election ballot as an independent candidate, as, if he was defeated at the primary, it is certain he cannot go on the general election ballot as the regular party nominee. The only other way he could get on, therefore, would be as an independent candidate.

The only sections of the statute I know of providing for the placing of the names of independent candidates on the general election ballot are sec. 11-18, subsec. 2, and sec. 30. He does not come under the provisions of sec. 11-18, subsec. 2, hence he cannot go on the ballot as an independent candidate under that section. I see no reason, however, why he cannot go on as an independent candidate under the provisions of sec. 30. The mere fact that he was a candidate at the primary election does not in any manner interfere with his candidacy as an independent candidate at the election. He becomes a candidate then under entirely different circumstances and in a different capacity from that in which he started out and the requirements of the primary election law that he file a declaration of his intention to become a candidate with his nomination papers, or five days thereafter, does not in any sense apply to his independent candidacy under sec. 30. You will notice that under that section it is not necessary for the nominee to file his declaration of intention to qualify if elected.

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**Elections—Ballots—Second Choice for U. S. Senator**—The ballots for the general election may be so arranged that electors may vote for second choice.

CHARLES A. TAYLOR,
District Attorney,
Barron, Wis.

In your letter of Sept. 14th you state that you would be pleased to have me suggest an arrangement of the general election ballot which will give effect to the provisions of sec.
RELATING TO ELECTIONS. 365

94w-1, Stats. This statute provides for the election of U. S. senators at the general election in November, and contains the following:

"2. The names of all persons nominated for the office of United States senator shall be printed on the ballot provided in subsection 1 of section 38 in substantially the manner and form indicated in the annexed form "A" provided in subdivision (a) of subsection 17 of section 38 so that each elector may designate on such ballot the name of his first choice and also the name of his second choice for the said office of United States senator; and such ballot shall be marked in the manner prescribed in subsection 8 of section 11-12.

"3. The rules and procedure of canvassing first and second choice votes cast for the office of United States senator at any general election shall, so far as applicable, be the same as the rules and procedure prescribed in section 11-17."

It will be noted from the above provisions that the names of the candidates for U. S. senator are to be printed on the general election ballot, being the ballot provided for in subsec. 1, sec. 38, but that so far as the office of U. S. senator is concerned the ballot shall be so arranged as to give the voters an opportunity to express their first and second choice for that particular office. It seems to me that this can be very easily accomplished by placing after the names of the respective nominees for the office of U. S. senator two squares instead of one, marking one "first choice" and the other "second choice."

An elector who desires to vote a straight democratic ticket, including a vote for U. S. senator, may place an X in the circle at the top of the democratic column which will be a vote for every officer on said ticket including a first choice vote for U. S. senator; then he may place an X in the square after the name of any other candidate for said office for second choice. If he desires to vote a democratic ticket straight, with the exception of the candidate for U. S. senator, for whom he desires to cast a second choice vote, he may place an X in the circle at the top of the democratic column and place an X also in the square after the name of the democratic nominee for U. S. senator, marked "second choice," and he may then mark an X for first choice in any other square for any other candidate on the ticket for said office.
I see no difficulty in complying with the provisions of our statutes.

_Elections—Corrupt Practices Act_—Whether use of automobile by the owner thereof to carry a candidate for office in the course of his campaign is a political contribution within the meaning of sec. 94-9, Stats., and required to be reported as such, considered.

JAMES F. MALONE,
District Attorney,
Beaver Dam, Wis.

I have your request for opinion of the 14th inst., in which you state:

"Is a failure to report the use of an automobile run by the owner thereof, for which no charge is made, by a candidate for county office, a violation of sec. 94-9, subsec. 3, subd. (3)?"

"If the mileage of the above automobile would exceed more than fifty dollars in value, must the owner of such machine report the donation thereof under sec. 94-11?"

"Can an action be brought against a candidate alleged to have violated any provisions of the Corrupt Practices Act save under sec. 94-30; that is, can an action be brought as in criminal cases?"

Your first question, in substance, is whether a person driving his own automobile, who takes a candidate for office to some place to which the candidate desires to go in aid of his campaign for nomination or election, contributes to of for the candidate a thing of value within the meaning of the Corrupt Practices Act, sec. 94-9, Stats., requiring that "Every sum of money and all property, and every other thing of value, over five dollars in amount of value," received by a candidate for his use for political purposes, shall be reported.

A similar question has arisen under sec. 94-13, that section of the Corrupt Practices Act prohibiting disbursements for political purposes on primary or election day. The language of that section is practically identical with that of sec. 94-9:

"No person nor personal campaign or party committee shall pay or incur any obligation, express or implied, to pay
any sum of money or thing of value whatever, for services to be performed on the day of any primary or election * * *.”

In an opinion by my predecessor under date of January 30, 1912, to S. G. Dunwiddie, district attorney for Rock county, it was held that a person using his own carriage or automobile to transport voters to an election does not violate sec. 94-13. (Biennial Report and Opinions 1912, p. 365.) The reasoning in support of the conclusion there reached is stated as follows:

“Under this section no person shall pay, or incur any obligation, express or implied, to pay any sum of money or thing of value whatever for the expense of transportation of any voter to or from the polls on such day. This is a penal statute and must be strictly construed in favor of the defendant. There is nothing in this section that prohibits a person that is driving to the polls with his own rig from taking his neighbor with him. Neither is there any provision expressly prohibiting the taking of any voter to the polls in a conveyance, unless there is some expense incurred in so doing. It is doubtful in my mind whether a person that transports voters to the polls in his own automobile or carriage during election day comes within the purview of this statute. A person so using his automobile, especially if done during the greater part of the day, incurs an expense for the gasoline required to propel his machine, but the same may be said of a person that simply takes his neighbor with him in his automobile when going to the polls for the purpose of voting himself. The question is not entirely free from doubt, but, in view of the fact that this is a penal statute and that only those that incur expense in transporting voters come within the prohibition of the statute, I very much doubt whether a person using his own automobile or carriage to transport voters to the polls is violating this statute.” (P. 366.)

That reasoning would seem to be equally applicable to the construction of sec. 94-9. Somewhat would depend possibly on facts not stated in your inquiry, but which might, if found by a jury, constitute the giving of such transportation the giving of a thing of value within the meaning of the law. The intention and circumstances of the parties would characterize the act done as a contribution of a thing of value in one case, while the situation and circumstances in another case would not.

The owner of an automobile overtaking a “legomobile” candidate on the highway might surely give the latter “a
lift” to some point of itinerary without any intention to contribute a thing of value to such candidate and without, in my opinion, doing so within the meaning of the act. Or the owner of an automobile might take a candidate for office in his automobile and drive to some point or points to which such candidate desired to go in the interests of his candidacy and be actuated thereto primarily by considerations of his own pleasure or his own interest in or curiosity concerning politics or other matters, and very slightly or not at all by a desire to contribute to the nomination of the candidate.

If, on the other hand, it should be shown that the owner of an automobile placed himself and his car at the service of a candidate to take such candidate from place to place in the aid of his candidacy and for that purpose, incurring in that behalf the expenses incident to the driving of an automobile, then, in my opinion, such service and the use of such automobile would be a thing of value within the meaning of the Corrupt Practices Act, and should be reported.

Answering your second question, I will say that, if the services in question and the use of the automobile are given under such circumstances as to constitute the same a thing of value within the meaning of the law as above construed, and if the value of the same would amount to more than fifty dollars, the person furnishing such service and automobile would be required, under sec. 94-11, to file a report of the same.

Answering your third question, I will say that the special proceeding provided for in sec. 94-30 for violations of the Corrupt Practices Act is, in my opinion, not exclusive, but is a special provision designed to allow any elector entitled to vote for a candidate to institute such special proceeding as therein provided against such candidate for violation of the Corrupt Practices Act. This special proceeding is not exclusive of criminal prosecution by the usual procedure at the instance of the proper prosecuting officer. That it is contemplated that the penalties of the act shall be enforced by the district attorneys of the several counties in criminal proceedings is made plain by reference to the provisions of sec. 94-36 for supplemental judgment of ouster from office of any person elected to office who shall have been adjudged in a criminal action guilty of a violation of the act, and further by the saving clause in sec. 94-30 that nothing in the act
“shall be considered as in any way limiting the effect or preventing the operation of remedies now in existence.”

Elections—County Committee—Officers—Officers and executive committee of the county committee of each party may be elected from persons outside of their membership.

J. Henry Bennett,
District Attorney,
Viroqua, Wis.

Under date of Sept. 24th you inquire whether the county committee of each party may lawfully elect a chairman, secretary or executive committee outside of the membership of the committee.

Under sec. 11-21, subsec. 8, it is provided as follows:

“The county committee shall at such meeting elect a chairman, secretary and treasurer of the county committee, and such other officers or subcommittees as they may deem necessary, and two persons from each assembly district in the county to be members of the congressional district committee, but where an assembly district comprises two or more counties, then there shall be one member from each county,” etc.

The committee is not expressly limited in its selection of these officers to members of the committee. In subsec. 10, sec. 11-21, it is provided that:

“Each committee and its officers shall have the power usually exercised by such committees and by the officers thereof, in so far as is consistent with this act. The various officers and committees now in existence shall exercise the powers and perform the duties herein prescribed until their successors are chosen in accordance with this act.

Special mention is made here of the officers of the committee. It has been common practice to elect at least the chairman not only of the county committee, but also of the state central committee from outside the members of the committees. The committee not being limited in selecting the chairman, secretary and executive committee from the membership of the committee, I believe they may lawfully select them from outside of the membership.
Elections—Publication of Notice—Time and place for publishing by county clerk the notice and copy of constitutional amendment to be voted on at general election.

October 3, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of the 28th ult. you inquire how often and for what length of time the county clerk must publish a copy of the proposed constitutional amendments, and you also inquire whether the city clerk of Chilton must also publish election notices at the cost of said city in the newspaper published in said city.

Sec. 20, subsec. 2, contains the following provision:

"The secretary of state shall transmit by mail a like notice to the county clerk of each county, specifying the said officers to be voted for in said county, and in case of a senator, the number of his district, and also any constitutional amendment or other question to be submitted to the electors of the state for a popular vote. The secretary of state shall append to each such constitutional amendment or other question to be submitted to the people a brief statement of the change that will be made in the constitution or the existing laws if such amendment or other question so submitted shall be ratified or approved by the people at such election. Such statement shall contain no argument for or against any such amendment or other question so submitted.

Sec. 21 provides as follows:

"The county clerk thereupon shall forthwith cause a notice containing so much of the notice so received by him as relates to any question and statement concerning the same and officers to be voted for in his county, together with a statement of the several county officers to be elected by the voters of his county to be published as follows: In counties containing a population of two hundred and fifty thousand such notice shall be published in not less than two and not more than four newspapers published therein; in all other counties of the state such notice shall be published in not more than two newspapers published therein, one of which publications shall be made in a newspaper which advocates the principles of the political party which at the last preceding election cast the largest number of votes, and another publication shall be made in a newspaper which advocates the principles of the political party that then cast the next
large number of votes. Such notice shall be published once each week until election, and shall be transmitted by mail to each town clerk, and the clerk of each village in which the next ensuing general election will be held, and to one of the inspectors of election in each election district in every city of his county. Whenever the office of county clerk is vacant and there shall be no person authorized to perform his duties, the sheriff shall make out and so transmit such notices."

You will note that the county clerk is required to publish said notice once each week until the election.

Sec. 22 provides:

"Every such town and village clerk and inspector shall, ten days previous to any general election or on receiving any such notice, give to the town, village and election district electors, respectively, notice of such election by posting notices in five conspicuous places in their towns, villages and election districts, stating the time when and place where the election will be held, the questions and statement concerning each appearing in the county clerk's notice which are to be submitted to the electors of the state for a popular vote, the officers to be voted for, whether any of them are to be chosen to fill vacancies, in which case the names of the last incumbents of the offices in which vacancies exist shall be given."

Sec. 94-23, subsec. 3, reads as follows:

"The secretary of state shall cause to be printed in such pamphlet to be circulated prior to such general election, as provided herein, a full and accurate copy of every constitutional amendment to be voted upon by the people at such election, and a full and accurate copy of every law to be submitted to the vote of all the electors of the state of Wisconsin at such election."

There is no provision in the statutes requiring a publication of the constitutional amendments, under sec. 36, Stats., and the city clerks are not required to publish such election notices at the general election. It is the county clerk that is required to publish the notice of the general election and the city clerk is required to publish such notice in municipal elections.

Since the opinion of the attorney general, dated Aug. 31, 1904, reported in the Attorney General's Opinions 1906, p. 116, to which you refer in your letter, sec. 58 was repealed by ch. 506, laws of 1909, so that now the constitutional amendments are no longer required to be published in the
notice, under sec. 36. Such amendments are now published in the election pamphlet provided for under sec. 94-23, subsec. 3.

The city clerk not being required to publish the notice of the general election, no expense is incurred by the city for publication of notices in a general election.

Elections—Publication of Notice—Constitutional Amendments—The constitutional amendments are to be published under sec. 21 and they should not be published once more under sec. 36 in the election notice.

The publication should be in two newspapers unless the county board by resolution provides for more.

James Kirwan,
District Attorney,
Chilton, Wis.

In your letter of Oct. 10th you inquire whether your county clerk, in publishing the election notice sent in by the secretary of state, must include therein the several proposed constitutional amendments in full.

Concerning this question I will say that my former opinion to you, under date of October 3rd, covers this question fully. The amendment is not to be published in the election notice under sec. 36, Stats. The county clerk is, however, required to publish said constitutional amendments in his county under sec. 21, Stats.

You also inquire if the county clerk does publish the same, is the county liable for the payment of such publication. This question must be answered in the negative. The county clerk has no right to publish the constitutional amendments in the general notice and he cannot bind the county for such publications if it has been done without legal authority.

You also inquire in how many newspapers the county clerk must publish the election notice in counties having a population of eighteen thousand.

The express provision of subsec. 6, sec. 36, Stats., answers your question:
"The publication required in this section shall not be made in more than two newspapers unless authorized by resolution adopted by the county board of supervisors of such county or city council of such city."

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Elections—Independent Nomination Papers—Words and Phrases—"Date," Meaning of—Nomination papers not verified by affidavit as to post-office address and date of signing, as required by subsec. 3, sec. 30, Stats., are irregular and invalid and should not be filed.

Compliance with the requirement that signers of nomination papers shall add "date of signing" requires that day, month and year be stated.

October 17, 1914.

LAWRENCE J. MISTELE,

District Attorney,

Jefferson, Wis.

I have your request for opinion of the 16th inst., in which you submit several questions for official opinion. You refer to subsecs. 3 and 5, sec. 30, Stats., which section prescribes the manner of making independent or nonpartisan nominations, and you ask whether an affidavit to a nomination paper which omits all reference to the post-office address of persons signing and the date of signing such nomination paper is a sufficient compliance with this statute.

Subsec. 5, sec. 30, requires that each voter signing an independent nomination paper "shall add his residence, post-office address and the date of signing." Subsec. 3 of said section provides that there shall be appended to each nomination paper the affidavit of a qualified elector "to the effect that he is personally acquainted with all the persons who have signed the foregoing nomination paper, that they are electors and that their residence, post-office address and date of signing are truly stated therein." These statutory provisions are express and mandatory. They leave no room for construction.

The legislature, in requiring that the post-office address and the date of signing be affixed by each voter signing such nomination papers and requiring that the same be verified as to post-office address and date of signing, doubtless intended thereby to provide means of investigating the genuineness of such signatures and the qualifications of those signing
them to do so. It follows that a verification or affidavit which does not comply with the statute in these particulars is without legal force or effect as such; that nomination papers so verified are irregular for want of verification and that the filing officer will refuse to receive and file the same and will refuse to certify as nominated the candidate named therein or cause his name to be printed on the election ballot.

Your second question is whether "a ‘date of signing’ which omits the year, as, for instance, ‘October 1st,’ is a substantial compliance with the provisions of subsec. 5”, sec. 30, Stats. As above stated, subsec. 5 of this section requires that each signer of a nomination paper shall add to his signature “the date of signing,” and is mandatory in form. The answer to your question turns upon the meaning of the word “date” as used in such a statute.

The word “date” is generally held to mean and include the day of the month, the month and the year. 13 Cyc. 259–260.

Where the law requires an instrument to be dated or requires that a date be affixed to an instrument, it is held to require the statement of the day of the month, the month and the year. Succession of Robertson, 49 La. Ann. 868; Heffner v. Heffner, 48 La. Ann. 1088; Shipman v. Forbes, 32 Pac. 599, 97 Cal. 572.

I am, therefore, of the opinion that a compliance with subsec. 5, sec. 30, requires that the date of signing be in some manner shown or indicated upon the nomination paper, including the day of the month, the month and the year.

Your third question is whether the provision of subd. (b), subsec. 4, sec. 11–5, Stats., requiring a candidate for whom nomination papers are filed under the primary election law to file either with such nomination papers or within five days after the filing thereof a declaration that he will qualify as such officer, if nominated and elected, is applicable to independent candidates nominated under sec. 30, Stats.

Sec. 11–5, Stats., is a part of the primary election law, regulating the manner of making nominations of candidates who stand for party nominations in party primaries, and has no reference or application to independent nominations outside of party primaries made under sec. 30, Stats. Any person nominated under sec. 30 as an independent candidate in the manner prescribed by that section is entitled, under sec. 38, Stats., to have his name printed in the independent
Elections—Nominations—Right to place on Election Ballot

A person whose name was not printed on the primary ballot and who received at the primary less than ten per cent of the vote of his party for governor in the preceding election, cannot be party candidate, and, if he received less than three per cent of the vote in his county for presidential elector, cannot have his name printed on election ballot as an independent candidate.

October 20, 1914.

ADOLPH P. LEHNER,
District Attorney,
Oconto Falls, Wis.

I have your request for opinion of the 17th inst. in which you submit the following facts:

At the September primary one P. H. Lynch, in whose behalf no nomination papers had been filed, and whose name was not printed on the primary ballot, received 49 votes on the democratic ticket for the office of district attorney, and he has since filed with the county clerk a declaration to the effect that if elected he will qualify. The number of votes received by Mr. Lynch is less than three per cent of the votes cast in the county for the democratic candidate for governor in the last general election. You ask to be advised whether the county clerk has authority under any statute and upon this state of facts to print the name of Mr. Lynch upon the official election ballot as a candidate for the office of district attorney in the ensuing election.

The answer to your question is found in sec. 11–18, supplemented by reference to subdiv. c and d of sec. 11–5, Stats.

Sec. 11–18, Stats., provides that the person receiving the highest vote at the primary as the candidate of any party, as determined under the rules for canvassing prescribed in the statutes, shall be the nominee of that party for such
office "and his name as such nominee shall be placed on the official ballot at the following election." This provision is, however, conditioned by the provisos in subsecs. 2 and 3, sec. 11-18. Subsec. 2, sec. 11-18 provides:

"Provided, however, that if all candidates for nomination for any one office voted for on any party ballot, shall not receive in the aggregate first choice votes equal in number to ten per cent or more of the vote cast for the nominee of such party for governor at the last general election, in the territory within which such candidates are to be voted for, then no person shall be deemed to be the party nominee for any such office, but the person receiving the highest first choice vote, as the candidate of such party for such office, shall be deemed an independent candidate, and his name shall be placed on the official ballot as an independent candidate."

The effect of this provision applied to the state of facts as disclosed by your communication is to prohibit the county clerk to print the name of Mr. Lynch upon the official election ballot as candidate for district attorney in the democratic column.

It remains to be considered whether Mr. Lynch’s name may be printed thereon as an independent candidate. This is governed by the third subsection, which provides as follows:

"Provided, further, that no person shall be entitled to have his name placed on such ballot who has not filed a nomination paper as provided in sections 11-5 and 11-6 of the statutes, unless he shall have received at such primary election a number of votes not less than the number of signers required by sections 11-5 and 11-6 of the statutes for nomination papers, and shall have filed within five days after receiving official notice of his nomination, a declaration that he will qualify as such officer if elected."

The effect of this provision is that a candidate who has not, as in the instant case, filed nomination papers, must, in order to be entitled to have his name printed on the election ballot at all, have received in the primary election "a number of votes not less than the number of signers required by sections 11-5 and 11-6 of the statutes for nomination papers." Subd. (c) and (d), subsec. 4, sec. 11-5, prescribe the number of signers required for nomination papers, viz.:
“(c) If for * * * a county office, by at least three per cent of the party vote in at least one-sixth of the election precincts of such district, and in the aggregate not less than three per cent * * * of the total vote of his party in such district.

“(d) The basis of percentage in each case shall be the vote of the party for the presidential elector receiving the largest vote at the last preceding presidential election.”

You do not state in your communication the number of votes received in your county by the democratic candidate for presidential elector receiving the largest number of votes in the last presidential election. Hence, I cannot answer your inquiry upon this point definitely. If, however, the fact be that the number of votes received by Mr. Lynch in the primary be less than three per cent of the vote received in the last general election for such democratic candidate for presidential elector, then the number of votes received by him is less than the number of signers which would be required on nomination papers to place his name upon the primary ballot as a candidate for democratic nomination for district attorney, and, therefore, less than the number of votes required under subsec. 3, sec. 11-18, Stats., to entitle him to have his name printed upon the election ballot as an independent candidate for the office of district attorney.

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Elections — Electioneering — 100-foot Law — Distributing pamphlets containing arguments against intoxicating liquors at the polls at a spring election when the license question is being voted on is in violation of the 100-foot law under sec. 4544.

C. F. McDANIEL,

District Attorney,

Darlington, Wis.

In your letter of the 12th inst. you state that at the annual election in the village of Argyle in your county, 1914, the question of license or no license was voted upon. That during the election and inside the polling place a person who is a preacher distributed printed pamphlets containing pictures and material against intoxicating liquors. That he was sub-
sequently arrested for electioneering within one hundred feet of the polling place under the provisions of sec. 4544d, Stats. You inquire whether the facts stated above constitute electioneering in contemplation of said statute.

Said sec. 4544d contains the following:

“No officer of any election held under the provisions of title 2 of these statutes shall engage in electioneering on the day on which any such election is held, nor shall any person solicit votes for any candidate or party or engage in any electioneering whatever on the day of any such election, within one hundred feet of any polling place, nor remove any ballot from any polling place before the polls are closed, nor show his ballot after it is marked to any person in such a way as to reveal the mark or marks made thereon, nor solicit any person to so show his ballot. * * * * * Whoever shall violate any of the provisions of this section shall be punished by imprisonment in the county jail not exceeding six months, or by a fine of not more than three hundred dollars nor less than fifty dollars, or by both fine and imprisonment, with the cost of prosecution.”

You state that the person in question distributed pamphlets “containing pictures and material against intoxicating liquors.” The question is whether this is electioneering. The Century Dictionary defines “electioneering” as follows: “Of or pertaining to the influencing of voters before or at an election.” The same dictionary defines “electioneer” “to employ means for influencing an election as public speaking, solicitation of votes, etc.; work for the success of a candidate or of a party in an election as to electioneer for a candidate.” The same dictionary says that an “Election in a political sense was formerly limited to the act of choosing a person to fill an office or employment. The new sense is the voting at the polls to ratify or reject a proposed measure.”

I find no case of any court of last resort in which the word “electioneering” or the word “electioneer” is defined. Anything that is done in the way of distributing literature or expressing thoughts and making arguments within one hundred feet of the polls for the purpose of influencing voters undoubtedly is electioneering in contemplation of this statute. I am of the opinion that, if the pamphlets distributed contained pictures and arguments which would naturally tend to influence the voters at the election, there has been a technical violation of the statute.
Elections—Time of filing Nomination Papers—The provision of subsec. 6, sec. 30, Stats., that nomination papers for county office shall be filed not less than "fifteen days before" election, requires filing at such time that fifteen days will intervene between the day of filing and the day of election.

October 21, 1914.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

I have your request for opinion of the 20th inst., in which you state:

"Subsec. 6, sec. 30, Stats., provides for the date when independent nomination papers shall be filed, to wit: In county office not more than forty or less than fifteen days before the election.

"An individual filed his papers at 10:00 o'clock Monday morning, Oct. 19th. Will this give the fifteen days before election?"

Subsec. 6, sec. 30, to which you refer, provides that nomination papers for independent candidates for office to be voted for wholly within one county shall be filed in the office of the county clerk "not more than forty and not less than fifteen days before such election." The answer to your question depends upon what constitutes "fifteen days before such election" and involves the determination of the proper rules for the computation of time under such a provision.

In the case of Ward v. Walters, 63 Wis. 39, 44, the rule under such a statutory provision is stated upon the authority of a number of cases there cited as follows:

"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 days or 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."

This rule is expressly proved in Pittelkow v. Milwaukee, 94 Wis. 651.
The same rule is stated by the court under a statute (sec. 1130, Stats. 1898), requiring the publication of a notice of sale “at least four weeks previous” to the day on which a tax sale is to be held, in Chippewa River Land Co. v. J. L. Gates Land Co., 118 Wis. 345, 357, where it is said: “The full period of twenty-eight days from the date of the first publication must expire before the day of sale * * *.” This language is quoted and followed in Pinkerton v. J. L. Gates Land Co., 118 Wis. 514, 524.

I think it may be taken, therefore, that the rule is settled in this state that, where a statute requires that a certain act must be done a certain number of days before another act may be done, the full number of days named in the statute must intervene between the day on which the first act is done and the day upon which the second act is done. Applying this rule to the statute under consideration, the statute must be held to require the filing of nomination papers for independent candidates for county office at such time that fifteen full days will intervene between the day upon which the nomination papers are filed and the day upon which the election is held.

It will be noted that the rule, as stated in Ward v. Walters, is stated as the rule only in the absence of a statute governing the computation of time in such cases. Subdiv. (24), sec. 4971, Stats., is the only statutory rule for the computation of time in this state. The rule there prescribed is one for the computation of “the time within which an act is to be done,” i.e., a rule for the computation of time under statutes which designate a period within or during which an act is required to be done. This is a different thing from a period of time prescribed by statute and designed to separate the time for the performance of certain acts or the happening of certain events or designed to assure the lapse of a designated period of time between the doing of one act or the happening of one event and the doing of another act or the happening of another event.

The statutory rule for the computation of time would appear, therefore, to be inapplicable to the construction of the statute requiring that an act shall be done a given number of days before the doing of another act or the happening of another event, and has been apparently considered in-
applicable by the supreme court in the decisions above referred to.

The statutory rule of construction referred to was enacted in ch. 194, laws of 1879, and has been in force at the time of the rendering of all the decisions above cited, but was not invoked in any of them.

Election day this year is Nov. 3d. In the case submitted by you the nomination papers were filed on Oct. 19th. This, under the rule of statutory construction established by the supreme court, was only fourteen days and not "fifteen days before such election," as required by the statute. Hence, the nomination papers in question are not legally filed, and the county clerk has no authority to place the candidate's name upon the election ballot.

_Elections—Vacancies—County Committee—Where no names were printed upon the primary ballot, and no nomination was made at the primary for certain county office, the county committee has no authority to fill the vacancy under either sec. 11-18 or sec. 34, Stats._

October 29, 1914.

JOHN B. CHASE,  
"Asst. District Attorney,  
Oconto, Wis.

In your letter of the 28th you state that no nomination papers were filed in your county for the office of county surveyor upon the Republican ticket prior to the September primary. That at such primary one W. B. Hall received forty votes, and one Eugene Fitzpatrick a smaller number of votes for such nomination. That the county board of canvassers reported that Hall had received the highest number of votes for the office of county surveyor on the Republican ticket. That it afterwards appeared that Mr. Hall had not received enough votes to permit his name being placed on the official ballot in the Republican column. That both Mr. Hall and Mr. Fitzpatrick, after the report of the board of canvassers, declined the nomination and refused to run on any ticket. That the Republican county committee appointed one James H. Brown to fill the vacancy
and a certificate of nomination in proper form was filed with the county clerk more than eight days prior to the day of election. You ask whether the committee had power to make such appointment.

Sec. 11–18, Stats., provides in part:

"1. The person receiving the highest vote at such primary as the candidate of any party for any office, determined under the rules herein provided, shall be the nominee of that party for such office, and his name as such nominee shall be placed on the official ballot at the following election.

"2. Provided, however, that if all candidates for nomination for any one office voted for on any party ballot, shall not receive in the aggregate first choice votes equal in number to ten per cent or more of the vote cast for the nominee of such party for governor at the last general election, in the territory within which such candidates are to be voted for, then no person shall be deemed to be the party nominee for any such office.* *.*"

According to your statement less than eighty votes were cast at the primary in your county for all candidates for the office of county surveyor on the Republican ticket. The 1913 Blue Book gives the vote in Oconto county for the Republican candidate for governor at the last general election as 2373. Clearly, then, by the very terms of the statute quoted no person can be deemed to have become the party nominee for the office of county surveyor by reason of the results of such primary.

Sec. 11-13, Stats., provides in part:

"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."

The second paragraph of the section provides for the case of a person whose name is printed on the primary ballot and who dies or declines to accept the nomination, after the ballots are printed, or who is disqualified. This, of course, has no bearing on the question you ask, as no person's name was printed on the primary ballot.

An opinion to the district attorney of Portage county under date of Oct. 10, 1912, found at page 246, Vol. I Opinions, Bancroft-Owen, seems to cover the question of whether or not there is a vacancy within the meaning of that term as used in sec. 11-13, Stats. Following that opin-
RELATING TO ELECTIONS.

ion I must hold that under the facts stated by you there is no vacancy that can be filled under sec. 11-18.

Sec. 34, Stats., after providing for the method of declining a nomination by any person who has been nominated to office, continues:

"Upon such declination or the death of a nominee the vacancy or any vacancy caused by the insufficiency of certificates of nomination or nomination papers may be filled in the same manner as original nominations, or by the committee representing the party."

In the case to which you refer there was neither a declination nor a death of a nominee. Neither was there any vacancy caused by the insufficiency of certificates of nomination or nomination papers. No certificate of nomination could properly be issued, as no person was nominated for that office upon the Republican ticket. No nomination papers were circulated for any candidate for that office upon the Republican ticket, if I correctly understand the facts as stated by you.

In my opinion it follows that there is no vacancy that can be filled by the county committee.

Elections—Board of Canvassers—Public Officers—Under sec. 81, Stats., that the county clerk and register of deeds are candidates for re-election does not render them ineligible to act as members of the county canvassing board.

JAMES KIRWAN,

District Attorney,

Chilton, Wis.

In your letter of the 5th you state that the county clerk and register of deeds of your county were each of them candidates for re-election at the recent election, and you ask if this bars them from acting as members of the county canvassing board.

Sec. 81, Stats., provides:

"On the Tuesday next succeeding the election, or at any time sooner if all the returns are sooner received, the county
clerk shall take to his assistance from among the following named officers of the county, to wit, the county judge, register of deeds, members of the county board or justices of the peace, two associate canvassers, one of whom shall not be of the same political party as such clerk, and who shall constitute with such clerk a board of county canvassers; and in case all the above named officers should belong to the same political party, then said clerk shall elect from the opposite political party some reputable citizen and elector to act as the third member of said board. In case of vacancy of the office of county clerk, or when from absence, sickness or other inability such clerk cannot perform the duties enjoined upon him, the clerk of the circuit court, or if there be no such clerk, or he be unable to perform such duties, then the chairman of the county board shall perform the duties required of the county clerk by this and the following sections, and be subject to the same punishment for violation thereof.”

You will note that this section does not provide that if the clerk, or any of the other officers named in said section, be a candidate for election, that that fact will render him or them ineligible to act as a member of the county board of canvassers. The term “other inability” used in the section relates purely to the county clerk, and evidently refers to something different than a disqualification because of interest in the result of the election. I will not attempt at this time to state just what is meant by the term “inability” as here used, other than to say that, in my opinion, it is not intended to cover interest in the result of the election.

I have found no other section of the statutes providing that interest in the result of the election would disqualify any of such officers from acting as a member of the county board of canvassers. There are provisions relating to other boards of canvassers, which specifically provide for such a case as you refer to. For instance, sec. 93, Stats., relating to the state board of canvassers, provides in part:

“When a member of said board is a candidate for an office as to which the votes are to be canvassed by him, the chief justice, upon the request of any opposing candidate, shall designate some other state officer, or a judge of the circuit court, who shall act in his stead at the session of the board at which the votes given for such member are to be canvassed.”

The fact that this section makes a provision of this kind, while sec. 81 does not, strengthens my belief that under the
latter section an officer is not disqualified from acting because he is a candidate for an office as to which the votes are to be canvassed. The statute evidently contemplates that the county clerk shall, in any event, act as a member of such board unless prevented by absence, sickness, or other inability. In my opinion the county clerk ought to select some other officer as an associate member of the board than one who is a candidate and thus interested in the result of the election. That, however, is a matter that the legislature seems to have left to the conscience of the individual county clerk.

You will note that even under sec. 93, interest in the result of the canvass does not absolutely disqualify a member of the state board of canvassers, but that section merely provides for the selection of someone else to act in place of such officer when such action is requested by an opposing candidate.

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**Elections—Ballots—Recount**—1. How ballots should be counted under facts stated.

2. Statutory remedy for recount not exclusive.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of Nov. 9th you submit four questions concerning the canvassing of votes cast at the last general election which I will take up in their regular order.

"First. Can any candidate appeal to the circuit court for a recount unless he first asks the canvassing board for a recount?"

Sec. 86, subsec. 3, provides as follows:

"Within five days after the determination of said board, any candidate aggrieved thereby may appeal therefrom to the circuit court of said county, by serving a notice in writing to that effect upon such other candidates who appeared before said board" etc. * * *

Subsection 4. "Nothing in this section shall be construed to abrogate any right or remedy that any candidate may now have affecting the trying of title to office."

25—A.G.
Under the express provision of subsec. 3, above partly quoted, it appears that the appeal can be taken within five days after the determination of the board of canvassers. Of course an appeal from the decision of said board cannot be taken before the board has acted. Your question must, therefore, be answered in the negative, but under subsec. 4 you will notice that all rights or remedies that any candidate may have are not abrogated by the provisions of subsec. 3.

"Second. A ballot was marked in the circle at the head of the Social-Democratic column and also at the head of the Democratic party. In the Social-Democratic column on said ballot there are no candidates for county offices, while on the democratic ticket there are names for all county offices. Does such ballot, without any other mark on it count for the Democratic county candidates?"

This question must be answered in the affirmative. The reason why the ballot as to state officers cannot be counted is that a vote has been cast for two candidates for each office. For the county offices there was only one candidate voted for and for that reason the votes for said candidate should be counted.

"Third. A ballot is marked in the circle at the head of both the Republican and Democratic columns and then also marks made in the square after each candidate named all the way down in the Democratic column except the sheriff’s name, and for sheriff a mark is made after the name of the republican candidate for sheriff. It is claimed that this should count for all the Democratic nominees except sheriff and for the Republican candidate for sheriff. Is this correct?"

This is certainly correct, as the intention of the voter clearly appears from the way the ballot is marked. Had the voter in question failed to put a cross at the head of the Republican column, in that case the vote should have been counted for the Republican candidate for sheriff under the provisions of sec. 57, par. 1, but in the case stated by you there was not only a mark after the name of the candidate for sheriff in the Republican column but there was in addition also a cross in the circle at the head of the Republican column. This is certainly a vote for the Republican candidate for sheriff, and the same reasoning applies to all the candidates on the Democratic ticket. There was not only a mark in the square after the candidates’ names but also in the circle at the head of the Democratic column.
"Fourth. Through mistake and ignorance a town board failed to return, the day after election, with the election returns to the county clerk the envelope containing the defective ballots cast at said election, but said town board made a supplemental return on the 9th day of November, 1914, to said clerk with said defective ballots therein and before the county canvassing board finished its work. Is such return legal and timely and on a recount can such defective ballots be opened and counted if found not defective? I think so, as the law gives a town board until the tenth of this month to make this return to the county clerk."

I agree with you in your conclusion.

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Elections—Board of Canvassers—Duty of canvassing board when contest is filed.

November 17, 1914.

WILLIAM E. McCARTY, Chairman.
Board of County Canvassers,
Milwaukee, Wis.

I have your telegram of this date in which you ask for my official opinion upon the following state of facts:

It appears from your telegram and my telephone conversation with you that the board of county canvassers of Milwaukee county have not yet undertaken the canvass of the votes of that county, but will do so tomorrow; that a number of so-called contests have been filed by various candidates at the recent election, asking for a recount of the ballots in a number of the precincts in Milwaukee county, in some instances the returns from all the precincts in the county being challenged; that to recanvass these votes will require two months time, which means that the duties of the canvassing board cannot be finally concluded for a considerable length of time after the time allowed by statute therefor. No contest has been filed affecting the great majority of the offices filled at the recent election and the question you ask is, whether the canvassing board should proceed to canvass the returns from the various precincts of the county in so far as such returns relate to offices not affected by contests.

Sec. 81, Stats., relates to the personnel of the county board of canvassers and provides that on the Tuesday next succeeding the election, or at any time sooner if all the
returns are sooner received, said county board of canvassers shall proceed to canvass the returns.

Sec. 83 provides:

"The returns having been obtained as hereinbefore provided, the board shall proceed thereupon to make out a separate statement, written in words, at length, containing the whole number of votes given in such county for each state officer voted for and for United States senator and for representative of congress * * *; and another of the votes given for senator, when the county alone does not constitute a senate district; another of the votes given for member of assembly, when the county alone does not constitute an assembly district; another of the votes given for county officers, and another of the votes given for senators and members of the assembly, when the county constitutes one or more senate or assembly districts * * *." 

Sec. 87 provides:

"The county clerk shall, seventeen days after any general election, transmit to the secretary of state certified copies of each statement of the county board of canvassers of the votes given for * * * state officers, senators and representatives in congress, state senate and member of assembly, where the senate and assembly district embraces more than one county."

Sec. 86 provides:

"Whenever any candidate, voted for at any primary or election, shall, on or before the last day of the meeting of the board of county canvassers, file with the county clerk a verified petition setting forth that he was a candidate for a specified office at said primary or election, and that he is informed and believes that a mistake or fraud has been committed in specified precincts in the counting or return of the votes cast for the office for which he was a candidate, or specifying any other defect, irregularity or illegality in the conduct of said primary or election, said board shall forthwith proceed to ascertain and determine the facts alleged in said petition and make correction accordingly and recount the ballots in every precinct so specified in accordance therewith. * * *"

The question here is, whether because contests have been filed affecting a portion of the officers voted for at the last election, the work of the board so far as it affects officers concerning which no contests have been filed, must be interrupted, and in view of the fact that so long a period will be
required to recanvass the returns, the situation is fraught with considerable public interest. It is apparent that the board should proceed in a way that will conflict as little as possible with the public interests or interfere with the orderly determination of the results of the recent election as far as it is possible for them to do so consistent with the law upon the subject. It is my understanding that no contest has been filed affecting any state officer. Sec. 83, above quoted, provides for a separate statement containing the whole number of votes given for each state officer voted for. I can see no reason why the canvassing board should not complete its canvass so far as it relates to the state officers and certify that result to the secretary of state, as provided for in sec. 87. This will enable the state canvassing board to meet on the first day of December, as required by sec. 94a, to canvass the returns upon state officers. It is not perceived how this can possibly affect the contest pending before your board, and will promote the orderly work of the state board of canvassers.

I understand that there are contests pending before your board affecting the offices of United States senator and one or two members of congress. I see no reason why your certification of the votes for these officers should not be made after your certification of the votes of the other offices. Public interest will not be so seriously affected by the delay in certifying the returns relating to those officers for the reason that they do not take their office until the 4th day of March.

My opinion is, therefore, that you should proceed to canvass the returns relating to officers upon which no contests have been made and certify your determination immediately; that you should defer the canvass of the returns relating to those officers affected by contests until after you have completed the canvass of the votes for officers relating to which no contests have been filed. By doing this you will not violate any statutory provision and you will promote the orderly transaction of the public business.
I have just looked over the opinion that I dictated to you rather hurriedly yesterday afternoon concerning the matter of procedure that should be followed by your board in view of the various contests that have been filed by candidates at the recent election in your county, and upon giving the matter more mature consideration, it occurs to me that I may make some additional suggestions which will be helpful to your board.

Upon considering the provisions of secs. 83 and 84, Stats., it appears that your board is required to do the following things:

1. Make out a statement containing the whole number of votes given in your county for each state officer voted for. While this statement will give the number of votes received for each candidate for each state office, it is to be made in one statement.

2. Another similar statement relating to the offices of United States senator.

3. A similar statement for each representative in congress, there being two such officers in your county.

4. A similar statement of the votes given for county officers. This statement is to include all of the votes cast for all candidates for county offices, but, as is the case with state officers, this is to be one statement.

5. A similar statement for each senatorial district.

A similar statement for each assembly district. The statement thus made by you relating to state officers, United States senator and the two members of congress are to be certified to the secretary of state by the county clerk.

So far as county officers, state senators and members of assembly are concerned, your duties extend a little further and by sec. 84 you are required to determine who is elected and to publish such determination in one or more newspapers of the county.

This determination must be annexed to the statement of votes given for such officers respectively. The votes for county officers are included in one statement, therefore, your determination as to who is elected to the various county offices must be attached to this statement and constitutes
one document. It would, therefore, appear that your dete-
mination as to who is elected to fill the respective county
offices constitutes one determination and cannot be sepa-
rated, so that you cannot, for instance, determine who is
elected district attorney, or sheriff, or county clerk, sepa-
rately and apart from the other offices. In other words,
you cannot determine that one county officer has been elected
until you are prepared to determine who is elected to all of
the county offices.

This is not true, however, of state senators and members
of the assembly. There you will have to make a separate de-
termination for each senatorial and assembly district, and
your determination as to who is elected in any given sena-
torial or assembly district need not wait upon your decision
with reference to any other officer.

It seems to me that in deciding upon your method of
procedure you should first have the above principles well
fixed in mind. You should then consider the public interests
involved and shape your course to interfere as little as
possible therewith.

As stated in my letter yesterday, there seems to be no
reason why you cannot promptly canvass the returns on
state officers and have the results certified to the secretary
of state under sec. 87, so that the state canvassing board
may proceed with its work of canvassing the state returns.
When you have done that you will be confronted with the
question of what officer next to take up. I think this is a
question left very much to your discretion and if you could
complete your labors before the first day of January it
would make very little difference. You should bear in mind,
however, that the county officers, state senators and assem-
blymen are required to take their offices early in January.
It is, therefore, highly desirable that if you cannot complete
your labors by that date, it is better that the canvassing of
the returns on United States senator and members of con-
gress be delayed as they are not required to take their oath
of office until March 4th.

It, therefore, seems to me that after having certified your
returns on the state officers you should take up either the
canvassing of the returns on county officers or the legislative
officers, bearing in mind all the time that when you have can-
vassed the returns from a given assembly or senatorial
district you may make your determination as to who is elected in that district, but upon the canvass of county officers you cannot make your determination upon any one county officer until you are prepared to make your determination upon all.

_Elections—County Canvassers_—A county canvass of an election made by county board of canvassers on which the deputy county clerk acted instead of the county clerk, who was sick, is a legal canvass.

A. J. O’MELIA,
_District Attorney,_
Rhinelander, Wis.

In your letter of the 18th inst. you refer to sec. 81, Stats., providing for the county canvassing board, and stating that if the county clerk is absent or sick that the clerk of the court may act, and if he is unable to perform the duties, that the chairman of the county board shall act.

You also refer to sec. 706, which provides that each county clerk shall appoint one or more deputies and that it shall be the duty of such deputy to aid in the performance of the duties of such clerk under his direction, and in case of his absence or disability or a vacancy in the office, shall perform all the duties of such clerk during such absence.

You state that at the canvass in your county the county clerk was absent by reason of sickness and that the deputy took his place on the canvassing board and completed the canvass and acting with the others selected on the board completed the canvass and made the return; that there is objection made to the return for the reason that it is claimed the deputy had no right to act on the canvassing board, but that the clerk of the court should have acted.

You inquire as to the legality of the canvass.

In answer I will say that I consider the canvass to have been legally made. The deputy clerk was certainly a _de facto_ officer as a member of the canvassing board and as such his acts will be considered the same as if he had been a _de jure_ officer so it is not necessary to decide the question whether it was his duty to act upon said board or whether it was the duty of the clerk of the circuit court. You are, therefore, advised that the said canvass was legally made.
Elections—Canvassing board of Milwaukee county advised as to procedure in recounting votes.

William E. McCarty, Chairman,
County Board of Canvassers,
Milwaukee, Wis.

In your communication of the 21st inst. you refer to the fact that several candidates for public offices have asked for a recount of the votes cast at the general election and that attorneys appearing for Paul Hustig, candidate for United States senator, have petitioned that the entire ballots, including the votes for the United States senator, be recounted at one and the same time and that they as representatives of Paul Hustig be recognized when this general recount is made, and you ask whether it is proper to follow this procedure or whether the recount of each and every contested office must be made separately and at different times.

The provisions of the law do not prescribe in detail the procedure to be followed by the canvassing board where there are so many demands made for a recount of the ballots. The law enjoins upon the canvassing board the duty of recounting the ballots with a view of establishing the truth concerning the result of the election of the offices so contested. This is the dominant object to be attained. The detail of procedure on the part of the board of canvassers, in my judgment, is left quite largely to the discretion of the board itself. If its labors may be expedited or if for reasons apparent to the board, justice will be promoted by canvassing these ballots one way or the other, it is at liberty to determine for itself which method it will adopt.

I can see no objection to the ballots being canvassed upon every contested office at one and the same time; neither do I see any objection to their being canvassed at separate and different times and the board should proceed in whichever way, under the circumstances, it feels will expedite the recount without prejudice to the rights or interests of any person interested in a contest.

But whatever method is pursued by the board, everything should be done openly and publicly. I think it would be a mistake to exclude any person interested in a contest at any stage of the proceedings. Any person so interested should
be accorded the privilege of being present and at all times when ballots affecting his right to hold office are under consideration. This should be done in the interests of justice and to free the board from any charge of partiality that might be made against it. It is my suggestion also that if the board sees fit to canvass the ballots separately with reference to each contestant that after the ballots are completed they should be returned to the bag from which they were taken and again sealed and there kept until they are again removed for the purpose of the next contest. And every person interested in a subsequent contest should be permitted to be present so that he can see exactly what becomes of the ballots when they are taken from the bag. This will prevent any suspicion of unfairness attaching to the board and place the members thereof above charges of unfairness or partiality.

I know the situation with which you are confronted is quite confusing and complicated. Important rights are involved. The purpose of this recanvass is to determine the truth. Every one interested should do everything in his power to promote such a result. No unreasonable demand should be made upon the board and so far as possible all reasonable requests on the part of those interested should be granted by the board, so far as they can be granted consistent with the rights of other contestants and with the public interests involved.

I believe that with this understanding of the situation the board will be able to meet the demands made upon it from time to time and proceed with its work in a manner to inspire the appreciation of the contestants and the confidence of the public.

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Elections—Corrupt Practices Act—Public Officers—Candidate for office to file expense statement after election.

December 16, 1914.

A. J. O'MELIA,
District Attorney,
Rhinelander, Wis.

In your recent communication you submit the following facts for my official opinion:
"A candidate for office at the recent election filed on the last Saturday preceding said election. Between said day and the election he had further disbursement for political purposes. Such disbursement had, of course, to be accounted for under the statement required to be filed by sec. 4543c and in view of this fact a doubt arises as to whether or not the expense incurred after the last Saturday before the election day need be accounted for on the second Saturday of November.

You also state:

"A candidate for county office filed an account on the last Saturday preceding the election. He did not file on the second Saturday of November, although his account filed under sec. 4543c shows an expenditure for political purposes made on the day preceding the election of November 3rd. This candidate was elected to office. Will his failure to file on the second Saturday of November disqualify him?"

Sec. 94-9, Stats., provides, in effect, that every candidate for office shall commence filing his account of political disbursements within four days ending on the second Saturday occurring after such disbursement has been incurred, and that he shall continue to file such accounts "within the four days ending on the second Saturday of each calendar month until all disbursements shall have been accounted for."

He is also required by the provisions of that section to file a statement of his disbursements "within the four days ending on the Saturday preceding any election or primary."

Does this section require a candidate to file an account within four days ending on the second Saturday of November if he has made disbursements for political purposes after filing his statement required to be filed within the four days ending on the Saturday preceding the election.

The question may be stated in another way—when does the obligation imposed upon a candidate to file statements of his political disbursements cease. A complete investigation of the corrupt practices act reveals but one phrase in any manner indicating when this obligation on the part of the candidate shall cease and that is the phrase underscored above. When the statements filed by him fully account for all of his political disbursements, then he is under no obligations to file any further statements, but so long as he has made political disbursements not accounted for by any previous report, plainly he is required to file his statements
of disbursements and to continue so to file "until all disbursements shall have been accounted for."

If he made disbursements for political purposes subsequent to the report filed by him, just prior to the election, such disbursements must be accounted for by him in a statement to be filed within four days ending on the second Saturday of November. If he did not file such statement, he did not comply with the requirements of sec. 94-9.

It is suggested that this statement need not be filed where the candidate complies with the provisions of sec. 4543c, requiring candidates to make out and file a similar statement covering all of their disbursements during the campaign. If the account required by the provisions of sec. 4543c be not filed before the second Saturday in November plainly it cannot be accepted as a compliance of the provisions of sec. 94-9, because it is not filed within the time required by that section, if for no other reason.

I am further of the opinion that in no event can the statement of account required by the provisions of sec. 4543c be substituted for the statement required by sec. 94-9 for the following reasons: First, the statute plainly requires the filing of a statement under each of the sections above quoted, even though the purpose of such dual filing may not be apparent. The plain provisions of the statute, unambiguous, as I deem them to be, are entirely sufficient to make unnecessary any effort to discover the reason therefor.

If, however, there be any ambiguity in the statutory provision and there should be any doubt as to the proper construction of sec. 94-9, the application of elementary rules for the construction of statutes would in my judgment lead to the same result. It is the dominant idea of the so-called corrupt practices act to confine the expenditure of money for political purposes within specified amounts and to certain purposes by disqualifying a candidate violating the provisions of the act from holding the office to which he was elected.

Secs. 94-30 to 94-32, inclusive, provide for a special proceeding for the enforcement of the act and the judgment pronounced by the court under such proceeding, if the candidate whose right to office is being investigated, be found guilty of a violation of any provision of the act
shall declare void the election of such candidate. And it is also provided by sec. 94–36 that if in an ordinary criminal proceeding any candidate shall have been convicted of a violation of any of the provisions of the act, the court shall enter a

"* * * supplemental judgment declaring such person to have forfeited the office * * * and shall transmit to the filing office of such candidate a transcript of such supplemental judgment, and thereupon such office shall be deemed vacant and shall be filled as provided by law."

And it is likewise provided that a conviction of a member of a personal campaign committee of any candidate of a violation of any of the provisions of the corrupt practices act shall operate as a forfeiture of the office to which the candidate was elected.

From these provisions it is apparent that the legislature placed great reliance on the penalty of forfeiture of office to secure a compliance with the provisions of the act. Now, if the candidate be not required to file a statement required under the provisions of sec. 94–9 on or before the second Saturday of November where he has incurred disbursements subsequent to the filing of his last account, a very easy method is open for an evasion of the law. It will be observed that the filing just before election may be made within four days ending on the Saturday preceding election. This statement could be filed as early as Wednesday, nearly a week preceding the election. The candidate may have spent all, or nearly all, he is permitted to spend under the law. After filing such last statement before election he could from that time to the day of election spend money in riotous sums, far exceeding his limit, and unrestrained in the purposes for which it was expended. If we are to assume that thereafter he is required to file only under the provisions of sec. 4543c he has but simply to neglect to file such statement and thereby incur only the penalty provided by sec. 4543c which is a fine of not less than twenty-five dollars nor more than five hundred dollars. The penalty for forfeiture of office would not in such case obtain, although if he had filed his statement truthfully it would reveal the fact that he had violated the corrupt practices act by exceeding his expense limit and the object intended to be
accomplished by the provisions of the corrupt practices act would be nullified.

From the foregoing considerations I am quite clear that a statement of the expenses, as required by sec. 94-9, must be filed on or before the second Saturday of November, if the candidate has made disbursements subsequent to the filing of his last expense account and which he may not have accounted for.

What has been heretofore stated suggests the answer to your second question. If I am correct in my conclusion that the candidate should have filed his statement within the four days ending on the second Saturday of November, then clearly he has violated the provisions of the corrupt practices act, and, if prosecuted and convicted in either of the ways provided for in the act itself, a judgment declaring the election void under the provisions of sec. 94-32, or that such person has forfeited the office under the provisions of sec. 94-36, must be entered.

Elections—Corrupt Practices—Attorney General—Attorney general will not appoint special counsel to investigate charges of irregularity in campaign of member of legislature.

Howard Teasdale,
State Senator,
Madison, Wis.

You recently filed with me a petition reciting various acts claimed to be violations of the Corrupt Practices Act, committed by J. Henry Bennett, of Viroqua, Wis., who was a successful candidate for the office of state senator from the thirty-first senatorial district, asking for leave to bring a special proceeding to investigate whether or not there has been such violation by the said J. Henry Bennett, and for the appointment of special counsel to conduct such proceeding in behalf of the state, all pursuant to the provisions of sec. 94-30, Stats.

Sec. 94-32, Stats., relates to the judgment that shall be entered in such proceedings if the candidate shall have been found to have violated the provisions of the Corrupt Practices Act. Subsec. 2 of that section reads as follows:
"If such proceeding has been brought to investigate the right of a candidate for member of the state senate or state assembly or for senator or representative in congress, and the court shall find that such candidate or any member of his personal campaign committee has violated any provision of this act, in the conduct of the campaign for nomination or election, the court shall draw its findings to such effect and shall forthwith, without final adjudication, certify his findings to the secretary of state, to be by him transmitted to the presiding officer of the legislative body, as a member of which such person is a candidate."

By the above quoted provision the court is only empowered to take evidence, make its findings, and certify such findings to the secretary of state to be by him transmitted to the presiding officer of the legislative body as a member of which such person is a candidate.

It is well understood that the legislature may impose only judicial powers and functions upon a court. Judicial power is variously defined in 23 Cyc., on page 1620 as:

"The authority to determine the rights of persons or property by arbitrating between adversaries in specific controversies at the instance of a party thereto."

"The authority vested in some court, officer or person to hear and determine when the rights of persons or property or the propriety of doing an act is the subject matter of adjudication."

"The power to interpret the constitution of the laws and make decree determining controversies."

"The power which adjudicates upon and protects the rights and interests of individual citizens and to that end construes and applies the laws."

The above quoted provision confers no power upon the courts to settle or determine any controversies or to adjudicate upon any rights. The courts may not pass judgment. It is only empowered to take evidence and make findings of fact and certify the same to the secretary of state.

In the case of State of Wisconsin ex rel. Walter A. Watson, Plaintiff, v. Don C. Hall, Defendant, tried in the circuit court of Portage county, Jan. 1913, Judge Park held this provision of the law to be unconstitutional for the reason that it attempted to confer non-judicial powers upon the courts. Without going to the extent of concurring in Judge Park's decision and holding squarely that this provision of the law is unconstitutional, I may say that there is much doubt of
its constitutionality. No lawyer can say less with any regard for his professional standing.

It is the policy of this department, existing for many years, to resolve all doubts concerning the constitutionality of a law in favor of such constitutionality unless it involves the appropriation of money from the public treasury, in which case the rule is reversed and all doubts resolved in favor of the public treasury.

I find myself in this position. I am asked to appoint special counsel to conduct this proceeding. He is to receive his pay from the state treasury. I am the legal adviser of the disbursing and financial officers of the state. Upon the presentation of the claim of the special counsel for services which he might render pursuant to such an appointment, such officers would be entitled to my official opinion as to whether disbursements to compensate such special counsel would be lawful. Recognizing, as every lawyer must, that there are serious doubts concerning the constitutionality of the law under which the special counsel is appointed and compensated, and following the established custom of this department, I should be obliged to advise against the audit and payment of his claim.

If I were now to appoint such special counsel and when his claim is presented for audit and payment advise the secretary of state and state treasurer that the same could not be lawfully paid, my position would be inconsistent, to say the least. To avoid such inconsistency, the application for leave to commence these proceedings should be and is denied. I arrived at this determination the more readily because the statute provides that your petition may be presented not only to the governor, but to the various county judges of the state. Should the appointment be made by them, I would not experience any embarrassment in advising the auditing officer and the state treasurer when it should become my official duty so to do.
Elections—Corrupt Practices Act—A disbursement for political purposes, made on election day, must be accounted for as provided by sec. 94-9, Stats.

December 28, 1914.

A. J. O'MELIA,
District Attorney,
Rhinelander, Wis.

In your letter of the 24th you say:

"In your opinion to me of Dec. 16th you state, in brief, that expenditures between the last Saturday before the election, or those arising between the filing made within the four days ending on the last Saturday before the election, and election, must be accounted for on the second Saturday of Nov., or within the four days ending on said Saturday. Would it make any difference in your opinion if the only disbursement was made on election day?"

Sec. 94-1, Stats., defines, among other things, the term "political purposes" and the term "disbursement." Neither of these terms, as thus defined, seems to indicate that a disbursement, to be one for political purposes, must be made before the dawn of election day.

Sec. 94-8, Stats., provides for the presentation and payment of bills for disbursements, and provides that such bills must be presented within ten days after the day of the election or primary in connection with which such bill, charge or claim was incurred.

Sec. 94-9, Stats., provides for the filing of the account of disbursements. Subsec. 3 of that section provides in part that every such statement shall give in full detail every disbursement, and every obligation, express or implied, to make any disbursement, over five dollars in amount or value, with the name of every person to whom the disbursement is made or to or with whom each such obligation has been incurred, the specific purpose for which each was made, and the date when each was made or incurred, together with the total amount of disbursements made and of obligations made in any amounts or manner whatsoever.

I find nothing in any part of the Corrupt Practices Act which appears to limit the account to be filed to those items of expense incurred before election day. If the money was spent or the obligation incurred for political purposes, then, in my opinion, it must be accounted for.
An obligation incurred or money spent on election day might well be incurred or spent with the intent, or in such a way as to influence or tend to influence, directly or indirectly, voting at such election. To hold otherwise would, it appears to me, open the doors to a very considerable evasion of the provisions of this act. In my opinion, all disbursements for political purposes must be accounted for, even though made on the day of the election.
OPINIONS RELATING TO FISH AND GAME

Fish and Game—Criminal Law—Under sec. 4567m, Stats., an informer who fails to appear in court and give testimony is not entitled to one-third of the fine imposed.

March 20, 1914.

BRUCE FLEMING,
District Attorney,
Spooner, Wis.

In your favor of March 19th you ask "Can a man who tells a deputy game warden of some person who has violated the game laws legally collect one-third of the fine imposed under sec. 4567m, Stats., if he fails to appear in court and fails to sign the information but merely gives such facts to the officers?"

Sec. 4567m, Stats., provides that one-third of the fines imposed and collected under the game laws "shall be paid by the magistrate to the person informing of the offense and prosecuting the offender to conviction." Of this provision Attorney General Gilbert said: "Such people, the informers, are entitled to the portion of the fine provided in this act, and they sufficiently perform their duty in respect to earning it by furnishing the information or appearing ready to give testimony which shall be required and they are, in that sense, prosecuting the offender." Biennial Report & Opinions of Attorney General 1910, p. 360, 361.

It seems to me that this is as liberal an interpretation of the expression "the person informing of the offense and prosecuting the offender to conviction" as can be given to it, and since in the case you state the informer failed to appear in court, I think that he has not brought himself within the terms of the statute and is, consequently, not entitled to one-third of the fine imposed. The statute clearly awards one-third of the fine to such persons only as shall not only inform of the offense but prosecute the offender to conviction.
In the case stated by you the person claiming one-third of the fine has done nothing that can in any way be said to be “prosecuting the offender to conviction,” for this, by the very terms of the statute, is something additional to “informing of the offense.”

I am therefore of the opinion that under the facts stated by you the informer is not entitled to one-third of the fine.

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Fish and Game—It is lawful to fish with hook and line at any time all fish, except trout, in the Pecatonica and Fever rivers in Iowa and Lafayette counties.

April 20, 1914.

JOHN A. SHOLTS,
State Fish and Game Warden,

In your letter of April 16th you inquire whether it is lawful to fish with hook and line in the Pecatonica and Fever rivers in Iowa and Lafayette counties, during the entire year, and you call my attention to sec. 4562, Stats., which reads as follows:

“It shall be lawful to take or catch any kind of fish, except trout, in the waters of the Pecatonica and Fever rivers in Iowa and Lafayette counties, in the Sugar river in Green county, and from Koshkonong lake and Rock river in Rock, Dane and Jefferson counties, and from Crawfish river in Jefferson county, with a hook and line at any time.”

You also direct my attention to the provisions of sec. 4560a–12 and subsec. 8, thereof, and the amendments thereto by ch. 391, laws of 1913. Said section prior to the amendment was as follows:

“1. It shall be unlawful and is hereby prohibited to take, catch or kill in any manner or by any device whatever, any large or small mouth black bass, Oswego bass or yellow bass, in any of the inland waters of this state, between the fifteenth day of March and the first day of June next succeeding, except as hereinafter provided.”

“8. It shall be unlawful and is hereby prohibited to have in possession or under control in any one day, more than twenty-five pounds of bullheads taken from all waters in Dodge county; there shall be no close season for any fish in the Pecatonica and Fever rivers. It shall be unlawful to
RELATING TO FISH AND GAME.

take, catch or kill in any manner or by any device, any variety of fish, excepting carp, from or in the mill pond in the village of Wautoma in Waushara county, prior to the first day of January, 1912."

That part in above subsec. 8, italicized, was eliminated by the amendment in 1913.

Said sec. 4562 is a special statute applying only to certain localities of the state, while sec. 4560a–12, in subsecs. 1 and 8 contains general provisions applicable to all parts of the state. 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 and the special statute is to be considered as remaining an exception to the general statute. State v. Public Land Commissioners, 106 Wis. 581; Walworth County v. Whitewater, 17 Wis. 193; Mead v. Bagnall, 15 Wis. 156; Janesville v. Markoe, 18 Wis. 350.

I think this rule of law is applicable here. The fact that the legislature eliminated that part of subsec. 8 which provides that there shall be no close season for any fish in the Pecatonica and Fever rivers must be taken as having been done for the purpose of striking out superfluous provisions. This is a penal statute and must be strictly construed against the state.

I am constrained to hold that it is lawful to fish any kind of fish, except trout, with hook and line at any time in the waters of the Pecatonica and Fever rivers in Iowa and Lafayette counties.

Fish and Game—Insofar as the federal act for the protection of migratory birds is in conflict with the state law, the former controls.

M. E. Davis,
District Attorney,
Green Bay, Wis.

In your letter of the 25th you say that you have been requested for an opinion as to whether or not the provisions of the United States statute prohibiting the shooting of ducks during certain seasons of the year have any effect
upon the state law on the same subject. That the question asked you was if the state law was still constitutional. You ask me to advise you upon this question.

The federal statute relating to the protection of migratory birds was passed as a regulation of interstate commerce. The federal constitution gives to congress the power to legislate upon such subjects. Assuming that the federal act is a proper and constitutional exercise of that power, in my opinion, insofar as the provisions of the federal act are inconsistent with the state law, the former would prevail over the latter. So far as I am aware the courts have not as yet passed upon this question.

Fish and Game—Words and Phrases—The word "dwelling house," as used in sec. 4560a–23, does not include a house boat.

July 22, 1914.

JOHN A. SHOLTS,
State Fish and Game Warden.

In your letter of July 15th you submit the following question: "Does the term 'dwelling house,' as used in sec. 4560a–23, Stats., include a house boat on government waters?" You also inquire whether the qualifying words after dwelling house in subsec. 2 of said section, to wit: "while permanently occupied" enlarge upon or have any bearing upon the word dwelling house, as used in subsec. 1, sec. 4560a–23.

Said section provides as follows:

"1. The state fish and game warden or any of his deputies shall seize any game, or fish, taken or held in violation of the laws of this state; and every such officer may arrest, with or without a warrant, any person whom he has reason to believe guilty of a violation thereof, and with or without a warrant, may open, enter, and examine all buildings, camps, vessels, boats, wagons, cars, stages, tents, and other receptacles and places where he has reason to believe that fish or game taken, or held in violation of the laws of the state are to be found, and seize such game or fish, if any be found therein, but no dwelling house shall be searched for the above purposes without a warrant, or sealed railroad cars be opened, entered, or searched without a warrant."
“2. Any person who shall refuse to permit an officer charged with the enforcement of the fish and game laws entry into any buildings or inclosures, vessels, boats, wagons, vehicles, or conveyance, cars, stages, tents, and other receptacles and places, except dwelling houses while permanently occupied, and to take possession of any fish, game, or any unlawful contrivance used for the taking of fish or game, upon demand made by him to that effect, shall be fined not less than twenty-five dollars nor more than one hundred dollars and the costs of prosecution, or by imprisonment in the county jail not less than thirty nor more than ninety days, or by both such fine and imprisonment.”

A house boat is defined in Webster’s New International Dictionary as: “A covered boat used as a dwelling, esp., a large flat-bottomed boat with a super-structure much like a house of one or two stories, used for leisurely cruising along quiet waters.”

A house boat is a kind of a boat, and boats are mentioned in both the first and second subsections of this section in which searches are permitted. I do not believe that the word “dwelling house,” as used in this section, can be construed to include a house boat.

A dwelling house is defined in Bouvier’s Law Dictionary as “a building inhabited by man; a house usually occupied by the person there residing and his family. It must be a permanent structure.”

A dwelling house is defined in Anderson’s Law Dictionary as a place where a person resides permanently.

“In its common acceptation a man’s dwelling house is the house in which he resides—the house of his present abode; the apartment, building or cluster of buildings in which a man with his family resides.” 10 Am. & Eng. Ency. of Law (2d. Ed.), p. 353.

In 14 Cyc. 1126 a “dwelling house” is defined as the house or building in which a person lives or has some permanent abode or residence with intention to remain.

A house boat used by the owner occasionally for sleeping purposes for himself and some of his crew would not, in my opinion, convert a house boat into a dwelling house, as that term is used in the section in question. Of course, if the house boat were permanently occupied as a home, as is the case in China, then it would be a dwelling house for all purposes and intents; but house boats are not used in that way in
this country. They are generally occupied only for a very short time and they can not be said to be the home or abode of any one.

In answer to your second question I will say that I do not believe that the words "while permanently occupied," as used in subsec. 2 of said section, enlarge upon the word "dwelling house" as used in subsec. 1.

_Fish and Game—Nuisance—_Under sec. 14980, subd. (8), subsec. 1, any screen set in the public waters shall be a public nuisance and the offender prosecuted. Sec. 45671 provides the penalty.

JOHN A. SHOLTS,
State Fish & Game Warden.

In your letter of July 17th you state that in the northern part of the state of Wisconsin certain wealthy men from Chicago have purchased or leased a large tract of land through which flow numerous creeks and streams stocked with trout. That they have placed screens in some of these waters preventing the free passage of fish, and you inquire whether or not they could be prosecuted for placing screens in these streams. You direct my attention to sec. 14980:

"1. The following are declared to be public nuisances:

* * * *

"(8) Any screen set in the public waters of the state to prevent the free passage of fish, or set in any stream which shall have been stocked by the commissioners of fisheries."

You also refer to sec. 45671, which provides a penalty for violating any of the provisions of the game laws for which there is no specific penalty prescribed. You inquire whether the placing of a screen in public waters would be considered an unlawful act and punishable under the last mentioned section.

This question must be answered in the affirmative. I find no statute in this state providing for criminal prosecution of a public nuisance, but a public nuisance was indictable at common law. 29 Cyc. 1278; 21 A. & E. Ency. of Law (2nd Ed.) p. 711. The parties in question may be prosecuted
under the common law for creating and maintaining a public nuisance. There can be no question but that this is the law in this state. See Luning v. State, 2 Pinney 215; Walker v. Shepardson, 2 Wis. 384; Douglas v. State, 4 Wis. 387; State v. Snell, 46 Wis. 524.

In the case of Smith v. State, 63 Wis. 453, our supreme court held that an information which alleges the forcible confinement and imprisonment of a person against his will without alleging any specific intent in such confinement, charges merely the common law offense and is punishable under sec. 4635, which section provides that 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 $250.00. The public nuisance in question was created by the game law of this state and in view of the fact that there is no specific penalty prescribed for a public nuisance, I am of the opinion that the penalty prescribed in sec. 4567/ is applicable in such cases and a person who is convicted for having created and maintained the public nuisance in question may be punished under said section.

Fish and Game—Criminal Law—A sheriff has a right to serve the warrants in a replevin action brought by a defendant in a criminal action for the boats and nets seized and in the hands of a game warden.

John A. Sholts,

State Fish and Game Warden.

In your letter of July 29th you direct my attention to sec. 14980, subsec. 2, Stats., where contraband goods are defined, and you state that on Lake Winnebago, a few days ago, two of your wardens made a seizure of two boats, nets and fish. The parties were brought into court and entered a plea of not guilty and that the cases were adjourned until Aug. 17th; that since said time these defendants have started replevin actions to recover the boats and nets. You ask:

"Can the sheriff or his deputies serve replevin papers upon a deputy game warden or other officer demanding the
release of contraband articles which are held in custody, and to be used as evidence in an adjourned case?"

Your question must be answered in the affirmative. While our court has held that replevin cannot be maintained against the officer who holds the property by virtue of another writ of replevin (Watkins v. Page, 2 Wis. 92; Weinberg v. Conover, 4 Wis. 803; Irey v. Gorman, 118 Wis. 8), our court has also held that property unlawfully taken and detained by the sheriff or U. S. marshal is not in the custody of the law and replevin will lie therefor in the state court; that to be in the custody of the law it must have been taken and held by legal process in a lawful manner and for a lawful purpose; that replevin will lie for property of a stranger to the writ against the U. S. marshal holding it under the writ. Gilman v. Williams, 7 Wis. 287.

While I believe your game wardens will win out in the replevin action, I also believe that the sheriff has a right to serve the warrants in such action when the same has been commenced.

Fish and Game—Nuisance—A boat used in violation of the fish and game law may be destroyed as a nuisance, although the owner was ignorant of the fact that a person was so using his boat.

William B. Collins,
District Attorney,
Sheboygan, Wis.

In your letter of Oct. 6th you state that the question has arisen as to whether or not a boat can be confiscated under sec. 14980, when the owner is absolutely innocent of any wrong-doing, and someone, without his consent and permission, took his boat and used it for illegal hunting. The material part of said section is as follows:

"1. The following are declared to be public nuisances:

(2) All seines or other devices, traps or contrivances set or found in any waters in a manner prohibited by any law relating to such waters, and any and all boats found in use in the taking of fish in violation of any of the provisions of these statutes."
“(6) Any boats, lamps or lights when used in the unlawful taking or attempting to take fish or game.

* * * *

“(11) The unlawful use of any of the articles mentioned in this section, contrary to the provisions of law, shall forfeit the same to the state, and upon their being found under any of the conditions which shall render them public nuisances as specified herein they may be immediately destroyed.”

Subsec. 3 of said section provides that a boat used in violation of any of the fish and game laws of this state is declared to be a contraband and may be sold by the game warden to the highest bidder.

Subsec. 4 of said section provides that any boat, etc., when used in violation of any of the provisions of the act in question, is declared a public nuisance and may be seized and disposed of as provided by law.

Sec. 1498k provides for the seizure of nuisances and the disposition to be made thereof.

There is no section in this statute which protects the property when the owner of the same is innocent of any wrong-doing and when the property is illegally used without his consent or permission.

The question submitted by you is whether this statute applies in such cases. I have been unable to find any decision of our supreme court on this question.

In the case of Low v. Conroy, 120 Wis. 151, 160, our court adopted the following rule in cases where applicable:

“Inasmuch as the law quite universally protects private property * * * the judgment or discretion of a quasi-judicial officer, though exercised honestly and in good faith does not protect him where by virtue of it, he undertakes to invade the private property rights of others to whom no other redress is given than an action against the officer.” Citing Mechem, Public Officers, Par. 642.

In that case damages were recovered against a health officer who destroyed meat in a meat market on the ground that the same was a nuisance and having been obtained from cattle which had a contagious disease. The jury found that the meat was not a nuisance and that the cattle were not contagious and damages were recovered. That is not a parallel case to the one submitted by you. Here the owner of the boat has a remedy against the party who con-
verted the same to his own use and used it in violation of the fish and game laws. The principle involved has, however, been passed upon by the courts of last resort. In the case of U. S. v. Brig Malek Adhel, 2 How. 91, it appeared that under the statutes of the United States any piratical aggression caused a vessel to be forfeited, though not made causa lucri, though the owners were entirely innocent and the vessel was armed for a lawful purpose and sailed on a lawful voyage. The court said:

"The next question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of congress? Here, again, it may be remarked, that the act makes no exception whatsoever, whether the aggression be with or without the coöperation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of congress) from which such piratical aggression, etc., shall have been first attempted or made, shall be condemned. Nor is there anything new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine, also, is familiarly applied to cases of smuggling and other misconduct, under our revenue laws; and has been applied to other kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs. In the case of The United States v. The Schooner Little Charles, 1 Brock. 347, 354, a case arising under the embargo laws, the same argument which has been addressed to us, was, upon that occasion, addressed to Mr. Chief Justice Marshall. The learned judge, in reply, said: 'This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against
the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report.” The same doctrine was held by this court in the case of *The Palmyra*, 12 Wheat. 1, 14, where, referring to seizures in revenue causes, it was said: “The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing; and this whether the offence be malum prohibitum or malum in re. The same thing applies to proceeding in rem or seizures in the admiralty.” The same doctrine has been fully recognized in the high court of admiralty in England, as is sufficiently apparent from *The Vrow Judith*, 1 Rob. 150; *The Adonis*, 5 Rob. 256; *The Mars*, 6 Rob. 87; and indeed in many other cases where the owner of the ship has been held bound by the acts of the master, whether he was ignorant thereof or not.

“The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party.” *U. S. v. Brig Malek Adhel*, 2, How. 102, 104.

In the case of *Dobbin’s Distillery v. U. S.*, 6 Otto 395, it was held that where the lessee of a brewery violated the United States revenue law which made the brewery subject to forfeiture, that this forfeiture could be enforced although the owner of the brewery did not know of the fraud of his lessee. On page 403 the court said:

“Fraud is not imputed to the owner of the premises, but the evidence and the verdict of the jury warrant the conclusion that the frauds charged in the information were satisfactorily proved from which it follows that the decree of condemnation is correct, if it be true, as heretofore explained, that it was the property and not the claimant that was put to trial upon the pleadings; and we are also of the opinion that the theory adopted by the court below that if the lessee of the premises and the proprietor of the distillery committed the alleged frauds, the government was entitled to a forfeiture even though the jury were of the opinion that the claimant was ignorant of the fraudulent acts or omissions of the distiller.”
In the case of Boggess et al. v. The Commonwealth, 76 Va. 989, a statute of Virginia was under consideration which declared that a vessel should be forfeited which was employed in violating the oyster laws. It was held that this law was applicable to a vessel which was unlawfully used in violation of said law without the knowledge of the owner. After reviewing some of the authorities in the federal courts, on page 994 the court observed:

"It is very true that these decisions are based upon acts of congress. It is well settled, however, that the right of the state governments to legislate in such manner as in their wisdom may seem best over the public property of the state, and to regulate the use of the same where not restricted by the constitution of the United States, is as complete and unlimited as that of the federal government in matters affecting the general welfare. And this is especially true with respect to the fisheries and oyster beds within the territorial limits of the state and which are the common property of the citizens of the state, and were never ceded to the United States."

In the case of Commonwealth v. Gaming Implements, 155 Mass. 165, a statute of Massachusetts was under consideration which provided for the forfeiture of property seized in a gaming house during the progress of an unlawful game, required that such property, in the absence of a finding in proceedings thereunder, was unlawfully used or intended to be unlawfully used and should be delivered to the owner. The jury found that furniture, fixtures and personal property were unlawfully used for gaming purposes; but the owner of the building was ignorant of the fact that the house was used for gambling purposes. On page 167 the court said:

"The claimants in the present case contend that the unlawful use referred to is an unlawful use by the owner of the property, and not merely by the keeper of the gaming house. We are of opinion that this contention is not well founded. The difficulty of enforcing the statutes against gaming is so great that the legislature has found it necessary to make stringent laws, and so it is provided that not only the implements of gaming may be seized, but the personal property, furniture, and fixtures found in the gaming house, and that such property, if unlawfully used or intended to be unlawfully used in the business carried on there, may be forfeited. The purpose of the statute seems to be to subject to forfeiture any property which is unlawfully used in a
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gaming-house, without proof of guilty knowledge on the part of its owner, and to put upon property owners who wish to have their property secure the burden of seeing that it is not kept and unlawfully used in a gaming-house."

See also *Fisher v. McGirr*, 1 Gray. 1; *Commonwealth v. Intoxicating Liquors*, 107 Mass. 296.

Under these authorities it is apparent that the state has a right to enact a law to confiscate property which is used in violation of its fish and game laws, and is declared by such laws as a public nuisance, and if property is used in violation of such a law it may be forfeited, although the owner of the same was ignorant of such violation

I am, therefore, constrained to answer your question in the affirmative.
OPINIONS RELATING TO INDIGENT, INSANE, ETC.

Indigent, Insane, Etc.—Counties—The father of an adult inmate of the state tuberculosis sanatorium is not his "legal representative" within the meaning of that term as used in sec. 702-8, Stats.

The father of an adult, indigent inmate of the state tuberculosis sanatorium may be proceeded against under secs. 1502, et seq., Stats., to compel him to support such inmate.

Feb. 16, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of the 12th you state in substance that an application has been made to the county judge and the chairman of the county board of supervisors of your county under sec. 1421-8, Stats., for the purpose of securing the certificate provided for by subsec. 2 of that section. That the person regarding whom such certificate is requested is about thirty-seven years of age, and is now in the State Tuberculosis Sanatorium, is unmarried, and has no property. That his father is a man of means, and up to this time has paid the cost of the son's maintenance at the sanatorium. That the application is made by the father.

You ask if it is not the duty of the father to continue paying the cost of such maintenance, or if the county can be required to pay it.

The section in question provides:

"1. All persons admitted as patients to the sanatorium shall pay to said institution the cost of their maintenance. The charges for any patient or patients may, however, be paid by any person or persons or society. The determination of such sum shall be made by the superintendent and the state board of control. Any person who is unable to pay the charges for his or her support may be admitted to said
sanatorium after it has been determined by the examining physician and superintendent of the sanatorium that such person is suffering from pulmonary tuberculosis, in the incipient or slightly advanced stage, provided, however, that before such person shall be admitted to the sanatorium, he or she shall file a statement with the judge of the probate court of the county within which he or she resides, setting forth the fact that he or she is unable to pay the regular charges.

“2. Said judge, upon presentation of the report of the examining physician that said person is afflicted with pulmonary tuberculosis in the incipient or slightly advanced stage and a statement from the superintendent of the sanatorium, that in his opinion the applicant is eligible and that he or she can be received, shall make an investigation, and if he finds that said applicant or his legal representatives are actually unable to pay such charges, shall approve in writing the application of such person, provided that such judge may in his discretion require the approval of chairman of the county board thereto, and in all cases the said judge shall notify the chairman of the county board of his action in such matters. Said judge shall immediately forward to the superintendent of the sanatorium a certificate in writing that said patient is unable to pay said charges and that he or she is a resident of the county in which such application has been so approved.”

Subsec. 3 provides that the maintenance of such patient thereafter, so long as he remains an inmate of the sanatorium, shall be charged to the county.

Clearly before the county can be charged with the cost of maintenance of this patient the procedure outlined in the statute must be strictly followed. The statement setting forth the fact of his inability to pay must be filed by him with the judge of the probate court. There must also be presented to said judge the report of the examining physician and the statement from the superintendent of the sanatorium, setting forth the necessary facts. It then becomes the duty of the judge to make an investigation and determine the facts. The judge may, in his discretion, require the approval of the chairman of the county board before issuing his certificate, but is not required to do so. He must, however, notify the chairman, in all cases, of the action taken by him. From the statements contained in your inquiry, I doubt very much if, as yet, any such proceeding has been properly commenced.

27—A. G.
Before the cost of maintenance of a patient can be charged to the county the judge must find "that said applicant or his legal representatives are actually unable to pay such charges."


It may include guardians. 5 Words and Phrases, 4075. As sometimes used it embraces representatives by contract, such as grantees or assignees, as well as representatives by operation of law. *Bradley v. Dells Lbr. Co.*, 105 Wis. 245, 253.

The rule seems to be that these words "will ordinarily be given their accurate primary meaning where nothing appears to indicate a different intention; but that this rule will readily yield, and where it appears from a survey of the context, the subject matter, and the purpose of the writing that the words were used as indicating heirs, next of kin, descendants, widow, and sometimes even assignees, grantees, or successors in interest, the intention will be carried into effect and the words given the meaning so intended." *Moyer v. Oshkosh*, 151 Wis. 586, 592.

This seems to state the rule as broadly as it is stated anywhere. As used in the statute referred to, I believe the term includes guardians, and probably, too, parents of minors, as they are guardians by nature.

I do not believe it includes parents of indigent adults, not under guardianship. If I am correct in this, it would not be proper for your county judge, upon a proceeding before him to fix the liability of the county for the cost of the maintenance of the person to whom you refer, to find that his legal representative is able to pay for such maintenance, based upon the fact that his father has ample means.

However, it appears to me that just as soon as the county judge makes his finding that this person is unable to pay the cost of his own maintenance, it must at once be apparent that he is a poor person, unable to maintain himself, and that upon proper proceedings under secs. 1502, 1502a, 1502b, and 1503, Stats., the father could be required to
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maintain him. In fact, I see no reason why such proceedings may not be commenced just as soon as the father fails to pay the cost of such maintenance, or as soon as the son files his application under the provisions of sec. 1421-8.

Indigent—A daughter having no property except dower and homestead rights in her husband’s land has not during the life of her husband sufficient ability to support her indigent mother in contemplation of sec. 1502.

JAMES H. HILL,
District Attorney,
Baraboo, Wis.

In your letter of Feb. 20th you submit the following:

“A husband and wife own a farm of some 100 acres. They are at least prosperous if not fairly prosperous. They have some children. The property is all in the husband’s name but is the joint accumulation of the labor of husband and wife. The property is more than a homestead and altogether worth perhaps $10,000.00. The mother of the wife has become a county charge. Has the wife such an interest in the property held in the name of her husband that is, is her homestead and dower right in her husband’s property such an estate that a county court would have any authority to make an order compelling her to contribute to the support of her indigent mother?”

Under sec. 1502 a child, if of sufficient ability, is liable for the support of an indigent mother. The question submitted by you is whether, in contemplation of this statute, the wife in question is of sufficient ability to support or contribute to the support of her indigent mother.

Our court in the case of Bennett v. Harms, 61 Wis. 251, 258, after reviewing the authorities came to the following conclusion as to the nature of an inchoate dower right:

“It would seem to follow from the weight of authority, that while the right of dower remains inchoate—a mere expectancy,—and until it becomes consumated by the husband’s death, it is entirely under the legislative control.”

In 10 A. & E. Ency. of Law, 2nd Ed., p. 145, it is said:
“Since inchoate dower is not a vested interest, the law making power may deal with it as it may deem proper, it may be increased, diminished, or otherwise altered, or it may be wholly taken away.”

In Munger v. Perkins, 62 Wis. 499, 504, our court used the following language:

“We think it plain that an inchoate right of dower is not a future estate, within the meaning of sec. 2034 R. S. The wife’s interest is contingent, does not become vested until the death of her husband, and cannot be conveyed or relinquished except in the manner pointed out by the statute. Wilbur v. Wilbur, 52 Wis. 298. The wife cannot, during coverture, convey or release her inchoate right of dower to one having no interest in the land except that which he derived from her release, or to a stranger to the title.”

Scribener on Dower, Vol. 2, p. 39, 2nd Ed., lays down the following rule:

“It is well settled that a mere right of dower before an assignment to the widow, is not such an interest or estate as can be levied upon and sold under an execution against her or a subsequent husband.”

The inchoate dower right is of such a nature as is manifest by the language of the above cited authorities, that the wife is powerless to dispose of it as long as the husband retains his title to the land in question. Neither can the court reach it by execution. The homestead right of the wife is, of course, exempt from execution under the provisions of sec. 2983, Stats.

Your question must, therefore, be answered in the negative.

Indigent—Counties—A person who moves into a county from another state and becomes an indigent before he acquires a legal settlement must be supported by the local authorities.

April 9, 1914.

James H. Hill,
District Attorney,
Baraboo, Wis.

In your letter of April 6th you inquire whether a county has any protection from any source under the following statement of facts:
“A man and family from another state move into this county. They become indigent within a year after moving into the county.”

You direct my attention to sec. 1512 which authorizes the counties to collect the amount expended for such purposes from another county in case the indigent person has a legal settlement in some other county in the state. There is no statutory provision, however, which protects a county under the facts stated by you. There is no way in which a county outside of the state can be compelled to contribute to the support of an indigent who has become a resident of any county in this state before he has acquired a legal settlement therein. All the counties of the state are subject to the support of indigent persons under such circumstances.

Indigent, Insane—Dependent Children—State Public School—Juvenile court of Milwaukee has right to sentence dependent babies from the maternity ward of Marquette university to the state public school.

April 16, 1914.

M. J. TAPPINS, Secretary.
State Board of Control.

In your letter of April 3rd you enclose a letter from Dr. Brown, superintendent of the state public school, and from the manager of the Marquette university of Milwaukee, and you state that the parties in charge of the maternity ward of the Marquette university are anxious to send its babies to the state public school at Sparta, but that Judge Sheridan and Judge Karel of the probate courts of Milwaukee county claim that they have no jurisdiction in the matter for the reason that the city charter compels them to commit the children to Wauwatosa. You ask me to advise you whether in my opinion the children can be committed from the maternity ward of the Marquette university to the state public school.

In a letter from Judge Sheridan, under date of April 14th, in answer to a letter of mine concerning this matter, he says that since the creation of the juvenile court in Milwaukee county, “the county court has had nothing to do with the
commitment of neglected or dependent children, all such commitments being made by the juvenile court,” and he also states, “Hon. Franz C. Eschweiler is the juvenile judge, having been appointed such by the court of record of Milwaukee county” and that the question of commitment to state schools and orphan asylums is a matter that will have to be taken up with him.

The city charter of Milwaukee, in sec. 5, ch. 90, laws of 1901, contains the following:

“When any child under the age of sixteen years shall be found to be dependent or neglected within the meaning of this act, the court may make an order committing the child to the care of some suitable state or county institution, as provided by law, or to the care of some incorporated association willing to receive it embracing in its objects the purpose of caring or obtaining homes for dependent or neglected children.”

The above provision is part of the law pertaining to the juvenile court of Milwaukee county. Sec. 573b, Stats., provides as follows:

“All courts and officers authorized by law to commit or apply for the commitment of dependent or neglected children to industrial schools, asylums or other institutions for the care of such children, shall, before making such commitment, upon application of the parents or guardians thereof, take into consideration, in selecting the institution to which the commitment shall be made, the wishes of such parents or guardians; but if no such application is made, the child, if of proper age and condition, shall be sent to the state public school,” etc.

Sec. 1547, Stats., provides in part as follows:

“Any male child under the age of ten years and any female child under the age of eighteen years, besides such as are included in section 1543, who shall be found begging or receiving alms, either directly or under pretense of selling or offering anything for sale in any public street or place for that purpose, or wandering in public places as one of the class known as rag pickers, or wandering without having any home, abode or proper guardianship, or destitute because an orphan, or having a parent undergoing imprisonment or otherwise, or who frequents the company of reputed thieves or of lewd, wanton or lascivious persons in speech or behavior, or notorious resorts of bad characters, or is an inmate of any house of ill fame or poorhouse whether in com-
pany with a parent or otherwise or has been abandoned in any way by parents or guardians, and any child within the ages aforesaid, upon petition of his parents, guardian, or if none, those having him in charge, showing that the welfare and best interests of the child require it, may be brought before any judge of a court of record of the county and committed to the state public school, or to an industrial school, in the manner and for the time before provided in this chapter, and subject to like appeal," etc.

Under these provisions of the law, the juvenile court of Milwaukee county certainly has the right to commit dependent children such as are found in the maternity ward of the Marquette university, to the state public school.

Indigent, Insane, etc.—Statute of Limitations—Counties—A county can recover from the estate of a deceased insane person for his maintenance for a period of over six years. The claim of the state for aid in the support of such insane person is against the county. The state may recover from the county the full amount paid by it toward the support of such insane person even though the county's claim is compromised.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.
In your letter of the 4th you ask:

"Where a claim has been filed by the county against the estate of a deceased insane person for the maintenance and support of that individual, can the county and state collect for the support of that individual for over six years?"

It is the duty of the county to support its insane where the insane person is properly a public charge. In such case the county is entitled to aid from the state. The county is not entitled to any aid where there are persons liable for the support of such insane person, (see Richardson v. Steusser, 125 Wis. 66); and therefore the county board would not be entitled to any compensation or aid from the state for the care of such insane person. (Sec. 604e, Stats.) Any money paid by the state under those circumstances is paid contrary
to law, and should be repaid to the state by the county. If not so paid it may be recovered in an action for money had and received. (Douglas v. Sommer, 120 Wis. 424, 430, 431; Biennial Report and Opinions of Attorney General 1912, p. 466).

As to any claim of the county, the statute of limitations would run in six years, so that the limit of recovery would be for maintenance furnished during the past six years, as to the county. (Biennial Report and Opinions of the Attorney General 1908, p. 134; Biennial Report and Opinions of the Attorney General 1910, p. 396; Supplemental Report and Opinions of the Attorney General 1913, p. 302).

If such person were confined in a state hospital for the insane, probably the state would be the one to have a claim against the estate of the deceased insane person, and as to such claim the statute of limitations would not run until the expiration of ten years.

It follows that if the insane person was maintained in a county hospital the claim should be made in the name of the county, and in such case, as the insane person was not properly a public charge, the state would have a cause of action against the county for any aid given as for money had and received. Of course the county should remit to the state the amount so paid to it as aid for such insane person.

You also ask:

"If a compromise is effected does the state get one-half of the compromised amount, or will the state be paid in full for its share of the claim and the county the balance?"

It follows from what is said above that the state would be entitled to a return of the full amount of the aid given by it.

Indigent, etc.—Municipal Corporations—A city is not liable for care of one temporarily within its boundaries if such person is able to pay for the bills incurred.

James Kirwan,
District Attorney,
Chilton, Wis.

In your letter of July 16th you state that a land agent from northern Minnesota, where he claims to own a lot of land
with a co-partner, was seeking buyers in Chilton about eight months ago, whom he took to Minnesota, where some of them bought land and some did not; that this man was reported to be financially rated at about $10,000; that three weeks ago he was taken suddenly ill and doctors rushed him to the hospital and operated on him; that he is still in the hospital and likely to be there for months.

You state that the doctors, after they had operated on him, were afraid that they would not get paid and they notified the city authorities here, who notified the county authorities under sec. 1512. You state that the land agent would not and has not signed any written request for aid, but that the doctors claim to have done so at his request. You inquire whether your county may be held liable to pay the bills incurred.

In answer I will say that, under the facts stated by you, the man in question has means with which to pay his own bills. In that case sec. 1512, Stats., does not apply. It will be proper for the city to refuse to pay the bills incurred unless it can be shown that the party in question has no money or property with which to pay his bills.

You also inquire whether the city or county can recover of the town or city of his residence in Minnesota for any such public aid given him. This question must be answered in the negative, as the statute in this state covers only counties within the state of Wisconsin and there is no provision in any law which authorizes the recovery of the money from counties outside of the state.

Insane Persons—Presumption of Insanity—An inmate of a county asylum for insane who is out on parole without the written recommendation of the visiting physician will not have the presumption of insanity removed after two years parole.

December 21, 1914.

M. J. TAPPINS, Secy.,
State Board of Control.

In your letter of Dec. 18th you refer me to secs. 604p and 587c, Stats., and you say that the question has arisen as to
whether a parole granted to an inmate of a county asylum without the written recommendation of the visiting physician will have the effect of removing the presumption of insanity against such person.

Sec. 604p provides as follows:

"The superintendent of any county asylum may, upon the written recommendation of the visiting physician thereof, allow any of its inmates to go therefrom on leave of absence for such time and under such conditions as such physician may direct. Whenever a person committed to any hospital or asylum for the insane dies, is discharged, transferred to any other such institution, escapes, is out on leave of absence or returns from such leave, the superintendent thereof shall give notice of the fact to the county judge of the county to which such person is chargeable, and such judge shall keep a record of the fact."

Sec. 587c provides that upon expiration of two years from the time of granting a parole to the inmate of the state hospital, northern hospital or Milwaukee hospital for the insane, the authority of the superintendent to require the return to the hospital of the person paroled shall end, and the presumption of insanity against such person because of the original adjudication that he was insane shall cease, and, until a new adjudication to the contrary, he shall be presumed sane the same as though his insanity had been established by a judicial determination, and it further provides:

"The provisions of this section as to the return to the hospital of paroled inmates and as to the effect of a continued absence of two years therefrom on parole, shall apply to all inmates thereof now at large on paroles granted before as well as after the passage of this act, and also to all inmates of county asylums who have heretofore been or shall hereafter be granted leave of absence from such an asylum pursuant to law and are now absent therefrom pursuant to such leave."

You will notice that the effect of the continued absence of two years from a county asylum shall be the same as those from the state institutions. It follows that the presumption of insanity has been done away with and the person will be presumed to be sane in the same way as if he had been off on a leave of absence from a state institution. He must be absent from the county asylum pursuant to law, and no
inmate can have a leave of absence without the written recommendation of the visiting physician.

Your question must, therefore, be answered in the negative, as a leave of absence from a county asylum without the written recommendation of the visiting physician is not in accordance with law in contemplation of sec. 587c.
OPINIONS RELATING TO INSURANCE

Insurancet—Tourist Policy—Under subsec. 2, sec. 1897, Stats., a policy may be written insuring property of tourists against loss by theft from rooms occupied by the insured in a hotel or boarding house.

Herman L. Ekern,
Commissioner of Insurance.

In your favors of Dec. 16th and 24th you request my opinion as to whether a clause in a so-called tourist policy which insures the property of tourists against loss by theft from rooms occupied by the insured in hotels or boarding houses is permissible under subsec. 2, sec. 1897, Stats.

Sec. 1897, Stats., provides in part:

"An insurance corporation may be formed for the following purposes: (The mention of several subjects of risks of insurance in any subsection indicates that any one or more or all may be included.)

* * * * *

"(2) Marine insurance. Vessels, freights, goods, moneys, effects, and money loaned on bottomry and respondentia, against the perils of the seas and other perils usually insured against by marine insurance, including the risks of inland transportation and navigation."

While subsec. 10, sec. 1897, Stats., provides for insurance against loss or damage by burglary or theft, sec. 1897a prohibits a company from engaging in any other kind of insurance than that specified in some one of the subsections of sec. 1897, with certain excepted combinations, the combination of subsecs. 2 and 10 not being one of them. And subsec. 5, sec. 1916, permits a foreign insurance company to transact in this state "only such kinds of business as, under the laws of this state, a like domestic insurance corporation is authorized to transact." The situation thus is that if the clause in question is permissible it is because it may properly
be included within the language used in subsec. 2 above quoted.

Marine insurance covers the perils of the sea, etc., and also the risk of loss by theft while the property is in transit in the hands of the carrier. Such insurance would not, strictly speaking, cover loss by theft while the property was in a hotel or boarding house, but Mr. O. B. Ryon, general counsel of the national board of fire underwriters states, in a letter to you dated Dec. 22, 1913, and submitted with your inquiry, that this form of tourist policy “is used by all companies writing business in the several states, and it is generally conceded that it is a proper part of the marine branch of all fire insurance companies. I have investigated the matter and I find that every company which does issue such policies handles them exclusively through the marine department.”

You will note that subsec. 2, sec. 1897, permits insurance “against the perils of the seas and other perils usually insured against by marine insurance, including the risks of inland transportation and navigation.” If Mr. Ryon is correct in the foregoing statement, it would seem that the risk of theft in a hotel or boarding house has become one of the “perils usually insured against by marine insurance” and is thus one of the perils against which insurance may be written by the express terms of subsec. 2, sec. 1897.

I do not think that the language of this subsection should be given a narrow or technical construction resulting in the prohibition of a kind of insurance which does not appear to be against the policy of the statute, and I am convinced that if the risk of theft of baggage in hotels and boarding houses has become recognized as a risk proper to be insured against under the marine form of policy, it is permissible under our statute.
Insurance—Appropriations and Expenditures—Under sec. 1978a, binder twine owned by the state stored outside the borders of the state is insurable in the state insurance fund and a premium for a policy thereon in a fire insurance company may not be paid out of the state treasury.

Feb. 12, 1914.

JOHN S. DONALD,
Secretary of State.

In your favor of Feb. 11th you state that you are in receipt of a bill from the board of control for a premium on a fire insurance policy covering binder twine belonging to the state in a warehouse at Fargo, North Dakota, and you request my opinion as to whether such bill can be properly paid by the state in view of the provisions for state insurance on state property contained in secs. 1978a to 1978c, Stats.

Sec. 1978a provides:

“No officer or agent of this state, and no person or persons having charge of any public buildings or property of the state, shall pay out any public moneys or funds on account of any insurance against loss by fire or tornado, or shall in any manner contract for or incur any indebtedness against the state on account of any such insurance upon any of the public buildings, furniture, fixtures or property of any kind whatever belonging to the state except in the manner hereinafter provided.”

Sec. 1978b provides in part:

“Upon July first, annually, the commissioner of insurance of the state shall provide for the insurance by the state of all state property for an amount equal to ninety per cent of the cash value of such property in the following manner: * * * * .”

The following sections contain provisions creating a state insurance fund from which is to be paid “in case any buildings or property of the state shall be damaged by fire or tornado” (subsec. 1, sec. 1978c) the amount of the loss as fixed by the commissioner of insurance, the same to be used by “the officer, board of control, board of trustees, or other agents in whose control said buildings or property belongs,” “for the rebuilding or restoration of the property damaged.” (Subsec. 2, sec. 1978c.)
Subd. (1), subsec. 46, sec. 172-67 and sec. 4918-15 give the board of control power to manage the state binder twine plant and dispose of its product, but do not give any express authority as to insuring the same.

The language of secs. 1978a, et seq. is general, and under familiar rules of construction “must receive a general construction, unless there is in the statute itself some ground for restraining their meaning by reasonable construction. *Barry v. Minahan*, 127 Wis. 570, 5. *Abbot v. Milwaukee*, 148 Wis. 26, 31.

I know of no reason why binder twine manufactured at the state binder twine plant and owned by the state should not be regarded as within the description “property of any kind whatever belonging to the state” (sec. 1978a) nor why it should not be deemed to be included within such language even though it may be without the territorial limits of the state. The Wisconsin supreme court has held that “The words ‘any corporation’ mean every corporation” and thus include foreign corporations. *State ex rel. Wis. Trust Co. v. Leuch*, 144 N. W. (Wis.) 290, 292, 293. The legislature may well have intended by secs. 1978a, et seq. that all the property of the state wherever located should be protected by the state insurance fund. The legislature clearly had power so to do and has used language appropriate to effect such purpose. Since I find nothing in the law to restrict the generality of the language of sec. 1978a, I am forced to the conclusion that the words “property of any kind whatever belonging to the state” must be given a general meaning and be held to include property of the state even when located outside its borders.

I am therefore of the opinion that the bill in question may not properly be paid out of the state treasury.
Insurance—Fire Insurance—A clause may be inserted in the Wisconsin standard fire insurance policy permitting the insured to remove from manufactured tobacco damaged by fire all trade-marks, etc., prior to any sale thereof.

March 3, 1914.

Herman L. Ekern,
Commissioner of Insurance.

In your letters of Feb. 7th, Feb. 21st and Feb. 28th, you submit a ruling of the New York supt. of insurance and some correspondence and opinions of attorneys with reference to the legality of inserting the following clause in the Wisconsin standard fire insurance policy:

"It is understood and agreed that in the event of a loss or damage to manufactured tobacco, the insured has the right to remove therefrom all trade-marks or marks of identification (these not being included in this insurance), prior to any sale of said damaged tobacco."

In a letter from W. O. Robb, manager of the New York Fire Insurance Exchange, to the New York superintendent of insurance, dated Nov. 17, 1913, it is stated that:

"The points which have been raised in this connection are (1) that the clause may be deemed to cover the liability of the companies beyond the 'direct loss or damage by fire' which alone may be assumed under the law; and (2) that while it is doubtless competent for the parties after the happening of a loss to waive or agree to modify provisions of the standard policy governing adjustments, it may well be doubted whether an undertaking for such waiver or modification can be introduced into the provisions of the policy itself. The object of the insured is, of course, to protect themselves from what would ordinarily be called the indirect or consequential damage they might suffer if goods of their manufacture and which had taken any damage, however slight, from water or smoke incident to fire were put upon the market through any channels whatever under their trade-mark and name. On the other hand, the removal of the trade-mark from manufactured cigarettes means, of course, the destruction not only of the package but of the paper wrapper of each cigarette and the reduction of the cigarette to the form of loose tobacco, an immense decrease in the salvage or selling value the stock would otherwise represent."
The ruling of the New York insurance department is as follows:

"The department is of the opinion that a loss occasioned by an act of the insured subsequent to a fire, such as caused by the removal of identification marks from manufactured cigarettes damaged by the fire, is not a contingency intended to be insured against under the standard fire insurance policy. No fire insurance company shall issue any fire insurance contract on property located in this state except such as shall conform in all particulars to the standard policy, which is made a part of the law itself, and under which the liability of a company is limited to 'direct loss or damage by fire.' An additional loss created after the establishment of a direct loss by fire constitutes, in the opinion of this department, solely a consequential damage, and therefore may not be insured against by a fire insurance company under the laws of this state."

The argument on the other hand is well stated in a letter by J. H. Holmes to you under date of Feb. 25, 1914, as follows:

"The situation is this: The American Tobacco Co. insures tobacco—plug and smoking—that bears labels or tags which insure to the consumer the quality of the tobacco. These trade-marks acquire value to the manufacturer of course, but they serve the further purpose of insuring identity of quality to the consumer. If a lot of 'Bull Durham' tobacco, for instance, suffers a smoke damage or water damage on the occasion of a fire, it still is of some value, and the insurance companies exercise the right which they have under their policy to pay us the whole value of the property damaged, and then recoup themselves by disposing of the damaged tobacco. In such a case it is manifestly unjust to the company, and unjust to the consumer, that this damaged tobacco should be sold as 'Bull Durham' tobacco. It, of course, has not the quality that 'Bull Durham' ordinarily has, and is liable, therefore, to do great injury to the trade-mark. It was to avoid this condition, and only this, that the clause was intended. Unless this condition were avoided, an insurance policy might be a liability to tobacco manufacturers rather than an asset.

"I cannot conceive, under the circumstances that I have just stated, that the clause in question provides for a loss subsequent to the fire. It is intended to require the insurance company, in disposing of damaged goods, to so dispose of them as not to injure the trade-mark belonging to the insured, or to deceive the consumer."

28—A. G.
The Wisconsin standard fire insurance policy provides for insurance "against all direct loss or damage by fire" (sec. 1941-43, Stats.), and subsec. 2, sec. 1941-64, Stats., provides:

"Printed or written forms of description and specification or schedules of the property covered by any particular policy, and 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 herein provided for), may be written upon or attached or appended to any policy issued on property in this state."

The clause in question is, in my opinion, quite clearly within the language of this statute in that it makes part of the policy, "matter necessary to clearly express all the facts and conditions of insurance." It does not seem to me to be in any way inconsistent with the provision or conditions of the standard policy. It tends to make definite the method of determining the "direct loss or damage by fire," rather than to extend the risk beyond such direct loss or damage. Our supreme court has said that "the proximate results of fire may include other things than combustion, as, for example, the resulting fall of a building, injuries to insured property by water, loss of goods by theft, exposure of goods during fire." O'Connor v. Queen Ins. Co., 140 Wis. 388, 394.

The standard fire insurance policy requires the insured to "separate the damage and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon" (Sec. 1941-55, Stats.); and permits the insurer, after the value of the property destroyed and damaged has been ascertained by agreement or arbitration, "to take all or any part of the articles at such ascertained or appraised value." (Sec. 1941-44.)

It is, of course, obvious that if tobacco which has been damaged by heat, smoke or water is taken over by the insurance company and sold bearing a known trade-mark or name, the insured and the public will be injured thereby and it seems to me to be entirely consistent with the provisions of the standard policy to provide against such loss by the insured. The clause in question would permit the insured to
remove his trade-marks, etc., before the insurer takes over the damaged tobacco. The loss caused by so doing is quite clearly, to my mind, a "direct loss or damage by fire," and the clause in question is, I am convinced, permitted by subsec. 2, sec. 1941-64, Stats., as "matter necessary to express all the facts and conditions of insurance."

In your communication of the 6th inst. you state that:

"Sec. 1989m, Stats., provides for the payment of premiums for state life insurance policies to the commissioner of insurance and also provides a method for the return of premiums on rejected applications. A question has arisen as to whether payments made for life insurance can be returned to the applicant before the medical examination has been given and the applicant rejected."

You ask whether in my opinion secs. 157–14 and 172–11 would cover repayments of money advanced as above stated. The question may be restated as follows:

"Can a person making application for insurance in the state life fund withdraw such application before the medical examination provided for and have the advance premium accompanying such application returned to him?"

If he may do this, then the secretary of state can audit such claim, under the provisions of sec. 157–14, and charge the same to the appropriation provided in subsec. 2, sec. 172–11.

Subsec. 2, sec. 1989m, Stats., provides:

"The state treasurer shall be ex officio treasurer and custodian of the life fund, and all other matters in relation thereto shall be under the supervision of the commissioner of insurance."
By virtue of the phrase italicized the commissioner of insurance is virtually made the general manager of the insurance company known as the state life fund. While a great many matters relating to the management of this fund are the subjects of specific statutory regulations, it is apparent that a great many matters will arise in connection with the administration and management of this fund concerning which no legislative regulation has been prescribed and that many matters must necessarily be left to the discretion of the insurance commissioner, especially matters concerning business policies to be pursued in dealing with the public and those seeking insurance in this fund.

I know of no matter which is more peculiarly within the discretion of the insurance commissioner than that of permitting an applicant to withdraw his application before the taking of the medical examination. Whether such practice should be permitted is a matter not covered by specific legal enactment, so far as I can discover, and unless it is prohibited by law I can see no reason why the commissioner of insurance may not permit such practice, especially in view of the fact that it is generally permitted by other insurance companies. As I understand it, it is the policy of the present commissioner of insurance to permit such withdrawals. The only question then is whether the amount so advanced may be audited and paid by the secretary of state and state treasurer under existing statutes.

Par. 7, sec. 1989m provides in part:

"* * * The commissioner of insurance and the state board of health shall pass upon all applications for insurance, and no life insurance shall be granted without a personal medical examination to be made at the direction of the state board of health, for which the local examiner shall receive the medical examination fee. If the application be rejected, the deposit shall be returned, excepting the fees mentioned in subsection 13."

Here is express provision for the return of the deposit after the medical examination has been had and the application has been rejected, but this does not, to my mind, include all cases in which the deposit may be returned. It simply amounts to an express provision that under such circumstances the deposit shall be returned and perhaps at that time and before the enactment of sec. 157–14
hereinafter quoted, the secretary of state was without power or authority to audit a claim for the return of such deposit, except under the provisions of the section above quoted, which provides for such return only after the examination and rejection of the applicant.

Par. 14, sec. 157, Stats., provides as follows:

"The secretary of state as auditor is authorized and directed to audit and draw his warrant in the manner provided by law, and the treasurer of state is authorized and directed to pay in the manner provided by law, all just claims against the state for moneys paid into any fund of the state treasury as a deposit or advance payment. Payments so made shall be charged to the appropriation provided in subsection 2 of section 172-11."

Manifestly this enactment was for the purpose of authorizing the secretary of state to audit claims for deposits upon which the state had no moral or legal claim and conferred upon him powers not theretofore enjoyed, and it would seem that the purpose of the statute was to confer authority in just such cases as are presented by your inquiry.

My conclusion is that the insurance commissioner, under authority conferred upon him by law, may consent to the withdrawal of an application for insurance in the state life fund before the medical examination is taken by the applicant and that in such cases the secretary of state is authorized by the provisions of sec. 157-14 to audit and draw his warrant in the manner provided by law for that portion of the premium accompanying the application of the applicant.

Insurance—State Insurance Fund—Fire Department Dues
—No transfer from the state insurance fund, as an insurer, is authorized to pay fire department dues to cities and villages in which public buildings are insured in the state insurance fund.

April 16, 1914.

Herman L. Ekern,
Commissioner of Insurance.

I have your request for opinion of recent date, in which you refer to secs. 1926 and 1926m, Stats., relating to the collection and disbursement through your office of fire de-
partment dues for the benefit of fire departments maintained in cities, villages and towns maintaining regularly organized fire departments. You further refer to secs. 1978a, 1978c and 1978d, providing for the state insurance fund and the insurance therein of public buildings belonging to counties, cities and villages, and ask to be advised whether the state, as an insurer of public buildings in cities and villages entitled under secs. 1926 and 1926m to fire department dues, may transfer from the state insurance fund an amount equal to the amount of fire department dues which would be paid by a private insurance company upon the insurance carried upon such public buildings for the benefit of such cities and villages.

The administration of the state insurance fund for the insurance of public buildings is provided for in secs. 1978a, 1978b, 1978c and 1978d, Stats. The theory and justification for these statutes and the policy which they embody is that, by the means of such a fund, the state is able to carry insurance on its own buildings and to carry, for the benefit of counties, cities and villages, insurance on their public buildings at less cost to them than would be the case were they obliged to carry such insurance with private companies.

The only provision made in these statutes for the transfer or payment of any moneys from the state insurance fund, other than the provision for the expenses of administering such fund in sec. 1978d (6), is for the payment of fire losses. This fund, subject to the insurance liabilities outstanding against it, is the property of the state. A transfer of any money therefrom for fire department dues, as suggested by your inquiry, would be equivalent to an appropriation from the state treasury.

Under the strict rule obtaining in this department with reference to appropriations, not only can no appropriation be made by implication, or, as in this case, by mere silence on the part of the legislature, but all doubts of construction are resolved against appropriations. Such a transfer from the state insurance fund to pay fire department dues to cities and villages can, in my opinion, be lawfully made only by clear and express authority of the legislature. Such a transfer certainly could not be made under authority of sec. 1978d (6), authorizing the expense of administering the fund to be charged to the fund. The statutes contain no such express
authority, and, therefore, in my opinion, you are not authorized to direct or approve any such transfer.

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Insurance—Counties—County Board—The default spoken of in sec. 1978d, subsec. 3, concerning the payment of premiums on the insurance of buildings by counties can only take place after the board has audited the bills at a regular county board meeting.


Herman L. Ekern,

Commissioner of Insurance.

In your letter of Aug. 22nd you refer to sec. 1978d, subsec. 3, Stats., relating to the state insurance fund, which provides:

"* * * Upon receipt of such certification of premium due, the same shall be audited as other claims against towns, villages, cities, counties or school districts are audited and shall be paid into the state treasury for the benefit of the 'state insurance fund,' in default of which the same shall become a special charge against such town, village, city, county or school district, and be included in the next apportionment or certification of state taxes and charged and collected as other special charges are collected, with interest at the rate of ten per cent per annum from the date such premiums were certified by the commissioner."

You ask to be advised whether the default therein mentioned can occur prior to the regular meeting of the county board held in November so as to authorize the certification by the secretary of state in October of premiums when there has been no opportunity to audit and allow the claim for such premiums at a regular meeting of the county board. You submit an opinion by N. O. Varnum, district attorney of St. Croix county, under date of August 12th, in which he comes to the conclusion that no one in the county has the right to pay the premium before it is audited by the county board, and that, therefore, there can be no default in contemplation of this statute until after the county board has had a regular session in November and passed upon the question, refusing to pay the same.
I believe the district attorney has arrived at the correct conclusion. It is clear that the claim must be presented to, and audited by, the county board the same as all other claims against the county under the above quoted provision of the statutes, and the legislature certainly did not contemplate that a special session of the county board should be held for that purpose.

*Insurance—State Insurance Fund—State Buildings—Buildings belonging to the state become automatically insured in the state insurance fund as soon as acquired.*

Where a state building burns before the certificates required by sec. 1978b are made, the transfer from the funds should be made under sec. 1978c the same as if such certificates had been issued.

No such transfers from the funds should be made, however, until the court has passed on the question.

HERMAN L. EKERN,
*Commissioner of Insurance.*

In your letter of Oct. 10th you state that you desire to submit for my opinion certain questions raised by a letter to you from Theodore Kronshage, Jr., president of the board of regents of normal schools, which letter reads:

“In the Fall of 1911, the board of normal school regents began the construction of a new building adjoining and attached to the then main building of the Superior state normal school. This building was completed and accepted by the board of normal school regents, on Feb. 5th, 1913. During the construction of the said new building, the contractor was required to carry the insurance on this new building. This building became state property and insurable by the State Insurance Department immediately after acceptance.

“The Board did not notify the insurance commissioner of the completion of this new building. On or about the 23rd of March, 1914, this building, together with the old buildings, was completely destroyed by a fire. It is manifest from the records in the office of the insurance commissioner as well as from the amount certified, that the new structure was not included in the insurance carried by the said de-
That the commissioner of insurance is required annually, on July 1st, to "provide for the insurance by the state of all state property for an amount equal to 90% of the cash value of such property," and to "determine the insurable value of each item of property" and fix the rate of insurance by the average rate charged by private companies, and to "certify to the state treasurer the amount of insurance upon such property to be carried by the state," and order the transfer of a 60% premium to the state insurance fund.

That the commissioner is also required, in case of damage by fire or tornado to "ascertain and fix the amount of such damage and forthwith file with the state treasurer and secretary of state a statement of same," upon which a warrant is issued by the secretary of state for the "transfer of the amount fixed as damages" to the proper fund "for the rebuilding or restoring of the property damaged."

That if there is not in the state insurance fund an amount equal to the award, the same may be paid from the general fund.

That the state insurance fund has been in operation for ten years without change except a provision added in 1911 including the property of such counties as choose to come in, and in 1913 an amendment providing for insurance of the property of cities, villages and school districts electing to go into the state insurance fund. That your department has adjusted and paid losses to the "amount of insurance upon such property," and has treated the property of the state as being insured from the date of its acquisition by the state, without regard to the time of the actual issue of the certificate of the amount of insurance.

That in reply to your request prior to July 1, 1912, the board of normal school regents, on July 6, 1912, furnished schedules of the buildings under its control, with the values of the different buildings and contents. That these schedules showed the dates of construction of the normal school buildings at Superior as 1895-1896, 1907-1909, 1911-1912, and the value as $90,000 for the building and $15,000 for contents. That certification of amount of insurance carried
by the state under sec. 1978b, Stats., was made accordingly as of July 1, 1912.

That for the certification as of July 1, 1913, the schedules of value were resubmitted to the board of normal school regents for changes and corrections. That such schedules were returned without change as to the Superior normal school, and certification was made as of July 1, 1913, for the ensuing year at the same amounts as before.

That a statement has been made and filed with the state treasurer and secretary of state showing an amount of loss fixed and determined by you equal to the full amount of insurance certified as of July 1, 1913, namely $81,000 on buildings and $13,500 on contents, total $94,500.

That the parts of the normal school building at Superior, as indicated in the schedule under date of July 6, 1912, were constructed at three different times. That this building and contents were carried by the state insurance fund at a value of $106,000 from July 1, 1903, to July 1, 1908, and $150,000 from July 1, 1908, to July 1, 1911, and $105,000 after July 1, 1911, the amount of insurance in each case being 90% of such value. That the last change in value was made upon the schedules furnished by the board of normal school regents.

That the claim is now made that separate certification and payment of loss should be made for the part described in the schedule as 1911-1912 on the ground that this was a new and separate building not included in the amount of insurance certified as of July 1, 1913. That a request is made for a separate and additional certification of the premium charge on this new building from Feb. 5, 1913, to the time of the fire, and a certification of the loss on this building for transfer from the state insurance fund to the board of normal regents. You enclose a copy of the certification of February 15, 1914, with a copy of schedule of risks attached, and also a copy of schedule No. 7 dated July 6, 1912.

Upon these facts you ask my advice whether the new building constructed in 1911-1912 is a part of the Superior normal school, should be treated as having been erroneously omitted and not covered by the amount of insurance heretofore certified, and as automatically covered by a separate amount of insurance, and whether a certification of premium for this building should now be made from Feb. 5, 1913,
and a certification of damages to this building should now be made for the fire occurring March 23, 1914.

Sec. 1978b, Stats., requires the commissioner of insurance to determine the insurable value of each item of property of the state annually upon July 1st. Upon the value so ascertained by him is based the amount of insurance to be carried in the state insurance fund. The statute makes no provision whatever, so far as I have ascertained, for a statement by the particular board or commission having charge of any building or buildings, to the insurance commissioner as a basis for his determination. If I correctly understand your statement of facts, the building constructed in 1911-1912 was not, in fact, considered by you at all in fixing the values certified to the state treasurer.

If I correctly understand the facts, this particular building was omitted by you at the time of fixing the value through an oversight, or rather because of the failure of the board of normal school regents to inform you of the change that had been made in the situation of the property at Superior. In my opinion, any building owned by the state becomes automatically insured upon its acquisition by the state, in this so-called state insurance fund, and it does not remain uninsured in that fund until a proper certification has been made by the insurance commissioner.

Sec. 1978c, Stats., provides:

"1. In case any buildings or property of the state shall be damaged by fire or tornado, the commissioner of insurance shall within thirty days ascertain and fix the amount of such damage and forthwith file with the state treasurer and the secretary of state a statement of the same.

"2. When the amount of loss has been fixed and determined by the commissioner of insurance and certified to the secretary of state, the secretary of state shall issue a warrant in the amount fixed by the insurance commissioner as a transfer of the amount fixed as damages from the 'state insurance fund' and credited to the proper fund of the officer, board of control, board of trustees, or other agents in whose control said buildings or property belong, to be used by said officer, board, or agent for the rebuilding or restoring of the property damaged and to be disbursed by the state treasurer in such manner as other state funds for the use of said officer, board, or agent are paid out, and if at the time of any such award of loss or damage by the commissioner of insurance, there shall not be in the 'state insurance fund'
an amount equal to such award, the secretary of state shall, notwithstanding this fact, draw his warrant payable from the general fund, and the state treasurer shall promptly pay such warrant out of any moneys in his hands in the manner above provided, and the commissioner shall thereafter from time to time order such reimbursement of the general fund from the 'state insurance fund' as he shall deem proper, on which order the secretary of state shall issue his warrant for such transfer."

You will note that this section does not limit the amount to be paid to the amount of insurance upon such property. It provides for a payment of the amount of the loss. It appears to me that in the case of the building in question the board of normal school regents are entitled to have transferred to the normal school fund the amount ascertained by you as the damage suffered by reason of said fire. I am also of the opinion that there should be transferred from the normal school fund to the state insurance fund the proper amount as premium upon the insurance that should have been carried upon this building under these sections.

In the foregoing I have attempted to state briefly my opinion as to the proper construction to be placed upon these sections with reference to the facts stated by you. At the same time I realize that I may be in error in what I have said, and that my opinion would be no protection to any officer if the court should finally determine that money had been improperly paid out of the state treasury. Because of the serious consequences that might follow any such determination by the court, it is my opinion that no transfer of funds should be made until after this question has been determined by the court.
RELATING TO INSURANCE. 445

Insurance—Foreign Corporations—Requisitions—A foreign insurance company not licensed in Wisconsin, soliciting insurance by mail from a citizen of this state, is violating our statutes and may be sued for the forfeiture if service can be made.

Officers of such company cannot be extradited on requisition.

Congress should pass a law prohibiting the use of the U. S. mails for such purposes.

Herman L. Ekern, Commissioner of Insurance.

November 18, 1914.

You have left with this department a letter of the Postal Life Insurance Company to Homer Cloukey, of Madison, Wis., under date of October 2, 1914, soliciting him to take a policy of life insurance in that company. You inquire whether this solicitation is not in violation of sec. 19550–5 and other provisions of the statutes, and whether the offense may be reached by extradition or otherwise.

In an official opinion rendered by my predecessor to Hon. George E. Beedle, then commissioner of insurance, under date of August 23, 1910, it was held that solicitation of insurance by a foreign insurance company in a letter addressed to a person residing in this state is in violation of sec. 1978 and of sec. 1947–5, and that the penalty for such offense is prescribed by sec. 19550–5. This is a well considered opinion and I see no reason for changing the ruling of the department on this point.

In view of the fact that the company in question has no agents in this state, no service can be made on said company and for that reason the courts of this state will not get jurisdiction of an action to recover the forfeiture. The question whether the offense may be reached by extradition will now be considered. Of course a corporation cannot be extradited, and the only question to consider is whether the officers of the corporation who are guilty of the offense may be extradited. It is, of course, self-evident that the officers of the corporation in question were not present in the state of Wisconsin when the alleged offense was committed. In 12 Am. & Eng. Ency. of Law (2nd ed.) 603, the following rule is laid down:
"In order to be a fugitive from justice it is essential that the accused should have been actually present in the state in which the offense is alleged to have been committed, at the time of its commission, and to have afterwards withdrawn from the jurisdiction of the state. A mere constructive presence in the demanding state and constructive flight therefrom is not sufficient. Thus a resident of one state who defrauds persons living in another state by means of false pretenses and representations made in a letter, or in a state other than the demanding state, to an agent of the persons defrauded, cannot be delivered upon the demand of the state in which the persons injured reside, as a fugitive from justice of that state."

The authorities seem to be unanimous to the effect that a person who is not within the state at the time when the offense was committed cannot be brought into the state by requisition. A late case is *Hyatt v. People ex rel. Corkran*, 188 U. S. 691. This principle has been carried to a great extent. In the case of *State v. Hall*, 115 N. C. 811, 44 Am. St. Rep. 501, it appeared that the defendants being in the state of North Carolina killed a man by shooting him, who was at the time on the other side of the state line in the state of Tennessee. The defendants were indicted for the murder in North Carolina and convicted. On appeal the conviction was reversed by the supreme court of North Carolina on the grounds that there was a defect of jurisdiction because the offense was committed in Tennessee. Afterwards it was sought by extradition proceedings to take them to Tennessee for the purpose of prosecuting them for the murder. They were arrested and placed in jail awaiting the warrant of extradition, and sought to be discharged from custody under a writ of *habeas corpus* sued out in their behalf. The judge below refused to discharge them and they appealed to the supreme court of North Carolina. The supreme court held that one who is only constructively present in one state at the time he stands in another state and fires a gun, the bullet from which kills a person in the former state into whose limits he has never gone since the commission of the crime, is not a fugitive from justice of that state and is not liable to extradition. The dissenting opinion of two of the justices is interesting but it does not embody the law on the subject.

If the courts of highest resort have not found it possible to rule differently on the provisions in the U. S. Const. and
RELATING TO INSURANCE.

It is well settled that the enumeration of the offenses for which extradition may be had in art. XV, sec. 2, clause 2, of the U. S. Const., being "treason, felony, or other crime" is broad enough to embrace all crimes and offenses of whatever grade made punishable by the laws of the state wherein the act was done, including misdemeanors. 12 Am. & Eng. Ency. of Law (2nd ed.) 601; See Opinions of Attorney General 1912, p. 957.

In searching for a remedy for a case such as is presented by your inquiry I have looked into the question whether a forfeiture under a Wisconsin statute could be sued for and recovered in another state, but I find that courts of other states have no jurisdiction to punish offenses against the penal statutes of Wisconsin, and this rule applies to forfeitures. See 16 Ency. of Pleading & Practice, p. 248.

Our court has laid down the same rule. See Belys v. Milwaukee, Etc., Ry. Co., 37 Wis. 323; Brigham v. Claflin, 31 Wis. 607.

Under present statutory provisions, both of this state and of the United States, I am unable to discover any provision which provides a remedy against an insurance company that has no agents in this state and violates the laws of this state by soliciting insurance through the mail. It may be possible to induce Congress to provide a remedy by prohibiting the use of the United States mail for such purposes. It is well known that the Webb law, being ch. 90, U. S. Stats.-at-large, vol. 37, part I, p. 699, was enacted for the purpose of aiding the states in enforcing the laws prohibiting the manufacture and sale of intoxicating liquors within a state. The state was powerless to prohibit the sale of intoxicating liquors within its borders when this sale was made through interstate commerce. This law was enacted to aid the state in suppressing such traffic.

I believe that our federal law makers should, in a similar way, aid the states in enforcing their laws against foreign insurance companies.
Insurance — Counties — Public Officers — Education—The county board of supervisors, after having determined the amount of insurance to be carried, may delegate to the county training school board authority to procure such insurance upon the county training school buildings in the name of the county.

December 28, 1914.

A. J. O'Melia,
District Attorney,
Rhinelander, Wis.

In your letter of the 24th you say:

“Can the county board, which is authorized by law to insure county buildings, delegate this power to the training school board and authorize it to insure the training school, which is a county building, and pay for such insurance from the training school fund? Or, can it authorize the school board to place the insurance and pay for same on bill presented to it, the county board?”

Sec. 669, Stats., provides that the county board of each county shall have the power at any regular meeting

“(4) To cause the county buildings to be insured in the name of the county and for its benefit.”

Sec. 702-10, subsec. 10, Stats., provides that the county board of education is authorized to exercise all the powers and privileges conferred by law upon the county training school board by sec. 411-1 to 411-11, inclusive, Stats., if the county board of supervisors shall so determine.

Sec. 411-2, Stats., provides that the county training school board shall have charge and control of all matters pertaining to the organization, equipment and maintenance of the county training school for teachers, except as otherwise provided by law.

If the county board has so determined, the county training school board is out of existence and its powers are to be exercised by the county board of education. If the county board has not so determined, then the county training school board is still in existence.

The county board of supervisors is a body of limited powers and has only such powers as are conferred upon it by statute. The phraseology used respecting the insurance of
county buildings seems to contemplate that the board shall delegate some of its authority in that respect to other persons. It says: "cause the county buildings to be insured." It can not delegate its legislative powers. It is my opinion that the county board must first determine whether or not the buildings shall be insured at all, unless it has already decided that all county buildings should be insured in the state insurance fund, as provided by sec. 1978d. Of course, if it has decided that they shall be insured in the state insurance fund, then they are kept automatically insured, as provided in that section.

The board should also decide, where such buildings are not to be insured in the state insurance fund, the amount of insurance to be carried. Having decided those questions, it appears to me that it may delegate to the county training school board the authority to cause the insurance so decided upon to be actually placed.

In referring to the state insurance fund, I must not be understood as deciding whether the provisions of sec. 1978d are constitutional or not.

The statute itself requires that the buildings be insured in the name of and for the benefit of the county. It would, therefore, appear to me that the bill should be presented to and acted upon by the county board of supervisors.

29—A. G.
OPINIONS RELATING TO INTOXICATING LIQUORS

Intoxicating Liquors—Licenses—A licensee whose license was revoked may not again be licensed in the same town, city or village for a period of twelve months. This prohibition does not extend to other towns, cities or villages.

January 30, 1914.

CHARLES E. BRIERE,
District Attorney,
Grand Rapids, Wis.

In your favor of Jan. 28th you state that a saloon keeper who had his license revoked under sec. 1559, Stats., shortly thereafter applied for a new license in an adjoining town. You present the question whether the limitation of one year, as provided for in said section, applies to another town in the same county or whether it simply applies to the town where the old license was revoked.

There is no decision of our supreme court on the question submitted by you. The history of this section, however, throws some light upon the interpretation to be given to it. Said section, in its present form, reads as follows:

"If such person shall not appear as required by the summons the complaint shall be taken as true; and if the board shall deem its allegation sufficient the license shall be revoked and notice thereof shall be given to the person whose license is so revoked; but if such person shall appear and deny the complaint each party may produce witnesses and be heard by counsel. If upon such hearing the board shall find the complaint to be true the license shall be revoked and if untrue the proceeding shall be dismissed without cost to the accused, and if the complaint be found by the board to be malicious and without probable cause the costs shall be paid by the complainant, and the board may require security therefor before issuing the summons as aforesaid. When a license is revoked it shall be so entered of record by the
clerk, and no other license shall be granted to such person within twelve months of the date of its revocation, nor shall any part of the money paid for any license so revoked be refunded."

As originally enacted in sec. 15, ch. 179, laws of 1874, it was in the following language:

"If such person shall not appear, as required by the summons mentioned in the foregoing section, to show cause in answer to such complaint, the board issuing the same shall take such complaint and the charges therein made to be true, and if they shall deem the allegations contained in said complaint to be sufficient, they shall immediately cause said license by them before granted to be wholly revoked and annulled, which action of the board shall be entered by their clerk on the books or journal of the board, and they shall cause proper notice to be given to the person whose license shall be so revoked; but if such person shall appear, he shall be allowed a traverse and deny the matters charged in such complaint, and upon such issue made, each party shall be allowed to produce witnesses as in other cases, and to be heard by counsel. If upon such hearing the board shall find the complaint to be true, they shall immediately revoke the license theretofore granted to the accused party; but if they shall find the same not to be true, after proofs adduced, they shall discharge the person complained of free of costs, and the costs shall be paid by the person making such complaint, if malicious and without probable cause for the payment of which costs, said board may take good and sufficient security of a complainant before issuing their summons as aforesaid; provided that in no case where such license shall be revoked and taken away from any person shall it be lawful for such board to grant another license to the same person within the time of twelve months from the date of such revocation; and provided, further that no part of the money paid by such person for the license so revoked shall be refunded to him."

The revisors of 1878 by verbal changes in the law put it in its present form. There have been no amendments to this section subsequent to its enactment. It thus appears that this statute in its inception prohibited the board who had revoked the license to grant another license to the same person within the time of twelve months from the date of such revocation. The revisors evidently thought it was superfluous to repeat the words "by such board" as the whole section refers to a proceeding before the board which had granted the license. It is not the duty of the revisors of statutes to change the same materially, but rather to change
its phraseology so that it may be consistent and improve the language. It seems clear that they did not drop the words "by such board" for the purpose of enlarging the scope of that part of the statute, but it was done rather for the purpose of cutting out superfluous words.

I therefore believe that the construction to be placed upon the last sentence in said sec. 1559 is that only the board in question which has revoked the license is prohibited from issuing another license within twelve months of revocation, but the licensing authorities in other towns, villages or cities are not thereby prohibited from issuing a license to the person whose license has been revoked.

Intoxicating Liquors—Sunday Closing—A saloon license will not protect one from the penalties imposed by sec. 1564 and 4595, the Sunday closing law.

February 7, 1914.

CHARLES E. BRIERE,
District Attorney,
Grand Rapids, Wis.

Under date of Feb. 6th you submit the following:

“A, a saloon keeper, who holds a license from a city to sell intoxicating liquors, keeps his saloon open on Sunday, and now, does the license protect the saloon keeper as far as section 1550 R. S. is concerned? Or, in other words, does the saloon license protect the illegal act of selling on Sunday?”

Under sec. 1550 it is provided that any one who sells liquor without having obtained a license or permit therefor shall be deemed guilty of a misdemeanor and provides a punishment. A person who is guilty of selling liquor on Sunday, who holds a valid license for the sale of intoxicating liquors, cannot be prosecuted under sec. 1550, Stats., for he has not violated the provisions of said section. There are other provisions of the statutes, however, under which such person may be prosecuted. Sec. 1564, Stats., provides:

“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, * * * 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."

If the person in question has kept a saloon open for the sale of liquor he may be prosecuted under sec. 4595, Stats. The saloon license will not protect him from the penalty imposed under sec. 1564 or sec. 4595, Stats.

INTOXICATING LIQUORS—LICENSE—A widow is not authorized to conduct a saloon under the license of a deceased husband.

E. P. GORMAN,
District Attorney,
Wausau, Wis.

In your favor of Feb. 6th you state that a Mr. Lawrence died in your county recently and that at the time of his death was the holder of a saloon license in the town of Eau Pleine; that the deceased ran a saloon in his lifetime, under this license and died intestate and that Mrs. Lawrence, his widow, desires to continue the saloon business, and you inquire whether she can run the saloon under her husband’s license without taking out a new license.

Sec. 422, Law of Intoxicating Liquors by Woollen & Thornton contains the following rule:

"The rule is a general one that on the death of the licensee, neither the license nor any rights thereunder pass to his personal representatives or to his heirs. This is upon the ground that the license is peculiarly personal to the person to whom it is granted—the privilege to sell liquors is a personal one—because of his ascertained fitness to engage in the liquor traffic after a hearing had and a determination of the fact by the licensing board. The license is not in the nature of property. There are statutes, however, which permit the transfer with the consent of the licensing board."

In the case of *William v. Troop*, 17 Wis. 463, our court held that it was not necessary that an administrator should take out a license for the sale of spirituous liquor to enable him to dispose of such liquors belonging to the estate in payment of a debt or otherwise. This case does not hold that the administrator or the heirs may continue the business. It simply provides that the sale may be made for the payment of a debt.

I am of the opinion that the widow in question is not authorized to conduct the saloon business under the license of her deceased husband.

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*Intoxicating Liquors—Posted Persons—* A district attorney may prohibit persons in a neighboring county from selling liquor to a posted man.

Feb. 11, 1914.

J. Henry Bennett,

*District Attorney,*

Viroqua, Wis.

In your letter of Feb. 9th you state that you have been requested to prohibit the sale of liquor to a person by certain saloon keepers in Monroe county. You inquire whether the district attorney of Vernon county has any right to prohibit saloon keepers in Monroe or La Crosse counties from selling liquor to an habitual drunkard.

Subsec. 1, sec. 1554, Stats., provides as follows:

"When any person shall, by excessive drinking of intoxicating liquors, misspend, waste, or lessen his estate so as to expose himself or family to want, or the town, city, village or county to which he belongs to liability for the support of himself or family, or so as thereby to injure his health, endanger the loss thereof or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person, or the security of the property of any other person, or when any person shall, on account of the use of intoxicating liquors, become dangerous to the peace of any community, the wife of such person, the supervisors of such town, the aldermen of such city or trustees of such village, the county superintendent of the poor of such county, the mayor of any city, the chairman of the county board of supervisors of such county, the district attorney of such county, or any of them may,
in writing signed by her, him or them, forbid all persons to sell or give away to such person any ardent, spirituous or intoxicating liquors or drinks for the space of one year and in like manner may forbid the selling, furnishing or giving away of any such liquors or drinks to such person by any person in any other town, city or village to which such person may resort for the same."

Under the express provision of this statute you, as district attorney, are authorized to prohibit the sale of liquor to any person who is addicted to the excessive use of intoxicating liquors and thereby exposes himself or family to want or the county, to which he belongs, to liability for the support of himself or family. This is true of persons who reside in your county. It does not apply to persons who reside in another county, but it often happens that a person who is posted in one county goes to the saloons in a neighboring county and there procures the liquor which he cannot procure in his own county. For that reason the last part of this section authorizes the parties named, among whom the district attorney is one, to forbid the selling or giving away of any such liquors to such person by any person in any other town, city or village to which such person may resort for the same. This expressly authorizes the district attorney to prohibit saloon keepers in neighboring counties to sell liquor to a person who may become a charge to the county of which the district attorney is the prosecuting officer.

You do not state in your letter that the party in question is a resident of your county, but, if he is, I am of the opinion that you have the right to prohibit the sale of liquor to him in any other place where you think he may procure liquor.

Intoxicating Liquors—License—A brewery must have a license to sell liquor from a distributing point in a town other than the one where the brewery is located.

Feb. 24, 1914.

E. P. Gorman,
District Attorney,
Wausau, Wis.

In your letter of Feb. 20th you state that a certain brewery wishes to establish an agency in a village in your county.
That the village has already licenses in excess of the number allowed by the Baker law, but that inasmuch as said licenses were in force in 1907 the licenses are lawful. You state that you have come to the conclusion that it is necessary for the brewery to obtain a local license in order to establish an agency for the distribution and sale of beer to the other saloons in the village. You inquire whether or not your interpretation of the law is correct.

In answer I will say that all distinction between a license for wholesale and a license for retail has been done away with by the statutes of this state, and it is necessary for a brewery to secure a license before it is authorized to sell liquor from a distributing point in a municipality other than the one in which the brewery is located. This is well settled by the decisions of our court. See Mayer v. State, 83 Wis. 339; Michels v. State, 115 Wis. 43; Jos. Schlitz Brewing Co. v. Superior, 117 Wis. 297.

You are therefore advised that you have given the correct interpretation to the law in question.

Intoxicating Liquors—Bond—District Attorney—It is the duty of the district attorney to bring an action in name of the state when a saloon keeper’s bond is breached, to recover the forfeiture.

A private person may bring an action on the bond when he has a special interest in it under sec. 1560.

March 4, 1914.

DAVID BOGUE,
District Attorney,
Portage, Wis.

In your letter of Feb. 25th you direct my attention to the provisions of sec. 1549, Stats., providing for the giving of a bond by saloon keepers as a condition precedent to the granting to them of a license, and you submit the following questions:

"1. Under this section who has the right to bring this action?

"a. Has a private citizen the right to sign the complaint and bring the action?"
"b. Has the district attorney the right to sign the complaint and bring the action?

"2. Whose duty is it to bring the action?

"a. If the district attorney has the evidence is it his duty to sign a complaint and bring the action?

"b. If complaint is made to the district attorney by a private citizen is it the duty of the district attorney to bring the action?"

Sec. 1549 provides as follows:

"Every applicant for license under section 1548, shall, before delivery of the license, file with such town, village or city clerk a bond to the state in the sum of five hundred dollars, with at least two sureties, to be approved by the authorities granting the license, who shall each justify in double its amount over and above their debts and liabilities and exemptions, and be freeholders and residents of the county, conditioned that the applicant, during the continuance of his license, will keep and maintain an orderly and well regulated house; that he will permit no gambling with cards, dice or any device or implement for that purpose within his premises or any outhouse, yard or shed appertaining thereto; that he will not sell or give away any intoxicating liquor to any minor, having good reason to believe him to be such, or to persons intoxicated or bordering upon intoxication or to habitual drunkards; and that he will pay all damages that may be recovered by any person pursuant to section 1560, and that he will observe and obey all orders of such supervisors, trustees or aldermen, or any of them, made pursuant to law. In case of the breach of the condition of any such bond an action may be brought thereon in the name of the state of Wisconsin, and judgment shall be entered against the principals and sureties therein named for the full penalty thereof; and execution may issue thereupon by order of the court therefor to satisfy any judgment that may have been recovered against the principal named in said bond by reason of any breach in the conditions thereof or for any penalties or forfeitures incurred under this chapter. If more than one judgment shall have been recovered the court, in its discretion, may apply the proceeds of said bond towards the satisfaction of said several judgments in whole or in part in such manner as it may see fit."

Under the provisions of this statute the action to be brought in the case of the breach of the bond is in the name of the state of Wisconsin and you will notice that the bond also runs to the state of Wisconsin instead of to the city, village or town in which the licenses are granted.
Sec. 752, Stats., contains the following provision:

"It shall be the duty of the district attorney:

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

In 32 Cyc. p. 715, the following rule is laid down:

"The duty of representing the state in the courts, although purely statutory, usually lies with the district or prosecuting attorney in all cases, unless expressly imposed upon another officer. No special enabling statute is necessary where his authority is conferred in general terms, requiring him to prosecute and defend on behalf of the state and county all actions, motions, etc., civil and criminal, before the courts in his district or any judge thereof."

When the bond of a saloon keeper is violated and he is guilty of a breach of the conditions thereof, under said sec. 1549 an action may be brought thereon in the circuit court of the county in which the bond was given in the name of the state of Wisconsin.

Under the above quoted provisions of sec. 752 it is not only the right, but also the duty, of the district attorney to prosecute such an action. The correct practice in such cases, it seems to me, is for the party who is in possession of the evidence to lay it before the district attorney and the district attorney should then make and sign a complaint and bring the action in the name of the state. It is the duty of the district attorney to prosecute such an action as soon as he has sufficient evidence in his possession showing that the bond has been breached.

I do not believe that a private citizen can bring this action for I know of no rule of law which authorizes the bringing of this action by a private citizen. I believe, however, in view of the fact that one of the conditions in the bond is that the principal will pay all damages that may be recovered, that if any citizen has a judgment secured by reason of the provisions of sec. 1560 he has a special interest in the bond and may bring an action as the real party in interest against the sureties, compelling them to satisfy his judgment, but no private citizen has a
right to bring an action on the bond who has not a special interest in the same.

*Intoxicating Liquors*—Sec. 1551, Stats., only authorizes the destruction of liquors belonging to one convicted of selling without a license or in his custody or possession as representative or agent of the owner.

JAMES F. MALONE,
*District Attorney*,
Beaver Dam, Wis.

In your favor of April 1st you state that:

“One Henry Roede, possessor of a wholesale government liquor license, on March 9th sold his stock of liquor to one Herman Rolfing and leased the building in the basement of which the liquor was stored to one Sophie Baeur. The lease of the building is in Sophie Baeur’s name. Herman Rolfing paying the rent therefor but claiming that he had no ownership in such lease. The liquor was locked up in the basement, Rolfing giving Mrs. Baeur a key thereto. Rolfing claims that he purchased such liquor intending to move the same to a saloon that he owns at Fox Lake as soon as the roads got good. Mrs. Baeur sold liquor on various occasions, Rolfing knowing that she sold it but claiming that she had a stock of liquor of her own.”

You request my opinion as to whether in case of conviction of Mrs. Baeur the liquor could be destroyed as provided by sec. 1551, and if it was so destroyed whether Mr. Rolfing would have any claim against the officer destroying the same.

Sec. 1551, Stats., provides that in case of complaint made to a justice of the peace showing that there is probable cause to believe that liquor has been sold at a particular place without the license required by sec. 1550, the justice shall issue a warrant requiring the officer to seize “any liquor found on said premises” and to arrest the accused; that if the defendant be convicted the court shall enter an order requiring the officer to publicly destroy the liquors so seized; and that if the defendant be acquitted “such order shall direct the officer to return the liquor so seized to such defendant.”
In view of the absence of any provision for notice to any person other than the defendant and the requirement for return of the liquors to the defendant in case of his acquittal, I think that the statute goes no further than to authorize the destruction of liquors either belonging to the defendant or in his custody or possession as agent or representative of the owner. The facts stated in your letter warrant the inference that the liquors seized were in the possession of Sophie Baeur with Rolfing's consent and that Rolfing was in all probability a guilty participant in the illegal sales made by her. Under such circumstances I think that the statute authorizes the destruction of the liquors seized and that the officer destroying the same would incur no liability to Rolfing unless such officer be unable to show that Rolfing had placed Sophie Baeur in possession of the liquor under such circumstances as to be bound by her acts. As to this question, which is of course one of fact, you will be better able to judge if a trial is had and witnesses are examined. The officer would not be authorized to destroy liquors belonging to an owner who was innocent of any wrong-doing in connection therewith, but the officer destroying the same under such circumstances would be liable in damages to the owner thereof. See Lowe v. Conroy, 120 Wis. 151.

_Intoxicating Liquors—Criminal Law—Beer is not a temperance drink and an advertisement of it as such is a violation of sec. 1747k, Stats._

April 15, 1914.

LLEWELLYN COLE,
_District Attorney,_
Clintonville, Wis.

In your favor of April 10th you state that the Knapstein Brewing Company of New London is using a sign which contains the following words “Knapstein’s Beer is a pure temperance drink;” that the particular product referred to is ordinary beer and is not a non-alcoholic beverage; and you ask whether the use of this sign is a violation of sec. 1747k, Stats.
That section provides that any person, etc., who with intent to sell or in any wise dispose of merchandise, etc., for the purpose of defrauding the public makes or publishes an advertisement of any sort regarding such merchandise which advertisement "contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor," etc.

Whatever may be the strict or permissible dictionary meaning of the word "temperance" the phrase "temperance drink" in its common and ordinarily understood meaning plainly includes only non-alcoholic beverages. It is this commonly understood meaning that would be given to the phrase if used in a statute or contract. See subsec. 1, sec. 4971, Stats.; State v. Hall, 141 Wis. 30, 33.

So our court has held that it will take judicial notice that the word "beer" means "a malt and an intoxicating liquor." Briffitt v. State, 58 Wis. 39, 43. In this case the court said that:

"If a witness on the stand were asked whether whiskey is intoxicating, he would be apt to smile as at a joke, and an intelligent witness, when asked the same question in relation to beer, might smile with equal reason." 58 Wis. 42.

Similarly I think it true that if a witness were asked if beer was a temperance drink he would be apt to smile at the joke.

The supreme court of Iowa has said that:

"'Temperance saloon' is a common designation for places where non-intoxicating drinks and other refreshments are kept for sale." City of Clinton v. Grusendorf, 45 N. W. (Ia.) 407, 408.

If beer is a temperance drink, then under the decision in the Briffitt case, so is whiskey or any other alcoholic liquor. None are temperance drinks except in the sense that they may be used temperately—in moderation, which is, of course, not the commonly understood meaning of the words "temperance drink."

Of course, the question whether the advertisement in question is untrue, deceptive or misleading is a question of fact to be passed upon by a jury, but if the brewing company should persist in the use of the advertisement after warning from you that it constitutes a violation of
law, it seems to me that most juries would decide that an advertisement of ordinary beer as a temperance drink was untrue and misleading. The only meaning conveyed to the public by the advertisement in question is that the beer so advertised is not the usual alcoholic drink known by that name, but is a non-intoxicating beer. Such an advertisement is, of course, untrue, deceptive and misleading where the beer is, in fact, the ordinary alcoholic beverage known by that name.

Intoxicating Liquors—Elections—There is no method of contesting the result of an election on the license question. The result as certified by the election inspectors pursuant to sec. 1565a is final.

ALEXANDER WILEY, JR.,
District Attorney,
Chippewa Falls, Wis.

April 16, 1914.

In your favor of April 11th you request my opinion on a question which you state as follows:

"Supposing that in a town election the license proposition is up before the electors, and through fraud and unlawful electioneering at the polls the 'wets' carry the election. What is the proper way or any way of reversing the result of that election shown by the statement of the inspectors?

"In this connection I would like to ask whether sec. 86 is applicable to town elections, and if so, whether you think a recount could reach the license proposition under this statute. As I understand it, the ballots 'for license or against license' are not returned to the county clerk. In instances of town elections what becomes of the town ballots and the license ballots?

"Supposing an action were brought to test the title to the office of town treasurer, and the evidence would show that there was fraud and electioneering as above stated, within the polls, in relation to this particular office and on the proposition of 'wet' or 'dry'? Would the court declare the entire election void in relation to all town offices then voted on; or simply declare that the election was void in relation to the office of town treasurer? Could the court in this action declare that the election was void in relation to the 'dry' and 'wet' vote, without interfering with the election as to any of the other officers outside of the office of town treasurer?"
You do not state in what the "fraud" used to carry the election consisted, but for the purposes of this opinion I assume that it consisted in the casting of votes by persons not legally entitled to vote.

Sec. 1565a, Stats., provides for elections on the question of license or no license to be held and conducted and returns canvassed in the manner in which elections on other questions are conducted and the returns thereof canvassed. The result of such an election is required to be certified by the canvassers and entered upon the records of the town, village or city. The language of this section and that of subsec. 8 and 19, sec. 38, and 807, Stats., is quite clearly insufficient to make applicable the provisions of sec. 86, Stats., as to the recount of votes cast for a candidate at an election, for the latter section is not one relating to the canvass of returns and its provisions are obviously inapplicable to contests other than those over the election of officers, and deals only with contests for offices, the returns for which have been canvassed by the county board of canvassers. That such statutes providing for contests over offices are inapplicable to elections on questions such as license or no-license, see Beason v. Shaw, 42 So. (Ala.) 611, and Bradburn v. Wasco County, 106 Pac. (Ore.) 1018, 9.

I am unable to find any express statutory provision which would enable any one to challenge the correctness of the certificate of the result of the election made by the election inspectors and in the absence of any statutory provision it seems very doubtful whether there is any way of attacking the validity of such certificate.

Were the contest one over an office, quo warranto would lie by the unsuccessful candidate or by a citizen and taxpayer. But the action of quo warranto is plainly inapplicable where the contest is not over an election to an office, but is on the question of license or no-license.

An action in equity by a taxpayer and citizen to restrain the town board from issuing licenses, on the ground that if the illegal votes be not counted the result of the election would, in fact, be against the issuing of licenses, cannot be maintained, for "equity does not revise, control, or correct the action of municipal officers at the suit of a private person, except as incidental and subsidiary to the protection of some private right or the prevention of some private
wrong, and then only when the case falls within some well defined head of equity jurisprudence” and “it is too plain for argument that the injury which the plaintiff will suffer from the anticipated action of the town board is not an injury to any private right of the plaintiff, but simply (if an injury at all) one which he suffers in common with all other residents of the town. He cannot maintain a private action to redress or prevent such an injury.” *Nast v. Town of Eden*, 89 Wis. 610, 611-12.

Similarly it has been held that one, who has been operating a saloon and claims that he could obtain a license so to do for the ensuing year were it not that an election had been held which resulted in favor of no-license and which election he claimed to be void because of defects in the petition and notice therefor, could not maintain an action to set aside the election because “no existing rights of the plaintiff are invaded by the threatened refusal of the city officers to license him to conduct this business, and hence plaintiff fails to allege any grounds tending to show an injury to a private right.” *Olingy v. New Richmond*, 141 Wis. 547-9.

Under these decisions and in the absence of any statutory method of contesting an election on the question of license or no-license I consider it very doubtful whether there is any way of reversing the result as certified by the election inspectors pursuant to sec. 1565a, Stats. It is for the legislature to provide the manner of holding elections, determine the result thereof and the method of contesting the same and until the courts are empowered to act they must refrain from interference (*Dickey v. Reed*, 78 Ill. 261, 271), unless, of course, it can be shown that plaintiff has suffered some injury to his private rights different from that sustained by the public at large. *Income Tax Cases*, 148 Wis. 456, 523.

Under the Eden and New Richmond cases previously referred to, it seems that no such showing could be made in any form of action whether in equity or by way of certiorari or mandamus. See *State ex rel. Smith v. Drake*, 83 Wis. 257. Such is the general rule in other states, i.e., that “unless some statute specifically authorizes a contest of a local option election there can be none.” *1 Woollen & Thornton Intoxicating Liquors*, sec. 544. *Joyce, Intoxicating Liquors*, sec. 412. 15 Cyc. 397. 23 Cyc. 101.
If fraud and unlawful electioneering have been practiced at such an election the remedy is by way of criminal prosecution of the persons guilty of the unlawful acts as provided in secs. 4478, 4543, 4544, 4544d, 4545, etc.

An action brought to test the title to the office of town treasurer would result merely in determining the title to that office and would not, it seems to me, affect the title to any other office or the result of the election on the license question. See sec. 3470, Stats.; State ex rel. Locksmith v. Raisler, 133 Wis. 672-5.

From the foregoing it results that I find that since the legislature has provided no method for contesting the result of an election on the license question, as certified by the election inspectors, the courts have no jurisdiction in any form of action to set aside the result as so determined and certified. See State ex rel. Nelson v. Emerson, 137 Wis. 292.

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Intoxicating Liquors—License—Town going wet after having been dry limited to one saloon for every 250 population. License may not be granted until July 1st after dry town votes wet.

JAMES E. O'NEILL,
District Attorney,
Dodgeville, Wis.

In your communication of the 15th inst. you state:

"The village of Ridgeway in this county voted dry last year. Prior to that they had more saloons than the prescribed ratio, i. e., more than one to every 250 of population, continuously, since June 30, 1907. This year they have again voted 'wet,' and wish to know how many saloons they are entitled to under the statute."

In reply I will say that I have ruled in an official opinion rendered to E. F. Hensel, district attorney of Trempealeau county, under date of June 23rd, that under such circum-

30—A. G.
stances the village can grant no more than one saloon for every 250 of population or fraction thereof.

You further state:

"They also wish to know when they may grant license; i. e., whether they may grant license prior to July 1, 1914, or whether they must wait until the end of the current year."

In answer to this question I will say that in an official opinion rendered to E. P. Gorman, district attorney of Marathon county, under date of March 31, 1913, I held that a license could not be issued until the first day of July, following the election at which the electors voted in favor of licensing saloons.

Intoxicating Liquors—License—Licensee must reside in town, city or village where license is granted.

Decision of town board refusing license is final.

April 18, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

Your welcome letter of the 16th inst. duly received. We are always glad to hear from you in this office. We were beginning to feel that you had forgotten us as you have only written four letters within the past week carrying an average of five or six questions to be answered by this department. We have plenty of time and not a great deal of work to do and it is indeed a pleasure to have as prolific a correspondent as you always have been. I trust you will not grow weary in well-doing, but that you will do your share towards keeping the office force in this department busy and make it possible for them to earn their salaries.

In your last communication you make a general statement in the following very clear and concise language:

"John Smith who lives at Kaukauna, Wis., and runs and owns a saloon there and dwelling house, has lately bought a saloon property in this, Calumet county, in a country town. His home is in Outagamie county, Wis., and I understand
he intends to keep on living at Kaukauna, Wis., and to continue running his saloon there also. The town board of this country town ask me these questions as district attorney, and I ask your opinion on them also please soon, viz.

"Question 1. Under such facts is it legal for the town board to grant John Smith a saloon license in the town here if he is a fit man, and pays his full license money to the town treasurer? Remember in answering this question that Smith does not live in this county and does not intend to nor have personal charge of said saloon, but to put an agent in there to run it for Smith, and that Smith already owns and operates a saloon in Kaukauna, Wis. Can he have two saloon licenses in different counties? Sec. 1548, Stats. 1913."

I am very glad to have you refer me to the section of the statutes which you evidently consider provides the answer to your question. The only difficulty with that section is that it does not appear to touch the question you present at all. You will find the answer to this question by reading sec. 1565, Stats. which provides:

"From and after the first Tuesday in July, 1908, no license to sell, deal or traffic in malt, ardent, spirituous, or intoxicating liquors shall be granted or issued to any person, unless to a domestic corporation, not a full citizen of the United States and of this state and a resident of the town, village, or city in which such license is applied for, nor shall any such license be granted or issued to any person who has been convicted of an offense against the laws of this state punishable by imprisonment in the state prison, unless the person so committed has been duly pardoned."

Under your statement of facts it appears that Mr. Smith is not a resident of the town in your county where he makes application for license and accordingly the town board will have no authority to grant him the license.

"Question 2. The license year ending July 1st, 1914, this town has no village in it at all, what sum must this man pay for his license from now until July 1st, 1914, is it $100 the regular full year's license, or can the town board legally grant him a saloon license in said town from now to July 1st, 1914, at any reduced sum or pro rata? I say no."

Your guess is right.

"Question 3. In looking over this chapter on saloon licenses I do not find that applicants must be United States citizens any more to get such a license. Has that been wiped out?"
If you will peruse the section of the statutes above quoted, which you will find on page 1106 of the Wisconsin Statutes for 1913, you will observe that it has not been wiped out.

"Question 4. Cannot a town board absolutely refuse a license to any one it sees fit to refuse under section 1548, Stats., without giving any reason therefor, and no appeal lies therefrom? I say yes. Mandamus will not lie to make them grant it either, will it? They are sole judges and its final, is it not, if refused?"

Once more you struck the bull's eye.

You ask a number of other questions, but the answer to the above makes it unnecessary to consider the other questions asked in your letter. They are all very simple and if it were not for the fact, as above stated, that we want to keep up our correspondence with you I would suggest that a reading of the statutes would furnish you the answer not only to the questions propounded in your last communication, but to a great percentage of the questions propounded generally.

It is certainly very complimentary to you to have the reports and official opinions in this office carry such conclusive evidence of your activity in the discharge of your official duties. No one can read the reports of this department for the last six years without feeling that you are a live wire. Cynical persons may suggest that a person elected to the office of district attorney should be able to answer some of these questions without continually bothering the attorney-general, but such persons are not charitably inclined. Whether enviable or not, you have established a record in propounding questions to this department that is not equaled by any other district attorney in the state, and you at least have this claim for distinction.

Trusting that I may hear from you again in the near future, I remain.
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Intoxicating Liquors—Elections—In a prosecution for selling liquor illegally, the defendant may not set up as a defense that an election certified to have resulted in favor of no license was in fact invalid because of defective notice of the election, etc.

April 29, 1914.

ALEXANDER WILEY, JR.,
District Attorney,
Chippewa Falls, Wis.

In your favor of April 22nd you refer to my letter of April 16th in which I gave my opinion that there was no way in which the result of an election on the license question as certified by the election inspectors might be contested, and you say:

"Now supposing these facts exist: A town which was formerly wet voted on the dry and wet proposition. The determination of the inspectors of election was that the drys carried the town. The Clerk of the town failed to comply with the statute in regard to posting notices on the dry and wet proposition, which failure, I understand, would under the decision of other courts invalidate the election. Besides this there was fraud and electioneering within the polling place.

"Are the town officials bound by this certificate of the inspectors of the result of the election, so that even though they know the election to be invalid they cannot grant a license? If they do grant a license can they be prosecuted successfully, or could the saloon keeper be prosecuted successfully? In other words, could either the person to whom the license was granted by the board or the board set up in a criminal action the defense that the election was void? Would the failure to post notices invalidate the election?"

It seems that a failure to give notice of an election substantially as required by statute will invalidate an election provided there is any way of contesting the result as certified by the election inspectors, (see 23 Cyc. 98), and it seems clear that the town officials are bound by the result so certified. Thus it is said in a recent textbook that "A licensing officer who knowingly and wilfully issues a license in violation of law lays himself liable to indictment if he be not a judicial officer, though not liable for error of judgment." Woollen & Thornton Law of Intoxicating Liquors, Sec. 415.
As to whether the validity of the election may be attacked by a defendant in a prosecution for selling liquor illegally it is said in Cyc. that "In some states also it is held that a defendant, prosecuted for violating the local option law, cannot set up a defense attacking the validity of the election adopting the law; but in others, such a defense is permissible, although the election is presumed to have been regular and valid, and the party attacking it must assume the burden of proof." 23 Cyc. 101-2.

The cases cited to the effect that the validity of an election may be attacked collaterally in a prosecution for illegal selling of liquor are those from Kentucky and Texas. In both these states it appears that there are statutory methods of contesting liquor license elections and later cases than those cited in Cyc. hold that in the absence of a statutory contest the court will not, in a prosecution for illegal selling, inquire into the validity of the election. Wesley v. State, 122 S. W. (Tex.) 550, 1; Cole v. Commonwealth, 98 S. W. (Ky.) 1002-3. But whatever may be the rule in such states the one supported by the weight of authority seems to be that "The declaration of the result of a local option election by the tribunal authorized by law to make the same is conclusive as to the result of such election until set aside or vacated in some way authorized by law, and is not subject to collateral attack. * * * * It is held that this is the rule even though such election cannot be contested." Jay v. O'Donnell, 98 N. E. (Ind.) 349, 354; State v. Gamma, 129 S. W. (Mo.) 734, 737; Barton v. State, 31 So. ( Fla.) 361, 364; State v. Cooper, 8 S. E. (N. C.) 134, 136; Crouse v. State, 57 Md. 327, 332; State v. O'Brien, 90 Pac. (Mont.) 514, 520; Combs v. State, 8 S. E. (Ga.) 318-9; Woodars v. State, 30 S. E. (Ga.) 522, 524.

In Crouse v. State, supra, the court said:

"The legislature made no provision in the statute itself, for any mode of revising the work of the judges of election. The statute makes no provision for inquiring into the regularity of the election it ordered. The provisions of the Code respecting contested elections, do not embrace this case. It nowhere in the Code appears that the inquiry sought to be made, can be made in this way. All that the Legislature has directed to be done, has been done to make the law enforcible. In criminal cases, the jury are the judges of both law and fact. If this evidence was
admitted, and the jury should think the election void, by reason of the irregularities alleged, or that on making such corrections as they thought the proof warranted, the result was against the law, and it was not adopted, and for those reasons should acquit; that verdict would only be an acquittal of that traverser, and would not conclusively settle the question of the legality of the election, or the correctness of the count and certificate of it. In another case, the question might be again inquired into, and another jury might come to a different conclusion and convict. It is evident a view of the law which leads to such a result cannot be sound. A statute is stable, and there must be some way of determining certainly that it exists and operates equally. The contention of the appellant, as is seen, leads to the anomaly of a statute having existence or not, as the particular jury may decide. It is clear that the inquiry proposed cannot be made in this way. Until in some legitimate and conclusive way, the election has been declared void; or the result of it has been changed, the certificate of the judges of election, and the proclamation of the clerk are conclusive of the question.” (pp 332-3.)

In State v. O'Brien, supra, the invalidity asserted was that the notice of election had not been published for the time required by the statute, and in Oligny v. New Richmond, 141 Wis. 547, one of the defects relied upon to show the invalidity of the election was an error in the notice of election. Plainly the failure to give a legal notice of an election will not permit the validity of the election to be asserted collaterally or by a person not having a legal interest in contesting the same more than any other ground of invalidity that may be asserted.

From the foregoing it follows that it is my opinion that one prosecuted for selling liquor without a license may not set up as a defense the invalidity of an election on the liquor question the result of which has been certified by the election inspectors to have been in favor of no license.
Intoxicating Liquors—License—1. A person soliciting liquor orders from a person in a dry territory to be filled by a brewery in another municipality may be prosecuted for selling liquor without a license and the party filling the order may likewise be prosecuted.

2. A brewery cannot sell liquor at a distributing point in a municipality other than where the brewery is located without a license.

May 9, 1914.

DAVID BOGUE, ESQ.,
District Attorney
Portage, Wis.

In your letter of May 6th you submit the following questions:

"1. If Mr. A., at Milwaukee, ships beer or whiskey into dry territory in Columbia county, that is territory that has been voted dry, is this an infraction of the federal law?

"2. If Mr. A., located in Minnesota, sells and ships whiskey into dry territory in Columbia county, Wisconsin, is he liable under the federal act or under any state act as controlled by the Webb law, provided the sale is made at Minneapolis?

"3. Can a brewery, located at Minneapolis or in Chicago, establish a distributing point or warehouse in dry territory in Wisconsin, ship its liquors to the distributing point, and then resell in the dry territory in wholesale lots?

"4. Can a brewery, located at Minneapolis or in Chicago, establish a distributing point or warehouse in dry territory in Wisconsin, ship its liquors to the distributing point, and then re-ship for sale outside of dry territory in wholesale lots?"

In answer to your first question I will say that after a municipality has voted in favor of no license it is unlawful to sell intoxicating liquors in the territory comprising such municipality. It is not unlawful to drink liquor in such municipality nor for any inhabitant thereof to send for liquor from some other place, provided the sale is made in a place where it is lawful to sell intoxicating liquors. Sec. 1565, Stats., makes it unlawful, however, for a person to solicit orders for liquor from any person in a dry territory. Said section provides in part as follows:
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"And any person soliciting, procuring, or receiving from or forwarding for, any person, firm or corporation, except a licensed liquor dealer, an order for the purchase of any such liquors, to be filled by any other person, firm or corporation outside of the municipality in which the order is taken, shall in case such liquors are delivered to the person so ordering them, be deemed and held to be liable as and for a sale of such liquors at the place where such order is solicited, procured, received or so forwarded, and the person, firm or corporation so receiving and filling such order, except for a licensed dealer, or for the individual purchaser upon his direct written order shipped direct to him, whether such liquors are shipped or delivered by common carrier or otherwise, or directed or delivered to the purchaser or his agent or to the agent of the shipper or to the agent of any carrier, to be delivered to such purchaser, shall be deemed and held to be liable as and for a sale of such liquors at the place where such liquors are so actually delivered, and received by such purchaser and not at the place of such shipment, in all respects as any local dealer in such liquors at such place of actual delivery, under chapter 66 of the statutes."

The Webb Law, being ch. 90, U. S. Stats. at Large, Vol. 37, part 1, p. 699, is as follows:

"Chap. 90. An Act Divesting intoxicating liquors of their interstate character in certain cases.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Under the provisions of the above quoted part of sec. 1565, it is lawful for an individual purchaser to have liquor
shipped to him upon his direct written order from any place where it is lawful to sell liquor, provided the sale is consummated at the place from which the liquor is shipped instead of at the place where the individual who ordered the liquor is located. A good case on the question as to where the sale of liquor takes place when it is shipped from one place to another is Sarbecker v. State, 65 Wis. 171. Your first question must be answered in the negative as there is not infraction of the federal law if liquor is shipped from Milwaukee into Columbia county for the federal law applies only to interstate commerce and this is intrastate commerce.

The question whether a shipment from Milwaukee into Columbia county is lawful or unlawful, depends upon the fact whether the individual made the order direct to the brewery in Milwaukee and whether the liquor was thereupon shipped direct to such purchaser. If the sale was secured by an agent of the brewery soliciting the order from the individual in the dry territory, the sale will be consummated in the dry territory and both the person who is securing the order and the brewery will be criminally liable for the unlawful sale of intoxicating liquors in the dry territory.

In answer to your second question I will say that if the shipment is made from Minneapolis, the same rule of law will apply as applies in case the liquor is shipped from Milwaukee. It may be lawful and it may be unlawful, depending upon the manner in which the orders were given and by whom the same were given. If the shipment is made in such a way that the sale is consummated in the dry territory it will be a violation of the state law and the fact that the shipment is an interstate shipment cannot be brought in as a defense for the reason that it is unlawful to make such a shipment under the federal law.

In answer to your third and fourth questions, I will say that it is unlawful to sell intoxicating liquors from a distributing point by a brewery without a license. In order to carry on such business it is necessary for the brewery to secure a license for the distributing point. See Joseph Schlitz Brewing Co. v. City of Superior, 117 Wis. 297; Mayer v. State, 83 Wis. 339, which was approvingly cited in Michels v. State, 115 Wis. 43, 47.
Under these decisions no lawful sale can be made from a distributing point without a license. The answer to your third and fourth questions must, therefore, be in the negative.

Intoxicating Liquors—Pharmacists—Registered pharmacists, in dry localities, may be granted permits to sell liquor for medicinal, scientific and mechanical purposes.

M. R. Munson,
District Attorney,
Prairie du Chien, Wis.

In your letter of May 19th you desire to be advised whether the village board in a territory that is voted dry, under the provisions of sec. 1565a and 1565b, can grant a pharmacist a permit to sell liquors for medicinal, scientific and mechanical purposes.

Under sec. 1548a every town and village board and every common council is given the right upon written application to grant to a registered pharmacist a permit to sell strong, spirituous and ardent liquors in quantities less than one gallon for medicinal, scientific or mechanical purposes.

Sec. 1565a and 1565b contain provisions for local option elections in towns, villages and cities of this state.

Subsec. 3, sec. 1565c provides as follows:

"Nothing in this or the two next preceding sections shall be construed as affecting the sale of such liquors for medicinal, mechanical or scientific purposes only by registered pharmacists as provided in section 1548a."

The local option election is for or against the granting of licenses and does not pass upon the question whether a permit to registered pharmacists may be granted.

In view of the provisions of said subsec. 3, sec. 1565c, as above quoted, I am of the opinion that there is nothing to restrain the village board in a dry territory in granting permits to registered pharmacists, as provided in sec. 1548a.
Intoxicating Liquors—License—A club which is not licensed to sell liquor cannot furnish liquors to its members belonging to the club without violating the excise laws.

May 19, 1914.

ROBERT N. NELSON,
District Attorney,
Madison, Wis.

Under date of May 14th you inquire to what extent and in what way, if at all, can a club or association of members, incorporated or otherwise, without taking out the usual license to sell liquor at retail, handle, deal or traffic in intoxicating liquors to or with its members, and in what way, if at all, can the members of any such association lawfully have a supply of liquors at the club room or club rooms of such association for their own use and for the purpose of supplying others.

You state that some of these clubs are incorporated and some are not; that they purchase liquors and claim to supply it to its members who are sold chips or coupons by the corporation with which to pay the corporation for the liquor; that the liquors are purchased at wholesale and sold to the members at the price that liquors are retailed at saloons; that the rate paid by the members is more than the wholesale price; that a few of the clubs have the locker system and they claim that every member purchases his own liquor and uses it for his own use and for the purpose of treating his friends.

It is true, as you say, that there is no decision of our court on the question involved, but the question has often been passed upon by the courts of other states, but the decisions do not agree. The question was passed upon by my predecessor in an official opinion to the district attorney of Rock county (Opinions of Attorney General, 1912, p. 556). The conclusion there reached was that in Wisconsin if liquor is sold by clubs without a license the excise laws are thereby violated. You will find in said opinion a list of authorities on both sides of this question. I see no reason for a different ruling by this department at the present time. It seems to me the test in every case of this nature is whether the title to the liquor has passed through the club. It is undoubtedly true that a person may purchase liquor and if he is a member of the club may put it in a locker and consume it at his
pleasure and treat his friends with it, but if the club purchases the liquor and then after having acquired title furnishes it to its members, it seems to me that there can be no question but that the excise laws of this state have been violated. I believe this is true, whether the club is incorporated or not, as it is well established that a corporation and also a partnership may be licensed to sell liquor in this state.

You state that some of these clubs have a United States government license.

In view of that fact and the provisions of subsec. 2, sec. 1565c, Stats., this fact alone will be *prima facie* evidence of the violation of the excise laws of this state if the club is located in a dry territory.

*Intoxicating Liquors—License—No liquor license can be transferred from one place to another.*

E. P. Gorman,
District Attorney,
Wausau, Wis.

You state in your letter of June 3rd that a certain saloon keeper in the town of Norrie conducted a saloon on a certain lot and that the building burned down; that the town board then gave him a permit to conduct the saloon on an entirely different lot and block; that no new license was taken out nor any money paid for the permit. You inquire whether a saloon license can be transferred by the town board from one location to another in the same town without taking out a new license.

In answer I will say that this question has been passed upon by my predecessor in office, F. L. Gilbert, in an opinion dated June 29, 1907. See Opinions of Attorney General 1908, p. 547. This has been the ruling of this department since that time and I see no reason for changing said ruling. In the absence of a statute authorizing such transfer I believe it cannot be legally done.

In addition to the authorities given in the above cited opinion, see Woollen & Thornton on Intoxicating Liquors, sec. 425, 426.
Intoxicating Liquors—License—A social club cannot distribute liquors to its members without a license.

June 9, 1914.

E. P. Gorman,
District Attorney,
Wausau, Wis.

In your letter of June 5th you submit the following:

"There is an unincorporated club here with club rooms in its buildings and which will have a government license, and intoxicating liquors are distributed to its club members only, and the actual cost of the same is paid by each member in the form of coupons from books sold at actual cost by the steward of the club so as to keep a check of the amount each member drinks."

You inquire whether this club which is unincorporated is violating the excise laws of this state.

In answer I will say that my predecessor in office has held that a social club that is incorporated is not authorized to distribute liquor to its members for a consideration without a license. Attorney General's Opinions 1912, p. 506. Under date of May 19th an official opinion was given by me to Robert N. Nelson, district attorney, Dane county,* to the effect that clubs, incorporated or unincorporated, cannot distribute liquor to their members, when the title passes through the club, without a license. The authorities are reviewed in the former opinion and it is not necessary to repeat them.

For the reasons stated in said opinions I believe that under the above stated facts a club is violating the excise laws if it distributes liquor to its members in the manner stated.

* Page 476 of this volume.
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Intoxicating Liquors—Bonds—Surety Companies—Citizenship—The bond to be given by licensed dealers in intoxicating liquors may be executed by a surety company as surety.

Under sec. 1565/l, Stats., a person need not have been a resident of the municipality for one year before a license to sell intoxicating liquors can legally be granted to him.

June 11, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of the 8th you state that town, city and village officers are asking you if I have given an opinion that a surety company bond is not legal for a saloon keeper to give for his license to a town, etc. That newspapers have stated that I have given such an opinion and held that only a personal bond is legal in such case. You ask whether or not I have so held and why.

I have not held that the bond required of persons to whom a license is issued to sell intoxicating liquors cannot be executed by a surety company as surety. I do not know where the newspapers got their idea that any such opinion had been rendered. As a matter of fact I have held just the contrary, that is, that a surety company could be accepted as surety upon such a bond.

You also state that town officers want to know how long a person must be a resident of the town before they can legally issue him a saloon license under sec. 1565/l, Stats. That you tell them he must be a bona fide resident when he applies for such license and continuously thereafter, if he gets it, during the license term. You ask if this is legally correct.

In an opinion given the district attorney of Rock county, which will be found published on page 503 of the Biennial Report and Opinions of the Attorney-General for 1910, it was held that it is not necessary for a person who is a citizen of the United States to reside in this state one year to make him a citizen under the provisions of sec. 1565/l, Stats. I see no reason at this time to come to a different conclusion than was reached in that opinion. As a person must be
a full citizen of the United States and of this state and a resident of the municipality in which the license is applied for, in order to receive a license for the sale of intoxicating liquors, it is probably true that when he ceases to be such citizen and resident, or ceases to be either such citizen or resident, he will forfeit such rights as he may possess under a license that has been granted to him.

Intoxicating Liquors—License—Sheriff not required to have license to sell liquors on execution.

JAMES E. O'NEILL,
District Attorney,
Dodgeville, Wis.

In your communication of the 18th inst. you ask for my opinion upon the question of whether an officer who has seized a quantity of liquor under an execution to satisfy a judgment may make sale thereof in the usual way.

In Woollen & Thornton’s work on the Law of Intoxicating Liquors, at sec. 361, it is said:

“A statute requiring all persons selling intoxicating liquors to have a license so to do has no application to an officer levy­ing upon, with an execution, and selling as stock of liquors by virtue thereof at public auction,” citing Wildermuth v. Cole, 77 Mich. 483; 43 N. W. 889; State v. Johnson, 33 N. H. 441; Nichols v. Valentine, 36 Me. 322.

In the case of Williams v. Troop, 17 Wis. 478, it is held that it is not necessary that an administrator should take out a license for the sale of spirituous liquors to enable him to dispose of such liquors belonging to the estate in payment of a debt or otherwise. At page 474 of the opinion it is said:

“We do not think it would be a fair or proper construc­tion of the excise law to say that it required an adminis­trator to obtain a license before he could sell or dispose of liquors belonging to his intestate. He is a person whose plain legal duty it is to sell property, collect and pay the debts and settle up the estate committed to his charge. In performing this duty and disposing of the spirituous liquors belonging to the estate it is no more necessary for him to
RELATING TO INTOXICATING LIQUORS.

obtain a license than it would be for a sheriff to obtain one before he could sell liquors taken upon an execution.”

You will note from the above extract that it was assumed by the court in that case, as a matter of course, that a sheriff was not required to take out a license for the sale of intoxicating liquors. I know of no authority holding to the contrary and it is my opinion that a sheriff is not required to have a license to sell intoxicating liquors in order to authorize him to make an execution sale of such commodities.

Intoxicating Liquors—Elections—An election on the license question may be valid although no notice thereof was given and the board of canvassers failed to file a certificate as to the result thereof.

Where an entry at the foot of the minutes of the annual town meeting shows that the town voted in favor of no license, the town board is without power to grant a valid license.

ALEXANDER WILEY, JR.,
District Attorney,
Chippewa Falls, Wis.

June 22, 1914.

In your favor of June 19th you refer to my letters to you of April 16th and 29th and state that you now find that no notice of the election on the license question was given by the town clerk and that no certificate of the result thereof was made or filed by the inspectors of election but that underneath the signature of the town clerk to the minutes of the annual meeting appears the following endorsement, “1914 The total number of votes cast for license was 27. The total number of votes cast against license was 31.”

And you ask:

“Has the town board the right to grant a liquor license? If a license is granted could the saloon keeper be prosecuted under the statute, and if so, could he prove the illegality of the election by showing that there was no notice given and that there was no statement or determination made as required by the statute?”

31—A. G.
Whatever may be the rule in other states as to the effect or failure to give notice of a special election, the rule established by our supreme court seems to be that such failure will not invalidate the election unless it also be made to appear that the body of voters had no actual notice. *State ex rel. Lutfring v. Goetze*, 22 Wis. 363; *State ex rel. Chase v. McKinney*, 25 Wis. 416; *State ex rel. Bruce v. Davidson*, 32 Wis. 114, 120; *State ex rel. Heim v. Williams*, 114 Wis. 402, 406.

It has been directly held that such defect, if any, could not be reached by action of certiorari to set aside the result of a liquor license election as certified by the board of inspectors because the fact of failure to give notice would not appear from the return and “The presumption is, in the absence of proof in the record to the contrary, that the required notice was given and that the election was regular and valid.” *State ex rel. Ennis v. Janesville*, 90 Wis. 157, 160; *State ex rel. Nelson v. Emerson*, 137 Wis. 292, 295.

The same presumption of regularity should, I think prevail as to the records of the town clerk and the absence of a certificate by the board of canvassers be held not fatal to the validity of the election. The entry made by the clerk at the foot of the minutes of the annual town meeting is an entry made in the course of his official duty and should, I think, be binding on the town board so as to deprive it of the right to grant licenses contrary to the action of the voters of the town as set forth in such entry.

This conclusion renders unnecessary the consideration of your further question as to whether if a license be granted the saloon keeper could be successfully prosecuted. At the present time such question is necessarily a moot one for if no license be granted the question can never arise, but my impression is that the mere absence of the certificate of the election inspectors would not render inapplicable the authorities cited in my letter of April 29th. Note particularly the last sentence of the quotation from *Crouse v. State*. 
Intoxicating Liquors—License—Sec. 1565b, Stats., does not compel the town board to grant licenses in case a vote of the electors has resulted in favor of license.

E. P. Gorman,
District Attorney,
Wausau, Wis.

In your favor of June 27th you state that:

"A town which has voted wet has a town board who refuses to grant licenses to saloons. They refuse to grant licenses on the grounds that they believe the town will be better off dry."

You ask whether the town board can be compelled to issue licenses or whether that matter is within their discretion.

In an opinion to James Kirwan, district attorney, Calumet county, under date of April 18, 1914, this department construed sec. 1565b, Stats., as permitting but not requiring the town board of a town which had voted in favor of license to grant licenses for saloons. This seems to be the only construction consistent with the language of secs. 1565b and 1548. The only purpose of requiring action by the town boards upon applications for licenses, as is required by subsec. 4, sec. 1548, must be that such board shall exercise its discretion either to grant or refuse the same. I think it can make no difference whether the ground of such refusal is that the board believes the town to be better off without saloons or whether such refusal is placed on the ground that the board does not think the applicant to be a fit person to hold a license.

All that the board is required to do is to exercise its discretion and I do not think that the reasons which actuate it to refuse a license can be inquired into or controlled by the courts. This seems to be the construction given to our statutes by the supreme court insofar as it has had occasion to consider the question. See State v. Downer, 21 Wis. 277, 279; Oligny v. New Richmond, 141 Wis. 547, 549.

June 29, 1914.
Intoxicating Liquors—Licenses—A town board has no power to grant licenses in excess of the number permitted by the population of the town, except to locations that have been continuously licensed since June 30, 1907.

July 10, 1914.

C. J. TeSelle,
District Attorney,
Antigo, Wis.

In your favor of July 9th you request my opinion on a question which you state as follows:

"The town of Norwood, this county, has a population of 1,115 and there are in the town five saloons. On June 30th, 1907 there were six licensed saloons in this town. From the first of July 1907 to 1908 a saloon license was refused to one saloon, thereby reducing the number of saloons to five. From July 1st, 1909 to June 30th, 1912 the license was again granted thereby increasing the number of saloons to six. From the first of July, 1912, to the 30th day of June, 1914, there were five licensed saloons. This year there was application for six saloon licenses. Has the town board, under this statement of facts, the power to grant six licenses?

"Will it make any difference if on July 1st, 1907, there were six applications for licenses but only five granted and if on July 1st, 1912, and July 1st, 1913, there were six applications made for licenses but that only five were granted. Does the fact that an application was made for the license but that the town board saw fit not to grant it make any difference in the situation?"

The decision in Koch v. State, 147 N. W. (Wis.) 366, is to the effect that premises must be used for saloon purposes continuously or the right to grant a license therefor in excess of the number permitted by population is lost. I do not think that the fact that an application was made for a license which was not granted can make any difference.
Intoxicating Liquors—License—A common council of a city in which ratio under Baker law is exceeded has no right to grant a license for a new location to one who was not in the saloon business on the 30th of June, 1907, and continuously thereafter.

July 18, 1914.

DAVID BOGUE,
District Attorney,
Portage, Wis.

In your letter of July 17th you have submitted a number of questions concerning the issuing of licenses to sell intoxicating liquors, which I will answer in their regular order.

1. The city of 'C' is a city which in 1907 had a number of saloons in excess of the number allowed under the Baker law, and still has a number of saloons in excess of those allowed under the Baker law.

'B' is desirous of going into the saloon business at the present time at a location denominated 'X', which is a new place. He procures from 'D', owner of a place legally operated on June 30, 1907, and continually thereafter by persons other than 'B', an affidavit that he 'D' will no longer permit his premises to be used for saloon purposes.

"Can the common council on the strength of this affidavit and the actual closing of 'D's' premises license 'B' to conduct a saloon at the new location 'X'?"

The council has no right to license 'B,' who was not in the saloon business when the Baker law went into effect, for a location which had no license at that time, or, in other words, which is a new location. This question has been settled by our supreme court in the cases of State ex rel. Marvin v. Larson, 153 Wis. 488, and Zodrow v. State, 154 Wis. 551.

2. Does it make any difference in the answer to the question put in the foregoing paragraph whether there is or is not a lapse of time between the closing of 'D's' place and the commencement of business by 'B' at the new place 'X'?"

This would not make any difference whatever, as no valid license can be granted to 'B' in a new location.

3. Generally speaking, when the owner of a location at which a license was in force on the 30th day of June, 1907, refuses to permit the further use of such premises for saloon purposes, can the common council grant a license for a new location to any qualified (by character, etc.) person, or must they grant such license for a new location only to the person
who was the licensee at the particular 1907 location, which was closed?"

The license must be granted for a new location to the person only who was the licensee at the particular 1907 location, which was closed. In other words, the party in question must have been in the saloon business on the 30th day of June, 1907, and continuously thereafter until the license is issued to him.

"4. Is the rule the same in regard to a village board and its power as the power of the common council of a city in regard to the above question?"

The rule is the same in regard to villages and their powers as in regard to the power of common councils of cities concerning this matter.

"5. The supreme court in the Larson case, 153 Wis. 488, used the following language in reference to the Baker law:

'We find no difficulty in construing it as follows: Notwithstanding the ratio limit, the owner of property under license for saloon purposes June 30, 1907, may by himself, or his tenant continue its use for such purposes (if properly licensed) thereafter, and any person in possession of such premises as lessee June 30, 1907, if thereafter deprived of opportunity to continue their use by refusal of the owner to lease the same for such purposes, destruction of the building by fire or the elements, or the operation of other provisions of the law (e.g. the establishment of a no-license area), may, if properly licensed, continue the business at some other location. The point has been made that this language was obiter dicta as applied to situations like these above outlined. Is it to be thus considered and treated?"

This is not to be considered as obiter dicta, for, in the case of Zodrow v. State, supra, the conviction was sustained because the defendant in that case, as the court said, "was neither the owner nor lessee of premises used for saloon purposes at the time and continuously since the law went into effect, hence the city of Milwaukee, which issued licenses in excess of the ratio, was powerless to grant him a license for a new location."

The ruling of our supreme court on this question is so clear and definite that there can be no question at the present time as to the illegality of a license which was granted to a person for a new location who was not duly licensed at the time when the Baker law went into effect, and continuously thereafter.
Relating to Intoxicating Liquors.

Intoxicating Liquors—Posted Persons—A written notice personally served on defendant or proof that he read one publicly posted is necessary to sustain conviction of selling liquor to a posted man.

President of a village may give such notice.

J. F. Malone,
District Attorney,
Beaver Dam, Wis.

In your letter of July 17th you inquire whether a person can be convicted under sec. 1556 for the sale or giving away of intoxicating liquors to a prohibited person by one not a liquor dealer without proof that the written notice required by sec. 1554, subsec. 1, was served upon such person alleged to have sold or given away the liquor.

In answer to this question I will say that it is necessary to prove that the party who sold the liquor had written notice served upon him. The giving of the notice is an essential element in the offense. 2 Woollen & Thornton Intoxicating Liquors, 744. Former Attorney General Gilbert in an official opinion which you will find in the Report and Opinions of the Attorney General for the year 1910, page 532, came to the conclusion that in view of the fact that this is a penal statute and therefore must be strictly construed in favor of the defendant, that it would be necessary that the written notice be served on the person who is accused of selling liquor to the posted person. This rule has been followed by this department ever since. A number of official opinions have been rendered to the same effect. In an official opinion dated Dec. 10, 1913, to Gad Jones, district attorney at Wautoma, Wis., not yet published, it was held that if the notice was posted in a public place and it could be shown that defendant read said notice it would be a sufficient service to satisfy the requirement of the statutes.

You also inquire whether the president of an incorporated village can give the written notice required by sec. 1554, subsec. 1, as being included under the designation "trustees" or whether the whole or majority of such trustees must sign such written notice.

This question was passed upon in an official opinion by my predecessor in office, Hon. L. H. Bancroft, dated Aug. 29,
1911, to David Bogue, district attorney of Columbia county. You will find this on page 520 of the Biennial Report and Opinions of the Attorney General 1912. The history of sec. 1554 was there considered and the conclusion arrived at that an individual trustee or alderman could give the notice required by said section. For the reasons there given I am constrained to arrive at the same conclusion. Under sec. 879 the president of a village is, by virtue of his office, a trustee of the village and comes within the express terms of said sec. 1554.

Intoxicating Liquors—License—A license to a different room in a building than the one in which the saloon was conducted is not a license to the same place.

July 30, 1914.

EDGAR EWERS,
District Attorney,
Richland Center, Wis.

Under date of July 28th you submit the following:

"On and prior to June 30, 1907, and until July 1st, 1913, a liquor license was granted to 'A' by the village board of Lone Rock, Richland Co., Wis., to conduct a saloon on the south half of lots 11 and 12, block 11, in said village. 'A' was the owner of said described premises during most of this time. A large business block is located on said described premises the first floor of which is divided into three rooms which we will designate herein as rooms one, two and three. The saloon has always been conducted in room one located on the southwest side of said building. 'A' sold the said premises to 'B' and 'B' leased the said room one in said building to 'C' and 'D'. 'C' was granted a liquor license for said south half of lots 11 and 12, and conducted a saloon in room one from July 1, 1913, to July 1, 1914. 'D' and 'E' each separately filed applications directed to the village board for a liquor license for south half of lots 11 and 12, for the year to begin July 1, 1914. The board refused to grant a liquor license to 'D' but granted a license to 'E'. 'D' refused to give up possession of room one in which the saloon was conducted claiming to hold under a lease. 'E' has possession of rooms two and three. The license has always been issued to south half of lots 11 and 12. The said three rooms in said building are all on said described premises."
No saloon has ever been conducted in rooms two and three. The saloon has been conducted continuously from a time prior to June 30, 1907, to July 1, 1904.

Question:—Can 'E' legally conduct a saloon in either room two or three?

Under the statement of facts it appears that the saloon in question has been conducted in room one ever since the Baker law went into effect. The lessee of said room has been refused a license by the village board. The party to whom the village board is willing to grant a license desires to know whether a legal license may be granted to room two or three which are in the same building in which room one is located.

While the premises for which the license has been issued in the past are described as the south half of lots 11 and 12 in block 11, I believe that it should have been described as room 1 in the building on said described lot. To grant a license for a lot or a building containing a number of rooms is subject to criticism. While our supreme court has never passed upon the question, this department has held that the word “premises” in sec. 1548-2 must be construed the same as the words “places” or “locations” in par. 3, sec. 1548. (See opinion to Joseph T. Sims, district attorney, June 27, 1913). In that opinion it was said:

“In construing this term I think we should bear in mind the fact that a saloon is not run on an open or vacant lot, but that it must be conducted within a building. Whether or not the ‘premises’ relates merely to the room in which the saloon is immediately conducted, or whether it may include other rooms in the same building, depends very largely upon the nature of the building, the use to which it is put, its connection with other parts of the building, as well as the ownership thereof. In the case of a saloon operated in a hotel building, where the building is either owned or under the control of one party, the hotel and the saloon being under the same management, it seems to me that in that case the term ‘premises’ refers to the entire building.”

The building to which you refer is not a hotel and while the question is not free from doubt, I am of the opinion that the granting of a license to either room two or three in the building in question would not be a license to the same location in which the saloon has been licensed ever since the
enactment of the Baker law. I therefore believe that the village board of Lone Rock is pursuing the right course in refusing a license to said rooms.

**Intoxicating Liquors—License**—The wife of an insane licensee must comply with the laws, including payment of a license fee, before she can be licensed to sell liquor.

E. P. Gorman,
District Attorney,
Wausau, Wis.

In your letter of Aug. 12th you state that a certain man in your county who was a paroled inmate of the state hospital for the insane, was given a license to sell intoxicating liquors; that subsequently, about two months thereafter, the man was again adjudged insane and taken to the state hospital at Oshkosh; that the sureties on the bond applied to be relieved of their liability and the saloon has been closed; that the wife of the man is desirous of continuing the saloon business and the town is willing to grant her a license and she seems in every way able to conduct a saloon.

You inquire whether she can sell liquor under the license of her husband or whether she must obtain a new license, and in the latter event whether the money that was paid by the husband for the license can be applied on the new license to be granted to the wife.

I believe all these questions must be answered in the negative. The husband being insane can sell no liquor through the agency of his wife or through the agency of anyone else. I believe it is clear that no liquor can be sold under his license as long as he is insane. If a license is to be granted to the woman it will be necessary for her to comply with all the provisions of the statute. She must file a bond and she must pay the regular license fee. It is well settled that a license cannot be transferred from one person to another and for that reason the wife of this man cannot get any advantage from anything that was done in procuring the license for her husband. I believe she must pay again the license fee if she desires a license in her own name.
Intoxicating Liquors—License—A voluntary discontinuation of a saloon for nearly two months causes a forfeiture of the right to a license.

Thorwald P. Abel,
District Attorney,
Sparta, Wis.

Under date of Aug. 22nd you state:

"The village of Norwalk, Monroe county, Wis., has six hundred inhabitants and for many years prior to July 1st, 1914, had five saloons and licenses were accordingly issued for the sale of liquor at five places. There were only four applications made for licenses for the year commencing July 1st, 1914. The fifth place has been vacant and not used for any purpose since July 1st, 1914, but was operated as a saloon up to July 1st, 1914."

You inquire whether the village board can legally grant a license for the sale of liquor in this building it having been vacant since July 1, 1914.

I believe this question must be answered in the negative under the ruling of our supreme court in the case of Koch v. State, 147 N. W. 366. It is true that in that case the premises in question had not been used for more than three years, while in this case it is not quite two months, but in the case of People ex rel. Bagley v. Hamilton, 25 N. Y. App. Div. 428, the same ruling that our court gave to our statute was given to the New York statute in a case where the place had not been used for a saloon for two months.

As the saloon business was voluntarily discontinued for nearly two months I believe the right to a license in said location has been forfeited.

Intoxicating Liquors—When an order for liquor is solicited by a person from another municipality or another state it must appear that the liquor was actually sold to constitute a violation of the law.

C. S. Roberts,
District Attorney,
Balsam Lake, Wis.

In your letter of Aug. 20th you refer to sec. 1565, Stats., and you inquire whether a liquor dealer who lives in Minne-
sota may personally or by agent deliver into this state intoxicating liquors directly ordered by written orders from person residing in this state.

This question has been passed upon in an official opinion opinion dated May 9, 1914, to David Bogue, district attorney of Columbia county. *

In addition to what is said in said opinion I may say that under said sec. 1565, it is necessary to prove not only that an order for liquor was solicited, but also that the liquor was actually delivered.

If a liquor dealer from Minnesota comes into the state of Wisconsin and solicits an order for liquor and thereupon the liquor is ordered directly by the person from whom the liquor was solicited, this will be a violation of the Wisconsin statute. If it is impossible to prove that the liquor was delivered, then, of course, no conviction can be secured.

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**Intoxicating Liquors—License—Minors—1.** Beer procured for a picnic should not be given to minors.

2. Whether a sale was made not determined.

L. Olson Ellis,
District Attorney,
Black River Falls, Wis.

In your letter of Sept. 9th you submit the following:

"Where a party of five or six persons get together for the purpose of having a beer-pinic and two of that number go to a saloon and buy two kegs of beer and later meet at a grove where a crowd gathers, minors as well as adults, and the beer is given out to those present, minors as well as adults, and after the picnic is ended a collection is taken up by the parties that got up the beer party to pay for the beer, will that constitute the offenses of selling liquor without a license and also selling or giving away liquor to minors?"

It is perfectly clear that the giving of liquor to minors was in violation of our statute for sec. 1557 provides in part as follows:

*Page 472 of this volume.*
“(1) * * * and any person whatever who shall procure for or sell or give away to any minor, whether upon the written order of the parents or guardian of such minor, or in any other manner whatsoever, or to any intoxicated person, any such liquors or drinks, shall be punished by a fine of not less than five dollars nor more than fifty dollars or by imprisonment in the county jail not to exceed thirty days, or by both such fine and imprisonment.

“(2) Where the offense is that of selling liquor to a minor seventeen years of age or under, the guilty person shall be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars or by imprisonment in the county jail not less than five days or more than eight months; and in all cases of conviction for a second or any subsequent offense by such imprisonment only.”

Under this statute any person who gave liquor to a minor at said picnic is guilty of its violation.

As to whether there was an unlawful sale of liquor without a license, cannot be definitely determined under the facts stated by you. If the parties in question who secured the liquor purchased it and resold it to those at the picnic it would, of course, be an unlawful sale, but it does not clearly appear that such was the case. If they were simply the representatives of the crowd at the picnic and purchased the liquor for and on behalf of the said crowd they would not be liable for a sale of liquor without a license. In order to determine this question it will require a careful investigation into all the facts. If the parties in question who secured the liquor received more money for the liquor than they paid for it and made a profit, that would be very good proof that liquor was sold directly to them and that they gave it away or resold it to the parties at the picnic.

Intoxicating Liquors—Minors—Parties who furnish liquor at a picnic and leave the glasses on the kegs of beer so that minors can help themselves to it in their presence are guilty of giving liquor to minors in violation of law.

L. Olson Ellis,
District Attorney,
Black River Falls, Wis.

Under date of Sept. 11th you supplement your request for an opinion under date of Sept. 9th, which opinion was
rendered under date of Sept. 10th, by adding the following:

"If the beer was poured into glasses and placed on top of the kegs and the minors helped themselves to it in the presence of those that furnished it, would not those that furnished it nevertheless be liable for giving liquors to minors?"

This question must be answered in the affirmative. Our court has held in the case of State v. Peters, 154 Wis. 111, that it is not necessary that any words should be spoken in order to constitute a sale. The giving away of the liquor or the sale of the same can, therefore, be inferred from the circumstances under which the transfer was made.

I have no hesitancy in holding that this was a giving away of liquor to minors in violation of sec. 1557.

You also inquire as to what constitutes selling liquor without a license. In answer I will say that the test generally is whether the title has passed through the party who has furnished the liquor. Under the facts stated by you in your former letter the question would be, has the title passed through the parties that secured the beer for the parties at the picnic or did the title pass directly from the retail liquor dealer to the consumers. Sec. 1565, Stats., defines an unlawful sale of liquor which may be helpful to you in this case.

Intoxicating Liquors—License—Persons not continuously in saloon business since June 30, 1907, cannot be legally licensed at new location.

H. H. Bodenstab,
Assistant District Attorney,
Milwaukee, Wis.

In your letter of Sept. 15th you submit the following as a basis for an official opinion from this department:

"1st. One Albert A. Johnson applied for a saloon license in this city, 601-603 Wells St. He is a saloon keeper at an old stand at 613 Wells St., which was used for saloon purposes prior to June 30, 1907, and has been continuously licensed ever since. Johnson became a tenant of the
above premises after June 30, 1907. The place at 613 Wells St. is now to be closed for saloon purposes.

“In view of the above facts, may license be granted to conduct a saloon at 601-603 Wells St?”

“2nd. Application of A. G. Ueberall was made for a license for a saloon, 427 State St. At 241 Tenth St. was an old saloon location, and saloon was conducted at said premises prior to June 30, 1907. Mrs. Lena Turner was a tenant and in business at the above premises prior to that time. In April, 1909, the above premises were closed for saloon purposes by operation of law, and the then lessee, Lena Turner, moved to 427 State St. Mrs. Turner conducted saloon at 427 State St. until 1910, when Mr. Ueberall became the tenant and conducted the saloon since.

“Under that statement of facts the question arises, can the city council legally grant a license, and Mr. Ueberall conduct a saloon at said premises, 427 State St?”

The city of Milwaukee has exceeded the limit fixed by the ratio in the Baker law, 1565d, Stats. Our supreme court had under consideration this question in the case of State ex rel. Marvin v. Larson, 153 Wis. 488, and in construing the same used the following language:

“We find no difficulty in construing it as follows: Notwithstanding the ratio limit, the owner of property under license for saloon purposes, June 30, 1907, may by himself or his tenant continue to use for such purposes (if properly licensed) thereafter, and any person in possession of such premises as lessee June 30, 1907, if thereafter deprived of the opportunity to continue their use by refusal of the owner to lease the same for such purposes, destruction of the building by fire or the elements, or the operation of other provisions of the law (e.g. the establishment of a no-license area), may, if properly licensed, continue the business at some other location.”

See also Zodrow v. State, 154 Wis. 551; State ex rel. Chandler v. Mayor and Common Council of the City of Superior, 156 Wis. 203; Koch v. State, 147 N. W. 366.

Under this ruling you will notice that it is necessary for a party who desires a license to have been either the owner of a premises for which license was granted on the 30th day of June, 1907, or he must be a lessee and duly licensed on said date. From the facts submitted by you this Albert Johnson was not in the saloon business on the 30th day of June, 1907, and continuously thereafter. It follows that he cannot be legally licensed in a new location in the city of Milwaukee.
You do not state definitely in your letter whether Mr. Ueberall was licensed on the 30th day of June, 1907, and whether he has been continuously licensed since said time. If he has, he may be entitled to a license, provided the location for which he held his license on the 30th day of June, 1907, comes within one of the exceptions mentioned in the Baker law, namely, refusal of the owner to lease the premises for saloon purposes, destruction of the building by fire or the elements or the operation of other provisions of the law, namely, the establishment of a no-license area. Presuming that Mr. Ueberall was not licensed on the 30th day of June, 1907, and continuously thereafter, I am constrained to answer both of your questions in the negative and that no legal license can be granted to either Mr. Johnson or Mr. Ueberall.

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**Intoxicating Liquors—License—Removal of Building**—A building in which a saloon is conducted if moved to a new lot is not the same place or location in contemplation of Baker law.

Edward Yockey,
District Attorney,
Milwaukee, Wis.

In your letter of Sept. 16th you submit the following set of facts as the basis for an official opinion:

"The saloon premises known as No. 3315 Fond du Lac Ave. were occupied for saloon purposes for the past fifteen years, and some three years ago the Milwaukee Electric Railway and Light Co. purchased these premises, and notified the occupant, Mr. Fred Lutz, that said property would no longer be used for saloon purposes, inasmuch as they intended to erect car barns thereon. The Milwaukee Electric Railway & Light Co. sold this saloon building to Mr. Fred Lutz, and said Mr. Fred Lutz moved this building across the street and continued to conduct a saloon in this building up to July 1st, 1914, and the common council granted licenses in this building up to July 1st, 1914. Mr. Fred Lutz retired as occupant of this building on July 1st, 1914, and Mr. A. Froedermann, a gentleman who has been in the saloon business for the past eight years, made application for license in this building.

September 21, 1914.
"Does this set of facts warrant a prosecution under the Baker law?"

In the case of *State ex rel. Marvin v. Larson*, 153 Wis. 488, our supreme court said that under the Baker law:

"The owner of property under license for saloon purposes June 30, 1907, may by himself or his tenant continue its use for such purposes (if properly licensed) thereafter,"

Mr. Froedermann is the owner of the building for which a license was granted on the 30th day of June, 1907, but this building has been moved since that time to a new location. The question arises whether this building at the present time is the same place or location in contemplation of the Baker law as it was prior to the time when it was moved. Sec. 1548 provides that the application for a liquor license shall designate the premises where such liquor is to be sold. While the word "premises" does often include buildings when the same are a part of the realty, I fail to find any use of said term applicable to buildings when the same are disconnected with realty and constitute personal property.

"Premises does not include and is never used to designate personal property. It is used both in law and in common speech to indicate land and tenants." Words and Phrases, p. 5512, and cases cited.

A careful consideration of this question has led me to believe that this building in question cannot be considered the same premises or the same place or location as it was when the Baker law went into effect and prior to the time when the building was moved. When the licensing authorities pass upon the question whether a license shall be granted for a certain location they have the right to consider all the surroundings and the neighborhood in which the premises for which the license is applied for is located and after the license has been granted the licensee will have no right to move his building together with the saloon to another part of the city and conduct the saloon business in a different location. If this were possible then a saloon keeper could often remove his building to a part of the town where a saloon would be very objectionable and for which no license would have been granted by the licensing authorities.

I am, therefore, constrained to hold that Mr. Froedermann, under the facts stated by you, cannot be licensed to
conduct a saloon in the building in question; that it is not the same place or location for which a license was granted on the 30th day of June, 1907, and that if a license has been granted to such place it is void and affords no protection and if liquor is sold under such a license the sale is in violation of the excise laws of this state, and such facts will warrant a prosecution for an illegal sale of intoxicating liquors.

Intoxicating Liquors—Nuisance—Sec. 1563, Stats., is a separate criminal offense and no conviction can be had unless the information charges such offense.

Order to abate the nuisance must be enforced by contempt proceedings.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

In your letter of Sept. 16th you refer to sec. 1563, Stats., and inquire as to the procedure to shut up and abate a public nuisance therein described. You inquire whether the municipal judge should order the same closed and instruct the chief of police of the city to enforce such order and if the party conducting the place refuses to keep the place closed what means should be used to enforce the court's order.

Said sec. 1563, Stats., provides:

"All places of whatever description in which intoxicating liquors are sold in violation of law shall be held and are declared public nuisances and shall, upon the conviction of the keeper thereof, be shut up and abated."

Our supreme court has held that an equitable action may be brought under sec. 3180a, Stats., to abate the public nuisance described in sec. 1563; State ex rel. Marvin v. Larson, 153 Wis. 488. Our supreme court has also held that a person violating sec. 1563, Stats., may be prosecuted and convicted in a criminal prosecution and when found guilty the public nuisance will be abated and ordered shut up.

In the case of State v. Gumber, 37 Wis. 298, the defendant was convicted under this statute and the trial court submitted three questions to the supreme court, one of which was:
“Does not the complaint contain sufficient to lawfully charge an offense under sec. 1, ch. 127, laws of 1873; and can the defendant, since the passage of ch. 179, laws of 1874, be convicted under the complaint of the offense mentioned in sec. 1, ch. 127, and punished therefor in accordance with sec. 5, ch. 179, or in accordance with the provisions of the first part of sec. 7, ch. 127.”

The court said in answer to this question (page 305):

“We give a negative answer to the third. The complaint is plainly and obviously under sec. 3, for keeping a saloon as a place of public resort where intoxicating liquors were sold in violation of law. This is the distinct offense charged. It does not charge, nor does it profess to charge, an offense under sec. 1, ch. 127, or sec. 5, ch. 179, for selling liquors without a license. That is a different offense from the one mentioned in sec. 3 of the former and sec. 19 of the latter statute. They are essentially different offenses, and are subject to different punishments, under both statutes. The allegation in the complaint that the defendant’s saloon was a place where intoxicating liquors were sold in violation of law, was plainly not inserted for the purpose of charging a sale without a license, but merely intended to state a fact constituting an element in the offense of keeping a public nuisance.”

Sec. 19, ch. 179, laws of 1874, was afterwards incorporated in section 1563. See also Faust v. The State, 45 Wis. 273, and State v. Wacker, 71 Wis. 672.

Information charging person with selling liquor without a license at a certain time and place does not charge an offense under sec. 1565 as this section describes a distinct offense under the above decision of our court.

In order to convict under this section it is necessary to charge the defendant with having violated its provisions and maintaining a public nuisance in violation of law. When convicted thereof the court is authorized to order the saloon shut up and public nuisance abated. The order of the court will, of course, be enforced as all other orders of courts are enforced and it is for the trial court to determine as to what order he desires to make. I find that the order is often given to the defendant direct, while in some cases it is given to the sheriff or constable to abate a nuisance when that is the best way to secure results. Under this section it would probably be the better practice for the judge to give his order direct to the defendant and if the
order is not obeyed by the defendant the usual remedy should be resorted to; that is, to punish the defendant for contempt of court.

Intoxicating Liquors—License—Only a lessee of a location under license June 30, 1907, and not the owner, may secure a license to a new location under Baker law (sec. 1565d, Stats.).

Wm. F. Schanen,
District Attorney,
Port Washington, Wis.

In your letter of Sept. 29th you state that on a certain piece of property a saloon was in existence at the time the so-called Baker law went into effect and it has been conducted on said property continuously since said time so that there is no question but that the saloon is legally in existence; that said property is now to be taken by the C., M. & St. P. Ry. for right of way and depot purposes, either by private agreement or by condemnation proceedings in the event that the parties cannot come to an agreement.

You inquire whether the owner of said real estate prior to its transfer is allowed to transfer his license to another adjoining lot which has never been used for saloon purposes.

Our supreme court has construed the Baker law in the case of State ex rel. Marvin v. Larson, 153 Wis. 488, and on page 491 said:

"We find no difficulty in construing it as follows: Notwithstanding the ratio limit, the owner of property under license for saloon purposes June 30, 1907, may by himself or his tenant continue to use for such purposes (if properly licensed) thereafter, and any person in possession of such premises as lessee June 30, 1907, if thereafter deprived of the opportunity to continue their use by refusal of the owner to lease the same for such purposes, destruction of the building by fire or the elements or the operation of other provisions of the law (e.g. the establishment of a no-license area) may, if properly licensed, continue the business at some other location."

It is only the person who was a lessee of the premises at the time when the Baker law went into effect who is authorized to take out a license for a new location.
As the party in question was the owner of the property and not the lessee, I am of the opinion that he cannot be licensed in a new location and the license that was issued to him for the premises which are to be transferred to the railway company cannot be transferred to a new location for the reason that no license can be transferred from one location to another in the state of Wisconsin.

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**Intoxicating Liquors—License**—A town which grants licenses not to exceed the limit or ratio in the Baker law is not limited to the old location.

William T. Lennon,
District Attorney,
Hurley, Wis.

In your letter of Oct. 23d you submit the following:

"Town of A at the time of its organization out of a portion of the territory of the town of B contained two saloon locations, the saloons being operated under licenses granted by the town of B.

"Later on licensees of said saloons made applications for licenses for the ensuing license year. Their applications were not granted, but a third applicant was granted a license to conduct a saloon in a new location. This saloon is the only one now in the town of A.

"Was such license legally granted?"

The license in question was legally granted so far as the Baker law is concerned. The town board in question in issuing one license have brought the town within the class where no more licenses are issued than one for every two hundred and fifty inhabitants or fraction thereof. They are, therefore, not limited to the old location, but may grant the license to any suitable place in the town. See Zodrow v. State, 154 Wis. 551.
Intoxicating Liquors—Licenses—Abandonment of saloon business at a place for about four months forfeits the right to be licensed at such place.

November 9, 1914.

JOHN J. HEALY,
District Attorney,
Manitowoc, Wis.

In your letter of the 5th inst. you state that a certain property in one of the towns in your county was used for saloon purposes for a number of years by the owner, and later rented; that the owner died some time ago and the property was abandoned for saloon purposes last July at the expiration of a lease that was then in existence; that no application for a license had been made since that date until now when this property has gotten into strange hands; that the number of saloons in the town in question exceeds the population limit. You inquire whether a legal liquor license may be granted for this place.

This question must be answered in the negative. The entire discontinuance of the business since July by the owner of the property was an abandonment of the premises for saloon purposes and the right to a license as one of the favored locations was thereby forfeited. See Koch v. State, 157 Wis. 437. It is true that in that case the premises in question had not been used for saloon purposes for three years, but the same principle is applicable to the case under the facts stated by you. In New York two months has been held sufficient to cause a forfeiture under a somewhat similar statute. See People ex rel. Bagley v. Hamilton, 25 N. Y. App. Div. 428.

You are, therefore, advised that no liquor license can legally be granted to the place in question.
**Intoxicating Liquors — Posted Persons —** County where liquor is given to a posted man is the place to bring the prosecution.

**James Kirwan,**

*District Attorney,*

Chilton, Wis.

Under date of Nov. 16th you state that a certain married woman in your county had her husband posted in the city of Chilton, and also in other places in Manitowoc and Fond du Lac counties. That the man is engaged in delivering beer to the saloons and recently came home from Fond du Lac county in a state of intoxication. That his wife insists that you should start proceedings to compel her husband to testify as to where he received the liquor for the purpose of prosecuting the saloon keepers who furnished him the same. You inquire whether you have jurisdiction of a case of that kind when the liquor was sold to him in the neighboring county.

In answer I will say that the venue of the criminal prosecution is in the county in which the crime was committed. If the liquor was furnished to this man in Fond du Lac county that is the place where the prosecution should be brought. In view of the fact that this woman lives in your county and that her husband was posted by the officials of your county, it is possible for you to be of great assistance to her in bringing the matter before the district attorney of Fond du Lac county.

**Intoxicating Liquors—Sunday Law—** Sec. 1564, prohibiting the selling of liquor on Sunday and election day, applies to a brewery which has a federal license only and sells beer in kegs to parties calling for it.

**J. H. Hill,**

*District Attorney,*

Baraboo, Wis.

In your letter of the 25th inst. you submit the following question:
"Does sec. 1564, Stats., 1913, apply to a brewery holding federal license, only, which sells by the keg to individuals calling at the brewery on Sundays."

Said sec. 1564 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, special election or primary 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 or imprisonment."

This statute was under consideration by our supreme court in the case of Jensen v. State, 60 Wis. 577, and it was held that:

"The words 'tavern keeper,' as used in this statute, clearly mean a person, a part, at least, of whose business it is to sell intoxicating liquors; and, applying the rule above quoted, the words 'other person' must be held to mean persons whose business, either in whole or in part, is to sell such drinks."

The court further said:

"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 vender of the articles on the days named in the act, is punished more severely under other provisions of law than under this section. As a general rule, a statute will not be so construed as to inflict two punishments for the same act. The legislature may have the power to authorize the infliction of two punishments for the same act, but the courts will not give such a construction to a legislative enactment, unless no other reasonable construction can be given to it. In this case it is not necessary to determine whether the act in question should be restricted to persons licensed to sell intoxicating liquors."

The case of Jensen v. State, supra, was approvingly cited in the case of Reismier v. State, 148 Wis. 593. That was a prosecution brought under said sec. 1564 and there was no direct evidence in the case that the defendant was licensed to sell intoxicating liquors. The court said on page 595:
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“There is sufficient evidence in this case to warrant the jury in finding that the defendant was at the time of the alleged offense a tavern keeper, and it must be presumed that he was a licensed tavern keeper, in the absence of any evidence to the contrary, rather than engaged in an unlawful business. We need not and do not decide whether the statute under consideration applies only to licensed persons.”

The brewery to which you refer in your letter has no license to sell intoxicating liquors under the laws of this state and under the decision of our supreme court in the case of Michaels v. State, 115 Wis. 43, said brewery cannot sell intoxicating liquors direct to a consumer, so the brewery may be prosecuted for violating the excise laws of the state of Wisconsin by selling intoxicating liquors without a license. In view of the decisions of our court in Jensen v. State and Reisman v. State, supra, the question has not been definitely settled whether the provisions of sec. 1564, Stats., apply to a person who is not a licensed liquor dealer. Until that question has been settled by our supreme court this department will be compelled to proceed on the assumption that the statute applies to a brewery which is not licensed under the state laws, but holds a federal license and is guilty of selling liquor direct to the consumers. Your question must, therefore, be answered in the affirmative.

I recommend as the safest practice the prosecution of the brewery in question for violating the excise law instead of violating sec. 1564.

Intoxicating Liquors—Posted Persons—A notice under sec. 1554, posting drunkards, must be served personally on party prohibited to sell the liquor. If the notice is posted in a public place and defendant read it, this is sufficient personal notice.

M. R. Munson,
District Attorney,
Prairie du Chien, Wis.

In your letter of the 10th inst. you inquire as to what constitutes proper service of the notice in writing to be given under the provisions of sec. 1554, this being the

December 12, 1914.
section which provides for the posting of persons who by excessive drinking of intoxicating liquors misspend, waste or lessen their estate so as to expose themselves or families to want or the public to the liability for their support.

You state that you find the statute is vague and does not provide the manner of service of the notice. You inquire whether a written notice properly signed, if served upon the saloon keeper and then posted upon the wall in his place of business, is a sufficient notice to all parties that buy liquors over his bar. You say you feel that the said section should provide for service upon the public either by advertising or by posting in public places.

In answer I will say that I agree with you that the statutes should provide a method of serving the notice for it is a criminal statute and will be strictly construed against the state in a prosecution and for that reason it is important to know what service will satisfy the requirements of this statute. In view of the fact that it is a criminal statute, I have held in an opinion to T. P. Abel, district attorney at Sparta, under date of Nov. 12, 1913, that the notice must be personally served on the defendant. In an opinion to Gad Jones, district attorney of Waushara county, under date of Dec. 10, 1913, I have held that in all cases where the notice is so worded that it is addressed to any one who may read it and the same is posted in a public place and that it can be shown at the trial that the defendant actually read said notice, that it would seem that this would be a sufficient personal service to satisfy the requirements of the statute. It would be necessary, under the facts stated by you, to show that not only was the party present in the saloon, but that the notice was posted and that such person actually read said notice. It may be difficult to prove such facts, but if it can be shown by trustworthy testimony that such was the case I believe a conviction can be sustained.
Relating to Intoxicating Liquors.

Intoxicating Liquors—Posted Persons—1. An individual alderman can post a person. 2. A person cannot be posted for a period of less than one year. 3. The notice posting a person cannot be revoked.

Albert H. Smith,
District Attorney.
Merrill, Wis.

In your letter of Dec. 18th you submitted three questions for an official opinion. They will be taken up in the order presented by you.

First: Can an individual alderman post a person?
Sec. 1554, Stats., provides in part as follows:

"The wife of such person, the supervisors of such town, the aldermen of such city or trustees of such village, the county superintendent of the poor of such county, the mayor of any city, the chairman of the county board of supervisors of such county, the district attorney of such county, or any of them, may, in writing, signed by her, him or them, forbid all persons to sell," etc.

The question is whether the words "or any of them", as contained in the above quoted statute, conveys the meaning that an individual supervisor, trustee or alderman may give the notice. This question is considered in an official opinion of this department by my predecessor to the district attorney of Columbia Co., under date of Aug. 29, 1911. See Report and Opinions of the Attorney General for 1912, p. 520.

The history of the statute in question was there thoroughly considered and the conclusion arrived at that an individual supervisor, alderman or trustee may give the notice. Such history shows conclusively that the words "or any of them" refer to the individual supervisors, aldermen or trustees. For the reasons given in said opinion, I am constrained to answer this question in the affirmative.

Second: Can a person be posted for a period of less than one year?
Sec. 1554 authorizes the persons therein named to "forbid all persons to sell or give away to such person any ardent, spirituous or intoxicating liquors or drinks for the space of one year * * *." There is no express authority given to
forbid the sale of such liquor for any time other than one year. I am satisfied that no right is given by this statute to post a person for a period of time less than one year. The person acting under this statute is limited to the authority therein conferred, and I know of no reason why an interpretation should be given to this statute authorizing the posting of a person for a less time than one year. Your second question must, therefore, be answered in the negative.

Third: Does the statute provide any way for taking a person off the black list by revoking the order forbidding the sale to such person before the end of the year?

In answer to this question, I will say that there is no authority given in the statute to take a person off the black-list who has once been posted. A posted person will stay posted for one year.

Intoxicating Liquors—Abandonment of Premises—A saloon keeper as tenant on June 30, 1907, who discontinues such business for two years, abandons his right to a license in a new place where the municipality has exceeded the ratio under sec. 1565d.

THOMAS C. DOWNS,
District Attorney,
Fond du Lac, Wis.

December 29, 1914.

In your letter of Dec. 23rd you state that on and prior to June 30, 1907, one A. was the tenant of certain premises in the city of Fond du Lac and held a license for the sale of intoxicating liquors and was conducting a saloon at said place; that on July 30, 1907, A. sold his stock in trade and retail liquor business to one B. who at the same time became the lessee of said premises and a license was duly issued to him and he continued in said business at said location for two years; that at the end of said two years A. repurchased from B. said retail and liquor business and stock in trade and leased said premises and again received a license for the sale of intoxicating liquors at said place; that since said time A. has been a lessee of said premises and continued to be licensed to sell intoxicating liquors at said location up to and
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including the 30th day of June, 1914; that at that time the owner of the premises refused to any longer lease said premises for saloon purposes; that thereafter A. made application to the council of your city for a license to sell intoxicating liquors at a new location, at which place no liquor had been sold since June 30, 1907; that the license was granted and A. is running a saloon at said new location; that the city of Fond du Lac at the time of and since the enactment of the Baker law has licensed more saloons than the ratio fixed by said law.

You inquire whether the license issued to A. is legal.

In answer I will say that under the decision of our court in the case of State ex rel. Marvin v. Larson, 153 Wis. 488, our court has held that any person in possession of premises as lessee on June 30, 1907, if thereafter deprived of opportunity to continue their use by refusal of the owner to lease the same for such purposes may, if properly licensed, continue the business at some other location. It appears from the facts stated by you that A. voluntarily sold his business and discontinued the same for a period of two years. He had certainly abandoned his rights to continue the business secured to him by the Baker law and when he subsequently again purchased the stock in trade and the business he must be considered the same as any other man who would have purchased the same and who had never previous to said time conducted the saloon business.

I am of the opinion that the license issued to A. is clearly in violation of the Baker law and, therefore, void. See also Koch v. State, 157 Wis. 437.

Intoxicating Liquors—Sunday—A saloon keeper who sells soft drinks in his saloon on Sunday, keeping it open for said purpose only, violates sec. 4595, and such offense is ground for revocation of his license.

December 29, 1914.

LAWRENCE J. MISTELE,
District Attorney,
Jefferson, Wis.

In your letter of Dec. 19th you inquire whether the keeping open of saloons on Sunday and the sale therein of so-called soft drinks is in violation of sec. 1564, Stats., or
whether it is punishable under sec. 4595. You also inquire whether a violation of the provisions of sec. 4595, only, can be followed by a revocation of the license under sec. 1558.

Sec. 1564 prohibits any tavern keeper or other person from selling intoxicating liquors on Sunday and other specified days. If the soft drinks of which you speak are such as ginger ale, lemonade, pop, etc., a conviction could not be secured under sec. 1564 for the reason that the drinks are not intoxicating. The sale of intoxicating liquors only is prohibited by said section.

Sec. 4595 prohibits any person from keeping open his shop, warehouse or workhouse on Sunday. The saloon in question would be a shop in contemplation of this statute, and the keeping open of the same on Sunday for the purpose of selling soft drinks would be in violation of sec. 4595 and the prosecution should be brought under this section.

Sec. 1558 provides that a license may be revoked for the grounds therein stated, among which is the keeping and maintaining of "disorderly or riotous, indecent or improper house." A house or shop that is run in violation of law, where drinks are sold in violation of sec. 4595 is, in my opinion, an improper or indecent house.

In an official opinion given by my predecessor, Hon. L. M. Sturdevant, on July 23, 1906, which you will find in the Reports and Opinions of the Attorney-General for 1908, page 538, he held that the sale of liquor on Sunday in violation of sec. 1564 was grounds for revocation of the license. He said: "This is a close question and one upon which lawyers may easily differ. It seems to me, however, that a saloon which is run contrary to the state law can hardly be considered as a proper house and that a place which is run openly in violation of the law would be considered an improper house within the meaning of this statute. I believe that in the absence of a judicial definition of this word as here used such a construction ought to be given to it."

Our court has not judicially defined the terms used in this statute and I agree with my predecessor that a saloon in which sales are made in violation of the state law should be construed as being an improper house.

You are therefore advised that a license may be revoked where the licensee keeps his saloon open on Sunday for the purpose of selling soft drinks.
OPINIONS RELATING TO LIVE STOCK AND LIVE STOCK SANITARY BOARD

Live Stock Sanitary Board—Quarantine Farms—Live stock sanitary board is authorized to prescribe reasonable regulations governing the conduct of quarantine farms.

April 15, 1914.

O. H. Eliason,
State Veterinarian.

I have your request for opinion of recent date, in which you ask:

"Can the live stock sanitary board, under the law, sec. 1492ab-1, authorizing the establishing of farms for the raising of healthy calves from tubercular cows, establish the following rule:

"No milk or cream from a re-acting cows shall be bought or sold or used except as hereinafter described: Cream must be separated from the milk on the premises of the quarantined animals. Cream can be sold only to creameries which maintain a pasteurizer which has been approved by the state pure food department. No milk shall be removed from the premises in any form."

The answer to this inquiry is governed by the provisions of sec. 1492ab-1, Stats., which section, as enacted by ch. 396, laws of 1913, reads as follows:

"1. Individual owners or companies may, upon application, be authorized by the state live stock sanitary board to establish quarantine farms for the purpose of raising healthy calves from tubercular cattle, under the Bang system, in conformation with such rules and regulations as may be established by the state live stock sanitary board for the maintenance of such quarantine farms.

"2. The state live stock sanitary board shall establish such rules and regulations as in the judgment of the members thereof are necessary for the proper conduct of such quarantine farms."
Under this statute the live stock sanitary board is given express authority to make such rules and regulations as in its judgment are necessary for the proper conduct of quarantine farms. These statutes, of which this section forms a part, are enacted by the legislature and the authority by them conferred upon the live stock sanitary board is so conferred and is to be exercised as within the police power of the state. It is a fundamental limitation upon every exercise of police power that it shall be reasonable. Therefore, in my opinion, there is this implied limitation upon the power of the live stock sanitary board to make and enforce regulations, and that power is by such implication limited to the making and enforcing of reasonable regulations.

Of the reasonableness of the regulation which you submit I have not the necessary information to enable me to form any judgment. I assume for the purposes of this opinion that it is founded upon good reason and is reasonably required in the interest of public health and of the prevention of contagious diseases among domestic animals. Upon this assumption, I am of the opinion that the regulation is one within the power of the live stock sanitary board to promulgate and enforce.

Live Stock Sanitary Board—Indemnity for Diseased Cattle Condemned and Slaughtered—That the owner of cattle is a nonresident of this state is not a proper ground for refusing indemnity.

April 15, 1914.

O. H. Eliason,
State Veterinarian.

I have your two requests for opinion of recent date. In one of these requests you ask whether indemnity may be paid to a resident of Illinois who keeps cattle on farms in the state of Wisconsin, several of which cattle have been tested and condemned. In the other opinion you state that a former resident of Wisconsin has become a resident of Illinois and upon the test of his cattle, made for interstate shipping from Wisconsin to Illinois, several of such cattle re-acted to the tuberculin test. You ask: "Can we, under the existing law, pay indemnity to this man, now a resident of Illinois?"
The answer to these inquiries depends upon the same statutes, namely, secs. 1492\textit{ab}, 1492\textit{ab-1} and 1492\textit{b}. Upon the statement of your requests for opinion the only distinction which I perceive affecting your inquiries differently, as compared with any other case in which cattle are condemned and indemnity allowed therefor under these statutes, rests upon the fact that the owner in each case is a nonresident of this state. As I understand the circumstances, the cattle in each case are found within this state, tested and condemned pursuant to the provisions of these statutes, and the right of the owner to indemnity follows according to the provisions of the statute, unless the fact of the owner being a nonresident of this state deprives him of the right to such indemnity.

These statutes are police regulations, designed to protect the health of domestic animals in the state of Wisconsin. Tubercular cattle are assumed by the legislature in enacting these statutes to be a menace to the health of domestic animals in the state. If this assumption is correct at all, it applies equally to all tubercular cattle within the state and is not affected by the residence of their owner, so that the state veterinarian has the same power and the same duty to test and condemn such cattle and to require them to be slaughtered, regardless whether their owner be a resident or a nonresident of this state.

The provisions of the statute providing for the testing of cattle, their condemnation and slaughter, if found infected, and for the payment of indemnity to the owner of cattle so slaughtered, make no distinction or discrimination as between cattle owned by residents and those owned by nonresidents, or as between residents and nonresidents with respect to the right to such indemnity. These statutes, as aforesaid, are police regulations. The fourteenth amendment, Const. U. S., provides, in part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This constitutional provision, of course, applies and has always been applied to police regulation, as well as other laws. In my opinion, any law of the state of Wisconsin which
would provide for the slaughter of infected animals by the state, allowing indemnity therefor to resident owners but denying it to nonresident owners, would be in contravention of these provisions of the federal constitution. The law should be construed in harmony with the constitutional requirements and, so construed, indemnity for cattle slaughtered pursuant to the statutes referred to can not be denied to the owner thereof merely upon the ground that such owner is a nonresident of this state.

Of course, the foregoing does not apply in the case of infected cattle brought into the state in violation of our laws and slaughtered, and it is expressly provided in sec. 1494-74 that in such cases no indemnity shall be paid.

*Live Stock and Live Stock Sanitary Board—Public Health—Public Officers—A tubercular cow is a sick or diseased cow within the terms of sec. 4607a, Stats.*

The live stock sanitary board has no authority to authorize the sale of cream from milk drawn from a sick or diseased cow, under ch. 396, laws 1913.

April 20, 1914.

J. Q. Emery,

*State Dairy and Food Commissioner.*

In your letter of the 17th you state that under the terms of ch. 396, laws 1913, authorizing the establishment of so-called quarantine farms for the purpose of raising healthy calves from tubercular cattle, the live stock sanitary board is authorized to make rules and regulations governing said quarantine farms. That under the authority thus conferred upon it that board proposes the following rule or regulation:

"No milk or cream from a reacting cow shall be bought or sold or used except as hereinafter described. Cream must be separated from the milk on the premises of the quarantined animals. Cream can be sold only to creameries which maintain a pasteurizer which has been approved by the state pure food department. No milk shall be removed from the premises in any form."

That among the definitions of adulterated milk or cream given by sec. 4607a, Stats., is the following:
"or cream from milk drawn from any sick or diseased cow or cow having ulcers or other running sores."

You request my opinion on the following questions:

"Would the 'tubercular cattle' kept on the said quarantine farms under the provisions of chapter 396, laws 1913, be 'sick or diseased cows' within the meaning of the language above quoted from section 4607a so as to render the cream from the aforesaid tubercular cattle adulterated within the meaning of section 4607a of the statutes? And if so, does the fact that the cream from the milk of the cows kept on the aforesaid quarantine farms is to go only to creameries that pasteurize their cream before manufacturing the same into butter have the effect in any way to modify the statute as to the cream being adulterated?"

In my opinion a tubercular cow is a sick or diseased cow within the terms of sec. 4607a, Stats.

Sec. 4607, Stats., provides in part:

"Any person who shall by himself, his servant or agent or as the servant or agent of any other person, or as the servant or agent of any corporation, sell or offer for sale, furnish or deliver, or have in his possession with intent to sell or offer for sale or furnish or deliver to any creamery, cheese factory, corporation or person, any adulterated milk or any adulterated cream shall be guilty of a misdemeanor, * * * ."

Sec. 4607a defines cream from a sick or diseased cow as adulterated cream and sec. 4607 absolutely forbids the sale of such cream. Neither of these sections makes any exception as to cream delivered to a creamery having a pasteurizer. The proposed rule of the live stock sanitary board appears to me to be in direct contravention of these statutes. Of course the board has no authority to pass any rule or regulation contrary to such provisions. Such cream would still be adulterated cream in spite of that rule and regardless of whether the sale were made to a creamery having a pasteurizer or to any other creamery or person.
"Live Stock—Registration of Stallions—Certification of enrollment of stallions and transfer of such certificate.

Dec. 16, 1914.

PROF. A. S. ALEXANDER,
Department of Agriculture,
University of Wisconsin.

In your letter of Dec. 7th you have submitted a number of questions to this department for an official opinion. They will be taken up in their regular order.

"QUESTION I. Re sec. 1494-39 (violation and penalty).
"(a) If an owner uses a nonenrolled stallion for the public service of mares owned by different owners can he be prosecuted and fined, in one joint action, for each separate violation of the law? That is to say if he breeds mares owned by A, B, and C can he be convicted and fined a specific sum for violation in the case of A and B and of C? Or is he simply convicted and fined for one violation and the A, B, and C cases cited in proof?
"(b) If convicted and fined on one count only (say case of A) can an owner be again brought into court and convicted and fined in the case of B and again (third trial) in the case of C?"

The correct practice is to charge the party alleged to have violated the law with breeding mares owned by A at a certain time and place. This will be one offense. If he has also bred mares of B and C those are separate offenses. This being a criminal prosecution the defendant can only be found guilty of one offense in one action, and if it is sought to punish him for other offenses a separate action must be brought. The defendant can be brought into court for every separate offense that he is guilty of.

"QUESTION II. Re sec. 1494-37.
"If an owner allows his enrollment certificate for a stallion that has been certified sound by a veterinarian, to lapse, by not renewing it before the first of April, can the Department of Horse Breeding require (in each case of this sort) that the stallion shall again be examined (re-examined) and certified to by a veterinarian or does the original veterinary examination remain sufficient for reinstatement after the enrollment certificate has lapsed?"

Sec. 1494-37, Stats., provides as follows:

"A fee of two dollars shall be paid to the department of horse breeding of the college of agriculture of the University
of Wisconsin, for the examination and enrollment of each pedigree and for the issuance of a certificate of enrollment, in accordance with the breeding of the stallion as above provided; and all enrollment certificates shall expire on the first of January of each year, following date of issuance, and must be renewed annually before the first of April following, and a fee of fifty cents shall be paid to the department of horse breeding for said renewal of certificates.

Under this statute the certificate of enrollment can be renewed annually at any time before the first day of April following the time of its expiration. After the first of April it is too late for renewal and the only way possible for the enrollment of a stallion whose certificate or enrollment has expired is to follow the provisions of the statute as to examination and certification by a veterinarian, and making an application for enrollment of the stallion by its owner in the same way as if he had never been enrolled.

"QUESTION III. Re sec. 1494-38 (transfers).

"When a stallion that has an enrollment certificate in good standing changes hands is a transfer of ownership compulsory or may the enrolled stallion be legally used for service without a transfer having been filed and recorded by the Department of Horse Breeding?"

Sec. 1494-38 provides as follows:

"Upon a transfer of the ownership of any stallion or jack enrolled under the provisions of this act, the certificate of enrollment may be transferred to the transferee by the department of horse breeding of the college of agriculture upon submittal of satisfactory proof of such transfer and upon payment of the fee of fifty cents; and a fee of fifty cents shall be paid for a duplicate license certificate issued where proof is given of loss or destruction of the original certificate."

Sec. 1494-31 provides as follows:

"No person, firm or company shall use or offer for use for public service in this state any stallion unless and until he shall have caused the name, description and pedigree of such stallion to be enrolled by the department of horse breeding, of the college of agriculture, of the University of Wisconsin, and shall have procured a certificate of such enrollment from said department. The word 'stallion' wherever used in this act shall be construed to include the word 'jack.'"

A person who has bought a stallion which was enrolled cannot use or offer him for use for public service in this state
before he has procured a certificate of enrollment from the department of horse breeding of the college of agriculture of the University of Wisconsin. Such is the express provision of the above quoted sections of the statute.

It is therefore necessary for the person who has purchased a stallion to procure a certificate of enrollment. It is unlawful for him to use the stallion without such certificate, and the transfer of the ownership of the certificate by the department of horse breeding of the college of Agriculture is compulsory if satisfactory proof is made of the transfer of the stallion and if the fee of fifty cents is paid. The above quoted statute uses the word “may” instead of “shall,” but the word “may” is often construed as “shall” in the statutes where it clearly appears that such is the intent. In this case the word “may” was probably used because no transfer was required to be made until proof of such transfer was presented to the department and until the fee was paid.

"Question IV.

"The existing stallion law grants enrollment certificates to five (5) classes of public service stallions, viz.: 1. Pure Bred. 2. Non-Standard Bred. 3. Cross Bred. 4. Grade. 5. Mongrel or Scrub.

“(a) Would it be constitutional to amend the law so as to omit reference to Mongrel or Scrub stallions? The purpose being to refuse enrollment certificates to such stallions whose breeding is unknown.

“(b) If not granted an enrollment certificate could a Mongrel or Scrub stallion legally be used for service?

“(c) Could he legally be used privately, or free of charge?"

The Wisconsin stallion law was enacted by the state of Wisconsin under the police power. This power has its limitations. "In order that a statute or ordinance may be sustained as an exercise of the police power the courts must be able to see (1) that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general welfare, and (2) that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable and appropriate manner tend towards the accomplishment of the object for which the power is exercised. The police power cannot be used as a cloak for the invasion of
RELATING TO LIVESTOCK.

personal rights or private property, neither can it be exercised for private purposes, or for the exclusive benefit of particular individuals or classes." 22 Am. & Eng. Ency. of Law (2nd ed.) 939.

In the case of C., M. & St. P. Ry. Co. v. City of Milwaukee, 97 Wis. 418, on page 422, our court said:

"In Beer Co. v. Mass., 97 U. S. 25, Mr. Justice Bradley said in effect that 'The police power at least extends to the protection of the lives, health and property of the citizens, and the promotion of good order and good morals.' In our judgment that is broad enough to cover the whole ground of police jurisdiction. When we say that under it the legislative branch of the government may constitutionally enact all reasonable regulations to promote the health, comfort, morals and peace of society and the safety of the individual members thereof, there is little more that can be said on the subject. When an enactment goes clearly beyond that, judicially considered it meets the bar of the constitution at some point and is therefore void."

It seems to me that a law which makes it unlawful for the owner to use a mongrel or scrub stallion, although said stallion is a healthy and well built and useful animal, would be unnecessary and unlawful interference with the property rights of the owner thereof. Such law would not tend to the protection of the lives, health or property of the people of this state. While it might, as you state, greatly benefit the horse breeding industry of the state of Wisconsin, it seems to me to be unlawful for the reason that it unnecessarily interferes with the property rights of our citizens.
OPINIONS RELATING TO LOANS FROM THE TRUST FUNDS

Loans From Trust Funds—Education—At a special school meeting to authorize the incurring of indebtedness, each proposition should be voted upon separately.

A proposition to build a schoolhouse may be coupled with one to issue bonds to pay for same, and with one to levy a tax to pay such bonds, as they are all parts of the same proposition.

No time is prescribed by statute for advertising for bids for building a schoolhouse.

No time is prescribed for offering the bonds of a school district for sale.

March 26, 1914.

W. E. Green,
District Clerk,
Evansville, Wis.

In your letter of March 23rd you state that at your last annual school meeting the school board presented the following report:

"Your board recommends:

"First. A separate heating plant located south of the grade building and opposite and west of the furnace room of the high school building, of sufficient size to install boilers for heating the two buildings and a new building when required, which new building the board recommends be located south of the heating plant.

"Second. The locating of the heating coil and fan in the high school building so that a grade or recitation room may be made of the present furnace room, and that this room be enlarged by removing the east wall and extending the north wall across the hallway, making a room about 20' x 40' in size. This room can be well lighted with suitable windows on south and west.

"Third. Installing water closets and play rooms as shown in the plans furnished by Mr. W. H. Blair of Janes-
ville, Wis., using the best automatic seats and connecting the same with the city sewers.

"FOURTH. Enlarging the windows in the four central rooms of the grade building so as to furnish ample light in these rooms.

"FIFTH. That the district raise the money to pay for the above improvements by the sale of 200 $100.00 bonds, bearing 5 per cent interest, payable annually: one tenth of said bonds to become due Feb. 1, 1918 and one-tenth each year thereafter until full payment is made.

"SIXTH. That an amount sufficient to pay the principal and the interest upon the said bonds as they shall become due be, and hereby is, levied against the taxable property of the district."

That the action taken as shown by the clerk's record is as follows:

"Upon the question of adopting the report and authorizing the district to borrow the money for the improvements mentioned, the vote was taken by written ballot and resulted as follows: for the loan 109, against the loan 104, majority for the loan 5."

That the plans and specifications for the work are nearly completed and you desire to know whether or not bonds issued by the district by virtue of the action mentioned would legally bind the district. That you wish to have no question of the validity coming up after the bonds are printed.

You also ask how long the district must ask for bids; in other words, what time must elapse between the notice that the district will receive bids on the work and the time of closing the bids. You also ask what time should be given for bids on the bonds.

This department is not authorized to give you an official opinion. Whatever is said herein, therefore, must be understood as wholly unofficial, not binding upon any person nor upon the state, and is given you merely as a matter of courtesy.

The only provisions of the statute under which a school district may borrow money are found in secs. 474, 474a, 475 and 476a, Stats. The only one of these that could possibly apply to your situation is that found in sec. 475. This provides:

"For the purpose of aiding in the erection of a schoolhouse any school district, whether organized under general law,
special law or charter, may, by vote of the electors at any annual or special meeting, called for that purpose authorize the district board, school board or board of education to borrow money, to an amount which shall not in any way exceed the limitations now provided by general law. 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 Feb. next ensuing. Such resolution shall be read to the meeting and the vote taken thereon by ballot. The ballots shall be written or printed, those in favor of the loan: 'for the loan,' those opposed: 'against the loan.' The resolution and the vote shall be recorded, and if adopted by a majority, the district board, school board or board of education shall be thereupon authorized to borrow such sum of any person on such terms, and execute and deliver to the lender such obligation therefor and such security for payment, including a mortgage or pledge of any real or personal property of the district, subject to the direction contained in the resolution voted as may be agreed upon, not prohibited by law, and shall also levy a tax to be annually collected thereafter, sufficient to pay the interest annually on such loan and the annual installments of the principal, provided to be paid in each year.

"Any bonds issued by any such school district, to secure any loan which bonds shall have been issued in conformity to law, including the provisions of this section, as amended are hereby declared to be and are valid claims and liens against the school district so issuing the same."

The first question that occurs is as to whether or not the purpose for which it is proposed to issue these bonds is that of building a schoolhouse. It appears plain to me that the schoolhouse includes all the necessary buildings used in connection with the school. I have no doubt that the building proposed for the purpose of installing a heating plant is a school building. As this section has always been construed by this department, the altering, remodeling, or enlarging of a schoolhouse comes within the terms of the section. If that construction is correct then the changing of the high school building by making a new room therein would be included as a part of the building of the schoolhouse. The same would be true as to enlarging the windows in the central rooms of the grade building. The installing of the water closets and play rooms does not come so clearly within the section. I presume, however, that the intention is to so
install them as to make them a part of the building, rather than mere equipment or furniture for the building. Under those circumstances I should be inclined to construe it as being a part of the building itself, and therefore coming within the terms of this section.

The section requires the matters to be proposed in the form of a written resolution. Strictly speaking the report of the board is not a resolution. I should be inclined, however, to give the section a liberal construction and construe the terms “written resolution” to mean any proposition in writing placed before the meeting for the purpose of being voted upon. I think that this might well be held to be a sufficient compliance with the section referred to in that respect.

While neither the constitution nor the statute in terms requires it, it has often been held that two or more propositions cannot be united in the submission so as to have one expression of the vote answer both propositions, as the voters might be thereby induced to vote for all of the propositions, who would not have done so if the questions had been submitted singly. 21 A. & E. Ency. of Law (2d ed.) 47; City of Denver v. Hayes, 28 Col. 111, 114; McBryde v. Montesano, 7 Wash. 69, 34 Pac. 559; Town of Woodlawn v. Cain, 135 Ala. 369, 33 So. 149; City of Leavenworth v. Wilson, 69 Kas. 74, 76 Pac. 400.

The question therefore arises as to whether or not the report of the school board contains more than one proposition. In form it contains six different propositions. In reality, however, it appears to me that the first four are merely parts of the one proposition. I do not believe the courts would hold that each of these must be voted upon separately. The fifth proposition provides for the issuance of bonds and the sixth raises a tax for the purpose of meeting the payments upon the bonds as they become due. These two can be united with the proposition for building the schoolhouse without involving more than one proposition. Thompson Houston Electric Co. v. City of Newton, 42 Fed. 723; Seymour v. Tacoma, 6 Wash. 138; Hubbard v. Woodsum, 87 Me. 88; City of Sioux Falls v. Farmers Loan & Trust Co., 136 Fed. 721. It is therefore my opinion that the report of the school board embraces but one proposition and that it was proper to submit it to one vote.
You ask how long a time must elapse between the giving of notice that the board will receive bids for doing this work and the time of letting the bids.

I do not find any statutory provision covering this. Under these circumstances I should say that the district board may fix the time for receiving such bids.

I do not find any statutory provision requiring that the bonds be offered for sale for any particular length of time. In my opinion the length of time of such offer may be fixed by the school board.
OPINIONS RELATING TO MARRIAGE

Marriage—Eugenics—Public Health—Certificate of physician must be in form prescribed by eugenics law.

Harry E. Carthew,
District Attorney,
Lancaster, Wis.

I have your communication of the 3rd inst. in which you state that application has been made to your county clerk for a license to marry upon a physician’s certificate presented by the male in the form prescribed by sec. 2339m, ch. 738, laws 1913, except that the physician certifies that he finds him “to be free from all venereal diseases so nearly as I can determine” instead of the statutory words “to be free from all venereal diseases so nearly as can be determined,” with the additional statement that the Wasserman test was not applied. You state you have advised the county clerk that he cannot issue a marriage license upon this certificate. You ask my opinion upon the constitutionality of this law, as to what clinical and laboratory tests are necessary under the certificate and as to whether in this particular case the county clerk can lawfully issue a license.

In reply I will say that there is no provision of this law that may be effectually branded as violating any provision of the constitution. The purpose of the law is to benefit society and posterity and in my opinion is well within the police powers of the state. It is intended to prevent the marriage of persons tainted with loathsome, communicable and transmissible diseases, a purpose which, it seems to me, should be applauded by all society. No purpose will be subserved by a discussion of the many questions concerning its constitutionality that are suggested. I consider it my duty and the duty of all administrative officers to regard the law as constitutional until otherwise determined by the supreme court,
even though I might entertain some doubts with reference thereto, which I do not.

In response to your inquiry concerning the nature of the clinical and laboratory tests which should be applied by the physicians, you are referred to an opinion rendered to Dr. C. A. Harper, secretary of the state board of health, under date of Dec. 22, 1913.

Answering your question as to whether the county clerk should issue a license on the certificate presented I will say that in my opinion he should not. The law prescribes the form of the certificate which must be made by the physician and in my judgment this form may not be modified or departed from. The county clerk has no jurisdiction or authority to issue the license unless the certificate of the physician is in the form prescribed by the law, but when the certificate is in the form prescribed by the law then the county clerk is without discretion in the matter and it is his duty to issue the license.

The uncertainty or misunderstanding arises from the contention on the part of some of the physicians that the law requires the application of the Wasserman test, thereby giving their own construction of the law against that of the attorney-general. By the application of rules of statutory construction familiar to lawyers (but with which physicians, of course, are not so well acquainted) the conclusion seems to me to be inevitable that the legislature only intended such clinical and laboratory tests as are within the reach of the ordinary licensed, practicing physicians of the state and such as they might be expected to apply for the fee prescribed in the law. There is certainly no intent manifest in this law to prohibit marriages in this state, and if the law means what these physicians say it means, to wit, that the Wasserman test must be applied, then, according to your own letter it would prohibit marriages in your community; for you say, "The effect of the law under such circumstances as surround us here is to absolutely prevent marriage." This, as all other laws, should be construed so as to reflect the legislative intent. I believe that is clearly reflected in the construction of the law given in my opinion to Dr. Harper hereinbefore referred to. I am also satisfied that to construe the law as requiring the application of the Wasserman test would be to entirely defeat the legislative intent because, as
stated in your letter, such a construction would operate to prevent marriages and such an intent on the part of the legislature is not to be thought of.

It seems to me that certain physicians of the state are unduly concerned about incurring the penalties prescribed by the law. There can be little question that they will be absolved entirely from any criminal intent if they in good faith apply the tests required by the law as interpreted by the attorney-general of the state.

Marriage—Eugenics Law—Public Officers — County clerk should not issue marriage license in absence of health certificate in form required by statute.

E. P. Gorman,
District Attorney,
Wausau, Wis.

I have your communication of the 5th inst. in which you enclose me a certificate of health given by Dr. W. A. Green, Wausau, Wis., to Buell A. Waterman, and by said Buell A. Waterman presented to the county clerk of Marathon county preliminary to and for the purpose of securing a marriage license under the provisions of sec. 2339m, as enacted by ch. 738, laws of 1913. You ask my opinion as to the sufficiency of this certificate and whether the county clerk should issue a marriage license thereon.

The certificate is in the form prescribed by the statute except that the following clause is added thereto, to wit: “Wasserman test not applied in accordance with opinion of attorney-general.” I have heretofore ruled in an opinion rendered to Dr. C. A. Harper, secretary of the state board of health, under date of Dec. 22, 1913, that ch. 738, laws of 1913, neither contemplates nor requires the application of the Wasserman test on the part of physicians making an examination for the purpose of issuing the certificate of good health provided for in said chapter. I have also ruled, in an opinion rendered to Harry E. Carthew, district attorney, Lancaster, Wis., under date of Jan. 5, 1914, that this certificate must be in the form prescribed by the statute.

January 6, 1914.
In the form in which this certificate is presented I must hold that it is not in the form prescribed by the statute and that the county clerk should not issue a license thereon.

In this connection, I may suggest that the clause added to the certificate above quoted, seems to me quite superfluous and wholly unnecessary, if, as I suspect, it was added for the purpose of saving the doctor from the charge of having certified falsely. The situation is just this: It is the duty of the attorney-general to interpret the law for the guidance of the administrative officers of the state. In the performance of such duty he has interpreted ch. 738 to require only the application of such “recognized clinical and laboratory tests of scientific search,” as are at the command of the ordinary licensed practicing physicians of the state. He has expressly stated that the law neither contemplates nor requires the application of the so-called Wasserman or other similar highly scientific tests. Certainly, if there is any purpose at all in the provision of law making it the duty of the attorney-general to advise the administrative officers, it must operate to relieve any officer of any imputation of malitia who follows the advice of the attorney-general. If those connected with the administration of this law act in conformity with the advice and ruling of the attorney-general, they cannot be charged with bad faith, much less criminal intent, nor will the state attempt or permit criminal prosecution of any one for having done that which was advised by the principal law officer of the state.

No matter what the private opinion of any physician may be as to the interpretation of this law, he should not set his interpretation up against that of the attorney-general. His duty in connection with the law is a public duty and if he perform that duty as directed and advised by the attorney-general he will be fully protected from all public consequences.

Under these circumstances, and upon the foregoing considerations, it is wholly unnecessary that physicians should introduce into these certificates gratuitous expressions concerning the Wasserman test. Such test not being required by the law, it is superfluous to negative its use in making the certificate. The form of certificate, coupled with the interpretation of the attorney-general, implies that the Wasserman test was not applied.
If I have said more than necessary to answer your question, it is for the purpose of promoting an understanding of the law and its requirements, to the end that it may be administered in harmony with its real spirit and purpose.

Marriage—County Judge—Under sec. 2339g a county judge has no power to dispense with a marriage license.

STANLEY G. DUNWIDDIE,  
District Attorney,  
Janesville, Wis.

In your favor of Feb. 10th you state that: “We have had two cases in this county recently arising under ch. 64, Stats. In one the boy was under eighteen and in the other the girl under fifteen,” and you ask: “Under sec. 2339g could the county judge marry the parties, notwithstanding the provisions with regard to age found in sec. 2329?”

Sec. 2329 provides:

“Every male person who shall have attained the full age of eighteen years and every female who shall have attained the full age of fifteen years shall be capable in law of contracting marriage, if otherwise competent.”

This statute has been construed to abrogate the common law rule as to the ages of consent, and thus to prohibit the marriage of persons under the prescribed ages. Our supreme court has also held that such marriage is not an absolute nullity, but is subject to be annulled under sec. 2351, Stats: Elliot v. Elliot, 77 Wis. 634, 640, 641; Elliot v. Elliot, 81 Wis. 295, 299; State v. Cone, 86 Wis. 498, 500.

Subsequent to these decisions our present marriage license law was enacted, sec. 2339b of which requires the applicant for a license to “sign and verify a statement in the presence of two subscribing witnesses that the parties applying for the license are of legal age,” etc. It is thus impossible for persons under legal age to obtain a license.

Sec. 2339a provides that the license must be obtained not less than five days previous to the marriage.

Sec. 2339g authorizes any county judge, court of record or presiding judge thereof, in his discretion, and upon
satisfactory evidence that certain circumstances exist, to
"authorize the marriage without the delay of five days
after the issuing of such license." Prior to its amendment
by ch. 324, laws of 1913, this section provided that the
county judge, etc., might "authorize the marriage without
such license, or the delay of five days after the issuing of
such license." The change was evidently made so as to
require a license to be obtained for every marriage, and I
find nothing in the section, as it now stands, which can be
said to authorize the judge or court to dispense with a
license or with any of the prerequisites to its issuance.
Quite plainly, such was not the legislative intent.

Furthermore, the specification of the circumstances upon
proof of which the county judge may authorize the marriage
without delay seems to negative his right to so authorize it
for any other reasons.

I am, therefore, of the opinion that the county judge has
no power to marry parties without a license first obtained
from the county clerk, and that no one has the power to
issue such a license where the parties are under the legal
age.

\[Marriage—Licenses to Marry\]—A man charged with sedu-
duction or bastardy must obtain a license to marry like any
other man.

Sec. 2339g does not authorize the county judge to dis-
pense with a license, which can be issued only on presenting a
physician’s certificate.

March 3, 1914.

Newton W. Evans,
District Attorney,
Oconomowoc, Wis.

In your favor of March 2nd you ask my opinion as to
whether it is necessary or compulsory that a man pass an
examination in accordance with the new eugenic law where
he is under arrest charged with seduction or bastardy, and
also whether under such circumstances the court can grant
a special dispensation for the parties to get married without
requiring the medical examination provided for before pro-
curing a marriage license.
Sec. 2339g provides that any county judge, court of record or presiding judge thereof, in his discretion, and upon satisfactory evidence that certain circumstances exist, may "authorize the marriage without the delay of five days after the issuing of such license." Prior to its amendment by ch. 324, laws of 1913, this section provided that the county judge, etc., might "authorize the marriage without such license, or the delay of five days after the issuing of such license." The change was evidently made so as to require a license to be obtained for every marriage, and I find nothing in the section, as it now stands, which can be said to authorize the judge or court to dispense with a license or with any of the prerequisites to its issuance. Quite plainly, such was not the legislative intent.

While Judge Eschweiler has held that the so-called eugenic law is unconstitutional, it seems that until the supreme court has so held it is the duty of a county clerk to treat the law as valid and therefore to require a physician's certificate before issuing a marriage license.

No exceptions are provided for by the marriage license statute, and I think that none can be read into it. It follows that a defendant charged with seduction or bastardy must, in case he desires to marry, comply with the statutes requiring a license as well as any other person.

Marriage and Divorce—Sentence of imprisonment as dissolution of marriage or cause for divorce.

May 7, 1914.

JOHN G. SALSMAN,
Asst. Adjutant General.

I have your letter of the 6th inst. asking for an official opinion as to "whether under the laws of this state a sentence to prison for over three years will operate as an absolute divorce or whether it is necessary that the wife go through the process of proceedings in court, using the sentence to prison as cause." You set forth in your letter the decision of the commissioner of pensions, advising that a claim for widow's pension is rejected "on the ground that claimant is not the legal widow of the soldier, being divorced from him
in accordance with sec. 2355, Stats." You suggest that, by "sec. 2355," sec. 2356 is probably intended.

You do not state the date or time at which the sentence of imprisonment was imposed, nor the term for which the convicted was sentenced.

Sec. 2355, Stats., 1898, existed and was in force in this state in the following form from 1858 down to the time of its repeal by ch. 323, laws of 1909, published and effective June 11, 1909.

"Section 2355. When either party shall be sentenced to imprisonment for life the marriage shall be thereby absolutely dissolved without any judgment of divorce or other legal process, and no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights."

If, in the case to which you refer, the soldier was convicted and sentenced to imprisonment for life during the period while this statute was in force, the passing of sentence operated as an absolute dissolution of the marriage relation. From that date the wife no longer had any rights or obligations as such and was not after his death, in contemplation of law, his widow. If the facts of the case brought it under this statute the construction placed by the commissioner of pensions upon this statute is correct.

If, however, the sentence was one for a term of years or in any form other than imprisonment for life, this statute would not apply. Under sec. 2356, to which you refer and which continues and for many years has been in force in substantially the present form, a sentence of imprisonment for three years or more is a cause upon which an absolute divorce may be granted. This sec., so far as material here, provides:

"Section 2356. A divorce from the bond of matrimony may be adjudged for either of the following causes:

* * * *

3. When either party, subsequent to the marriage, has been sentenced to imprisonment for three years or more; and no pardon granted after a divorce for that cause shall restore the party sentenced to his or her conjugal rights."

If the sentence of imprisonment in the case to which you refer is not a sentence "to imprisonment for life," but only "to imprisonment for three years or more," then the passing of such sentence did not operate in any way to affect the conjugal rights of either the husband or wife, but merely
constituted a cause for divorce. Unless the wife procured, by
a decree of court in divorce proceedings, a divorce from the
bond of matrimony, she retained, notwithstanding the con-
viction and sentence of her husband, all of her conjugal
rights in the law, and upon his death she became his lawful
widow, entitled to all of her rights as such under the laws of
this state.

Marriage—Marriage License—A resident of this state
may marry a girl, a resident of Minnesota, in that state,
without obtaining the physician's certificate of health pro-
vided for by sec. 2339m, Stats., unless such resident goes
outside the state to evade the provisions of the statute.

Clive J. Strang,
District Attorney,
Grantsburg, Wis.

In your favor of May 19th you state that a resident
of your county is intending to marry a Minnesota girl in
the near future and that he claims that he is not compelled
to have a certificate provided for by sec. 2339m, Stats.,
and you ask my opinion as to whether that section applies
to the case of a man from this state marrying a girl that is a
resident of Minnesota when the marriage is to take place
in Minnesota and the license is to be procured there.

Sec. 2339m, Stats., makes the presentation of a physician's
certificate a prerequisite to the issuance of a marriage
license and can, of course, have no application where such
license is not issued in this state. Its only application to
marriages performed outside this state is in case a resident
of this state goes into another state with intent to evade
the provisions of sec. 2339m. Unless there is such an intent
no physician's certificate need be obtained under the cir-
cumstances stated in your letter.
Marriage—License—A county judge may authorize a marriage without the delay of five days after the issuance of the license at the request of parent or parents or guardian.

June 5, 1914.

STANLEY G. DUNWIDDIE,

District Attorney,
Janesville, Wis.

You have submitted to this department the question raised by Judge Fifield of your county court concerning the construction of sec. 2339g, Stats. Said section provides in part as follows:

"Upon application of either of the parties to a proposed marriage, any county judge, court of record or presiding judge thereof, in his discretion, upon satisfactory evidence being presented that either of the parties to the proposed marriage is dangerously ill, such illness being liable to result in death, or that the female is pregnant with child, or at the request of the parent or parents or guardian, if any, of the female, by order may authorize the marriage without the delay of five days after the issuing of such license."

Judge Fifield raises the question as to what cause must be shown under the provision, "at the request of the parent or guardian of the female," or whether it is left to the discretion of the court.

In answer to this question I will say that it is not necessary to show any cause whatever under this provision. The county judge is authorized to make an order authorizing the marriage without delay of five days after the issuing of the license, if the parent or parents or guardian of the female request him to do so. This section reads, omitting the intervening clauses, as follows:

"Courts of record or the presiding judge thereof, in his discretion * * * at the request of the parent or parents or guardian, if any, of the female, by order may authorize the marriage without the delay of five days after the issuing of such license."

The records, of course, should show that the request was made by the parent or parents or guardian and for that reason I would suggest that in all cases the request should be in writing signed by the parent or guardian.
MISCELLANEOUS OPINIONS

Automobiles—A dealer in automobiles is not authorized to use the dealer’s number plates on automobiles for his private use or on those let out for hire.

JOHN S. DONALD,
Secretary of State.

January 13, 1914.

Under date of Jan. 9th you requested an opinion in regard to the question submitted in the first paragraph of the letter therewith enclosed addressed to you and subscribed by Marx Brothers of Cashton, Wisconsin. Said paragraph reads as follows:

“'We note that star numbers are not to be used on cars for livery purpose. Now we do not make a business of doing livery work and don’t want any of it, but there are times in a small town of this size where there is no regular auto livery where we are requested to make a hurry trip and, of course, expect pay for such driving. We do not advertise livery and have only done this to help some one out where they could not get any other means of going. We also have a Reo truck that we use for demonstrating. Occasionally it is used for hauling some freight to the depot and as we are in the piano business it is sometimes used to deliver a piano. In just such cases as mentioned above can you suggest some remedy, as we feel it would be an unjust demand to ask that they be registered separately as there is no one car used in particular for livery or drayage.”

The star numbers referred to are the dealers’ or manufacturers’ numbers on cars.

Under subsec. 1, sec. 1636-48, the secretary of state is authorized to issue to manufacturers of or dealers in automobiles, motor cycles or other similar motor vehicles one certificate of registration containing the name, place of business, address of the applicant and general distinguishing number and also eight official number plates.
Subsec. 2 of said section provides as follows:

"All automobiles, motor cycles, or other motor vehicles owned or controlled by such manufacturer or dealer, except those for his own private use, shall, until sold or let for hire, be regarded as registered under such general distinguishing number, which must be displayed at all times upon such automobiles, motor cycles, or other motor vehicles, while being operated on public highways of this state in the manner herein provided."

Subsec. 3 provides a penalty for a violation. You will notice that the automobile on which the manufacturers or dealers can place the star or dealers’ numbers are those owned or controlled by him "except those for his own private use," and they can be used on such automobiles "until sold or let for hire." In contemplation of this statute a dealer or manufacturer of automobiles is not supposed to use any of the automobiles for his own private use or for hire when he is intending to sell the same to customers. If a dealer or manufacturer intends to let out an automobile for hire or to use one for his own private use, either for his family or his business, such as a piano business, it is necessary for him to have the automobile so used regularly registered. The law as above indicated is very clear on this subject.

You will observe that in subsec. 9, sec. 1636-47, provision is made for transferring the number plate to another automobile in case the automobile which is registered is sold, and that the secretary of state is authorized, upon application and the payment of fifty cents by the applicant, to issue a new certificate of registration for the automobile to which the number plate is transferred.

I am of the opinion that under the wording of the statute as we have it at the present time, a dealer is not authorized to use an automobile for hire without having the same regularly registered and that a dealer’s number on such automobile will not be a protection to the person using it, and that a truck used in the private business must be registered and if the same is sold and another truck used the number plate must be transferred and a new certificate of registration issued by the secretary of state for the automobile to which the number plate is transferred.
Automobiles—An automobile dealer who fails to display a distinguishing number on his automobiles may be prosecuted under sec. 1636-54 as violating sec. 1636-47.

May 20, 1914.

JOHN B. HAGERTY,
District Attorney,
Medford, Wis.

In your letter of May 18th you submit the following:

“What fine may a court impose on an automobile dealer who fails and neglects to display any (distinguishing) number on his automobile if found guilty by the court?”

Sec. 1636-47 in subsec. 1, provides in part 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 or application for the registration of the same shall have been made and forwarded to the secretary of state, accompanied with the requisite fee therefor, in accordance with the provisions of section 1636–47 to section 1636–57, inclusive,” etc.

Sec. 1636-48 provides that every manufacturer or dealer in automobiles may, instead of registering each automobile owned or controlled by him, make application upon a blank furnished by the secretary of state for a general distinguishing number, and that the secretary of state—

“shall issue to the applicant one certificate of registration * * * and shall also issue and deliver to such applicant eight official number plates of such design as said secretary of state shall determine.”

Under sec. 1636-54 a penalty is provided for the violation of the provisions of sec. 1636-47, it being a punishment by a fine of not less than ten dollars and not more than twenty-five dollars. It is true that this does not refer to sec. 1636-48, but it must be remembered that the dealer may instead of registering each automobile, make application for a general distinguishing number and all automobiles controlled by such manufacturer or dealer shall be regarded as registered under the general distinguishing number.

I am, therefore, of the opinion that if a dealer has no distinguishing number on his automobile, he may be prosecuted
as violating the provisions of sec. 1636-47, Stats., and the penalty provided for a violation of said section is applicable. If the manufacturer can show at the trial that he had a general distinguishing number for said automobile and that the same was displayed as required by statute, he will be entitled to an acquittal. The dealer or manufacturer may also be prosecuted under subsec. 7, sec. 1636-48 if said section has not been complied with, and as general rule both subsec. 7 and sec. 1636-47 will be violated if no distinguishing number plate is attached to the automobile.

Barber Licenses—Fees—The state barbers board has no authority to issue a license for less than the statutory fee. A license issued for less than the prescribed fee is void.

Feb. 26, 1914.

MERT J. BRENNAN, Secy.,
State Barbers Board,
Janesville, Wis.

In your letter of the 25th you state that the state barber law, ch. 752, laws of 1913, became effective Aug. 2, 1913. That this law changed the fee for master barber licenses from one to two dollars. That the law provides that “every person receiving any such master’s license between July 1st and Dec. 31st shall pay a fee of two dollars.” That some licenses were issued after Aug. 2, 1913, for the old fee of one dollar.

You ask the following questions:

(1) Is it incumbent upon the board to collect the additional dollar for licenses so issued?

(2) What is the status of such licenses, if the additional dollar is to be collected and payment refused?

(3) What is the proper procedure in case payment is refused?

The board had absolutely no authority to issue any licenses after the law went into effect except upon payment of the full fee required by the statute. Any licenses attempted to be issued by them for less than the amount stated are null and void. State ex rel. Treat v. Hammel, 134 Wis. 61.
If the full fee is not paid immediately the person to whom such license was attempted to be issued should be prosecuted under secs. 1636-28 and 1636-29.

Of course I realize that this was an honest mistake on the part of the board and those to whom such pretended licenses were issued, and for that reason it seems to me the board should notify each one of the persons to whom such a pretended license was issued and give him an opportunity to pay the balance of the fee before bringing any prosecutions.

Barbers Board—Barber’s License—Barber’s license should not be granted by one member of board without an examination of the applicant.

August 19, 1914.

MERT J. BRENNAN, Secy.,
Wisconsin State Barbers Board,
Janesville, Wis.

Under the date of Aug. 17th you inquire whether in cases where a license has been lost or destroyed it is necessary that the applicant furnish an affidavit before a duplicate may be issued. In answer I will say that there is no statutory provision covering such a case. It will, however, be good practice to require an affidavit of such fact before any duplicate licenses are issued.

You also inquire whether, in a case where a barber is eligible for examination and is considered by a member of the board to be a first class workman, it would be lawful to issue to this barber a master barber license without an examination. In answer I will say that such a party will have no trouble in passing the examination and I see no provisions of the law relating to the regulation of barbers which would authorize one member of the board to issue a license arbitrarily.
Barbers Journeyman’s License—A person holding a journeyman’s license can again be given such license at its expiration.

November 17, 1914.

MERT J. BRENNAN, Secy.,
Wisconsin State Barbers Board,
Janesville, Wis.

In your letter of Nov. 16th you submit the following for my opinion:

"Where a journeyman license has expired before the holder thereof has passed the required examination and secured a master barber license what should be done in order that the applicant may continue at the trade? Could the applicant apply for and secure another apprentice license and start over again, or could the journeyman license be renewed for another year?"

Sec. 1636-23 in subsec. 1 provides that the statutes providing for the regulation of barbers shall not be deemed to prohibit any person from serving as apprentice in said trade under a licensed master barber in this state.

Subsec. 2 provides:

"Such apprentice or student shall apply to said board for an apprentice license and upon such application being approved by said board an apprentice license shall be issued permitting such apprentice to practice as an apprentice or student under the instruction of a licensed master barber. No fee shall be received from an apprentice in connection with the apprenticeship license. Said apprentice license shall be valid for a period of two years from the date thereof unless revoked by action of said board. After having practiced the trade for two years under a licensed master barber the said apprentice or student shall be eligible to apply for a journeyman's license and it shall be unlawful for such apprentice or student to practice the trade after the expiration of the apprentice license unless such apprentice or student has applied for and received a journeyman's license or has duly qualified and received a master barber's license."

Sec. 1636-24 provides in part as follows:

"Any person desiring to become a licensed master barber shall first make an application for a journeyman's license and such application shall be accompanied by a fee of one dollar. Upon approval of such application the board shall issue to such person a journeyman's license which shall entitle the
holder thereof to practice as a barber under a master barber for a period of one year from the date of said journeyman’s license and shall also entitle the holder thereof to take one or more examinations provided for in section 1636-22. Said examinations may only be taken during the life of such journeyman’s license.”

It appears from the above statutes that an apprentice license cannot be renewed after its expiration for it provides that it shall be unlawful for such apprentice to practice the trade after the expiration of the apprentice license, unless such apprentice has applied for and received a journeyman’s license or has duly qualified for and received a master barber’s license.

I have been unable to find any provision in the statute prohibiting the issuing of another journeyman’s license at the expiration of the first one granted to any person. Sec. 1636-26, subsec. 1, provides:

“A barber journeyman’s license shall be issued only to such persons as shall show themselves to have studied or practiced the trade for two years as an apprentice under one or more license master barbers,” etc.

It is apparent that any person whose journeyman’s license has expired in this state is able to comply with the conditions here prescribed. I am, therefore, of the opinion that if the person holding a journeyman’s license does not pass the examination during the life of such license, for a master barber’s license, he may apply for and secure another journeyman’s license and that it is not necessary to start at the beginning and first secure an apprentice license before another journeyman’s license can be issued to him.

Black River Falls Relief Committee—Black River Falls relief committee has no power to transfer real estate to the city of Black River Falls for municipal purposes.

November 16, 1914.

Henry Johnson,
State Treasurer.

In your letter of the 11th inst. you state that the Black River Falls relief committee is about to wind up its affairs;
that it has some real estate property on hand consisting of certain pieces of land on which there is a house; that it has tried to sell this property and convert it into cash, but it has not been able to get a satisfactory price for the same; and the fact that the house is not located in a very favorable residence section of the city is the reason that the committee finds difficulty in selling the property; that the house itself is probably worth about $1800 and that you consider the whole property worth $2700.

You inquire whether the committee as trustee for this property has the legal right to turn this property over to the city.

The Black River Falls relief committee was appointed by the governor at the time of the great flood in the city of Black River Falls. Under ch. 13 and 21, laws of special session 1914, appropriations were made for the construction of dams, dikes, retaining walls and other works for reclaiming and protecting swamp and overflow lands in and adjacent to the city of Black River Falls. The money was appropriated to the Black River Falls relief committee, and certain duties of said committee specifically prescribed.

I find no provision in said ch. 13 and 21 which expressly or by fair implication authorizes this committee to turn over real property to the city of Black River Falls for municipal purposes. This committee has no other powers than those expressly granted and those which can be fairly implied from the powers expressly granted. You are, therefore, advised that the said committee has no legal right to turn this property over to the city of Black River Falls.

Black River Falls Relief Committee—Black River Falls relief committee is not authorized to convey real estate to the city of Black River Falls, but the legislature may authorize it to do so.

November 24, 1914.

George F. Cooper, Secy.,
Black River Falls Relief Committee,
Black River Falls, Wis.

In your letter of the 20th inst. you refer to my opinion to Henry Johnson, state treasurer, in which it is held that the
Black River Falls relief committee has no power to turn over to the city of Black River Falls any real estate which came into their possession by reason of the provisions of chs. 13 and 21, laws special session 1912.

You state that in addition to the appropriations received by virtue of said ch. 13 and 21, $12,000 was appropriated by Jackson county and $850 was collected in Chicago by a former resident of Black River Falls for the benefit of the relief work. You say that the land in question was purchased with said money so furnished by Jackson county and the donators in Chicago, besides the appropriations of the legislature. The amount paid for the land in question was $4800. You inquire whether these facts will make any difference in the conclusion arrived at in the opinion to State Treasurer Johnson.

In answer to this I will say that I do not believe that the committee has the power to convey to the city of Black River Falls real estate of which it has title at the present time. The appropriation by Jackson county was not made for the city, but for the improvements to be made to protect the court house; neither were the donations in Chicago made for the purpose of giving to the municipality any real estate or donations. They were simply for the relief work. In order to direct this fund into a different channel the provisions of sec. 1747, Stats., would have to be complied with, but so far as the money derived from the state of Wisconsin is concerned it would be necessary to secure the passage of a bill in the legislature authorizing this committee to transfer the property in question to the city of Black River Falls. Without such authority from the legislature I do not believe the property can be transferred as proposed by your committee.

Contracts—Public Offices—Superintendent of public property advised with reference to bids for coal.

June 23, 1914.

Otto Onstad,
Superintendent of Public Property.

In your communication of the 23rd inst. you enclose a blue print of analysis of bids on coal received and publicly
opened on Wed., June 17, 1914. You call attention to the fact that the bid of the Sunnyside Coal Co. is recommended for acceptance, as well as the fact that this bid is the only one submitted which is contingent upon changes in freight rates.

You ask whether under your form of proposed and general conditions it would be unjust or illegal to award the contract to the Sunnyside Coal Co., whose bid is the only one subject to changes in freight rates.

In advertising for these bids I take it you acted under the provisions of sec. 291, Stats., which reads as follows:

"All materials, supplies, fixtures, apparatus or equipment required to be furnished by the superintendent which are manufactured at the state prison or at any of the other public institutions of the state shall be purchased by the said superintendent from said prison or institution. When such supplies, materials, fixtures, apparatus or equipment cannot be purchased at the state prison or any of the other public institutions of the state and the cost thereof exceeds one hundred dollars, the said superintendent shall in such manner as he shall deem best to secure the attention of probable bidders, invite proposals to furnish the same and shall purchase from the lowest responsible bidder."

It will be observed that this statute is quite general in its terms and does not tie the superintendent of public property down to any manner of advertising for bids for materials or supplies which it is his duty to purchase for the state. He, therefore, may exercise considerable discretion in the manner of advertising for bids as well as prescribing the notice and form thereof.

In the notice to contractors calling for the bids in question, a copy of which you have supplied with your inquiry, I note the following clause:

"The right is reserved to reject any or all bids or to accept any bid considered advantageous to the state of Wisconsin."

In view of this express reservation in your notice to bidders I do not think any person can feel aggrieved if you do accept the bid which appears to be the most advantageous to the state; neither, in my opinion, will any of the rejected bidders acquire any legal claim against the state because of any action you may take in the premises. I presume the objection raised on the part of the other bidders is founded on that
feature of the bid of the Sunnyside Coal Co. providing that their price on coal is "subject to change in freight rates" by amount of such change in either direction. They do, however, quote a price on coal delivered at the heating plant in Madison based on existing freight rates. I think this is a substantial response to the call for bids contained in your proposal and that you would not be subject to criticism or the charge of injustice to other bidders to accept this bid.

I may add as a further reason why you may lawfully exercise your discretion in accepting this bid that no person can sue the state without its consent and that even though the other bidders felt aggrieved or felt that they had any claim against the state it would be impossible for them to enforce the same.

March 21, 1914.

RAILROAD COMMISSION OF WISCONSIN.

I have your request for opinion dated the 18th instant, in which you state:

"Under ch. 302, P. & L. laws, 1864, the Willow River Dam Co. was incorporated and 'authorized and empowered to construct the dam across the main Willow River at, near or about 80 rods above the Willow River Falls, in the town of St. Joseph in St. Croix county, Wis., for the purpose of the driving of logs and other timber on said Willow river; and to aid further in driving the same, to also construct a dam for the same purpose at the head of Willow river in township thirty-two (32) range fifteen (15), and to keep up and maintain both of the said dams for a term of twelve years.'

"The Willow River Dam Co. constructed said dams and maintained the same until about 1869 when it disposed of its interests therein to Christian Burkhardt."

"Ch. 361, P. & L. Laws, 1869, provides that 'Christian Buckhardt, his heirs and assigns, if he or they are or shall become the owner or owners of, or entitled to the use of the
dam constructed under the provisions of ch. 302, P. & L. laws 1864, at, near or about 200 rods from the Willow River Falls, may within two years from the passage of this act erect a flouring mill or other machinery at or near said dam on his or their land, and he or they are hereby authorized to keep up and forever maintain said dam to the height of twenty-one feet above low water point of said river and use the water supplied thereby for said mill and for other machinery.' By section two of said ch. 361, 'the dam is made subject to all the provisions of ch. 56, Stats., entitled "Mills and Mill Dams."

"It will be observed there is a typographical error in the printing of the name Burkhardt in said ch. 361.

"By ch. 239, P. & L. laws, 1871, Christian Burkhardt is 'authorized to keep up and forever maintain the dam now kept up, maintained and used by him on his land in operating his flour mill and sawmill at or near about two hundred rods from the Willow River Falls, the town of St. Joseph, county of St. Croix.'

"The dam first mentioned in ch. 302, P. & L. laws, 1864, and referred to in ch. 361, P. & L. laws, 1869, and ch. 239, P. & L. laws, 1871, was actually constructed about 900 feet north of Willow River Falls. Mr. Burkhardt now proposes to construct a new dam at the falls to take the place of such existing dam."

You ask to be advised whether, in order to construct said new dam, the owner is required to obtain the authority of the commission, as provided in ch. 755, laws 1913.

Ch. 755, laws 1913, is now incorporated as secs. 1596-50 to 1596-70, Stats. Subsec. 1, sec. 1596-59, Stats., provides:

"No person, firm, association of individuals, corporation, or municipality shall conduct, maintain, operate, or use any dam in or across any meandered or nonmeandered stream, navigable in fact or law in this state, from and after six months after the passage and publication of this chapter, without having authority of law, or without having legislative permission heretofore granted, or without obtaining a franchise as hereinafter provided, authorizing such maintenance, operation, and use; but this section shall not apply to dams constructed in or across nonmeandered streams prior to July 13, 1911."

Your question is, therefore, whether the dam in this case is one constructed under "legislative permission heretofore granted" at the time of the passage of ch. 755, laws 1913. I take it there is no question but that the authority conferred by ch. 302, P. & L. Laws, 1864, ch. 361, P. & L.
Laws, 1869, and ch. 239, P. & L. Laws, 1871, includes the power to maintain the dam therein authorized to be constructed, and that such authority to so maintain such dam would include the power to replace the old dam by a new dam of the same height and at the same location at any time when that should prove to be the practicable and expedient method of maintenance, assuming, of course, that there had been no abandonment of the old dam so as to work a forfeiture of the franchise.

I take it that the typographical error in spelling the name of Christian Burkhardt in the enactment of ch. 361, P. & L. Laws, 1869, raises no question as to the identity of the person intended to be referred to by that act. A mere mistake by the legislature in the name used in conferring a franchise or passing a franchise law will not affect the rights conferred, if, from the context and the circumstances, the person or corporation meant can be identified. Madison, Watertown & Milwaukee Plankroad Co. v. Reynolds, 3 Wis. 287.

As I understand your inquiry, the only question presenting any difficulty is whether the dam constructed by the Willow River Dam Co., subsequent to the passage of ch. 302, P. & L. Laws, 1864, and by that company conveyed to Christian Burkhardt in 1869, and since maintained by him, and which dam was actually so constructed and maintained at a point 900 feet north of Willow River Falls, may be held to be the dam authorized to be constructed and maintained by the several private acts referred to.

It will be observed that the location of the dam authorized by ch. 302, P. & L. Laws, 1864, was a dam across Willow River “at, near or about 80 rods above the Willow River Falls.” The dam, the franchise for which is confirmed to Christian Burkhardt by ch. 361, P. & L. Laws, 1869, was by that act located “at, near or about 200 rods from the Willow River Falls.” By ch. 239, P. & L. Laws, 1871, Burkhardt is authorized to maintain “the dam now kept up, maintained and used by him on his land * * * at or near about 200 rods from the Willow River Falls.”

It will be observed that the language used to indicate the location of the dam, authority to maintain which is granted and confirmed by these several acts of the legislature, is studiedly indefinite, “at, near or about 80 rods
above” the falls; “at, near or about 200 rods from” the falls, and “at or near about 200 rods from” the falls.

The words, “at,” “near” and “about,” are all words of indefinite, uncertain meaning, depending upon the context in connection with which they are used. The use of the word “about” gives a margin for a moderate excess in or diminution in the quantity or measure used and negatives the idea that exact precision is intended. 1 Cyc, 196-197.

The use of such forms of expression shows that the distance was estimated and not measured. Mt. Pleasant Coal Co. v. Del. L. & W. R. Co., 50 Atl. 251, 200 Pa. 434.

In a land description the expression “at or about” the head of a certain stream was held sufficiently accurate, although it might extend a few rods either way from the place intended. State v. Coleman, 13 N. J. L. 98.

Similarly, the word “near,” when used to designate place or location, is a relative term and will permit greater or less variation, according to the circumstances of the case. When used in fixing the location of a railroad terminus, a variation of 2500 feet is permissible. Fall River Iron Works Co. v. Old Colony & F. R. Co., 87 Mass. 221, 227.

It has been held, also, that a railroad touching a point within two and one-half miles of a town was “near” the town, within the conditions of a stock subscription by the town to the proposed railroad. Barrett v. Schuyler County Court, 44 Mo. 197, 202, and, in another similar case, nine miles was held “near.” Kirkbride v. Lafayette County, 108 U. S. 208.

The phrase, “at or near,” in designating the location of a railroad terminus, has been held to permit a variance of one and one-half miles. Appeal of Parke, 64 Pa. 137, 441.

While the word “at,” used alone, or the expression, “at or near” in the charter designation of the location of a bridge would not permit so great a variation as the difference between 900 feet and 200 rods (State v. Old Town Bridge Co., 26 Atl. 947, 950, 85 Me. 17), the use of the expression “at or near about” would seem to import somewhat more of the idea that the distance indicated was intended only as a very rough approximation, and that a very considerable latitude of variation was intended to be permitted.

Moreover, it would seem that a greater variance in location might properly be permitted as to a mill dam than would be
permitted, for example, in the case of a bridge used for purposes of public travel.

Assuming that the dam presently existing could be shown to have been the dam actually "kept up, maintained and used by" Christian Burkhardt at the time of the passage of ch. 239, P. & L. Laws, 1871, and the dam therein referred to, I am of the opinion that the location described in that act would be construed consistently with the actual location and that the indefinite language would be held to permit in that case a variation from 200 rods to 900 feet in the distance of the location of the dam from the falls.

Furthermore, the intent of the legislature being plain upon the face of the act to authorize and confirm to Christian Burkhardt and his heirs the right to maintain the dam which he then maintained, a variance in the description of the location would not be allowed to defeat the grant, especially when it appears from the language used that the description was intended only as a rough approximation of the actual location.

Upon the assumption, and you do not state the facts upon those points, that the present claim, which it is proposed to re-construct, is the dam which existed in 1871 and at the then location, and that there has been no forfeiture of the rights conferred by the act of 1871 and the prior acts by abandonment or non-user, I am of the opinion that the owner thereof has the right to re-construct or otherwise maintain said dam without obtaining a license therefor under the provisions of ch. 755, laws 1913.

_Dams—Franchise_—A franchise to erect and maintain a dam 21 feet high at or about near 200 rods from a given point or to maintain a dam theretofore maintained 900 feet from said point does not authorize the construction at said point of a dam with a 92-foot head.

March 26, 1914.

**RAILROAD COMMISSION OF WISCONSIN.**

I have your favor of the 23d inst. in which you refer to my opinion of the 21st instant in reference to the franchise of one Christian Burkhardt to maintain a dam at or near Willow
River Falls, St. Croix county. Your letter of the 23d inst. explains the situation more fully than I had gathered it from your first inquiry. My opinion was that, under the facts disclosed upon your request for opinion, Christian Burkhardt has a right, without obtaining a franchise or license therefor, to erect and maintain a dam upon the site of the dam now and heretofore maintained by him, as being within the right given him by the several acts of the legislature, referred to, to maintain such dam.

Upon your letter of March 23d it appears, however, that such is not the question or not all of the question to which you desire an answer. It now appears that it is not proposed to erect this dam upon the site of the existing dam, but right at the Willow River Falls, which is some 900 feet from the site of the existing dam, and it further appears that it is proposed to erect such new dam so as to produce a head of approximately 92 feet. It is clear that such proposed new dam would not be at the location or even approximately at the location specified by ch. 302, P. & L. laws 1864; ch. 361, P. & L. laws 1869; or ch. 239, P. & L. laws 1871.

Nor would he be maintaining the dam “maintained and used” by Christian Burkhardt under the terms of ch. 239, P. & L. laws 1871. Moreover, unless it is made to appear that the dam being maintained by Christian Burkhardt at the time of the passage of the act last named was of a greater height, it would seem that the height of the dam which Christian Burkhardt is authorized to maintain is limited by ch. 361, P. & L. laws 1869, to twenty-one feet.

Even though it were made to appear that, at the time of the passage of ch. 239, P. & L. laws 1871, Christian Burkhardt maintained said dam at a greater height than twenty-one feet, contrary to the provisions of ch. 361, P. & L. laws 1869, there would be a grave doubt as to whether the provisions of ch. 239, P. & L. Laws 1871, would be construed as authorizing the maintenance of said dam at any greater height than that specified in ch. 361, P. & L. laws 1869. The maintenance of a dam lawfully authorized but at a height greater than that authorized in the franchise, is, as to such excess, an unlawful usurpation. State v. Norcross, 132 Wis. 534.

While, therefore, Christian Burkhardt has a franchise to maintain a dam on the site of the dam heretofore maintained
by him and to the height of twenty-one feet, and possibly to a greater height, if he actually maintained such dam to such greater height at the time of the passage of ch. 239, P. & L. laws 1871, this is not, in my opinion, a franchise to erect and maintain another dam at a distance of some 900 feet from the old dam and to maintain a head of ninety-two feet. To erect and maintain such a dam, lawful authority therefor should be obtained under the provisions of ch. 755, laws 1913.

Labor—State Employees—A day’s work for teamster on a farm owned by the state is not limited to eight hours.

September 30, 1914.

Magnus Firth, Steward,
Wisconsin Home for Feeble-Minded,
Chippewa Falls, Wis.

In your letter of Sept. 29th, you inquire whether there is any statute governing the number of hours that men shall work on a farm when the farm is owned by the state. You say that the teamsters who work on this farm say that eight hours constitute a day’s work. You inquire whether this is correct.

In answer I will say that I am not aware of any statute which limits a day’s work to eight hours on a farm owned by the state. Sec. 1729, Stats., provides as follows:

“In all engagements to labor in any manufacturing or mechanical business, where there is no express contract to the contrary, a day’s work shall consist of eight hours and all engagements or contracts for labor in such cases shall be so construed, but this shall not apply to any contract for labor by the week, month or year.”

Sec. 1729m provides:

“1. 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 a 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
their contracts shall be permitted to work more than eight hours in any one calendar day, except in case of extraordinary emergencies.

“2. The phrase ‘extraordinary emergencies’ as used in this section shall mean and include only such as grow out of the necessity of protecting property or human life when endangered by reason of an attack by the public enemy or endangered from fire, flood, or storm.

“3. This section shall apply only to such work as is actually performed on the premises on which such buildings or works are being erected, constructed, remodeled or repaired.”

This section only applies to “public buildings or works” which are erected, constructed, remodeled or repaired and it is not broad enough to include work performed on a farm; neither is it broad enough to include teamsters who work on a farm.

I know of no other statute relative to this matter and your question must, therefore, be answered in the negative.

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Licenses—Sale of Concentrated Feeding Stuffs—License to sell concentrated feeding stuffs under secs. 1494-11 to 1494-18, Stats., is not transferable. Payment of license fee by one person will not protect another person succeeding to the same business.

March 17, 1914.

W. H. Strowd,
Agricultural Experiment Station, U. W.

I have your request for opinion under date of the 12th inst., in which you ask to be advised whether a license to sell concentrated commercial feeding stuffs is transferable under the following conditions: A corporation holding a license issued by the state under the provisions of secs. 1494-11 to 1494-18, Stats., is about to dissolve. One of the incorporators expects to take over and continue the business. May he do so and operate under an assignment of the license heretofore issued to the corporation without obtaining a license in his own name?

The statute, sec. 1494-14, provides:

“Each manufacturer, importer, agent or seller of any concentrated commercial feeding stuffs, shall pay annually to the director of the Wisconsin agricultural experiment
station a license fee of twenty-five dollars. Whenever a manufacturer, importer, agent or seller of concentrated commercial feeding stuffs desires at any time to sell such material and has not paid the license fee therefor in the preceding month of December, as required by this section, he shall pay the license fee prescribed herein before making any such sale."

And, in sec. 1494-16:

"Any manufacturer, importer or person who shall sell, offer or expose for sale or distribution in this state, any concentrated commercial feeding stuff, without complying with the requirements of sections 1494-11 to 1494-18, inclusive, or any feeding stuff which contains substantially a smaller percentage of protein or fat, or both, than are certified to be contained, shall, on conviction in a court of competent jurisdiction, be fined * * * ."

It will be observed that the language of the statute is personal. "Each manufacturer, importer, agent or seller" shall pay the license fee, and "Any manufacturer, importer or person who shall sell" without complying with the law shall, on conviction, be fined. The license or certificate in such a case is merely evidence that the holder has paid the license fee and complied with the other conditions of the law prerequisite to the lawful selling of such feeding stuffs. It is not expressly provided for in the statute. But the clear implication of the statute is that a person paying such fee becomes a licensee, licensed upon complying with the other provisions of the law to engage in this business in this state.

The statute provides that persons selling such feeding stuffs shall furnish the purchaser a statement of the contents in proteins, fats, etc., and also provides that a copy of the statement and samples of the feeding stuffs shall be furnished to the director of the agricultural experiment station for analysis, the result of such analysis to be published from time to time in bulletin form. It would seem that such publications, to be effective for the purpose intended, that is, for the purpose of advising the public as to the character and quality of feeding stuffs sold as such by various persons, should contain the name of the manufacturer, dealer or person selling the same for purposes of identification. In this view of the matter a license is, therefore, personal to the person who pays the license fee and who, upon demand,
submits samples of his feeding stuffs for examination and analysis.

The statute contains no provision authorizing an assignment or transfer of the license or privilege of selling concentrated feeding stuffs. In *State v. Bayne*, 100 Wis. 35, it was held that one who purported to sell liquor under a license originally issued to another, but transferred and assigned to him, was lawfully convicted of selling liquor without a license. The court said in the course of the opinion:

"The statutes further provide that if any person shall sell liquors, "without first having obtained a license or permit therefore, as required by this chapter (ch. 66), he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished therefore," etc. There is no pretense that the defendant had obtained any license as required by that chapter." (p. 38.)

The court also cites and relies upon the common law rule that a license, being a matter of special confidence and trust in the licensee, is not assignable at common law. While this case dealt with a liquor license, as to which there are reasons for holding the same unassignable which would not obtain as to a license of the kind here under consideration, yet I am inclined to be of the opinion that, under the language of these statutes, the license to sell feeding stuffs is so far personal that it comes within the common law rule and, in the absence of an express provision in the statute to that effect, it is not assignable. The application of this rule is not confined to liquor licenses, but is general. 25 Cyc. 625, and cases cited, n. 52.

The statute, of course, contemplates that, in general, the license fee of $25.00 for the sale of feeding stuffs shall be paid in the month of Dec., and shall protect the licensee for the succeeding year. But it does not contemplate, except as to express provision with reference to agents of the licensee, that such license shall protect any other person. The statute, moreover, expressly provides that, whenever any person desires to sell such feeding stuffs and has not paid the license fee therefor in the preceding Dec., he shall pay it before making any such sale. It thus contemplates that in such a case, and which is precisely the case here (if the license is not assignable), one who has not paid the license fee in the month of Dec., i. e., in time to have the benefit thereof for a
full license year, shall pay the license fee before making such sale and for whatever portion of the license year remains. Upon the foregoing, I am of the opinion that such license is not assignable and that the regular license fee should be paid by the person expecting to continue such business before undertaking to do so.

Pharmacists—Physicians—License—A practicing physician is not authorized to run a drug store without complying with the pharmacy law.

Edward Williams, Secy.,
State Board of Pharmacy,
Madison, Wis.

In your letter of Nov. 20th you call my attention to sec. 1409g, Stats., and you say that a certain practicing physician in the city of Mellen, Wis., who is not a registered pharmacist, is the owner and proprietor of a pharmacy known as the Red Cross Drug Store; that several complaints have been made to the board of pharmacy, charging that the said drug store was being conducted for several weeks at a time without a registered pharmacist being in charge; that you have letters from the said physician admitting the correctness of the charge. You state that the board of pharmacy has always taken the position that subsec. 5, sec. 1409g, applies exclusively to the furnishing of medicine or poisons by practicing physicians which they may have prescribed for their patients as the result of a diagnosis of a particular case, and that the said subsection would not render lawful the sale of drugs, medicines or poisons indiscriminately nor would it render lawful the institution of a pharmacy, store or shop for such purpose. You desire an opinion for the board of pharmacy as to whether the physician in question is violating sec. 1409g.

Subsec. 1, sec. 1409g provides:

"Any person who shall retail, compound or dispense or permit to be retailed, compounded or dispensed drugs, medicines or poisons, except paris green, put in packages labeled 'paris green, poison,' or institute or conduct any pharmacy, store or shop for retailing, compounding or dispensing drugs, medicines or poisons in any town, city or
village having five hundred or more inhabitants, unless such person shall be a registered pharmacist, or shall employ and place in charge of such pharmacy, store or shop a registered pharmacist, shall forfeit fifty dollars for each offense."

Subsec. 5, same section, provides:

"Nothing herein shall interfere with any practicing physician when dispensing his own medicines, or supplying his patients with such articles as may seem to him proper."

You will notice that said subsec. 1 not only prohibits any person from retailing, compounding or dispensing drugs, medicines or poisons, but also prohibits the institution or conduct of a pharmacy, store, or shop for retailing, compounding or dispensing drugs, medicines or poisons.

Under the facts submitted by you the question is, can a practicing physician conduct a pharmacy by reason of the fact that he is a practicing physician and without being registered as a pharmacist?

Had the legislature intended to give to the physicians the right to conduct pharmacies without being registered as such they would have simply exempted practicing physicians from the operations of the statute in question. Instead of that they have specifically stated to what extent a practicing physician shall not be interfered with by the statute regulating the practice of pharmacy. "Nothing in said act shall interfere with any practicing physician when dispensing his own medicines, or supplying his patients with such articles as may seem to him proper." This statute was enacted in 1895 in practically the same words as we find them in our present statute. The word "dispense" is defined in Webster's Dictionary—

"To deal out in portions; to distribute; to give."

And in the Century Dictionary & Encyclopedia one of the definitions is—

"To deal or divide out; give forth diffusively or in some general way; practice distribution of, as the sun dispenses heat and light; to dispense charity, medicine," etc.

Only practicing physicians are authorized to dispense their own medicines and physicians who have been regularly licensed but are not practicing their profession cannot dispense their own medicine.
In Michigan the statute regulating the practice of pharmacy contained the following:

"Nothing in this act shall apply to or in any manner interfere with the business of any practicing physician who does not keep open shop for the retailing, dispensing or compounding of medicines and poisons, or prevent him from supplying to his patients such articles as may seem to him proper."

In the case of People v. Moorman, 49 N. W. 263, 265, the supreme court of Michigan said:

"Under this act, if a physician wishes to keep open shop, or, in other words, a drug store, he must come under the same regulations as other persons; and he has no more right than any other person to step into a drug store and to compound or sell drugs, medicines or poisons to one not his patient."

The court held that he may be as competent to do this as a registered pharmacist, but he had no vested right as a physician to do so and that the legislature had the right to require him to be licensed as a pharmacist.

The Kentucky statute regulating the practice of pharmacy contained the following:

"Nothing in this act shall apply to or in any manner interfere with the business of any licensed practicing physician or prevent him from supplying to his patients such articles as may seem to him proper or with his compounding his own prescriptions."

In the case of Commonwealth v. Hovious, 66 S. W. 3, 4, the court said:

"It seems from the opinion of the circuit court that the court was of the opinion, and so adjudged, that the provisions of the last named section of the statute entitles a licensed, practicing physician to keep, sell and compound drugs as a retail druggist, without any other license. The contention of appellant is that the section in question only permits such physician to sell or furnish to or compound drugs for his own patients. It will be seen from the section supra that it does not, simply in general terms, exempt physicians from the provisions of section 2620. We are of the opinion that the true meaning and intent of section 2632 is to allow a physician to compound or sell any kind of drugs to his own patients, but not to fill prescriptions sent to him by others. In other words, if a party applies to a physician for examination and treatment, the physician may furnish
him any kind of drugs that in his judgment is proper, or compound for him any kind of drugs or medicine; but he cannot sell drugs indiscriminately to persons calling for the same, nor compound drugs and sell them indiscriminately to all who may call for them."

In the state of New York the pharmacy act contained the following:

"This article shall not apply to the business of a practitioner of medicine who is not the proprietor of a store for the retailing of drugs, medicine or poisons, and shall not prevent practitioners of medicine from supplying their patients with such articles as they may deem proper, nor shall it apply to persons who sell medicine or poisons at wholesale."

In the case of Suffolk County v. Shaw, 21 App. Div. (N. Y.) 146, 148, the court used the following pertinent language:

"It is the contention of the appellant that the effect of this language only exempts the physician so far as the compounding of drugs and the filling of prescriptions are done in the business or practice of the physician; that it is a personal exemption and does not extend beyond the filling of prescriptions which are prescribed by him in his practice. This is the narrowest possible view to be taken of this language, and we are not inclined to adopt it. The statute is in the nature of a police regulation and has for its primary purpose the protection of the public against incompetency and ignorance in the preparation and compounding of drugs which are required to be dealt out on prescriptions by physicians. The business deals with dangerous compounds, from which serious and tragic results have flowed, and the main purpose is to safeguard in that respect. It is manifest that no such objection can apply to a skilled physician. Indeed, the requirement of the statute seeks for competency and training which will enable those engaged therein to follow the direction of the physician intelligently. * * *

The language of this clause is somewhat ambiguous. The purpose seems, however, to be clear enough to exempt from the operation of the act physicians who are engaged solely in the practice of medicine, and not as the proprietor of a store carrying on the business of merchandising in drugs, medicines or poisons. If the physician is so engaged, he must take out a license. We can scarcely think that it was in the mind of the legislature to prohibit a physician from casually filling a prescription made by another physician and compounding the drugs necessary therefor, under a
penalty of $50, when he might do the same act for himself without violation of the statute. The purpose of this act was not to prohibit physicians from compounding drugs. It seeks to encourage skill and exclude incompetence. There might exist necessity for a physician to fill the prescription made by another physician, and it passes reason to suppose that the legislature intended that such physician should pay a penalty therefor. We have recently held that a similar act is to receive an equitable construction, and this rule applies as well to persons who are exempt from its provisions as to those who violate its terms. (People v. Abraham, 16 App. Div. 58). The entire purpose of this section of the act will be accomplished, as well as the purpose and object of the whole statute by construing this exemption to include physicians except when they are engaged in the business of pharmacy, either for themselves or another. We think it was not intended to prohibit an occasional act of filling a prescription made by another physician."

The above cases are the latest decisions on this question that I have been able to find. Of course, the wording of our statute is different from that of those quoted from other states and passed upon by the above cited authorities, but you will notice that in none of them is a physician authorized to conduct a drug store or pharmacy without being regularly registered or licensed as a druggist or pharmacist.

I believe the correct construction of our statute is the one given to the N. Y. statute by the supreme court of N. Y. I believe a physician who has his own medicine in his office as a practicing physician may occasionally fill a prescription of another physician, but that no person, including a practicing physician, is authorized to engage in the business of pharmacy without complying with the general provisions of the pharmacy law, and that a practicing physician is, of course, authorized to furnish his own medicine to his own patients.
Prisoners—Poor Farm—Workhouse—The poor farm is not a workhouse within contemplation of sec. 697c, but prisoners may be employed there under the provisions of subsec. 2 (a), (d) and (e) of said sec. 697c.

Feb. 20, 1914.

L. Olson Ellis,
District Attorney,
Black River Falls, Wis.

In your letter of the 18th you state that your county has a poor farm with good buildings thereon to house the poor. You ask whether that is a workhouse within the meaning of sec. 697c, Stats., so that violators can be sentenced to hard labor at the poor farm, or if they must be sentenced to the county jail at hard labor. You also ask whether, when sentenced to the county jail at hard labor, persons can be employed on the poor farm for the county.

The workhouse referred to in sec. 697c, Stats., is evidently the same workhouse which, by sec. 697a, the county board may provide for the erection and maintenance of. The poor farm is provided for by sec. 1523, Stats. The two are separate and distinct. The poor farm is not a workhouse within the meaning of sec. 697c, and violators of the law should not be sentenced to hard labor at this poor farm.

Subsec. 2 (a), sec. 697c, provides:

"In any county, having no workhouse, such sentence shall be to the county jail at hard labor. Any person so committed shall be required to do and perform any suitable hard labor for not to exceed ten hours each day, except in case of farm labor, not less than ten hours nor more than twelve hours each day, Sundays and holidays excepted, provided for by the sheriff anywhere within said county. The court sentencing such person shall have power at the time such sentence is imposed or at any time thereafter during the time of such sentence, to direct the kind of labor at which such person shall be employed and the nature of the care and treatment such person shall receive during such sentence. Such direction of such court shall be based upon a reasonable consideration of the health and training of such person and his ability to perform labor of various kinds and the ability of the sheriff to find and furnish various kinds of employment. The county jail of such county is extended to any place within the county where said work is so provided by the sheriff. The sheriff shall at all times have the custody of such convicted person."
Par. (d) of the same subsec. makes it the duty of the sheriff to make contracts in writing for the employment of all such convicted persons where they are not employed in doing work for the county.

Par. (e) of the same subsec. provides in part:

"In case such convicted person has worked for the county, then the sheriff shall, at the end of each week, deliver to the person so designated to receive same an order on said county, payable to the person, for an amount equal to one dollar per day for the number of days that such person has actually worked for such county."

Clearly it is intended that where a person is sentenced to the county jail at hard labor, such labor may be performed for the county, or the sheriff may make contracts with others for the employment by them within the county of such convicted person. If their services are needed upon the poor farm the sheriff may require them to perform the hard labor there. The county jail is extended so as to cover any place within the county at which such person is employed.

_Prisoners_—Under 697c, Stats., the full earnings of a prisoner should be paid to his dependents, without deduction for his board at the jail.

L. Olson Ellis,
_District Attorney,_
Black River Falls, Wis.

In your favor of April 11th you ask:

"Where under ch. 625, laws 1913, one is sentenced to hard labor at the county jail and he is hired out by the sheriff and the wages collected by the sheriff; must all his earnings be turned over to his wife or those dependent upon him, or must his clothing and board bill at the jail be deducted before paid over to his wife or dependents."

Sec. 697c, Stats., as amended by ch. 625, laws 1913, provides that in case a person has been sentenced to the county jail at hard labor, it shall be the duty of the sheriff to make contracts for his employment and for the collection of his earnings and further that it shall be the duty of the sheriff at the end of each week to pay over for the benefit of
the person or persons dependent on the prisoner for support
"a sum equal to the value of the earnings of such person,
collected by him."

The section also provides that:

"* * * In case such convicted person has worked
for the county, then the sheriff shall, at the end of each week,
deliver to the person so designated to receive same an order
on said county, payable to the person, for an amount equal
to one dollar per day for the number of days that such person
has actually worked for such county. * * *

The phrase "a sum equal to the value of the earnings
of such person" is scarcely susceptible of any other interpre-
tation than as meaning the total amount earned by the
convicted man. Had there been an intent that a charge
for the prisoner's board or for any other purpose should be
deducted therefrom, I think that it would have been ex-
pressly so provided. In the absence of such a provision no
construction should be placed on the statute that will,
even in a slight degree, impair the beneficial purpose of
the law to provide for the support of the dependents of a
man convicted of crime out of his earnings.

It was probably necessary in order to secure the efficient
and easy administration of the law to provide that where the
prisoner worked for the county the amount to be paid to
his dependents should be a fixed sum, but I think that the
purpose was where the sheriff made a contract that the
prisoner should work for some one other than the county
that the full amount of the earnings of such prisoner should
be paid over to his dependents.

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Public Accountant—Certificate as certified public ac-
countant not to be issued to persons who have not passed
twenty-third birthday. Candidates may be examined
before attaining twenty-three years of age.

March 16, 1914.

J. B. Tanner, President,
Wisconsin Board of Accountancy.

I have your request for opinion of recent date, in which
you refer to sec. 1636-203, Stats., and ask to be advised:
"First. Are we correct in assuming that we cannot issue a certificate to any person who has not passed the 23rd anniversary of his or her birthday?

"Second. Would it be legal for this board to allow applicants, who are in their 23rd year, to take the examination, and, if successful, to issue certificates subsequent to the 23rd anniversary of their birthday?"

The section of the statute referred to provides, in the first paragraph thereof,

"No certificate as a certified public accountant shall be granted to any person other than a citizen of the United States, or person who has in good faith declared his intention of becoming such citizen, who is over the age of twenty-three years * * * , who shall have successfully passed an examination * * * ."

Answering your first question you are not authorized to grant a certificate to any person who is not over the age of twenty-three years, that is, who has not passed his twenty-third birthday; in other words, until after twenty-three years have elapsed since the date of his birth. The age requirement and the requirement of having passed an examination as prescribed in the statute are separate and distinct requirements. The statute does not in terms require that the candidate shall be over twenty-three years of age at the time of taking or passing such examination, but merely requires that he shall have passed such examination before the certificate may be issued to him.

I see no reason why the statute should be construed to make the age limit applicable to candidates for examination, and I am, therefore, of the opinion that one who is not over twenty-three years of age may take the examination and, if he passes it, may, upon attaining that age, be granted a certificate.
Teachers' Retirement Fund—Teachers employed to teach in public schools have no election as to whether a portion of their salaries shall be withheld and placed in the teachers' retirement fund, sec. 460-8, Stats., being mandatory in that respect.

March 16, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

I have your request for opinion under date of March 10th, in which you ask to be advised, in effect, whether by sec. 460-8, Stats., the salary of a teacher in the public schools of this state is subject to assessment for the teacher's retirement fund without the consent of such teacher.

Subsec. 1 of this section is in mandatory terms and directs that every school board "shall retain on every pay day from the salary of each teacher in their respective schools the amounts herein provided." The second paragraph of the section provides: "Every teacher shall be assessed upon his or her salary as teacher for a period of twenty-five years, as follows:" stating the rates of assessment.

The third paragraph reads:

"In becoming a teacher in said public schools after September 1, 1911, he or she shall be conclusively deemed to undertake and agree to pay such assessments, and to have such assessments deducted from his or her salary as herein provided."

The remaining two paragraphs provide that teachers employed prior to Sept. 1, 1911, i. e., prior to the school year succeeding the passage of this act, which was enacted as ch. 323, laws of 1911, may elect to come under the act for the unexpired period of such prior employment.

It does not appear upon the face of this statute that there is any election for teachers employed subsequent to Sept. 1, 1911. As to all such the terms of the statute are mandatory and the acceptance of such employment is made conclusive of the consent of the teacher to the terms of the act, so far as any such consent may be necessary. This statute has been passed upon by my predecessor in office in an opinion under date of April 23, 1912, to the state treasurer, in which it is held that the law is constitutional (1912 Opinions, p.
139). In this opinion it is assumed that the statute is mandatory and applies regardless of the teacher's consent.

**Towns—Town Meeting—Counties—Action to Quiet Title**—In newly created towns sec. 786 cannot be complied with for the first town meeting, so far as the same relates to ballots to be used. They may elect their officers in any way that they may choose.

A county having a tax title cannot bring action to quiet title.

CLIVE J. STRANG,
District Attorney,
Grantsburg, Wis.

In your letter of Feb. 16th you state that at the last regular term of the circuit court for Burnett county a new town was created under secs. 775a-775e. That this town was created out of parts of two of the old towns. You direct my attention to ch. 666, laws of 1913, providing for the printing by the town clerk of each town of a supply of ballots for the spring election. You inquire who is to see to getting these ballots printed for the election in this new town and who is to call the meeting in such town and give notice to the public of such meeting.

Sec. 786, Stats., provides as follows:

"The first town meeting in any newly organized town shall be held on the day of the annual town meeting next after its organization; but if the inhabitants of any such town shall fail to hold their first town meeting on the day of the annual town meeting any three qualified voters of such town may call a town meeting for such town at any time thereafter by posting up notices thereof at not less than three public places therein at least ten days previous to the holding of such meeting."

Under this provision the first town meeting held in the newly created town in question will be held at the regular time for holding annual town meetings in other towns. It will be held at the place fixed by the circuit court under sec. 775d. Sec. 782 provides that "no notice of holding any annual town meeting need be given."

It is therefore not necessary that any one call said meeting nor that notice of the same be given, but as to your first
question relative to the printing of the ballots I will say that ch. 686, laws of 1913, cannot apply to the first town meeting in a newly incorporated town for the reason that it is impossible to comply with its provisions. There is no person elected to the position of town clerk and the town has not yet been regularly organized. I am of the opinion that ch. 686 does not apply to the first town meeting in newly incorporated towns, but that the electors may meet at the first town meeting and may elect their town officers in any way that they may choose at such meeting.

You also inquire what can be done in towns which are located forty miles from the place where they are to get their printing done if the ballots cannot be printed within five days and returned to them.

My answer to your first question is a complete answer to your second question as the statute does not apply to the first town meeting in towns newly created, but in future town meetings in such towns it will be necessary to do the best that can be done under the circumstances. It would seem to me that it is possible to go forty miles and have tickets printed to be used at a town meeting and return in time for said meeting. The printing of such tickets does not require a great deal of time and it seems to me that it is possible to comply with the law even though the distance is forty miles from the place where the printing can be done.

You also inquire whether the district attorney of a county has a right to bring an action to quiet title in the following case:

"In 1876 and 1877 two tax certificates were issued to our county. In 1878 the county of Burnett gave a quitclaim to a party and assigned the certificates to him. He neglected to take out tax deeds, and now among other defendants, the county is to be made a party defendant, because of the above. Could the owner bring his own action to quiet such title?"

In answer I will say that under sec. 3186, Stats., an action to quiet title can only be brought by a person who has the legal title. The county, under the facts stated by you, has no title to the land whatever and for that reason no action can be brought in the name of the county to quiet title. The owner of such land, if he has a legal title to the same, may bring action to quiet title under sec. 3186, Stats.
OPINIONS RELATING TO MUNICIPAL CORPORATIONS

Municipal Corporations—Village Boards—Village boards have no power to change name of village streets.

January 22, 1914.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

This department is in receipt of your favor of Jan. 15th, in which you submit the following question:

"What power has the village board to change the name of their village street, and what is the regular way of doing it?"

There is no express authority given in the statutes to the village board to change the name of the streets. In sec. 893, subsec. 9, express authority is given:

"To renumber the lots and blocks of the village or any part thereof and to cause a revised and consolidated plat of the same to be recorded in the office of the register of deeds."

The fact that it was considered necessary to give express authority to renumber the lots and blocks, negatives the idea that the village board would have the right to change the name of streets without express authority in the statute.

Under sec. 2261, giving the requirements which are necessary to be complied with in order to entitle a map or a plat to be recorded, subsec. 1, subd. (f), provides that upon the face of the map shall appear "the name given to the tract of land so divided and mapped and of the streets thereon." Thus the statutes expressly provide for the naming of the streets by the one who plats the land.

Under sec. 925-52, subsec. 32, city councils are authorized to change the names of streets within cities. As no authority is given by statute for changing the names of the streets by the village board, it is necessary to come to the conclusion
that the board has no such powers. I know of no way of changing the names of the streets of our villages. Of course, a plat may be vacated and a replat made of any land, under our statutes.

*Municipal Corporations—Public Utilities*—A city furnishing water and electricity to consumers outside its corporate limits is a public utility as to such consumers, so as to be under the control of the railroad commission and under obligation to furnish reasonably adequate service, at reasonable rates, etc.

February 16, 1914.

**RAILROAD COMMISSION OF WISCONSIN.**

In your favor of Feb. 10th you enclose copy of resolution adopted by the common council of the city of Richland Center on Feb. 3, 1914, reading as follows:

"WHEREAS the electric light plant of the city of Richland Center used for generating light and power and also for the pumping of city water, is greatly overloaded and whereas it will help relieve such situation to discontinue the furnishing of electric light, power and water to consumers outside of the incorporated limits of said city, now therefore,

"BE IT RESOLVED by the common council of said city that no electric light, power or city water shall hereafter be furnished to any consumer applying for the same to be used outside of the corporate limits of said city and that from and after the 1st day of May, 1914, said city shall discontinue the furnishing of electric lights, power or city water to all persons now using the same outside the corporate limits of said city, provided however, that if petition be duly made to the common council asking for the annexation of territory outside of the limits of said city, pursuant to sec. 925–17 to 925–21, of the revised statutes of this state and where such light, power or water is now furnished, the common council may authorize the furnishing of light, power and water in the territory to be so annexed.

"BE IT FURTHER RESOLVED that it shall be the duty of the superintendent of the electric light plant to see that the provisions of this resolution are carried out, and

"BE IT FURTHER RESOLVED that the city clerk send a copy of this resolution to the railroad commission of Wisconsin and to each consumer using light, power or water without the incorporated limits of said city."
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You state that the people living outside of the corporate limits of the city have had water and light service for some ten years and you ask me to define the rights and duties of the city in this matter.

The public utilities law, enacted by ch. 499, laws of 1907, defined the term "public utility" as used therein to include every corporation, company, individual, etc., "and every town, village, or city that now or hereafter may own, operate, manage, or control any plant or equipment or any part of a plant or equipment within the state, * * * for the production, transmission, delivery, or furnishing of heat, light, water, or power, either directly or indirectly, to or for the public, * * * .” (Subsec. 1, sec. 1797m-1, Stats.)

Other sections of the law provide that the railroad commission is "vested with power and jurisdiction to supervise and regulate every public utility in this state" (sec. 1797m-2, Stats.); that "every public utility is required to furnish reasonably adequate service and facilities" at "reasonable and just" charges (sec. 1797m-3, Stats.); that upon complaint made or when the commission shall believe that any rate, regulation or service of a public utility is unreasonable, unjustly discriminatory or inadequate, the commission may investigate the same, and after notice and hearing shall order a reasonable rate, regulation or service to be substituted for one found to be unreasonable or inadequate, etc. (secs. 1797m-43 to 1797m-49, Stats.); and that the commission may order improvements and additions to be made to any water, light or power plant owned by a city (sec. 927-19b, Stats.).

The supreme court has said that a city in supplying water to its inhabitants is "acting in a private capacity just as an individual or private corporation would act in doing the same business,” State Journal Printing Co. v. Madison, 148 Wis. 396, 406; and that the words "public utility" in the public utilities law "relate as distinctly to a municipality performing the service, whether 'directly or indirectly to or for the public' as to a private corporation.” Calumet Service Co. v. Chilton, 148 Wis. 334, 367. Under these decisions and the express language of the public utilities law, there can be no doubt but that a municipal public utility is under the same obligation to furnish adequate service at reasonable rates, without discrimination, and is subject to
the orders of the railroad commission just the same as a private corporation public utility.

Nor does it seem that the fact that certain consumers reside outside the corporate limits of a city in any way changes the situation. A city owning its water plant has express statutory authority to supply water “to any adjoining city or village not owning or operating a separate system of water-works, or any of the inhabitants thereof” (sec. 959-47, Stats.). This statute does not in terms include a town or its inhabitants, nor the furnishing of electricity, but sec. 927-11, Stats., provides that “any plant or equipment or any part thereof for the production, transmission, delivery, or furnishing of heat, light, water or power may be constructed or acquired by any town, village or city as herein provided; and such plant may be constructed within or without the corporate limits of such town, village or city” and subsec. 1, sec. 1797m-79, provides that “Any municipality shall have the power * * * to construct and operate a plant and equipment or any part thereof for the production, transmission, delivery, or furnishing of heat, light, water or power.”

It may be that none of these sections are directly applicable to the situation presented at Richland Center, but I am convinced that, even without an express provision authorizing a city to furnish service to consumers outside its corporate limits or making it the duty of such city to continue to furnish them adequate service at reasonable rates without discrimination, such authority and duty are to be found unmistakably written in the public utilities law. That “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, 367.

In that case it was held that the comprehensive language of the definition of a public utility “was plainly designed to cover every conceivable situation of the existence of an industry of the nature mentioned. No room was left for controversies over technical ownership or capacity to own. The purpose was to encompass the physical situation,—to deal with the condition whatever it might be, and the person, natural or artificial, whatever might be the particular relation of the person, or persons, whether that of owner,
operator, manager or controller, and give thereto the status of a public utility.” (148 Wis. 348.)

And it was said further that, if the plaintiff in that case, a private corporation, did not have the requisite corporate capacity to entitle it as a public utility to take an indeterminate permit,” “the company possessed ample power because, by force of the public utility law, the corporate authority was automatically expanded, if necessary, to enable the company to receive the thing given to it for the one surrendered,—the one which it was operating under, regardless of any technical question as to its previous capacity, at the suit of the state, to so operate.” (148 Wis. 349.)

The above quoted language was, of course, used with reference to a private corporation, but it seems to me that it is equally applicable to a municipal corporation, for the legislature has the same power to increase the corporate powers and duties of the latter as it has those of the former. If, as stated in the Calumet Service Co. Case, “the purpose was to encompass the physical situation” and to give the status of a public utility to whatever person, natural or artificial, might be actually engaged in furnishing light, heat, power or water to the public at the time the law was enacted, it seems beyond dispute that the city of Richland Center, which was at that time engaged in furnishing such service to consumers outside of its corporate limits, was, as to such consumers, a public utility with the power to furnish such service and the duty to continue to furnish it at reasonable rates and without discrimination the same as to consumers within its corporate limits.

Of course, there may prove to be upon investigation other facts which show the situation to have been different from that now appearing and as stated in this letter; but as to the following general propositions I think there can be no serious dispute:

1. That a city is a “public utility.”
2. That, as such, it is subject to the control of the railroad commission the same as any private corporation public utility.
3. That it must furnish reasonably adequate service at reasonable rates and without discrimination.
4. That the commission may enforce the performance of such duties by requiring the plant to be made adequate, if necessary, and to prescribe reasonable rates and regulations.

5. That a city has power to furnish water and light service to consumers outside its corporate limits, where it was engaged in such service at the time the public utility law was enacted.

6. That such a city is under obligation to continue furnishing such service to such consumers, at reasonable rates and without discrimination, the same as to consumers within its corporate limits, unless there be factors in the special situation, such as great cost of maintenance or the furnishing of the service or other such reasons, which would justify a discontinuance thereof or the charging of a higher rate therefor.

Municipal Corporations—Taxation—Sec. 925-152 is not applicable to cities not under the general charter law.

John S. Donald,
Secretary of State.

In your favor of Jan. 21st you enclose a letter from Charles R. Prosser, of Seymour, and you request me to give you an opinion on the question submitted by Mr. Prosser.

Prosser states that the city of Seymour is governed under a special charter; that it is a city of the fourth class and that in its charter is a provision authorizing a payment of two per cent to the city treasurer for collection of taxes. He calls attention to ch. 477, laws of 1911, which provides salaries for town, village and city treasurers in lieu of fees, and he inquires whether it is mandatory on the city council to fix the salary for the city treasurer of Seymour or whether it is optional with the city council; and further if the city council is indifferent, whether the electors can compel action, and if so, in what way.

Said ch. 477, laws of 1911, to which he refers, amends sec. 925-152, Stats. This section is part of the general charter law and is not applicable to cities that have not adopted it. As Seymour is under the special charter, the provisions of
ch. 477 do not apply and it is a sufficient answer to his ques-
tions to state that his city being under the special charter
law is not affected by the amendment contained in ch. 477,
laws of 1911.

Municipal Corporations—Schools—The city of Portage
having adopted sec. 925-133 of the general city charter may
issue bonds for building schoolhouses and is not bound by
a provision in its special charter limiting the amount of such
bonds to $5,000.00.

Feb 26, 1914.

C. P. Cary,
State Supt. Public Instruction.

In your favor of February 24th you request my opinion
as to whether the city of Portage has power, under its special
charter, to issue bonds in the sum of sixty-five thousand dollars
for the purpose of erecting common school ward buildings.

Sec. 121, ch. 132, laws 1882, provides in part that "The
council of the city of Portage on the application of the board
of education may borrow money for the erection and com-
pletion of schoolhouses in said city, not exceeding in amount
the sum of five thousand dollars, and may issue the bonds of
said city for payment of the same" etc.

This provision has been a part of the charter of the city
of Portage since 1860. See sec. 5, ch. 216, Private and Local
Laws 1860. It is evidently a portion of the city charter and
in effect to-day except as it may have been modified by the
subsequent legislation hereinafter referred to.

Sec. 942, Stats., provides that "any city or village may
also borrow money and issue its negotiable bonds for any of
the following purposes, viz.: * * * the construction of
school buildings" etc.

Sec. 926-11, Stats., provides that:

"The common council of any city incorporated by and
operating under a special charter may issue bonds, * * *
for the following purposes:

"* * *

"(3) For the erection, construction and completion of
school buildings and the purchase of school sites, * * *"
This latter section has been held to be valid and to be an amendment to the charter of every city included within its terms. *Johnson v. Milwaukee, 88 Wis. 383, 7; Hall v. Madison 128 Wis. 132, 143-4.*

In the Hall case it was held that the city of Madison was authorized by sec. 926-11, Stats., to issue bonds in the sum of two hundred fifty thousand dollars for the erection of a high school, notwithstanding the fact that sec. 21, ch. 295, laws 1861, provided that the common council should have power "to borrow a sum of money not exceeding ten thousand dollars, * * * for the erection of said high school edifice," the court saying:

"As to the $10,000 limitation contained in the act of 1861, the objection is answered by reference to the provisions of sec. 926-11, Stats. 1898. This is a general act passed expressly for the purpose, as its terms clearly express, of giving to all cities operating under special charters the power to issue bonds for certain purposes, among which is 'the erection, construction, and completion of school buildings, and the purchase of school sites.'"

Furthermore, sec. 925-133, Stats., which you state has been expressly adopted by the city of Portage, provides that:

"The council shall have authority to issue bonds for the following purposes only:

"(1) Building schoolhouses and for public libraries.

"* * * *

"(9) * * * provided, that no such bonds shall be issued so that the amount thereof, together with all other indebtedness of the city, shall exceed five per cent of the assessed valuation of the property therein at the last assessment for the state and county taxes previous to the incurring of said indebtedness" etc.

The adoption of this section, of course, operated to supersede such portions of the special charter as were inconsistent therewith, and the decision in the Hall case is clearly to the effect that a provision authorizing the issuance of bonds without other limitation than the five per cent constitutional debt limitation is inconsistent with and supersedes a provision placing some smaller limit on such power.

Sec. 925-133 is, in this respect, stronger than sec. 926-11 for it expressly places a limit on the amount of the bonds that may be issued in that it provides that the amount
thereof together with all other indebtedness of the city must not exceed five per cent of the assessed valuation.

It seems to me that under the decision in the *Hall* case it must necessarily follow that the adoption of sec. 925-133, giving the power to issue bonds for erecting school buildings within the constitutional five per cent limitation, operated to supersede that provision of the special charter which limited the power to issue bonds for that purpose to five thousand dollars.

*Municipal Corporations—Water Works—Elections—Vil-
lages—Where the electors of a village have voted to issue bonds pursuant to secs. 927-11 *et seq. and 942 and 943, to erect a waterworks plant according to certain plans and specifications, the village board may not use the proceeds of the bonds to build a substantially different plant.

March 18, 1914.

Alexander Wiley,
District Attorney,
Chippewa Falls, Wis.

In your favor of March 16th you request my opinion on a question stated as follows:

"On Nov. 8th, for the purpose of issuing bonds for the installation of water works, the village voted upon the question:

"'Shall negotiable coupon bonds of said village be issued to the amount of fifteen thousand dollars for the purpose of purchasing or erecting a water works system in said village, with the necessary pumping machinery, buildings, reservoirs, mains, pipes and other appliances, according to the plans and specifications and estimates of L. G. Arnold, engineer, on file with the village clerk?"

"These plans and specifications call for a well to be about three thousand feet distant in a northwesterly direction from the platted portion of the village. This place was determined upon after more than a year's searching, observation and work of the best engineers to be had, under the direction of president Steele of the village board. By an affirmative vote of the people, the above proposition was passed. Bonds were issued and sold. Now the village board are searching for another supply of water, believing that the same can be found within the village limits, intending, if other water
can be found, to use that as a source for water instead of the place shown by the plans and specifications. The conclusion of the other engineers who were at work before was that no water could be found in that vicinity.

“Now my question is this: Can the village board use the moneys derived from the sale of the bonds for attempting to locate another well, and if they do locate another well, can the plans and specifications be modified and the money used in erecting a water works system as so provided?”

You do not state under what statutory authority the bonds were issued and sold, but I assume the action was taken pursuant to sec. 927-11 et seq. and sec. 942 and 943, Stats. Sec. 926-13 requires an election on the question of issuing bonds for the acquisition or construction of a water works plant, and sec. 927-14 requires that the notice of such election shall state “(1) the purpose thereof; (2) the plant, equipment or part thereof it is proposed to acquire or construct; (3) the proposed manner of payment for the same;” etc.

Sec. 927-15 requires the question to be submitted to the voters “in substantially the following form: Shall (designate plant, equipment or part thereof) be acquired or constructed and mortgage certificates [(and) (or) bonds] be issued therefor?”

Sec. 943 provides that the proposition for the issue of any bonds shall be submitted to the people of the city or village; that the notice of the election shall recite the purpose thereof; and that if a majority of the ballots cast shall be in favor of issuing bonds, the president and clerk of the village, subject to the direction of the board, may issue bonds “for the purpose of raising money for the object stated in the notice of the election.”

Under these sections and especially sec. 927-14, providing that the notice of election shall state the plant, equipment or part thereof, it is proposed to acquire or construct, it seems clear that the village board has no power to divert the proceeds of the bonds from the purpose for which the bonds were voted, or to build any plant substantially different from the plant which the electors voted to issue bonds to construct. The electors having authorized the erection of a water works plant as outlined in certain plans and specifications, the officers of the village quite clearly have no power to disregard such authority and erect a substantially different plant.
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They must, of course, have and exercise a certain discretion as to details, but as to the main features of the proposition there can be no variation, for the voters have authorized the erection of a certain plant and not any plant that may seem best to the village officers. The village board probably has authority in the absence of express direction by the voters to exercise considerable discretion as to constructing water works (see subsec. 29, sec. 893, Stats.), but a vote of the electors was necessary before bonds could be issued and by such vote the electors have restrained the use that may be made of the money received from the proceeds of the bonds, and such money may consequently be lawfully used in no other way.

This general principle is clear enough, but difficulty arises in its application. While it might well be true that in general the expense of determining the proper location of a well is a legitimate part of the expense of erecting a water works plant, it seems to me that under the circumstances stated in your letter the incurring of further expense for that purpose cannot be said to have been authorized by the voters. Under the notice of election and the form of the question voted upon the electors must have understood that the plant, substantially as outlined in the plans and specifications that had been prepared, was the one that they were voting money to erect, and that no part of the money so voted was to be expended for the purpose of determining whether a variation in such plans would be advisable, or for the purpose of preparing further plans or searching for another location for the well. In other words, it seems to me that the expenditure of money, that had been voted for the erection of the plant according to then existing plans and specifications, in the effort to devise a better plan is a substantial variation from the purpose for which the electors voted the bonds. It may be that the general funds of the village may be used for further search for a location for the well, and that if a better location is discovered the village board would have authority to place it in the newly discovered location and vary the plans accordingly; (Neacy v. Milwaukee, 151 Wis. 504, 510,) but I consider even this very doubtful, as it seems to me that under the circumstances here existing, the voters decided to erect the plant according to the plans that had been prepared at the time of the elec-

37–A. G.
tion, which plans provided for the location of the well as a material and important part thereof. But in any case I am convinced that the expenditure of the proceeds of the bonds for the purpose of discovering whether the plans authorized by the voters should not be varied is not permissible.

Municipal Corporations—Elections—Towns—The authority of a committee appointed pursuant to sec. 822, Stats., terminates with the adjournment sine die of the town meeting.

April 23, 1914.

ADOLPH P. LEHNER,
District Attorney,
Oconto Falls, Wis.

In your letter of the 20th you state that at the regular town meeting held on April 7th, last, the town of Chase refused to accept the report of the town clerk. That a resolution was offered and passed instructing the chairman of the meeting to appoint a committee of three to examine the clerk’s books. That this task could not be accomplished on the day of the meeting, which was on the same day adjourned sine die. You ask if this committee has any authority now to act. Also if the adjournment of the town meeting did not also terminate the authority of the committee. You further ask if the authority has not been terminated, what fees, if any, are the members of the committee entitled to. You refer me to sec. 820 and 822, Stats.

It is no part of the duty of the district attorney to advise town officers, and this department is only authorized to advise district attorneys upon matters coming before them in their official capacity. For this reason I have no authority to give you an official opinion upon the questions you ask. Whatever is said herein therefore must be understood as wholly unofficial and given you merely as a matter of personal courtesy.

Sec. 820, Stats., relates to the meeting of the town board of audit and sec. 821 provides for the drawing up of a report by the said board of audit stating in detail the items of account audited and allowed, the nature of each, and the per-
son to whom allowed. Sec. 822 provides that such report shall be produced and publicly read by the town clerk at the next ensuing town meeting. This, of course, is not a report of the clerk but is a report of the town board of audit. I assume, however, that this is the report to which you refer. Sec. 822 further provides:

"And the whole or any portion of such report may be referred, by the order of such meeting, to a committee, whose duty it shall be to examine the same and report thereon to such meeting."

This seems to be a different committee than the one you refer to. You say that the chairman was instructed to appoint a committee to examine the clerk's books. I assume, however, that you really mean the committee provided for by sec. 822. The only authority that can be conferred upon this committee is to examine the report of the town board of audit and report thereon to the meeting by which it is appointed. When that meeting adjourns without day, it ceases to exist, and the authority of the committee so appointed ceases with it. In my opinion the committee has no further authority and the members thereof are not entitled to any fees.

**Municipal Corporations**—A city council can not confer upon the board of public works authority in addition to that conferred by ch. 11, general charter law.

The powers and duties of the board of public works under ch. 11, general charter law, are not the same as those of commissions appointed pursuant to secs. 925-95 to 925-107, Stats.

May 5, 1914.

LEWIS E. GETTLE,

Secretary Railroad Commission.

In your letter of to-day you enclose a letter from James Murray, city attorney of Waupun, and ask for my opinion upon the questions asked by him.

Mr. Murray asks:

"Has the common council of the city of Waupun, authority to confer on the board of public works such authority as is conferred by the enclosed ordinances covering powers and duties of the board of public works?"
I understand that the city of Waupun is a city of the fourth class and is under the general charter law. The powers of the board of public works are fully defined in ch. 11, general charter law, being sec. 925-78 to 925-94, inclusive, Stats. The city council has no power to confer additional duties or authority upon such board.

Mr. Murray also asks:

"Has a board of public works organized under sec. 925-95 the same powers as is conferred on commissions under 925-95 to 925-107?"

The powers of the board of public works are defined in ch. 11, general charter law, while the powers of a commission are given by sec. 925-95e, Stats. The board of public works has not the same powers as has the commission.

The third question asked by him is:

"What authority can be conferred upon boards of public works by resolution or ordinance or council in regard to utility of operating systems?"

The council has no authority to confer powers or duties upon the board of public works but such powers and duties are defined in ch. 11, general charter law.

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**Municipal Corporations—Ordinances—Libraries**—An ordinance accepting a gift for a public library, pursuant to sec. 931a, Stats., need not lie upon the table twenty days before being acted on by the council.

May 9, 1914.

M. S. Dudgeon, Secy.,

*Wisconsin Free Library Commission.*

In your letter of the 7th you state that sec. 931a, Stats., provides that if any gift be offered to any city for a public library such city may obligate itself by an ordinance adopted by a two-thirds vote to levy and collect an annual tax for the support and maintenance of such library. That it further provides that the ordinance shall be subject to the referendum provided for in sec. 39j, Stats. That recently the common council of Black River Falls adopted a resolution accepting a gift for its public library and obligating
itself to levy and collect an annual tax for its support and maintenance. That shortly afterwards a new mayor was elected who makes the contention that this city ordinance accepting the gift and obligating the city must lie on the table for twenty days for action upon it. You ask my opinion as to whether or not there is in the statute any provision requiring such an ordinance to so lie on the table.

I am not aware of any statutory requirement that this ordinance lie upon the table for twenty days. Of course under sec. 39j, Stats., the ordinance does not become effective until twenty days after its passage. I presume that this is the provision to which the mayor of Black River Falls refers. However, the twenty days would not begin to run until the ordinance was passed. It is therefore necessary that the council take action upon the ordinance and pass the same to start the twenty days to running.

_Municipal Corporations—Cemeteries—Public Officers—Attorney-General—District Attorney—Cemetery grounds in incorporated villages may be extended as provided by sec. 1454, Stats._

It is no part of the duty of the attorney-general to advise district attorneys on matters not coming before them in their official capacity.

William F. Schanen,
District Attorney,
Port Washington, Wis.

In your letter of the 8th you state that in 1900 certain persons attempted to lay out and establish cemetery grounds which violated the provisions of sec. 1454. That a farmer whose land adjoined the tract intended to be used for a cemetery secured an injunction against the laying out and establishing of said cemetery. That since that time sec. 1454, Stats., has been amended so that now the clause under which the parties would be allowed to lay out their cemetery reads as follows:

"and that cemetery grounds established in any town, city or village before said date may be enlarged in the manner and subject to the conditions of the next following section."
That the land now intended to be used for cemetery purposes is adjacent to an old cemetery, which has been used as a cemetery since prior to April 30, 1887. That it is the same tract of land which was intended to be used at the time by the defendants in the injunction proceedings. You ask whether or not the enactment of this amendment to said section does away with the injunction obtained in said action.

I do not see how this question could come before you in your official capacity. It is no part of the duty of the attorney-general, and he is not authorized, to give advice to district attorneys upon matters not connected with the duties of their office. For that reason whatever is said herein must be understood as wholly unofficial, and not binding upon any person, and given you merely as a matter of courtesy.

The only amendments to sec. 1454, Stats., since 1900 are those made by ch. 29, laws of 1909, and ch. 120, laws of 1913. The amendment enacted by ch. 29, laws of 1909, has no bearing upon the question you ask. The amendment added by ch. 120, laws of 1913, was the following:

"provided, that an existing cemetery in a village may be extended toward or beyond either of the two nearest village limits upon first obtaining the consent of the village board and of the owners of any dwelling or other building within fifteen rods of such addition."

The provision that you refer to was in the law in 1900. See sec. 1454, Stats. 1898. You do not say upon what specific grounds the injunction was granted. If those interested in extending the cemetery grounds obtain the consent of the village board and also the consent of the owners of all dwellings and other buildings within fifteen rods of such addition, in my opinion the mere fact of the injunction that was granted in 1900 would not prevent the extension of the cemetery grounds. Without such consent, however, the grounds could not be so extended.
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Municipal Corporations—Elections—Referendum—Sec. 39j, Stats., held unconstitutional, includes all ordinances and resolutions of a common council or county board.

May 27, 1914.

LAWRENCE J. MISTELE,
District Attorney,
Jefferson, Wis.

In your favor of May 25th you ask my opinion on a question which you state as follows:

"Does sec. 39j of the 1913 statutes pertain to all ordinances and resolutions passed by the council of any city, except such as are under the commission form of government, or does it pertain only to such ordinances as are proposed for popular vote under the provisions of sec. 39i?"

In Meade v. Dane Co., 145 N. W. 239, sec. 39j, Stats., was held unconstitutional, but it seems to have been interpreted as including all ordinances and resolutions passed by a common council or county board.

Municipal Corporations—Town—County Board—In dividing a town into two the proceeding under sec. 671 must be followed by the county board.

May 29, 1914.

JOSEPH T. SIMS,
District Attorney,
Wabeno, Wis.

In your letter of May 25th you state that it is proposed to organize a new town of Newald in your county by dividing the present town of Caswell so that the proposed town of Newald and the remaining town of Caswell will comprise the territory of the present town of Caswell. You inquire whether this may be done by the county board under the provisions of sec. 670, subsec. 1, Stats., or whether the procedure must be under sec. 671.

In answer I will say that this is a division of a town into two townships and the procedure under sec. 671 is applicable and must be followed. See State ex rel. Rosander v. Lippels, 133 Wis. 211.
Municipal Corporations—Board of Police and Fire Commissioners—Sec. 959-41c (ch. 418, laws of 1911), making secs. 959-41l to 959-41n, applicable to cities of the fourth class only in case the common council adopted those sections, has no effect on cities which had organized a board of police and fire commissioners, as required by sec. 959-41m (ch. 187, laws of 1909) prior to the enactment of ch. 418, laws of 1911.

Sec. 959-41p (ch. 744, laws of 1913) has no application to such cities.

WILLIAM F. SCHANEN,
District Attorney,
Port Washington, Wis.

In your favor of May 27th you request my opinion upon a question which you state as follows:

"A city operating under special charter, had a population of less than 4,500 and more than 4,000, according to the census of 1905, and has a population of less than 4,000 and more than 3,500, according to the census of 1910; in 1905 it adopted sub-ch. 7 of the general charter law as part of its charter; and in 1907, sub-ch. 5 of the general charter law, and in 1912, sub-ch. 6 of the general charter law.

"A board of police and fire commissioners was duly appointed and organized by virtue of ch. 187, laws of 1909. Such board duly appointed all police officers and members of the fire department, and ever since its organization in 1910, such board has continued to exercise the powers pertaining to a board of police and fire commissioners the same as if section 959-41o, Stats., never had been created. New members were appointed on said board after the creation of said sec. 959–41o, the same as if said section had never been passed; and the whole police and fire departments continued to operate the same as if said sec. 959–41o, had never been created.

"The common council of said city has never adopted sec. 959–41l, 959–41m, and 959–41n, or sec. 959–41l and 959–41m, Stats.

"What is the present status of the police officers and members of the fire department in said city?"

Sections 959-41l, 959-41m and 959-41n were created by ch. 187, laws of 1909. The first of these sections provided that "In all cities of the fourth class, however incorporated, there shall be a board of police and fire commissioners"
etc. Also that "It shall be the duty of the mayor of every such city, between the last Monday of April and the first Monday of May, 1910, to appoint the five members of such board" etc. Section 959-41n expressly repealed "all provisions contained in the charter or ordinance of any city of the fourth class * * * for the election or appointment of a chief of police * * * or members of the fire department * * * to take effect from and after July 1, 1910." etc.

The appointment and organization of a board of police and fire commissioners in the city in question in the spring of 1910 was clearly not only authorized but required under ch. 187, laws 1909. The law is mandatory in terms and was in effect after its passage and publication so that there seems no reason to doubt but that it was applicable to a city under the circumstances stated in your letter.

Ch. 418, laws 1911, amended sec. 959-41l so as to read as follows:

"In all cities of the fourth class, however incorporated, except as hereinafter provided, there shall be a board of police and fire commissioners" etc.; and created a new section (959-41o) which provided that "In any city having a population of four thousand or less, sec. 959-41l, 959-41m 959-41n, of the statutes, shall only apply if the common council by a majority vote, and the approval of the mayor, or by a two-thirds vote without such approval, shall adopt said sections."

I do not think that this chapter had any effect on cities in which a board of police and fire commissioners had already been appointed and was in existence pursuant to the terms of ch. 187, laws 1909.

It is a rule for the construction of statutes that they are presumed to have only a prospective effect "unless the contrary clearly appears". Lanz-Owen & Co. v. Garage Equipment Mfg. Co., 151 Wis. 555, 560. There is nothing in ch. 418, laws 1911, from which it may be said to clearly appear that the statute was intended to have a retroactive effect and I am convinced that it was intended to apply to only such cities of the fourth class as might be thereafter organized or such previously existing cities of the fourth class as had failed to organize a board of police and fire commissioners pursuant to ch. 187, laws 1909.
The sections in question were also amended by ch. 663, laws 1911, and by ch. 593 and 744, laws 1913, but I find nothing in such amendments affecting the construction of ch. 418, laws 1911, previously outlined.

From the foregoing it follows that it is my opinion that the board of police and fire commissioners was validly organized, under the circumstances stated in your letter, and that the subsequent legislation has not affected such organization, so that the board continues in office for the terms and with the powers provided by statute.

You also ask:

"What is the meaning of sec. 959-41p of the statutes? Did the legislature intend that the officers enumerated in said last mentioned section should constitute the board of the police and fire commissioners in a city where secs. 959-41l and 959-41m are not in effect?"

Sec. 959-41p, which was enacted by ch. 744, laws 1913, provides that:

"The officers in cities of the fourth class, having a population of four thousand or less inhabitants, that have not adopted or have rescinded the adoption of the provisions of sec. 959-41l and 959-41m, of the statutes, shall be a mayor" etc.

This enactment, like ch. 418, laws 1911, must be construed in my opinion as prospective and not retrospective in character. It has, I think, no application to a city that has in existence a board of police and fire commissioners organized pursuant to the provisions of ch. 187, laws 1909. While such city is not one that in the strict sense of the term has "adopted" secs. 959-41l and 959-41m, Stats., it is a city in which such sections are in effect. Sec. 959-41p is obviously inapplicable to such a city.
RELATING TO MUNICIPAL CORPORATIONS.

Municipal Corporations—Sewers—Surface Water—A city may discontinue a drain which is established to carry off surface or storm waters.

STATE BOARD OF CONTROL.

In your favor of June 17th you request my opinion upon a question which you state as follows:

"We are making some changes in the sewage disposal system at the Industrial School for Boys in which it will be necessary for us to grant some concessions to the city of Waukesha so as to enable the city of Waukesha to run the sewers for that city through the lands of the Industrial School. The question has arisen as to whether a city or town has the right to divert storm and surface waters from their natural course into its sewers or other artificial water courses and then after a number of years, say possibly ten or twelve, return the water to its old course by damming up the inlets to the artificial courses and sewers, and lay pipes and dig ditches to return the water to the old courses to the detriment of the land owners below."

While the facts of the particular case, if fully ascertained, may somewhat change the situation, the general principle which must control is clear and will be, I imagine, sufficient for your present purposes. This principle has been stated in a recent decision of our supreme court as follows:

"A municipality, after it has made provisions by a drain or sewer for carrying off surface water, may discontinue or abandon the drain or sewer if the landowners are thereby left in no worse condition with reference to the surface water set back than if the sewer had never been constructed." Peck v. Baraboo, 141 Wis. 53.

Municipal Corporations—Commission Form of Government—Board of Education—Under sec. 925m-308, Stats., the council of a city under the commission form of government is required to name one of its members as member of the board of education, if there be such a board.

C. P. Cary,
State Supt. of Public Instruction.

In your letter of the 30th you state that the city of Antigo has adopted the commission form of government and that
at a recent meeting the board of education in that city was notified by the council that one of their number had been appointed as a member of the school board. That the city of Antigo, prior to adopting the commission form of government, was operating under the general charter law, while the schools were operated under the provisions of ch. 197, Vol. 2, laws 1889. That is, that the schools of that city were not taken under the provisions of the general charter when a change was made from the special charter form of government to the city government provided for in the general laws.

You ask if the council has authority to appoint one of its members, or any other citizen, to act as a member of the board of education of the city.

Sec. 94, ch. 197, laws of 1889, provides that the board of education shall consist of two commissioners from each ward whose term of office shall be for two years, and until the election and qualification of a successor. Sec. 925m-303, Stats., subsec. 1, relating to the commission form of government, provides:

"Any law applicable to any city before its reorganization and not inconsistent with the provisions of sections 925m-301 to 925m-319, inclusive, shall apply to and govern such reorganization."

Sec. 925m-308, Stats., provides in part:

"5. All boards and commissions created and existing under laws heretofore in force in any such city shall continue to exist, and all powers, authority, jurisdiction and duties conferred and imposed upon such boards and commissions shall remain unaffected by this act, except that the mayor shall not be ex officio a member of any such board or commission.

"6. Upon the first Tuesday in May following the reorganization of any city as provided for in sections 925m-301 to 925m-319, inclusive, and annually thereafter, the council shall select from among their number some one to act as a member of each of such boards and commissions. Such member so selected shall have all the power and authority vested by law in any other member of such board or commission, and shall serve as a member thereof so long as he shall remain in office or until the council selects his successor."
It would appear from this that the law relating to the commission form of government expressly provides that one member of the council shall be selected as a member of each board or commission existing in such city. The board of education of the city of Antigo was provided for in its special charter, and according to the statement of facts submitted, that portion of the special charter law is still in force there. The provisions of the law relating to the commission form of government, insofar as they are inconsistent with such provisions of the general charter, amend the same, and in my opinion the council of the city of Antigo not only has the power, but it is its duty, to appoint one of its members as a member of the board of education.

Municipal Corporations—Library Board—Under subsec. 3, sec. 932, Stats., the city of Fort Atkinson has a library board of nine members unless the board has taken action to reduce it to six.

Wisconsin Free Library Commission.

In your favor of July 7th you request my opinion on a question which you state as follows:

"Fort Atkinson, Wis., a city of the fourth class, has a library board consisting of nine members. According to sec. 932, Stats., * * * 'in each city of the fourth class, in each village or town there shall be a board of six directors' etc. They wish to know whether or not the three additional members have a right to vote on any questions which arise—whether they are legitimate members of the board. Will you be good enough to let me know at your early convenience?"

Subsec. 3, sec. 932, Stats., provides that:

"In any city of the fourth class, or any village or town, having a public library with a board of nine directors, upon the request of such board, the mayor of such city, the president of such village or the chairman of such town shall omit to make the appointments to the board to fill vacancies until the number of the members of the board, excluding the ex officio member, is reduced to six, and thereafter the board shall include no more than six appointive members."

The above quoted subsection was enacted by ch. 98, laws 1901. If the city of Fort Atkinson had at that time a
library board of nine members such board has evidently con-
tinued in existence and of the same size unless it has re-
quested the mayor of the city to omit appointments as
provided in the subsection quoted. If no such request has
been made and there are no provisions in the special charter
of the city which control, and if the common council has
taken no action to reduce the number as provided in subsec.
5, sec. 932, it seems that the board now lawfully consists of
nine members.

Municipal Corporations—Public Utilities—Constitutional
Law—Mortgage certificates issued against a public utility
plant, pursuant to sec. 927-17, Stats., do not constitute
municipal indebtedness within the meaning of sec. 3, art.
XI, Const.


RAILROAD COMMISSION OF WISCONSIN.

In your letter of the 24th you state that you have a letter
from one John J. Fisher of Bayfield, Wis., in which he indi-
cates that he is quite anxious to have an opinion from this
department on the question of the relation of the issuance
of mortgage certificates against a utility plant to the con-
stitutional limitation of municipal indebtedness; that you
have written Mr. Fisher that you would call my attention
to the urgency of the matter, and ask me to hasten the
opinion as much as possible.

I assume that Mr. Fisher has reference to the issuance
of mortgage certificates under the provisions of sec. 927-1,
et seq., Stats. Sec. 927-17, Stats., provides in part that
the mortgage certificates issued under the provisions of
those sections shall recite upon their face that no municipal
liability is created thereby. These mortgage certificates
are to be issued only in payment for the acquisition or
construction of public utilities, and would bind the particular
property so acquired or constructed, and, as I understand
it, would not bind any property formerly owned by such
municipality.

In the case of Connor v. Marshfield, 128 Wis. 280, it was
held that the purchase of a public utility, subject to an exist-
ing mortgage indebtedness, the amount of which, together
with the other indebtedness of the municipality, would exceed the five per cent constitutional limitation, such purchase being authorized by statute, would not violate the constitutional provision. The court cited other Wisconsin cases, and gave the distinguishing element between contracts creating municipal liability and those which do not as follows:

"The distinguishing element, as then defined, consisted in the fact that the city could not be coerced by the creditor of its grantor into applying to his claim either its general revenue or property owned by it at the time of the contract, but was free at its election to abandon the plan of acquiring or holding that which, prior to the contract, it did not own. This distinction between conferring upon another power to take, in invitum, either general municipal revenue or property owned by the city prior to the contract, and a right merely to retake the property which is acquired by the contract or the earnings or proceeds thereof, is sustained in many decided cases." (p. 292.)

I see no reason for distinguishing between the situation in that case and the situation which I suppose exists at Bayfield. In either case, the municipality is merely pledging the property which it receives for the payment of the debt incurred in acquiring or constructing such property. In neither case does the city pledge its general revenues nor the property which it theretofore owned for the payment of such obligation.

In my opinion such mortgage certificates do not constitute an indebtedness of the municipality within the meaning of the constitutional limitation.

_Municipal Corporations—Towns_—A newly created town must have at least $100,000 worth of taxable real estate if it has less than 36 square miles.


_Sam J. Williams,_
_District Attorney,_
_Hayward, Wis._

Under date of Aug. 22nd you state that on March 17, 1913, the county board of supervisors of Sawyer county, by ordinance, detached a portion of the territory of the town of
Reserve so that it left the said town with only $50,000 taxable real estate. You inquire whether this ordinance is valid.

Sec. 671, Stats., which relates to the division of towns by proceedings in the county board upon petition by thirty or more freeholders, residents of the town, contains the following provision:

"But no town shall be divided so as to constitute or leave any town of less than thirty-six sections according to the United States survey, unless each such town, after division, shall have real estate valued at the last preceding assessment at $100,000, or more, and fifty qualified voters, resident therein, at the time of the division."

You do not state in your letter whether the town created or the town left after the territory was detached contained less than thirty-six sections. If they do contain less than thirty-six sections, then the ordinance in question is invalid for the reason that the town does not contain taxable real estate valued at $100,000.

_Municipal Corporations—Towns—Under sec. 627 a town may be created of less than $100,000 worth of taxable property if the town has 36 square miles, although some of said land is Indian property and exempt from taxation._

August 29, 1914.

SAM J. WILLIAMS,
District Attorney,
Hayward, Wis.

Under date of Aug. 28th you refer to my opinion to you under date of Aug. 25th and you state that the town which the county board created has not thirty-six sections of taxable land for the reason that part of it is occupied by Indians and for that reason not taxable, and you inquire whether, under sec. 627, Stats., the ordinance by the county board creating said town is valid.

In answer I will say that as long as the town in question has thirty-six square miles the division is proper and the ordinance legal. The fact that part of the sections comprising the towns contains lands which are exempt from
Relating to Municipal Corporations. 593

taxation cannot alter the case. Most every town has some land which is exempt from taxation, such as church property, parks, etc.

Municipal Corporations—Public Utilities—Constitutional Law—Mortgage certificates issued pursuant to sec. 927-19b, Stats., and pledging property theretofore owned by the municipality, constitute indebtedness of the municipality within the meaning of sec. 3, art. XI, Const.

Sept. 10, 1914.

Railroad Commission of Wisconsin.

In your letter of the 8th you state that my opinion of Aug. 25th, relating to the issuance of mortgage certificates against the public utility at Bayfield, Wis., was forwarded to Mr. Fisher, city attorney, and that in reply thereto you received a letter from him which you enclose. You ask that I give you a supplemental opinion upon the matter.

Mr. Fisher states that in the former opinion we passed upon a situation which does not exist in Bayfield. That the city of Bayfield is proposing to issue mortgage certificates under the authority of sec. 927-19b, relating to mortgaging plants already owned by the municipality for the purpose of making improvements thereto. That the municipality now owns the plant in question.

In the former inquiry it was not stated whether the city of Bayfield was proposing to issue mortgage certificates upon property already owned or whether it proposed to issue them as a part of the purchase price of property to be acquired. We assumed that the latter was the situation.

Sec. 927-19b provides:

"1. Whenever the railroad commission of Wisconsin shall make an order requiring improvements, additions or extensions to be made to any water, light or power plant owned by any city, village or town in this state and it shall be made to appear to the satisfaction of said commission that the city, village or town owning such plant has not sufficient funds available for the purpose of making such improvements, additions or extensions as have been ordered by said commission, then in all such cases the said commission may, in its discretion, issue a certificate granting to the commission or board, having the management of such plant for such city,
village or town, authority to issue and negotiate mortgage certificates for the purpose of making such improvements, additions or extensions, which certificates shall bear interest not to exceed six per cent per annum, payable semi-annually, and which shall not be sold for less than the par value thereof and which shall mature at the option of such commission or board, having the management of such plant, not less than one year from the date thereof and not more than ten years from the date thereof.

"2. Such mortgage certificates shall be secured by a trust deed or mortgage executed by the chairman and secretary or clerk of such commission or board, having the management of such plant, upon the plant so to be improved, added to or extended, or such part thereof as may be necessary, which deed of trust or mortgage shall constitute and be a lien upon the said plant or such part thereof as may be thus incumbered, but no municipal liability shall be created thereby * * * ."

As noted in our former opinion the supreme court of this state has several times held that obligations which do not bind the property in general of the city or other municipality but merely bind the plant the purchase price of which is secured by such obligations, do not create indebtedness within the meaning of the constitutional prohibition. The question here is as to whether similar obligations, which in form do not obligate the city to pay them, but which are secured upon particular property theretofore owned by the municipality, constitute indebtedness within the meaning of the constitution.

In the case of Connor v. Marshfield, 128 Wis. 280, cited in our former opinion, the court, after citing several Wisconsin cases, said:

"The distinguishing element, as then defined, consisted in the fact that the city could not be coerced by the creditor of its grantor into applying to his claim either its general revenue or property owned by it at the time of the contract, but was free at its election to abandon the plan of acquiring or holding that which, prior to the contract, it did not own. This distinction between conferring upon another power to take, in invitum, either general municipal revenue or property owned by the city prior to the contract, and a right merely to retake the property which is acquired by the contract or the earnings or proceeds thereof, is sustained in many decided cases."
This case seems to make a distinction between those contracts which are binding upon property theretofore owned by the city, and those which merely bind property to be acquired by the proceeds of the obligations themselves. I have not been able to find any Wisconsin case in which bonds or other obligations binding property theretofore owned by the city, but purporting not to create any municipal liability, have been passed upon. In Illinois, however, just such a situation was before the court in the case of City of Joliet v. Alexander, 194 Ill. 457, 62 N. E. 861. The city of Joliet had a system of waterworks, and adopted an ordinance to extend it by issuing bonds for that purpose, to be paid out of the water fund, and to be secured by a mortgage upon the waterworks. The ordinance was in accordance with the statute of the state authorizing cities to build or extend waterworks. The city was indebted in excess of the constitutional limit of five per cent of the value of its taxable property. It was held that such bonds and mortgage would create a debt within the meaning of the constitutional prohibition, and, among other things the court said:

"It is true that no action can be maintained against the city on the certificates, other than to compel it to appropriate the water fund to their payment, and to make the city defendant in a foreclosure suit by which its property is taken and applied to such payment. But it is not essential that there should be a right of action on the certificates against the city in order to constitute a debt, where its money or property can be taken in payment. Where one party occupies the position of creditor, and another of debtor, there is, in the common understanding, a debt. * * * It is not essential to a debt or to a mortgage that there should be any promise of the mortgagor to pay the debt. The mortgage may be merely to secure payment, and a debt exists in many cases where there is no personal liability, and where there could be no suit at law, and no personal decree could be rendered for a deficiency. One who pawns or pledges his property, and who will lose the property if he does not pay, is indebted, although the creditor has nothing but the security of the property; and so, also, is a mortgagor who is liable to lose his property if he does not pay the money secured by the mortgage. No one would agree to the proposition that a city could obtain money by mortgaging the city hall, the buildings of the fire department, or other property of the city, without a promise to pay, but so as to enable
the creditor to take them in satisfaction of the loan, under a statute authorizing such action, and yet not create any indebtedness of the city. We see no difference between mortgaging the public buildings and property of the city and mortgaging its system of waterworks. The city owns an existing system of waterworks, with its lands, buildings, machinery, and appurtenances; and the ordinance provides for mortgaging that system to secure the certificates under the act providing for a foreclosure and sale, by which the city would be deprived of its property for a term of years, not exceeding fifty.

"In addition to mortgaging the existing system, the ordinance proposes to take the income now derived from it, amounting to about ten thousand dollars a year, and devote it to the payment of the certificates. This is existing property and income of the city derived annually from the present system of waterworks, independent of the extension, and in no manner resulting from or depending upon it. The city is to lose property in the form of established income for the purpose of paying the certificates. If the city, being indebted beyond the constitutional limit, can issue certificates payable out of that fund without creating a debt, it would be equally within its power to issue obligations by pledging the fund derived from dram-shop licenses, or licenses from hackmen, peddlers, theaters, or amusements, or any other funds of the city. All of the revenues of the city, except such as would be derived from general taxation, might in that way be pledged or mortgaged for long years to come, and we apprehend that no one would be found to say that such a scheme would not be a mere evasion of the constitution.

"What is said relative to mortgaging property owned by the city, or pledging its existing income, is not intended to apply to a mortgage purely in the nature of a purchase money mortgage, payable wholly out of the income of property purchased, or by resort to such property. This is not a case where there is no obligation of the city except the performance of a duty in the creation and management of a fund, and where the waterworks, upon paying for themselves, will become the property of the city. The reasoning in Winston v. City of Spokane (Wash.), 41 Pac. 888, cannot be applied to a case like this, and could only apply to property or a fund which the city never had, where the property is to be paid for by its own earnings without imposing any further liability on the city."

So far as I have had time to examine them, the great majority of the authorities are in line with this case from Illinois.
In my opinion, the issuing of mortgage certificates against the utility, now owned by the city of Bayfield, even though issued under a statute providing that no municipal liability is created thereby, creates an indebtedness within the meaning of the constitutional prohibition. Insofar as such certificates merely cover the extensions and improvements to the existing plant which are paid for from the proceeds of such certificates, it would appear to me that they come within the reasoning of the case of Connor v. Marshfield, and to that extent do not create indebtedness.

Municipal Corporations—Ordinances—City of Milwaukee—Ordinances of the city of Milwaukee regulating the inspection of boilers and providing for an inspection of boilers and licensing of engineers are valid.

Industrial Commission.

You have requested an opinion relative to the legality of the ordinances establishing and regulating the inspection of boilers and establishing the examination and licensing of engineers in Milwaukee. You have enclosed a copy of said ordinances.

In answer I will say that the common council of Milwaukee is given the power to pass ordinances “to provide for the inspection and regulation of stationary steam engines and boilers.” (Milwaukee city charter, p. 67, par. 45.) The common council has also been given the power to create new offices besides those created by ch. 205, laws of 1887. (Milwaukee city charter, p. 20, sec. 1.) It thus appears that the common council has full power to pass ordinances to create the office of inspector of boilers.

You will notice that the ordinance exempts from its provisions “portable boilers on which certificates of inspection are issued by the industrial commission of Wisconsin.”

The ordinance also provides that the mayor shall appoint within sixty days after its passage a board for examining and licensing of engineers having charge of stationary steam boilers, steam engines, etc. It is true that the provision in the city charter does not use the word “license”, but uses instead the word “regulation.” I believe, however, that this
is broad enough to authorize them to license engineers for it seems to me to be a necessary part of the regulation of steam engines to say who shall be allowed to run the same.

In Town of Russellville v. White, 41 Ark. 485, 486, it was held that the word "regulation" as used in the statute, giving a municipal corporation the power to regulate hotels includes power to license as a means of regulating.

In the Laundry License case, 22 Fed. 701, 703, it was held that the word "regulate" as used in the Portland city charter, providing that the city council has power and authority to control and regulate slaughter houses, wash houses and public laundries, etc., includes the power to license such houses.

So in Illinois, where the general law empowers municipalities to direct the location and regulate the management and construction of packing houses, renderies, bone factories, etc., it was held that the power to require a license is one of the means of regulating the exercise or pursuit of this business. Chi. Packing and Provision Co. v. City of Chicago, 88 Ill. 221, 225.

I have not examined all the separate provisions of these ordinances, but have only considered the general power of the city to pass the general provisions therein contained and I believe that the common council has such power and I see no reason for questioning the legality of the ordinances.

Municipal Corporations—Public Utilities—Town containing unincorporated village is authorized to establish water works and to issue bonds therefor without further permission from the state, unless, by reason of there being already a water works utility furnishing service therein, a certificate of convenience and necessity is required under sec. 1797m-74, et seq.

SAM J. WILLIAMS,
District Attorney,
Hayward, Wis.

I have your letter of the 2nd inst., in which you state that the town of Hayward, Sawyer county, is contemplating the installation of a water works system and voting bonds for
that purpose to the amount of $10,000. You ask whether it will be necessary to have a permit from the state to enable the town to build the plant.

The town of Hayward is a town containing a population of more than five hundred, and having therein an unincorporated village. Therefore, under the provisions of subsec. 13, sec. 776, Stats., there is conferred upon the town and the town board all powers conferred upon villages and village boards by ch. 40, Stats.

Under subsecs. 10 and 29, sec. 893, Stats., it is provided that village boards

" * * * shall have power, by ordinance, resolution, law or vote: * * *
"(10) To * * * provide protection from fire by * * * the erection or construction of pumps, water mains, reservoirs or other water works; * * *
"(29) To construct and maintain water works for the supply of water to the inhabitants of the village, with the necessary pumping machinery, buildings, reservoirs, mains, pipes and other convenient appliances; and to regulate the mode of construction, the manner of making connections therewith, the rent for the use of water," etc.

The town of Hayward has, therefore, express statutory authority to establish a water works system. The only limitation upon this power is that of sec. 1797m-74, et seq. (the public utilities act), which provides in effect, that in case there is an existing water works utility furnishing water works service in the community, the municipality is forbidden to establish and erect a competing plant, but can only acquire the existing plant as provided in the public utilities law.

Secs. 927-11 to 927-19 expressly provide authority to towns, cities and villages to construct or purchase water works and other utilities and to issue bonds or mortgage certificates to pay therefor.
OPINIONS RELATING TO OIL INSPECTION

Oil Inspection—The sale of oil from a tank may or must be accompanied by a sales ticket giving the fire and gravity test.

March 10, 1914.

DAVID BOGUE,
District Attorney,
Portage, Wis.

In your letter of March 5th you submit the following:

"A. is the owner of an oil tank wagon and buys oil from the Standard Oil Co. When this oil is delivered to him by the tank load, the Standard Oil people furnish him a tank wagon sale ticket, give the fire test for flash and burns, also the gravity test. A. places this certificate in plain view upon his wagon, and starts delivering oil to the houses. The people purchasing furnish their own containers. Question: 1. Must A. furnish a separate sale ticket giving the fire test and gravity test for each sale he makes? 2. If he neglects to furnish such a sale ticket, what is the penalty?"

In answer to your first question let me call your attention to sec. 1421e, which contains the following:

"It shall be the duty of the supervisor or his deputies to inspect all such petroleum products under whatever name called, whether manufactured within this state or not, and stamp the gravity test over his official signature, which shall also be stamped on the barrel, cask, or package inspected, before being sold or offered for sale within this state. Provided, however, that any person, corporation or vendor, selling or delivering gasoline, benzine, naphtha, and other like products of petroleum for illuminating, heating or power purposes in bulk by tank wagon shall, in lieu of the stamp or brand herein provided for, print or stencil on each tank wagon sale-ticket covering deliveries the following: "

"This is to certify that the (gasoline, oil) covered by this sale has a fire test-flash................... degrees; burns.................. degrees; gravity test of .................. degrees Beaume scale;"
according to a certificate or certificates of approval issued by the state oil inspection department (month)..............
(day)............... (year)...............;
"(Name of oil company and individual making delivery.)"

Under the express provision of this statute I am constrained to hold that your first question must be answered in the affirmative. To the same effect see opinion of my predecessor in Biennial Report and Opinions for 1912, p. 694.

For answer to your second question, I will say that I must confess that there is considerable doubt in my mind as to what statute prescribes the penalty for this offense. The penalties prescribed in section 1421e were already part of said section prior to the insertion therein of the requirement that a sale in bulk from a tank wagon must be accompanied by a tank wagon sale-ticket showing the flash, burning and gravity tests. The only provision in the third paragraph in said section which might be applicable is the following:

"Any person * * * who shall knowingly use or furnish for use for illuminating, heating or power purposes, any oil, gasoline, benzine, naphtha, or other like products of petroleum which shall not have been properly examined or tested and stamped, sealed or marked, as provided in section 1421c to 1421p, inclusive, shall be liable to a fine or not less than five dollars nor more than five hundred dollars."

It might be argued in view of the fact that the tank wagon sale-ticket must be furnished in lieu of the stamp or brand, that a sale without the same is a sale of the oil, gasoline, benzine, naphtha or other products of petroleum not properly stamped, sealed or marked, but this does not provide a penalty for the sale of the oil without such stamp, seal or mark, but only for the use or the furnishing for use of said product. It is very doubtful whether the words "furnished for use" are broad enough to include a sale in contemplation of this statute as the word "sale" is used in contra-distinction from the word "use" in the same section.

The only penalty provided for in the last paragraph of said section, which might be applicable, is the following:

"Any person * * * who shall offer for sale or shall sell any such oil or gasoline, benzine, naphtha, or other like
products of petroleum * * * without providing and exhibiting in a conspicuous place where such oil, gasoline, benzine, naphtha or other like products of petroleum is sold, a sign or placard announcing and plainly proclaiming to all intending purchasers the tests, flash, burning and gravity, according to the last certificate issued by the deputy inspector, making the inspection of the product as to explosive qualities and the gravity test of gasoline provided for in section 1421c to 1421p, inclusive, shall be liable to a fine of not less than five dollars nor more than five hundred dollars, or to imprisonment in the county jail for not more than six months or to both such fine and imprisonment."

In view of the fact that this is a penal statute, I am somewhat in doubt whether the language here used is definite enough to be applied to the offense in question. If it should be held by the court that neither of these penalties apply to the offense in question, then the provisions of section 4635 of the statutes are applicable. Said section provides:

"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."

In all three of these provisions penalties may be prescribed by the trial judge ranging from five dollars as the minimum to two hundred and fifty as the maximum, and the judgment can be sustained under any one of the three statutes quoted. If the trial judge desires to impose a penalty less than five dollars or more than two hundred and fifty dollars it is then necessary for him to decide under which section of the statutes the penalty must be imposed. As there is considerable doubt in my mind on this question I do not think it is necessary to definitely pass on that question at this time. This must be left to the court when the question arises.
Oil Inspection—Public Officers—A deputy oil inspector may stamp his signature with a rubber stamp under the gravity test which is required to be stamped on each cask.

December 15, 1914.

LOUIS F. MEYER, Supervisor,
Inspectors of Illuminating Oils,
Madison, Wis.

In your letter of Dec. 11th you direct my attention to sec. 1421e, Stats., which provides in part as follows:

“...shall be the duty of the supervisor or his deputies to inspect all such petroleum products under whatever name called, whether manufactured in this state or not, and stamp the gravity test over his official signature, which shall also be stamped on the barrel, cask, or package inspected, before being sold or offered for sale within this state.”

You inquire whether under this provision of the statutes a deputy oil inspector has a legal right to stamp his name with a rubber stamp or whether such name must be signed in his own handwriting. You also inquire whether in case a stamp can be used the same must be a facsimile of his own handwriting.

In 25 Am. & Eng. Ency. of Law, (2nd ed.) 1066, the following rule is laid down:

“In general where a signature is required, the party’s name printed upon the instrument and intended as a signature is sufficient. So a stamp has been held to be a sufficient signature.” Citing Streff v. Colteaux, 64 Ill. App. 180; Bennett v. Brumfitt, L. R. 3 C. P. 28; Signature of Secretary of Treasury, 1 Op. Atty. Gen. 670.

But it seems to me our court has definitely settled the question. In the case of Dreutzer v. Smith, 56 Wis. 292, it was held that under sec. 1140, Stats. which provided that the county clerk or treasurer may assign tax certificates “by writing his name in blank on the back thereof * * * with his official character added,” it was held that such certificates may be assigned by the officer stamping his name and official character upon them with intent to assign. On p. 296 the court said:

“The objection to the assignment is that it was not in the proper handwriting of the clerk and was therefore void. We think the county clerk may, under the statute, assign a
tax certificate by putting his name on the back thereof with a stamp. If the name of the county clerk, with his official character added, be stamped by him on the back of the certificate with the intent to assign the same, it is a compliance with the statute which authorizes him to assign the same 'by writing his name in blank on the back thereof, with his official character added.' The statute does not require in express terms that the county clerk shall indorse on the back of the certificate his written signature, and so does not come within the terms of that part of subd. 19, sec. 4971, which provides that 'in all cases where the written signature of any person is required it shall be in the proper handwriting of such person,' etc. The statute requires that 'he shall by writing his name, etc., assign, and the question is whether a person may not write his name, within the meaning of these words, in any other way than with a pen, by forming the letters thereof separately. Does he not, when he takes a stamp upon which the letters composing his name are fixed in their proper order, and especially if the letters on the stamp are a facsimile of the letters as they would be formed by him if made there with an ordinary pen, and stamps his name with one motion of his hand, as effectually write his name as though he made the letters separately.

"We are clearly of the opinion that such stamping the name is writing the same, within the meaning of the statute; and we are more strongly convinced of the propriety of so holding, from the fact that the same statute declares that the words 'written' and 'in writing' may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters.

"* * * *

"All the cases seem to hold that when a party places his name to an instrument in writing with intent to be bound thereby, it is immaterial whether the name be printed, written, or stamped; either will answer the purpose, and is a compliance with a statute requiring his subscription or signature."

See also Words & Phrases, 6508, 6513; Scott v. Seaver, 52 Wis. 175; Mezchen v. More, 54 Wis. 214.

The statute under consideration does not state that the official signature shall be written. In view of the authorities above cited I am of the opinion that the affixing of the official signature with a rubber stamp will be sufficient under this statute and that although it may be well to use a stamp which is a facsimile of the handwriting of the deputy, still it seems that if the letters are the ordinary type, it would also be sufficient.
OPINIONS RELATING TO PEDDLERS

Peddlers—Transient Merchants—Licenses—Corporation may not be licensed as transient merchant.

April 16, 1914.

D. H. Davies,
State Treasury Agent.

With your communication of the 11th inst. you enclose a letter under date of April 10th addressed to you by E W. Wendlandt, city attorney, New London, Wisconsin in which he submits the following statement:

"A transient merchant license is issued to a corporation; the corporation sends one of its agents, John Doe, to the city of New London, to do business as a transient merchant in behalf of said corporation, paying the local license as required by the ordinance. About two weeks later the same corporation sends another one of its agents, viz., Richard Roe, to the city of New London, who exhibits the same state transient merchant license, pays the local license, and does business."

He asks whether more than one agent may use the transient merchant license issued to the corporation or whether the corporation must limit itself entirely to John Doe, the first agent that used said license. You ask for my official opinion on the question thus presented.

The first question suggested is whether the word "person" as used in sec. 1574 includes a corporation. If it does, and a corporation may be licensed as a transient merchant, then, as a corporation may act only through an agent, it would seem immaterial who that agent is, or whether he is the same person from day to day. The corporation would be the transient merchant, and it is the transient merchant, not the agent, that the statute licenses and regulates.

May a corporation be licensed as a transient merchant? Sec. 1574 provides in part:
"No person shall engage in or follow the business or occupation of a transient merchant, as hereinbefore defined, at any place in this state, without first obtaining a license authorizing him to do so. Any person desiring a license as a transient merchant shall, before receiving the same, pay into the treasury the sum of seventy-five dollars." etc.

Sec. 4972 provides in part:

"In addition to the rules of construction specified in the preceding section, the following rules shall be observed in the construction of these statutes: * * *

"(2) The word 'person' shall extend and be applied to bodies corporate unless plainly inapplicable."

The word "person" as used in sec. 1574, therefore, is to be construed as including bodies corporate unless the statutory provisions providing for and regulating the licensing of transient merchants plainly indicates a contrary intention.

Is a contrary intention disclosed by such statutes? At this point our attention is arrested by sec. 1575 which provides:

"But one person shall be authorized to carry on business under the terms of any license provided for in sections 1570 and 1584i, inclusive, and no persons shall conduct business under the same license as co-partners, agents or otherwise. And it shall be the duty of any person licensed as herein provided, upon the demand of the treasury agent or any of his deputies, or of any sheriff, constable or police officer to exhibit his license and make affidavit that he is the person named therein. Any person failing to exhibit his license when requested by the persons above designated, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than ten dollars nor more than twenty-five dollars, or by imprisonment in the county jail not less than fifteen days nor more than thirty days."

These requirements seem to contemplate that the person receiving the license must be a natural person and exclude the idea that a corporation may be licensed. This is fairly inferable from the first sentence of said section: "But one person shall be authorized to carry on business under the terms of any license provided for in sec. 1570 to 1584i, inclusive, and no persons shall conduct business under the same license as co-partners, agents or otherwise." This sentence makes it clear that but one person "shall carry on business" under the license. It cannot be carried on
by more than one person "as co-partners, agents or otherwise," but if the statute stopped here there might be some doubt as to whether a corporation could receive the license and carry on the business through one agent. However, this seems to be effectively cleared up and answered in the negative by the following sentence: "And it shall be the duty of any person licensed as herein provided, upon the demand of the treasury agent or any of his deputies, or of any sheriff, constable or police officer to exhibit his license and make affidavit that he is the person named therein."

Thus, the person licensed must produce his license and make affidavit that he is the person named therein. Here is a requirement that cannot be complied with by a corporation. A corporation cannot make an affidavit; neither can an agent of a corporation so licensed make the affidavit required. He cannot swear that he is the person named therein. The provisions of sec. 1575 plainly disclose a general purpose to limit the business of a transient merchant to a natural person and to require him at all times to be in the active management thereof. I, therefore, conclude that there is no legal authority for licensing a corporation as a transient merchant.

Peddlers—The party under consideration is a peddler under the facts stated, although he has a fixed place of business.

D. H. Davies,  
State Treasury Agent.

In your letter of the 26th inst. you enclose a letter from Otto Krueger to the secretary of state, containing an inquiry and you request an official opinion concerning the point involved. Mr. Krueger submits the following:

"Mr. Zeb Wood, a general merchant of the village of Shiocton, Outagamie county, Wisconsin, located there since February, 1913, intends to buy up eggs and farm produce from farmers outside of the said village, in surrounding towns, going over a radius of about 15 miles, not proposing to enter cities and villages for said purpose. He will offer to pay for goods so bought by him in cash or merchandise from his store, the latter to be carried along or delivered on order later. He intends to use a wagon and team of horses."
He inquires whether this man needs a license for the purpose of carrying on said business.

It has sometimes been held that milk dealers and meat markets may deliver their products to regular customers without having a peddler's license. The party in question would not come under such exceptions. He takes his groceries or other merchandise and carries it in his wagon as he is traveling from place to place within a radius of fifteen miles from his store and exchanges the same for farm produce. The fact that this is not a sale but a barter does not cut any figure for peddling may be by barter. See Druce v. Gabb, 6 W. R. 497. This is an English case and it was held that a person who goes about the country and barters needles, threads and tapes for bones, rags and other similar articles requires a license under the statute. I have not been able to find any authority announcing a different rule.

In the case of Dewitt v. State, 155 Wis. 249, 144 N. W. 253, our court used the following language concerning a peddler: (p. 251)

"He may have a fixed business domicile and yet be a peddler, and he may be such regardless of whether he carries the whole or a part of his stock of goods with him. The essential thing is that he must do business by going about from place to place, selling and delivering merchandise in a retail way to such individuals as he may be able to deal with. While doing that he is a peddler, though he may at the same time have a business domicile to which he occasionally resorts. It is the method of disposing of the goods which makes the person a peddler. A peddler is simply one who peddles and any one peddles who sells at retail from place to place, going from house to house carrying the goods to be offered for sale with him."

I am of the opinion that it is necessary for Mr. Wood to have a peddler's license in order to carry on the business described in Mr. Krueger's letter.
Peddlers—One selling goods on the installment plan is a peddler under sec. 1570, Stats., even though a written contract is made stating that the goods are leased merely, where it is plain that a sale is the ultimate purpose of the transaction.

D. H. Davies,
State Treasury Agent.

In your favor of June 24th you request my opinion as to whether the C. F. Adams Co. would be required to have a license to peddle their goods under the blank form of contract which you enclose. Such contract purports to be a lease of the goods (clothes, furniture, etc.) "as per memorandum, valued at $... ... ...", which are agreed to be held and carefully used as the goods of the C. F. Adams Co., until the agreed value shall have been paid in rent in weekly installments. The contract further provides for its termination on failure to pay the rent, etc., and that the C. F. Adams Co. may on such failure take possession of the goods; that upon full performance and the payment of one cent the goods shall be transferred to and become the property of the lessee; that it is agreed and understood that there is no sale until the full agreed value and one cent shall have been paid and that the lessee has the right of possession only until failure to pay the agreed rental; and that to secure the payment of the amount due the lessor assigns all his salary and wages due or to become due to him and authorizes the C. F. Adams Co. to receipt for such wages or salary in the name of the lessor or otherwise.

Sec. 1570, Stats., provides that:

"No person shall engage in or follow the business or occupation of a hawker or peddler within this state without having first obtained a license for that purpose."

In construing this section our court has said in a recent case that the term "peddler" "has no very technical meaning. Its ordinary, popular meaning was incorporated into the law. That is so well known, a resort to learned discussion in respect to it in legal opinions, or to its peculiar ancient definition, is confusing rather than illuminating. A peddler is not necessarily 'a deceitful fellow' satisfying the old ideas found in Jacob's Law Dictionary; nor is he, necessarily, a
person having no fixed business domicile, nor one who carries his entire stock of merchandise with him. He may be a very honorable man and yet be a peddler, and he may be such regardless of whether he carries the whole or a part of his stock of goods with him. The essential thing is that he must do business by going about from place to place selling and delivering merchandise in a retail way to such individuals as he may be able to deal with. While doing that he is a peddler though he may, at the same time, have a business domicile to which he occasionally resorts. It is the method of disposing of the goods which makes the person a peddler. A peddler is simply one who peddles, and any one peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him.”

*De will v. State*, 155 Wis. 249.

If the person peddling satisfies the requirements mentioned he is a peddler and must have a license. While the contract under which the goods are delivered is in form a lease, it is perfectly apparent that the ultimate purpose of the transaction is a sale of clothes and furniture on the installment plan. The leasing of such goods on the payment of a weekly rental could not well be for any other purpose than the sale of the goods and their payment in installments. Even if the transaction be not in reality a conditional sale so as to make necessary the filing of the contract as provided by sec. 2317, Stats., still I am of the opinion that a person delivering goods under such a contract, the ultimate purpose of which is plainly the sale of the same, is a peddler within sec. 1570, Stats. Such a transaction is as clearly within the reason of the statute licensing peddlers as an outright sale. If the making of sales on the installment plan be peddling, which cannot well be doubted, quite plainly the delivery of goods under the form of contract under consideration must be held to be peddling and I am therefore of the opinion that the C. F. Adams Co. must have a license in order to operate under such form of contract.
Peddlers—License—One selling cigars at wholesale to dealers for purposes of resale is not a peddler within sec. 1570, Stats.

D. H. Davies,

State Treasury Agent.

In your favor of June 24th you enclose certain correspondence from which it appears that a question has arisen as to whether one buying cigars from a manufacturer and traveling through the country by team, automobile or common carrier, selling them at wholesale to merchants and saloon keepers, delivering the same on the spot from his trunk or rig and collecting his pay at the time, is required to have a peddler’s license; and you ask my opinion as to whether one selling cigars under such circumstances exclusively to merchants and persons who resell them is required to have a license pursuant to sec. 1570, Stats.

Sec. 1570. Stats., provides that “No person shall engage in or follow the business or occupation of a hawker or peddler within this state without first having obtained a license,” etc.

The word “peddler” is not defined by the statute but our supreme court has said in a late case that the term “has no very technical meaning. Its ordinary popular meaning was incorporated into the law. * * * The essential thing is that he must do business by going about from place to place selling and delivering merchandise in a retail way to such individuals as he may be able to deal with. * * * A peddler is simply one who peddles, and any one peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him.” Dewitt v. State, 155 Wis. 249, 251. In this case the question was not presented and of course not decided whether one who sells exclusively at wholesale is a peddler within the statute.

In State v. Whitcom, 122 Wis. 110, our supreme court held unconstitutional sec. 1570, Stats. 1898, as amended by ch. 341, laws 1901, which section then provided in part, that “No person shall be allowed to travel from town to town, from house to house, or from place to place, in any town * * *, for the purpose of selling or exposing for sale, barter or exchange, at retail or to consumers, any goods,
wares," etc. without a license. The law was claimed to make an unconstitutional discrimination in favor of peddlers selling at wholesale, on which question the court said:

"The discrimination in favor of persons selling only at wholesale or only to dealers is clearly a false one if this is a tax measure. No conceivable reason exists why a person peddling goods, who confines himself to one kind of customers, should not contribute to the revenues as much as another man selling to other kinds of customers. The distinction is not based upon any characteristic of the person taxed, ability to pay taxes, or other distinction having any possible relation to the subject of raising revenue. Whether, if the measure is merely police, and were an attempt to regulate peddlers for the purpose of protecting the general public against irresponsibility and chicane, there might be a legitimate distinction drawn on the theory that dealers are less subject to such deceits, and hence that one selling only to them does not need to be so carefully watched by the government, is a question hardly at all debated in the briefs, and which we shall not feel called upon to decide at this time. See Peoria v. Gugenheim, 61 Ill. App. 374." State v. Whitcom, 122 Wis. 110, 121.

It being now settled that the peddlers license law is a police rather than a tax measure, (155 Wis. 249, 252), and that a classification made by a law is not to be held invalid unless the court can say that "No one in the exercise of human reason and discretion could honestly reach a conclusion that distinctions exist having any relation to the purpose and policy of the legislation" (State v. Evans, 130 Wis. 381, 6; Maercker v. Milwaukee, 151 Wis. 324, 8-9), it seems clear that the statute would not be invalid if interpreted to prohibit only sales at retail. So the question remains undecided by our supreme court whether the expression in sec. 1570 "the business or occupation of a hawker or peddler" includes or excludes one who makes sales exclusively at wholesale to dealers. The indication in the opinion in the Dewitt case is, of course, that in the mind of the writer of that opinion at least the word "peddler" includes only those making sales at retail. This has been directly held by other courts. State v. Fetterer, 32 Atl. (Conn.) 394, 5; Commonwealth v. Over, 66 Mass. 493, 8; Standard Oil Co. v. Commonwealth, 55 S. W. (Ky.) 8, 9; Commonwealth v. Standard Oil Co., 93 S. W. (Ky.) 613.
RELATING TO PEDDLERS.

Many of the judicial definitions of the word "peddler" limit the meaning of the word to one making sales at retail. (See 6 Words and Phrases, 5262, 4.) Thus in State v. Fetterer, supra, it was said:

"The word 'peddler' is commonly used to describe one who, travels about retailing small wares. Webst. Int. Dict. in verb. It carries the idea of pettiness as respects the character of the business transacted." (32 Atl. 395.)

And in Standard Oil Co. v. Commonwealth it was said:

"We think the statute means to sell to the public for the purposes of consumption by it rather than sales to a merchant for the purposes of resale." (55 S. W. 9.)

In view of these decisions and the language of our supreme court in the Dewitt case I am constrained to hold that our statute should be interpreted not to include sales made to dealers for purposes of resale. It follows, therefore, that a person selling cigars under the circumstances stated in your letter is not required to have a peddler's license.

Peddlers—Transient Merchants—An oculist or optician who fits and sells glasses temporarily in a city is not a transient merchant as defined by sec. 1574, Stats.

H. A. Sawyer,
District Attorney,
Hartford, Wis.

In your favor of July 8th you request my opinion on a question which you state as follows:

"Is one who conducts an optical office in the city of Milwaukee and visits a city in this county a few days at a time three or four times a year, where he rents a room at one of the local hotels, and there fits and sells, eye glasses, spectacles and cases to contain the same, advertising his coming extensively each time, a transient merchant defined by sec. 1574, Stats., and subject to the state license required by such statute?"

Sec. 1574, Stats., requires license to be obtained by transient merchants and defines the term as:
“one who engages in the vending or sale of merchandise at any place in this state temporarily, and who does not intend to become and does not become a permanent merchant of such place.”

While I have been unable to find any decision directly in point I am of the opinion that an oculist or optician who fits glasses and sells the same is not a merchant within the meaning of that term as used in sec. 1574, Stats. The sale of the glasses and cases to contain them is rather an incident of the service of fitting them and I think that a person so engaged is neither in legal acceptation or in common parlance a merchant. It therefore follows that such a person is not required to obtain a license as a transient merchant.

Peddlers—Transient Merchants—Persons selling lemonade, ice cream, etc., of their own manufacture at temporary stands are not transient merchants.

Persons selling crackerjack, peanuts, etc., purchased for purposes of resale, at temporary stands, are not within the intent of the transient merchant law, though persons making a business of setting up such stands at circuses, fairs, etc., are within the peddlers' license law.

D. S. Law,  
District Attorney,  
La Crosse, Wis.

In your favor of July 8th you ask several questions with reference to the transient merchant license law and request my opinion as to whether one operating a lemonade stand upon such occasions, as circuses, fairs, etc., and selling lemonade, crackerjack, ice cream and like merchandise is required to have a license.

While this department has ruled that one is a peddler whether he is selling articles of his own manufacture or not (see opinion to L. Olson Ellis, district attorney, Dec. 5, 1913, which ruling modifies somewhat the opinions of Attorney General Gilbert, to which you refer), still it has been held that a person selling not as a peddler but at a temporary stand articles of his own production is
not a transient merchant in that a merchant is one who sells articles which he has bought for the purpose of resale and not one who makes or produces the articles which he sells. *State v. Fleming*, 140 N. W. (N. D.) 674. Consequently it would follow that a person who sells lemonade, ice cream, etc. of his own manufacture at a temporary stand is not a transient merchant. It can make no difference whether he conducts such business upon his own premises or whether his stand is erected by consent of the public authorities in a public park or thoroughfare.

While it may be a question whether, if such person also sells articles like crackerjack, peanuts, etc., not of his own manufacture, but which he has bought for resale, he is not, strictly speaking, a transient merchant within the definition of sec. 1574, Stats., still I am inclined to believe that such petty business was not within the legislative intent in enacting the transient merchant license law. It has been customary for years for such small business to be done on holidays, circus days, etc., and it seems absurd to assume that the legislature intended to practically prohibit such business by making it illegal to conduct the same except upon the payment of a seventy-five dollar license fee. Certainly it would be very difficult, if not impossible, to secure a conviction from a jury in such cases.

If the party conducting such business be a nonresident of the locality and one who makes a business of going about from place to place where fairs, circuses and the like are being held, it may well be that the statute should be construed to include him either under the head of a peddler or a transient merchant, and the same thing would be true of one using a stand on wheels which is drawn from one place to another and used only upon such special occasions, though I am of the opinion that in the two cases last mentioned the person conducting such business should be held to be a peddler rather than a transient merchant.

Sept. 9, 1914.

THOMAS C. DOWNS,
District Attorney,
Fond du Lac, Wis.

This department received your letter dated the 5th inst. on the 9th inst., in which you present the following statement of facts:

“A representative of a business concern located at Plymouth, Wis., calls at the village of St. Cloud, in this county and state, about every two weeks with a team and wagon and solicits and delivers orders for groceries. Upon his arrival in said village, said agent goes from house to house therein, and delivers goods from his wagon ordered upon a previous visit and solicits orders for goods to be delivered upon his next visit.”

Upon this statement of facts you desire an opinion as to whether said agent can be compelled to pay a license as a peddler or transient merchant under ch. 67, Stats.

Our supreme court, in a recent case, Dewitt v. State, 155 Wis. 249, on page 251 has given the following definition of a peddler:

“A peddler is simply one who peddles, and any one peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him.”

And in another sentence found on same page, holds that “The essential thing is that he (the peddler) must do business by going about from place to place selling and delivering merchandise in a retail way to such individuals as he may be able to deal with.”

Sec. 1574, Stats., defines a transient merchant as follows:

“A transient merchant within the meaning of sections 1570 to 1584i, inclusive, is defined as one who engages in the vending or sale of merchandise at any place in this state temporarily, and who does not intend to become and does not become a permanent merchant of such place.”

Upon the facts stated in your letter it is clear that the “representative” or “agent” referred to therein does not come within the law relating to peddlers and transient merchants.
Former Attorney General F. L. Gilbert, in an opinion rendered April 24, 1909, upon a very similar state of facts, went into this question very thoroughly and I can do no better than to quote from said opinion which is found in the Attorney General's Opinions for the year 1910 on pages 545 and 546, and incorporate the same herewith as a part of the answer to your inquiry:

"I do not consider that a person that simply takes orders for goods by exhibiting samples comes within the definition of a transient merchant as given in the above statute. One of the most recent, as well as perhaps the most pertinent definitions of a transient merchant under a very similar statute is that of State v. Bristol (Ia.), 109 N. W. 199. Under a statute of that state peddlers were required to pay a county tax and the acts defined peddlers to include all transient merchants and itinerant vendors selling by samples or taking orders, whether for immediate or future delivery. The defendant was a traveling solicitor for a corporation engaged in selling tea. He took orders for goods similar to samples carried by him and delivered the order to the corporation, and, if the orders were approved, it prepared the goods for delivery and they were delivered by the defendant. The corporation kept accounts with all its customers and it was held that the defendant was not within the statute. Speaking of vendors, the court said in that case (ibid p. 200):

"He was simply an agent or sales man, a soliciting agent or commercial traveler, who took orders for goods. He made no sales himself, and, although he delivered goods and collected pay therefor, he did nothing more in this respect than any carrier might do. State v. Nelson, 128 Iowa, 740; 105 N. W. 327. Was he an itinerant vendor selling by sample or by taking orders? A vendor (vender) is one who transfers the exclusive right of possession of property, either his or that of another, for some pecuniary equivalent. A soliciting agent who takes orders subject to the approval of his principal is not ordinarily regarded as a vendor. While some conflict, the weight of authority seems to support this proposition. It would doubtless be competent for the legislature to tax and license all soliciting agents if, in its wisdom, it saw fit to do so; but the act in question does not seem to cover them."

I therefore conclude that, under the circumstances mentioned in your statement of facts, the "agent" or "representative" does not come under the law providing for the licensing of peddlers or transient merchants.
Peddlers—Interstate Commerce—A person who travels about from place to place taking orders for goods and afterwards delivers them to the purchasers is not a peddler.

If goods are outside the state when ordered it is interstate commerce.

CHARLES E. BRIERE,
District Attorney,
Grand Rapids, Wis.

In your letter of Oct. 8th you submit the following for an official opinion:

"First: A. comes to the city of Grand Rapids, takes orders for merchandise. These orders are sent to a city in Illinois. The goods so ordered are then put in a car, billed in the name of the agent who took the orders. Each order being marked in the name of the purchaser. When the car reaches Grand Rapids, the soliciting agent takes the goods from the car and delivers the same to the purchasers and collects the money when the delivery is made. Does this party so soliciting and delivering orders come within either transient merchant or the peddler law?

"Second: Would the above statement of facts call for a different opinion, provided the orders were filled from an adjoining county and not from outside the state?"

It has been held by this department, repeatedly, that a person traveling about and taking orders for goods by samples, which orders are afterwards delivered by the solicitor, is not a peddler within contemplation of our peddler's law, and of course he would not be a transient merchant under the facts stated by you. See Opinions of Attorney-General 1906, p. 581, in which the authorities relied upon were exhaustively stated. See also Opinions of Attorney-General for 1908, p. 614, and 1910, p. 550.

With reference to your first question I will say that the limitation upon state authority to regulate sales of goods brought from other states is phrased in the Cyclopedia of Law and Procedure as follows:

"The states may control sales by peddlers who buy goods to sell on their own account or who as agents, even for nonresidents, sell goods which are in fact within the state at the time of sale; but sales, or the soliciting of sales by peddlers, commercial travelers, or other agents for nonresidents of goods in fact outside the state at the time of sale, are acts of
interstate commerce and beyond state influence." 7 Cyc. 441, 442; notes 55 and 56 and cases cited. 10th Cent. Digest, Title Commerce, Sec. 107; 15 A. & E. Ency. of Law (2nd Ed.) 296.

I am, therefore, of the opinion that both of your questions must be answered in the negative.

Peddlers—License—One who raises fruit which he peddles is not on that account exempted from the payment of a peddler's license.

October 28, 1914.

DAVID H. DAVIES,
State Treasury Agent.

I have your request for opinion of this date in which you state:

"This office desires to be informed, in writing, whether or not a person who raises apples and fruit in Michigan, has same brought into Wisconsin and peddles same from place to place would be required to procure a peddler's license. There has been a general understanding of the law that farmers within this state can sell goods of their own raising. It is not known and has not been shown to this office by affidavit or otherwise, that the apple vender is a raiser of apples in Michigan, but in making your decision it is assumed that said apple vender is a grower of the apples he peddles."

The distinction which has heretofore been made in some opinions of this department under the peddler's license law, as between persons peddling produce or articles produced or manufactured by them and persons peddling such articles purchased by them for re-sale, has been, in effect, repudiated by more recent opinions in this office. This distinction rested upon the proposition that a person merely selling and offering for sale articles of his own production or manufacture is not a peddler.

As a matter of law, in the absence of an express declaration to that effect in the statutes, this distinction would seem to have little, if any, foundation. It was definitely abandoned as applied to the construction of the peddler's license law in this department in an opinion dated Dec. 5, 1913, to L. Olson Ellis, district attorney of Jackson county.
The conclusion reached in the opinion to Mr. Ellis was applied in the opinion rendered to you under date of May 28, 1914. This view of the law would seem to be amply sustained, both by the decision in the Whitcom Case, 122 Wis. 110, and also in the Dewitt Case, 155 Wis. 249.

Accordingly, I am of the opinion that the fact that the person referred to in your present inquiry raises the apples and other fruit which he offers for sale and peddles does not exempt him from the payment of peddler's license, and that he should be required to pay such license.
OPINIONS RELATING TO PLUMBERS' LICENSES

Plumbers—License—Applicant for a license of a master plumber, a journeyman plumber, or a plumbing contractor, must be given a license if he shows on examination that he has the necessary qualifications.

Only those who make application within sixty days after the passage of the act can come in under the waiver clause.

Those violating the law must be prosecuted like all other criminals.

March 3, 1914.

C. A. Harper,
State Health Officer.

In your letter of Feb. 27th you have submitted a number of questions, which I will answer in their regular order.

"1. The law requires all persons doing the work of plumbing in cities of the first, second and third class, and fourth class cities of 5,000 population or more, to obtain state license. In the smaller cities and villages, however, no license is required under the law. Some of these plumbers in the smaller places are making application for license, and the question arises: (a) Is the board expected to license them; and (b) if the board is expected to license them, do they come in under the waiver clause, or is an examination required of them? Some of these plumbers still remain in the smaller places, while some anticipate moving into the cities where the law licensing plumbers is applicable."

In answer to question (a), I will direct your attention to the following provision in the second paragraph of sec.959-54, Stats. (ch. 731, L. 1913):

"Any person, firm or corporation desiring to engage in or work at the business of a plumbing contractor in this state shall apply to the state board of health and be by said board first duly licensed to engage in such work."
It is the duty of the state board of health under said ch. 731, laws of 1913, to grant licenses to those plumbers who show the necessary qualifications. Any applicant who desires a license either as a master plumber, a journeyman plumber or a plumbing contractor should be given a license if, upon examination, he shows that he has the necessary qualifications, unless he is entitled to a license without an examination. It is not necessary for a party duly licensed to engage in the business after he has secured his license, but if he desires a license and pays the necessary fee and is duly qualified, the board is required to grant a license to him. A plumber in a city or village in which no license is required may intend to engage in the plumbing business in those cities in which a license is required and if he makes application to your board the board is obligated to license him.

In answer to question (b), I will say that subsec. 1, sec. 959-55b, (ch. 731, L. 1913) provides as follows:

"All master plumbers engaged in business as such in the state, desiring to continue as such, are hereby required to procure a master plumber's license from the state board of health within sixty days after the passage and publication of this act, the fee for which license is hereby fixed at ten dollars, such license, unless sooner revoked, to expire on December 31, next after the issuance thereof, but no examination shall be required of such master plumbers making such application for license within the time hereby limited. Commencing January 1, 1914, and annually thereafter on January first of each year, a renewal fee of five dollars shall be paid to the state board of health for a renewal of such license by all master plumbers, theretofore licensed, continuing in business as such within this state."

Subsec. 2, of the same section contains a similar provision as to journeyman plumbers and subsec. 3 contains a similar provision as to plumbing contractors.

Sec. 959-55a provides, in subsec. 1, as follows:

"All persons at the time of the passage and publication of this act engaged in the plumbing business in this state, either as master plumbers or journeyman plumbers or plumbing contractors shall be respectively licensed as such by the state board of health without examination, upon the payment to the state board of health of the license fee herein-after provided. No person who desires to engage in the business or practice of plumbing, either as a master plumber or
a journeyman plumber, after the passage and publication of this act, shall be granted a license until he has passed a satisfactory examination. Before any applicant shall be permitted to take such examination, he shall pay to the state board of health the examination fee as herein provided for.'

Under these provisions of the statute it is necessary for a master plumber, a journeyman plumber or a plumbing contractor who is engaged in the plumbing business at the time of the passage of ch. 731, laws of 1913, if he desires a license without an examination, to make the application within sixty days after the passage and publication of ch. 731, laws of 1913. This chapter was approved August 1, 1913, and published August 2, 1913. It is, therefore, too late to come in under the waiver clause at this time and the board is required to grant a license to those who have not already secured one, if the party in question has duly passed an examination as contemplated by the law in question.

"2. The law went into effect October 2, 1913. A number of plumbers were in business at that time who have failed to comply with the provisions of the law and take out a license, claiming that they were out of work, or were not going to engage in the plumbing business until some time later. Some of them are now applying for plumbing license. The question arises: (a) if licensed, are they to be licensed under the general waiver provision; or (b) must they take an examination the same as a person who starts into business? (c) If they come in under the waiver provision, are they required to take out a license for the balance of 1913, and also renew the license for 1914; and (d) if so, what would be the procedure according to provision of the law?"

In answer to question (a), I will say that, in view of the answers already given to the above questions, it must be answered in the negative. Question (b) must be answered in the affirmative, as more than sixty days has expired since the passage and publication of the act in question. In view of the answers given to questions (a) and (b), questions (c) and (d) do not require an answer.

"3. Does the law state a definite time, or is there anything in the law which would authorize the board of health to fix a certain time after which plumbers will be prohibited from coming in for license under the waiver provision?"
In answer to this question I will say that the law does state a definite time after which plumbers are prohibited from coming in for licenses under the waiver provision of the law in question, the definite time being sixty days after the passage and publication of the act as above stated.

"4. It is apparently necessary in a few instances to apply the penalty provision of the law in the case of plumbers engaged in work as such, in cities where license is required, without the state license required by law. May I ask you to outline the procedure in instigating a prosecution?"

In answer to this question I direct your attention to sec. 959-56 (ch. 731, laws 1913), which provides, in subsec. 1, as follows:

"Any person who shall engage in the work of a master or a journeyman plumber for compensation without a permit or a license as provided in sections 959-53 to 959-56, inclusive, of the statutes, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor exceeding fifty dollars, or imprisonment in the county jail not exceeding thirty days for each and every violation thereof. Each day of such violation shall constitute a separate offense."

Under this provision of the statute it is a crime for any one to violate its provision, and a prosecution must be brought in the same manner as all criminal prosecutions are brought. Complaint must be made to a magistrate by some one who is conversant with the facts. In all such cases the statement of facts upon which the prosecution is to be brought should be presented to the district attorney, whose duty it is to prosecute if the law has been violated and a crime has been committed.

Plumbers—Statutes—Ch. 731, laws of 1913, being the law regulating plumbers, must be considered as constitutional until a court of competent jurisdiction declares it unconstitutional.

C. A. Harper,
State Health Officer.

With your letter of April 19th you enclose one from Thomas F. Hayden, attorney at law of Milwaukee, addressed
to Bernard J. Doyle, in which he contends that ch. 731, laws of 1913, is unconstitutional for the reason that it requires a plumbing contractor's license from a person who has already a master plumber's license when such person is engaged in dealing and selling plumbing material and supplies in connection with the installing of plumbing.

He says, beginning on page 2:

"I can engage in the business of dealing in and selling of plumbing materials and supplies tomorrow, though I know nothing about the science of sanitation or the art of plumbing, and I will not be required to pass any examination, obtain any license nor pay one cent for a license fee, yet you, whom the state certified as an expert by issuing your master plumbers license, cannot exercise the same privilege without paying a sixty dollars license fee."

Mr. Hayden cites no authorities except some on the general proposition against discrimination. You inquire what answer should be given to the letter of Mr. Hayden.

It seems to me that the point he raises is far-fetched and in the absence of any decision of the court on this question we must treat this law as constitutional. This law purports to regulate the plumbing, or the installing of plumbing materials, and not the business of dealing in such material. Any person, including a master plumber, may carry on the business of dealing in plumbing materials and supplies without violating the law in question. It is only when the business of dealing in such articles is carried on in connection with the installing of plumbing that a plumbing contractor's license is required. This is required of every one, of the dealer as well as of the plumber.

A proper answer to make to the letter of Mr. Hayden is that you will consider such law constitutional until a court of competent jurisdiction declares otherwise.
Plumbing—Local Permit—A city ordinance providing that no local permit for the installation of plumbing shall be issued to one not having a state license is valid.

February 2, 1914.

C. A. Harper,
Secretary State Board of Health.

In your favor of Jan. 30th you inquire if, under the provisions of sec. 959-58, Stats., a city may provide that no local permits for the installation of plumbing shall be issued to one not having a state license provided for under ch. 731, laws of 1913.

Under sec. 959-57 it is provided that cities of the first, second and third class having a system of water works or sewerage shall, and cities of the fourth class may, appoint one or more inspectors of plumbing. Sec. 959-58 provides as follows:

"Each city of the first, second and third class having a system of waterworks or sewerage shall and cities of the fourth class may, by ordinance or by-law, prescribe rules and regulations for the materials, construction, alteration and inspection of all pipes, faucets, tanks, valves and other fixtures by and through which supply or waste water or sewerage is used or carried, and provide that they shall not be placed in any building therein except in accordance with plans which shall be approved by the board of public works, where such board exists, or the board of health of such city, or such person or persons as either of said boards may designate; and shall further provide that no plumbing shall be done, except in case of repairing leaks, without a permit being first issued therefor upon such terms and conditions as such city shall prescribe; provided that no such ordinance, by-law, rule or regulation prescribed by any such city shall be inconsistent with this act or any rule or regulation adopted or prescribed by the state board of health; and provided further, that no city shall be authorized to or require the licensing of journeyman or master plumbers or plumbing contractors, or prevent any such plumbers or plumbing contractors who are licensed under the provisions of this act from engaging in or working at the business for which they are respectively licensed in any place in this state."

In this section cities are authorized by ordinance or by-law to provide that no plumbing shall be done, except in cases of repairing leaks, without a permit being first issued
therefor upon such terms and conditions as such cities shall
prescribe, but such ordinances, by-laws or any rule or regu-
lation prescribed by any such city shall not be inconsistent
with the provisions of the act in question, namely, ch. 731,
laws of 1913, or any rule or regulation adopted or prescribed
by the state board of health. You state that the state board
of health has not passed a rule or regulation on this matter.

A city ordinance or by-law, providing that no local permit
for the installation of plumbing shall be granted to anyone
who has not a state license, is certainly not inconsistent
with any provision of the above sec. 959–58, and as the stat-
ute expressly provides that the city may grant the permit
upon such terms and conditions as such city may prescribe
so long as the same is not inconsistent with the provisions
of the act in question, I therefore conclude that such an
ordinance would be valid.
OPINIONS RELATING TO PUBLIC HEALTH

Public Health—Public Officers—Dairy and Food Commissioner—State Board of Health—Industrial Commission—
The dairy and food department has no jurisdiction over the sanitary inspection of bakeries and confectionery establishments.

If stores and other places where bakery and confectionery are stored or sold do not store or sell any other "food," the jurisdiction of the state board of health and the industrial commission as to the sanitary inspection of such places is exclusive, but if other "food" is also stored or sold the dairy and food department has concurrent jurisdiction.

The dairy and food department has no jurisdiction over the sanitary inspection of hotels.

April 18, 1914.

J. Q. Emery,
Dairy & Food Commissioner.

In your letter of the 14th you refer to secs. 1636–66, 1636–67m, 4601h and 4601i, Stats., and ask:

"Insofar as the sanitary inspection of bakery and confectionery establishments is concerned, is the dairy and food department given any jurisdiction, or is the jurisdiction over such places given exclusively to the industrial commission and to the state board of health?"

Sec. 1636–66 provides in part:

"1. It shall be the duty of the industrial commission and boards of health, both state and local, to see that the provisions of sections 1636-61 to 1636-67, inclusive, are enforced. The industrial commission shall inspect and ascertain the sanitary condition of the bakery and confectionery establishments of the state and of such rooms, buildings, or apartments for which application for license to establish or operate a bakery or confectionery establishment therein has been filed, and shall examine such plans and specifications for buildings, rooms, or apartments to
be occupied and used as bakery or confectionery establish-
ments, as may be submitted to it with reference to the laws
for their sanitary regulation, and shall require such action
to be taken as may be needed to have bakery and confectionery establishments conform to the provisions of law.”

Subsec. 2 provides for the issuing of licenses by the com-
missioner of labor and industrial statistics (whose powers are
now imposed on the industrial commission—sec. 2394–54,
Stats.), for establishing or operating bakeries and con-
fectioneries. Subsecs. 3, 4, 5 and 6 are devoted to definitions.
The bakery inspector is under the supervision of the in-
dustrial commission. Sec. 2394–52, Stats.

Sec. 1636–67m provides in part:

“1. All stores and other places where products of a
bakery or baking establishment or of a confectionery or
confectionery establishment are sold or exposed or offered
for sale, and all cases, pans, boxes, baskets or containers
used for storing, shipping or delivering any such products,
shall at all times be kept in clean and sanitary condition.

“2. All show cases, shelves, counters, in or upon which
any such products are kept or stored for the purpose of
sale, shall at all times be well ventilated and kept free from
dust and dirt.

“3. The baking inspector shall have authority and is
authorized to inspect any place where any such products
are sold or offered for sale and is charged with the duty of
enforcing the provisions of this section.”

Sec. 4601h provides in part:

“1. It shall be unlawful to manufacture or prepare
for sale food as defined in section 4600 of the statutes,
unless in the process of its manufacture for sale or its prepa-
ration for sale it is securely protected from filth, flies,
dust or other contamination, or other unclean, unhealthful
or unsanitary conditions. It shall be unlawful to store or
offer or expose for sale or sell food as defined in section 4600
of the statutes, unless it is securely protected from filth,
flies, dust or other contamination, or other unclean, un-
healthful or unsanitary conditions.

“2. The dairy and food commissioner is hereby author-
ized and empowered, by himself, or by his assistants, chem-
ists, inspectors or agents, to enforce the provisions of this
section, and for this purpose, he or any of his assistants,
chemists, inspectors or agents shall have power to enter
and inspect every building, room, basement or cellar, which
may be occupied or used for the manufacture or preparation
for sale, storage, exposing or offering for sale or selling food as herein defined."

Sec. 4601i provides:

"The display or storing of fruits, vegetables, or other food products on the sidewalk, or outside the place of business is hereby prohibited, unless such fruits, vegetables or other food products are securely covered by glass, wood or metal cases, or inclosed in tight boxes, bags or barrels, and all such cases and containers raised at least two feet above the sidewalk. The provisions of this section shall not apply to fruits or vegetables which are peeled or skinned before being used, or which are stored in tight barrels, boxes or crates."

Sec. 4601k makes it the duty of local health officers, coordinately with the dairy and food commissioner, his assistants or inspectors, to enforce the provisions of sec. 4601i.

Sec. 1636–66 is a special statute relating to bakeries and confectioneries. Sec. 4601h is a general statute relating to all places in which food of any kind is prepared for sale, offered for sale, exposed for sale, or sold. Under a familiar rule of statutory construction the provisions of the special statute prevail over those of the general statute. In my opinion the dairy and food department has no jurisdiction so far as the inspection of bakery and confectionery establishments is concerned.

Referring to the same sections you ask:

"Insofar as the sanitary inspection of stores and other places where bakery and confectionery products are sold or stored is concerned, is the dairy and food department given any jurisdiction, or is the jurisdiction over such places given exclusively to the industrial commission and the state board of health?"

If the stores and other places where bakery or confectionery products are sold or stored do not sell or store any other food, within the definition of that term as given by sec. 4600, in my opinion the industrial commission and state board of health have exclusive jurisdiction. If, however, not only bakery and confectionery products but other "food" as well, are sold or stored, then, in my opinion, the dairy and food department has concurrent jurisdiction with the industrial commission and with the state board of health.
You also refer to sec. 1408m–10, in connection with secs. 4601h and 4601i, Stats., and ask:

"Insofar as the sanitary inspection of restaurants and hotels is concerned, does the dairy and food department have any jurisdiction, or is that given exclusively to the state board of health?"

Sec. 1408m–10 is a special statute relating to hotels and restaurants, and confers the authority to inspect such establishments in the interests of sanitation and health upon the state board of health. The other sections to which you refer in this connection are general statutes relating to places where food is manufactured, prepared, offered for sale or sold. In my opinion the dairy and food department has no jurisdiction so far as the sanitary inspection of hotels and restaurants is concerned.

Public Health—Municipal Corporations—Plumbing—The adoption of the statutes relating to plumbing did not repeal municipal ordinances relating to the same subject not inconsistent with such statutes.

Such statutes do repeal such parts of municipal ordinances as are in conflict with them.

Additional rules and regulations relating to plumbing desired by any municipality should do so by ordinance or resolution.

The state board of health may adopt rules for the prevention of unnecessary duplication of material on a job of plumbing.

April 29, 1914.

C. A. Harper,

State Health Officer.

In your letter of the 28th you state:

"The state plumbing code prescribes minimum standards on a rather broad scale, sufficient (if followed) to insure safe and substantial plumbing anywhere in the state.

"I desire information on the following points:

"(1) Does the adoption of the state plumbing code have the effect of repealing such local ordinances governing the installation of plumbing as were in existence prior to the enactment of the state law?"
“(2) If the adoption of the state plumbing code does not altogether repeal the various local ordinances, does it repeal such portions as conflict with the provisions of the state code?

“(3) Is it necessary, now that the state code has been adopted and published and thus has the effect of law, for the cities desiring additional regulations to make such additional provisions by new local ordinances or by-laws?

“(4) Should a municipality desire to add additional provisions as to material and construction which are really not necessary in order to have reliable and efficient plumbing installations, do the general recommendations of the code, without specifically restricting such additional provisions to local rules and regulations, cover the situation by implication?

“The interpretation of the law along the lines above indicated is made necessary because of questions which have arisen as to ordinances already in force in various cities of the state as well as ordinances now pending.

“One more point: observation has shown that more material than is necessary is sometimes installed, in fact there is sometimes duplication of material on a plumbing job. When we see this unnecessary expense being imposed upon the property owner, what action or jurisdiction would we have over such a situation?”

Sec. 959-55a, subsec. 2, provides:

“The state board of health shall prescribe and shall have power to amend the rules and regulations governing plumbing, drainage, sewerage and plumbing ventilation in connection with all buildings in this state and may prescribe minimum standards which shall be uniform throughout the state. This act shall not be construed to deny the right to any local governing body having jurisdiction to adopt and enforce additional rules and regulations relating to plumbing, drainage, sewerage and plumbing ventilation not inconsistent with the provisions of this act, or the rules and regulations prescribed by the state board of health * * .”

Sec. 959-58, Stats., provides in part:

“Each city of the first, second and third class having a system of waterworks or sewerage shall and cities of the fourth class may, by ordinance or by-law, prescribe rules and regulations for the materials, construction, alteration and inspection of all pipes, faucets, tanks, valves and other fixtures by and through which supply of waste water or sewerage is used or carried, and provide that they shall not be placed in any building therein except in accordance
with plans which shall be approved by the board of public works, where such board exists, or the board of health of such city, or such person or persons as either of said boards may designate; and shall further provide that no plumbing shall be done, except in case of repairing leaks, without a permit being first issued therefor upon such terms and conditions as such city shall prescribe; provided that no such ordinance, by-law, rule or regulation prescribed by any such city shall be inconsistent with this act or any rule or regulation adopted or prescribed by the state board of health."

It will be noted that these sections expressly recognize the authority of local municipalities to adopt and enforce rules and regulations relating to plumbing which are not inconsistent with the statutes or the rules and regulations prescribed by the state board of health. In my opinion the adoption of the statutes relating to plumbing did not repeal local ordinances governing the installation of plumbing except insofar as such local ordinances are inconsistent with the statutes. Insofar as they are inconsistent with the statutes, they were repealed by them. It would also seem that the adoption of rules and regulations by the state board of health, pursuant to the authority conferred upon them by law, would repeal any inconsistent provisions contained in the ordinances of local municipalities.

In answer to your third question it appears to me cities desiring regulations additional to those provided by statute and the rules of the state board of health unless such additional regulations are contained in ordinances or by-laws herefore enacted, in order that such additional regulations may have any force or effect, must make them by ordinance or by-law.

If I correctly understand your fourth question it is answered by what is said in reply to your third question.

Subsec. 4, sec. 959-55, Stats., provides in part:

"The state board of health shall have power to revoke any journeyman or master plumber's license if same was obtained through error or fraud, or if the recipient thereof is shown to be grossly incompetent, and for a second wilful violation of any rules and regulations prescribed by the state board of health; the state board of health shall also have power to revoke any plumbing contractor's license, if the owner thereof shall be guilty of a second wilful violation of any rule or regulation prescribed by the state board of health \*\*\* ."
It appears to me that under the authority conferred upon the state board of health by sec. 959-55a, it may make rules and regulations covering the question of the amount of material to be installed, and that for a second wilful violation of such rules the license of the master plumber or plumbing contractor may be revoked.

Public Health—Public Officers—Veterinarian—Police Power—The owner of cattle shipped into the state as “feeders” pursuant to subsec. 2, sec. 1494-71, Stats., cannot be compelled to pay the local health officer for his services in quarantining such cattle.

The local health officer must see that the law is complied with even though no fee is provided for his services.

O. H. Eliason,
State Veterinarian.

In your favor of June 11th you ask my opinion as to whether the owner of cattle shipped into the state “as feeders” pursuant to subsec. 2, sec. 1494-71, Stats., which requires such cattle to “be in quarantine and remain in such restraint until slaughtered or shipped out of the state,” can be ordered by your board to pay the local health officer for his services in quarantining such cattle or whether such health officer should be paid through the ordinary channels by the town board.

A careful reading of secs. 1494-71 to 1494-77, discloses no provision requiring the owner of cattle shipped into the state without previous examination and certification to pay the cost of the quarantine except the provisions of sec. 1494-74, which are by their terms confined to payment of the expenses of the quarantine and examination of “animals intended for breeding or dairy purposes.” Such provision is plainly inapplicable in the case of cattle shipped in “as feeders,” which are not required to be examined at all and are not “intended for breeding or dairy purposes” but are merely required to be kept in quarantine “until slaughtered or shipped out of the state.” Even if the expense of the quar-
antine could be regarded as part of the expense of the examination, which, by the last clause of subsec. 1, sec. 1494-71, is chargeable to the owner, that section could apply only in case the examination was actually had, and could not be applicable to cases where no examination is provided for but only a detention in quarantine until slaughtered or shipped out of the state. The owner of cattle brought into the state “as feeders” must of course defray any expense which is necessary in order to keep such cattle in quarantine (i.e. any expense caused by keeping the cattle separate from other cattle) but in the absence of a provision that he must also pay the cost to the state of overseeing such quarantine and the fees of the officers of the state in watching for violations of the law, I do not think that he is under liability to do so. Conceding that the legislature might have provided that the owner of such cattle must pay the expense of inspection by the state in determining that the law is being obeyed, it is clear that the statutes fail to so provide and under such circumstances I am of the opinion that the owner cannot be compelled to pay such expense.

The quarantine is required to be under the direction of the local health officer, (see subsec. 1, sec. 1494-71 and sec. 1494-74) so that it is his duty to see that the law is complied with. On familiar principles he must perform such duty even though no special compensation is provided therefor. “Officers take their offices cum onere, and services required of them, for which no specified fee is provided, are considered to be compensated by the fees allowed for other services.” McCumber v. Waukesha County, 91 Wis. 441, 4. It seems that the local board of health of the town in fixing the salary of the local health officer pursuant to subsec. 4, sec. 1411, Stats., might well consider the duty thus placed upon him and provide a salary sufficient to compensate for performing such duty.
Public Health—Nuisance—The health board of a village, under sec. 1414, Stats., after giving the notice provided therein, may remove a nuisance and recover the expense of so doing from the person responsible in a civil action.

Such person is entitled to show in such action that in fact there was no nuisance, or that the proper procedure was not followed, etc.

August 3, 1914.

C. A. Harper,  
State Health Officer.

In your letter of July 29th you enclose a letter from Dr. C. J. Willard, health officer of Wauzeka, in which he says:

"Several weeks ago I received a communication from your office requesting me to examine a vault and outbuilding of a local resident. This was following a complaint received by your department.

"In that letter you informed me if I found the condition as alleged, to have it remedied within twenty-four hours, and that the work of so doing would be a lien against the property.

"I immediately called the entire board of health together and we investigated the nuisance, and found the condition of the vault to be extremely unsanitary and filthy as alleged.

"However, the owner was at the time contemplating and making an effort to secure plumbers to connect with the sewer, so we were inclined to be fair in the matter and we disregarded the twenty-four hour feature, but informed him of our action in declaring it a nuisance, and gave him a reasonable time in which to correct the condition.

"However, after waiting about thirty days, I called the owner by telephone and ordered him to cover the vault within a twenty-four hour period.

"At the expiration of that time, we employed a man to carefully set the building aside and cover the vault, after both had received treatment with chloride of lime. The expense of the work and disinfection amounted to $5.45, and the local board allowed the bill.

"The owner of the property says that he will not pay it, giving as a reason that he was not 'given a hearing' in the matter.

"Will you kindly advise me if there was any act of commission or omission in our procedure that would exempt the owner of the property from the expense incurred.

"A letter from your department or attorney general, giving in detail the method of procedure for the local board to pursue, would be greatly appreciated."
You say that sec. 1414, Stats. specifically authorizes local health authorities to abate dangerous nuisances; that, since this nuisance has been abated at the expense of the local board of health, the question of its collection from the property owner remains to be settled, and you ask if I can give you such information as to properly direct the health authorities to bring about a proper settlement of the situation, not only in this case, but in similar cases that arise from time to time in other localities of the state.

By sec. 1407a-5, Stats., it is made the duty of local health officers, among other things, to "enforce within their jurisdiction the provisions of the public health law and the rules and regulations of the state board of health."

By sec. 1411, Stats., the village board of every village is required to organize annually as a local board of health, or to appoint such a board, and the same section makes provision for the appointment of a health officer, who shall be ex officio a member of such board. Such local board of health is expressly authorized to "examine into all nuisances, sources of filth, and causes of sickness, and make such rules and regulations respecting the same as they may judge necessary for the public health and safety of the inhabitants."

Sec. 1413, Stats., provides:

"Notice shall be given by the board of health of all orders and regulations made by them by publishing the same in some newspaper, if there be one published in such town, village or city; if there be none, then by posting up the same in five public places therein; and such publication of said orders and regulations shall be deemed a legal notice to all persons."

I do not understand that the action taken in this matter is claimed to have been taken because of violation of any rules or regulations of the local board of health published as required by this section.

Sec. 1414, Stats., provides:

"Whenever any nuisance, source of filth or cause of sickness shall be found on private property the board of health shall order the owner or occupant thereof to remove the same at his own expense within twenty-four hours, and if he shall refuse or neglect to comply he shall forfeit not less than five nor more than fifty dollars; and said board may cause the same to be removed and may recover all expense incurred thereby from the said owner or occupant or from
such other person as shall have caused or permitted the same."

It will be noted that this statute provides a very drastic remedy for evils such as that claimed to have existed in the village of Wauzeka. In my opinion the courts would hold it must be strictly construed, and that to subject the owner of the property to liability for the expense of removing the nuisance, the procedure mapped out must be strictly followed.

From Dr. Willard's letter it is not entirely clear that it was the board of health that ordered the abatement of the nuisance, nor that it was the board of health that caused the expense to be incurred. Both acts may have been those of the health officer, or both may have been acts of the board. Certainly the board did ratify both acts, and thus made them their own.

The question upon this branch of the inquiry is whether of not the calling of the owner over the telephone by the the health officer, and requiring him to abate the nuisance within twenty-four hours is such an order by the board of health as is contemplated by this section. While this question is not altogether free from doubt, I am inclined to think, in view of all the circumstances, that the courts would hold this a sufficient notice.

A place of the kind named in Dr. Willard's letter "is not necessarily a nuisance, but may become such by its location and the manner in which it is maintained." 29 Cyc. 1183, and cases cited.

To enforce the liability of the owner of the premises, it must be shown that it was in fact a nuisance. Upon that question he is entitled to his day in court. Salem v. Eastern R. Co., 98 Mass. 431; Lowe v. Conroy, 120 Wis. 151.

The proper method of enforcing the liability is by a civil action brought in the name of the village, as in any other case of implied contract. Salem v. Eastern R. Co., 98 Mass. 431.

The person responsible for the existence of a nuisance is not excused from such liability because he was not given a hearing before the nuisance was abated. Salem v. Eastern R. Co., 98 Mass. 431; Train v. Boston Disinfecting Co., 144 Mass. 523; Lisbon Avenue Land Co. v. Lake, 134 Wis. 470.
But he may contest the questions of the existence of a nuisance, the compliance with the statutory requirements, the reasonableness of the expense incurred, etc. *Salem v. Eastern R. Co.*, 98 Mass. 431.

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**Board of Health—Deputy Health Officers—Photographs**—Deputy state health officers, when and as directed by the Board of Health, may lawfully take photographs of premises which they are authorized to inspect without consent of the owner.

October 20, 1914.

C. A. Harper,

*State Health Officer.*

I have your request for opinion of the 13th inst., in which you state as follows:

"The deputy state health officers, employed by the state board of health, have been instructed to look into the insanitary conditions in the various parts of the state and to abate the same as far as it is reasonably possible. These men have been instructed by the state board of health to use cameras for taking pictures of special insanitary conditions, these pictures to be used in public health work. They have further been instructed to take pictures, after the insanitary conditions have been corrected, to show how improvements in such localities have been made.

"** The question arises whether the state board of health, and particularly the deputy state health officers, have the authority to photograph certain insanitary conditions, private and public, in this state for the purpose of being better able to represent the conditions to the administrative officials. Only in instances where the public is concerned are photographs taken of insanitary conditions. These photographs are not used to injure the individual, but to better formulate the work of the state board of health along the line of education; the pictures to be used at times in lantern slides, of course without using the name of the owner of the premises photographed. In most instances photographing especially bad conditions has the effect of immediate clean-up, and therefore is a potent factor in the administration of public health laws.

"Kindly give us an opinion as to the reasonableness of this feature of public health work by our deputy state health officers. To put the question direct, has the state
board of health through its deputy state health officers the right to take pictures of anything they have the right to inspect?"

Among the general powers of the state board of health the following are prescribed in sec. 1407, Stats.:

"The said board shall have general supervision throughout the state of the interests of the health and life of citizens, and shall especially study the vital statistics of the state and endeavor to put the same to intelligent and profitable use. They shall make sanitary investigations and inquiries respecting the causes of disease, especially epidemics, the causes of mortality, and the effects of localities, employments, conditions, habits and circumstances, and shall diffuse such information as they may deem proper."

In sec. 1407a-1, the board is required to establish a bureau of sanitary inspection; in sec. 1407a-2, it is provided that the secretary of the state board of health "shall hereafter be designated and known as the state health officer;" and in sec. 1407a-3, the board is required to divide the state into five sanitary districts and to appoint for each such district "a deputy state health officer." In subsec. 2, sec. 1407a-3, the duties and powers of deputy state health officers are prescribed in part as follows:

"The deputy state health officer shall have jurisdiction throughout his district; and he shall have the right of entry into any workshop, factory, dairy, creamery, slaughter house or other place of business or employment, when in pursuit of his official duties. The deputy state health officer shall carry out the instructions of the state board of health and shall make such investigations and reports as said state board of health may require. He shall, when required by the state board of health, with the help of local health officers, inspect and report upon the sanitary conditions of streams and sources of public water supplies, schools and schoolhouses, dairies, creameries, slaughterhouses, workshops, and factories, and of all places where offensive trades or industries are conducted in his district."

These statutes are police regulations enacted in the interests of the public health. They contemplate a system of sanitary inspection under the supervision of the state board of health. By their terms, deputy health officers are required, in the manner and as directed by the board of health, to make inspections and reports upon the sanitary condition of cream-
eries, dairies, slaughterhouses and the like. By other provisions of these statutes, the board of health and the deputy health officers are required to cooperate with and assist, by advice and otherwise, local health officers. It is clearly contemplated that publicity of facts and conditions affecting public health and sanitation shall be among the means employed by the state board of health in safeguarding "the interests of the health and life of citizens," and it is expressly provided that the board "shall diffuse such information as they may deem proper."

The duty and authority of deputy state health officers to "make such investigations and reports as said state board of health may require," in my opinion, clearly include the duty and authority to inspect and report upon sanitary conditions in establishments of the character enumerated in the statutes and as a part of such investigations and report, when directed to do so by the board of health, to take photographs of such sanitary conditions and transmit the same to the board of health as a part of such reports.

Doubtless, also, these statutes would be held to authorize the state board of health and the deputy health officers, when so ordered by the board of health, to utilize the information acquired through such investigations, including photographs so taken in the discharge of their official functions of disseminating information and assisting local health officers and other administrative officers in the enforcement of sanitary regulation.

The only question that remains, therefore, is whether the statutes conferring such authority on public officials and imposing upon them such duties are a valid exercise of the police powers of the state. Unless they exceed the legitimate scope of the police power by attempting to authorize an unreasonable invasion of constructional or fundamental private rights, they must be held to be valid and be given effect according to their terms.

The only objection suggested to the validity of these statutes and to the lawfulness of the board's practice under them of making investigations and reports by means of photographs is that the board or its deputy health officers may not lawfully take photographs of premises inspected by them without the consent of the owner of such premises. The question raised appears to be in the law a novel one.
and the objection is, so far as I am able to find, without support of express judicial authority anywhere.

Cases have arisen in which the aid of courts of equity has been invoked to enjoin the unauthorized publication of a photograph of a person, generally for advertising or trade purposes. In such cases the right to relief sought has been predicated on the so-called "right of privacy," a supposed fundamental right incident to personal liberty and to pursuit of happiness. The question is ably considered in the New York Court of Appeals in the opinion of Chief Justice Parker in what is probably the leading case in this country. Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 59 L. R. A. 478.

In that case the conclusion is reached and maintained that there is at common law, and independent of statute, no such "right of privacy" capable of legal or equitable enforcement and protection. The contrary view is maintained in a vigorous minority opinion in the case by Mr. Justice Gray.

In Rhode Island and Michigan likewise, the courts have held that there is no "right of privacy" capable of legal enforcement, such as will entitle one to injunction to restrain the unauthorized publication of a photograph. Henry v. Cherry & Webb, 30 R. I. 13, 73 Atl. 97; Atkinson v. Doherty, & Co., 121 Mich. 372, 80 N. W. 285.

In the supreme court of Georgia and in the court of appeals in Missouri, however, the opposite conclusion is reached, and the so-called "right of privacy" has been vigorously asserted and enforced by judicial decree. Pavesich v. Insurance Company, 122 Ga. 190, 69 L. R. A. 101; Munden v. Harris, 134 S. W. 1076.

It would appear, therefore, that the weight of authority is rather against the existence of such "right of privacy" in this country. It should be observed, moreover, that these cases deal with the unauthorized publication of a photograph for trade purposes. In none of them is it declared to be an invasion of the "right of privacy," or an actionable wrong to photograph a person without his consent. Indeed, it is said, in effect, by Mr. Justice Gray, in his dissenting opinion in the Rochester Box case, and which dissenting opinion is followed by the Georgia and Missouri courts, that there is no relief against the taking of photographs without the consent of
the subject. In the course of his opinion, Mr. Justice Gray says:

"Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form in invitum their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution." 59 L. R. A. 488.

In no case, so far as I am able to find, has the "right of privacy" been invoked to prevent the taking of photographs of places or property in invitum their owner. It will be observed, moreover, that, even in the cases where the "right of privacy" has been held to exist and to entitle a person to protection against the unauthorized publication of his photograph, the right has been held to exist only as against private persons making such publication without any pretended authority or warrant of law and only for purposes of private gain. Decisions in such cases, in my judgment, would not support any such claim to protection against the acts of public officers performed at least under color of statutory authority in taking and publishing photographs of premises inspected by them under express and clearly valid legal authority and duty.

Even though one had a right in law to restrain a private person from taking and publishing unauthorized photographs of his premises (and even this right I do not find maintained in any judicial authority) the situation will be quite different when the person sought to be restrained is a police officer of the state acting in the discharge of duty and in the exercise of authority imposed and conferred upon him in form, at least, by statute.

This distinction is illustrated by cases involving the right of police officers to photograph and to publish by distribution in police circles photographs of persons arrested and charged with crime. Downs v. Swann, 111 Md. 53, and cases there cited.

The right to take and place in the "Rogues' Gallery" of the police department photographs of persons accused before trial is, however, denied in Schulman v. Whitaker, 117 La. 703, 7 L. R. A. N. S. 274, and Gow v. Bingham, 107 N. Y. S. 1011.
The decisions denying the right of police authorities to take compulsory photographs of persons accused of crime are rested upon the right of personal liberty as a fundamental right and would seem to have no application to the question of the right of public health officers to photograph premises which they are authorized to inspect without the consent of the owner.

What has been said heretofore, of course, assumes that the taking and publication of photographs of premises by health officers and any statements made in connection therewith are not libelous. Of course, the law does not authorize health officers to libel any person or his business. If they do so, they will be answerable therefor the same as any other person. If the photographs taken are true and the statements made by the board of health incident to their publication in the manner suggested in your inquiry are truthful and made for a good public purpose, such publication will not be libelous although the result thereof may be to injure some person in his business or reputation.

I am, therefore, of the opinion that the board of health and its deputy health officers are within their lawful rights and authority in photographing premises which they are authorized by law to inspect, and that such photographs are a part of the information obtained by the board upon such inspections and investigations which the board is, by statute, in its discretion authorized to diffuse or publish, provided that such publication be for the public purposes contemplated by the statute, and provided further that the same be not in any respect either false or malicious.

Public Health—Nuisance—Query whether word "owner" in sec. 1414, providing for the abatement of a nuisance, if owner or occupant does not remove it after being ordered to do so, includes a person who owns an equitable interest in the property, such as a mortgagee.

C. A. Harper,
State Health Officer.

Under date of Oct. 15th you submit the following:

October 23, 1914.
"In the village of Soldiers Grove a dangerous and disagreeable nuisance is created on block A of the original plat on account of stagnant water collecting on this property and also for the reason that nearly all of this property which is near the water level has been used for a number of years for the disposal of household waste and other decaying vegetable and animal matter. All of the owners of property abutting on this lowland agree to fill their property so as to eliminate this nuisance with the exception of the owners of a hotel site located on lot 2 of this block. The owners of this property are nonresidents of the state and refuse to pay the taxes as well as any special assessments that may be made against the property. Citizens state the property is mortgaged for practically all it is worth and the question therefore arises as to the possibility of the village authorities collecting any special assessment which may be made against the property under the circumstances. What action do you advise in this case?"

Sec. 1414, Stats., contains the provision for the abatement of nuisances by boards of health. It provides as follows:

"Whenever any nuisance, source of filth or cause of sickness shall be found on private property the board of health shall order the owner or occupant thereof to remove the same at his own expense within twenty-four hours, and if he shall refuse or neglect to comply he shall forfeit not less than five nor more than fifty dollars; and said board may cause the same to be removed and may recover all expenses incurred thereby from the said owner or occupant or from such other person as shall have caused or permitted the same."

Under this statute the board of health has a right to order the owner or occupant of the premises to remove the nuisance. The question arises, is the word "owner" broad enough to include a person who has an equitable title in such property. If both the occupant and the person who owns the legal title are execution proof, then it is a vital question whether the person who owns the mortgage on said premises may be reached. This question has never been passed upon by our supreme court, but other courts have often held that the word "owner" is broad enough to include all persons who have any interest in the property. See Words & Phrases, Vol. VI, p. 5141.

I have been unable to find a decision, however, from a court of last resort holding that the word "owner" in a
statute of this nature is broad enough to include others than the legal owner of the premises. The question, therefore, is not free from doubt, but as this is the statute under which the board of health is required to act, if they intend to remove the nuisance in question, my advice is that the notice or order be given not only to the occupant and the owner of the legal title, but also to the mortgagee or the owner of the equitable title, and if it is necessary to bring an action to recover the expense for removing the nuisance, then such action should include the owner of the equitable title as one of the defendants.

_Public Health—Vaccination—Municipal Corporations—_ Authorities of cities, villages and towns to make rules concerning vaccination. Construction of sec. 1413(l, Stats. (Ch. 113, L. 1907.)

C. A. Harper,

_Health Officer._

In your letter of the 16th inst. you cite the following portion of sec. 1413(l (ch. 113, laws 1907):

"* * * such city, incorporated village or town shall prohibit the attendance at school in any such district or part thereof for a period of twenty-five days, after the appearance of smallpox, of any and all pupils and teachers, who have not been successfully vaccinated or who fail to show a certificate of recent vaccination."

You state in your letter that some municipalities have ruled that a pupil or teacher should be vaccinated every five or seven years in order to immunize successfully such individuals from smallpox, and you further state that the question has arisen whether such municipalities are authorized to make such a ruling, or whether the law referred to prohibits any local ruling as to the time of vaccination, and by so doing admits to all schools of the state pupils and teachers who at some time in their lives have been successfully vaccinated.

It is my opinion that the statute quoted cannot be enlarged upon so as to give the municipalities mentioned any greater power or authority than the language used therein warrants.
Our supreme court, in the case of State ex rel. Adams v. Burdge, et al., 95 Wis. 390, has clearly defined the authority of the state board of health as to how far it may go in absence of statute in prescribing rules requiring the vaccination of pupils, and it seems clear to me that the same limitations apply to cities, villages and towns.

The legislature, in the section referred to, has itself determined under what conditions a city, incorporated village or town, shall prohibit the attendance at school in any school district, viz.: "all pupils and teachers, who have not been successfully vaccinated or who shall fail to show a certificate of recent vaccination."

Had the legislature intended to prescribe further conditions, as, for instance, that "A pupil or teacher should be vaccinated every five or seven years," it would have incorporated such condition as a part of said law.

In my opinion a pupil or teacher who has been successfully vaccinated or who shows a certificate of recent vaccination has complied with all the requirements of said act, and has a right to insist upon admission to school, and this right can be enforced by mandamus the same as in the Burdge case above cited.
Public Lands—Where a notice of a public sale of public lands part of which are valuable for agriculture states the sales will be for cash that does not prevent the commissioners of public lands from determining, at any time before the sale, that as to the lands valuable for agriculture sales will be made on terms as prescribed by sec. 209, Stats.

January 6, 1914.

W. H. Bennett,
Chief Clerk Land Department.

In your letter of the 3rd you state:

"Pursuant to your verbal advice since recent act of the legislature amending sec. 209 that any state lands, without regard to classification may be sold on time, and each purchaser required to file affidavit, per sec. 210, all applicants to purchase have been so instructed. A list of Forestry lands in Douglas county are advertised to be offered for sale January 8th inst., at Superior. The published advertisement reads, "Sales will be for Cash," as prepared by state forester. Can these lands be sold on time, same as other forestry lands, or must sales be for cash only, as advertised?

"State treasurer requests advice on this point to guide him in conducting the sale on Thursday next."

I do not know upon what statement of mine you base your statement regarding the effect of ch. 597, laws 1913. I feel certain you must have misunderstood what I said. Under sec. 209, Stats., only "state lands valuable for agriculture may be sold for cash." What I told you was that the provisions of sec. 210, Stats., now apply to the sale of all state lands.

Sec. 207, Stats., prescribes what the notice of sale of public lands must specify. This does not include the terms of sale.

Sec. 209, Stats., provides:
"Sales of all public lands may be made for cash, to be paid at the time of sale, and all said lands valuable for agriculture may be sold on terms," etc.

You will note that the provision as to a sale on terms is permissive only. It leaves it to the discretion of the commissioners of public lands to determine whether lands valuable for agriculture shall be sold on terms or for cash. As the notice is not required to specify the terms of sale, the fact that it states "sales will be for cash," does not, in my opinion, prevent the commissioners from exercising their discretion at any time before the sale, and determining that the lands valuable for agriculture may be sold on terms.

Permit me, however, to suggest that if the commissioners should so determine it seems to me the sale ought to be postponed and readvertised. It may well be that the statement in the notice that "sales will be for cash" will keep away many who might wish to bid if terms are granted, and thus unfairly deprive them of an opportunity to so bid.

Public Lands—A purchaser of state land, regardless of its classification, is limited to 160 acres, and must give the affidavit required by sec. 210, Stats.

Only those public lands "valuable for agriculture" may be sold on terms.

January 6, 1914.

W. H. BENNETT,
Chief Clerk Land Department.

In your inquiry of Nov. 17th, last, you say:

"There are conflicting views as to the effect of Ch. 597, laws of 1913, on sales of forest reserve lands. One view is that said law removes entirely the limitation of quantity of such lands, classed as agricultural or otherwise, that may be sold to one person, company or corporation, and that affidavit prescribed by sec. 210, Stats. is not to be required from purchasers of any state forestry lands, whether application be to purchase on time or for cash.

An adverse view is, that Ch. 597, laws of 1913, repeals the clause in sec. 209, Stats., which distinguishes between forest reserve lands 'classed as agricultural' and other lands granted for forest reserve; that purchasers of any of such
lands are restricted to 160 acres each; and required to file the affidavit prescribed by sec. 210, Stats., with every application to purchase, whether on time or for cash. Also, that any state forestry lands, whether classed as 'valuable for agriculture' or not, may be sold on terms specified in paragraph one, of said sec. 209.

Your interpretation of ch. 597, laws of 1913, upon the points of difference here stated, is requested for guidance of this commission. Meantime the latter view above outlined is adopted in conducting forestry land sales."

Prior to the passage of ch. 450, laws 1903, there was no limitation as to the amount of land that could be purchased by any person, no affidavit was required, and all sales were for cash. That chapter limited the amount of land that one person could purchase from the state to 160 acres, and required an affidavit by the purchaser, to be filed with the commissioners, before the purchase, that all public lands of the state then owned by him, sold by the state since October 15, 1903, together with the land desired to be purchased, did not exceed that amount. It still required cash payment in full.

Ch. 264, laws 1905, repealed ch. 450, laws 1903, and withdrew from sale all state lands North of town thirty-three, with a provision that such of said lands as should be found by the state forester "to be more suitable for other purposes than for the purposes of the state forest reserve, because of their character, condition, extent or situation," might be sold by the commissioners of public lands.

Ch. 143, laws of 1907, reenacted that portion of ch. 450, laws of 1903, above referred to, 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."

Sec. 3, ch. 264, laws of 1905, is the one withdrawing from sale lands North of town thirty-three, and providing for the sale of such as were found more suitable for other purposes than for the purposes of a state forest reserve. There is no conflict between this and those provisions of ch. 143, laws 1907, which required an affidavit and limited the purchases of any individual to 160 acres. This latter ch. also enacted sec. 207, Stats., providing in part:
"All public lands not heretofore offered for sale shall, * * * be offered for sale," etc., and this is doubtless the part that shall not "be construed as in any manner affecting the provisions of sec. 3, ch. 264, laws of 1905."

It appears to me that the legislature desired to make it plain that the term herein used "all public lands" should not include any lands North of town thirty-three except those found more suitable for other purposes than for the purposes of a state forest reserve. It would seem that no individual could purchase more than 160 acres of land, of any kind, that he must give the required affidavit, and that he must pay cash, as the law stood after this enactment of 1907.

By ch. 452, laws 1911, "all state lands valuable for agriculture may be sold on terms," etc. The only change made by this chapter, material to your inquiry, is this one. It affects only the sales of lands valuable for agriculture, and this chapter expressly provides:

"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 classed as agricultural lands." This evidently has reference to other provisions of the act, relating to credits to be given for improvements, rather than to sales on terms, as that by its own terms applies to "all state lands valuable for agriculture."

Ch. 597, laws 1913, repeals subsec. 2, 3 and 4 of sec. 209, Stats., subsec. 4 being the one expressly providing that the provisions of sec. 209 and 210 shall apply to the sale of all state lands classed as agricultural lands. This, in my opinion, does not in any way affect the questions you ask.

It therefore is my opinion:

That a purchaser of state land, regardless of whether it is forest reserve land or is otherwise classified, is limited to 160 acres, and must give the affidavit required by sec. 210, Stats.

That only lands "valuable for agriculture" may be sold on terms.
Public Lands—Deeds—Grantor in warranty deed may maintain action to quiet title, under sec. 2801, Stats.
State may pay part of purchase price pending such an action.

April 1, 1914.

State Board of Control.
In your favor of March 30th you state that you have purchased what is known as the Crane Farm in Racine county for a site for the new home for the feeble-minded. That owing to a break in the chain of title it is necessary that a suit be brought to quiet the title which will take three months or more. That the owners suggest that a deed of conveyance be now made to the state and a partial payment of the purchase price made to them and the deed held in escrow until the title is perfected. You ask whether the Cranes can bring an action to quiet the title in case they make a deed to the state.

In case the action was begun prior to the deed to the state, sec. 2801 would seem to authorize its continuance, although the Cranes had parted with the legal title to the property. See Home Investment Co. v. Emerson, 153 Wis. 1, 3.

Furthermore, if the deed to the state was a warranty deed it would seem that the Cranes retained, after giving their deed, such interest in clearing the title and thus protecting their warranty as to authorize them to maintain such an action. See Ely v. Wilcox, 26 Wis. 91; Pier v. Fond du Lac, 53 Wis. 421; Spear v. Door County, 65 Wis. 298.

You also ask whether it would be proper for you to take a deed to the land and make a partial payment under the circumstances stated.

There is every reason to believe that the Cranes have title to the property in question because of more than thirty years possession under deeds purporting to convey title to them. There is, consequently, no reasonable doubt but that they will succeed in maintaining an equitable action to quiet the title. Under such circumstances I think you would be justified in making a partial payment for the land and have the deed placed in escrow awaiting the outcome of such suit. Especially would this be true if the Cranes would give you a bond to protect the state to the extent of the payment.
made by it and any moneys expended in improvements on the property in case they failed to give the state clear title to the property.

Public Lands—Highways—Public Officers—State Parks—Statutes—The state board of forestry has authority to discontinue or alter a highway through a state park. General laws do not apply to the state.

April 20, 1914.

W. H. McFettridge,
Member State Park Board,
Baraboo, Wis.

In your letter of the 14th you ask what is the proper procedure to vacate a road on state park lands?

You state that the only property directly served by the road proposed to be vacated is the Claude property and that owned by one Carrie Martin. That the representative of the Claude property informs you that he favors the new road and the abandonment of the old one and that you are of the opinion that the owner of the Martin property will object to the vacating of the present road. You also state that the proposed new road will serve better this Martin property than does the present road.

Sec. 1494t—3m provides in part:

"1. The said board shall have charge and supervision of all lands that the state may acquire for parks, and the supervision of all state parks except insofar as said supervision has been or may be by law placed in other persons or boards.

"2. The board shall have power to lay out and ornament any state park and to govern and manage the same, and to lay out and construct all proper roads and bridges therein.

* * *

By ch. 527, laws of 1913, subsec. 4 was added to sec. 1494—42 providing:

"The care and protection of all lands that have been, or may hereafter be acquired by the state for public park purposes, shall be under the direction of the state board of forestry, and all moneys appropriated for the purposes of the protection and improvement of such parks shall be expended under the supervision of such board of forestry."
It would appear that it was the intention of the legislature to clothe the state board of forestry with all of the powers theretofore possessed by the park board except the power to purchase land for state parks. In my opinion this would give to the forestry board those powers theretofore conferred upon the park board by subs secs. 1 and 2 of sec. 1494t-3m quoted above. These subsections gave very broad powers respecting the state parks and broad discretion in the matter of managing and looking after them, including such physical changes as to said board might seem desirable.

Sec. 1265, Stats., is the one providing a method for altering or discontinuing a highway. If proceedings be taken under this section and the town board orders the alteration of the highway, the only remedy of the owner of the Martín property would be by an appeal as provided by the statutes. However, in my opinion, that statute does not govern here. General statutes do not apply to the state unless it is clear that it was the intention of the legislature to have them so apply. In my opinion there is nothing to indicate a legislative intent that sec. 1265 should apply to the alteration or discontinuance of roads upon state property. The state itself can control in the matter of laying out or discontinuing highways, and I believe it was the intention of the legislature to delegate this power to the state park board insofar as highways in or through state parks are concerned, and now that power of the board has been conferred upon the state board of forestry. At any of its regular meetings, or at any meeting called for that purpose, the state board of forestry may adopt a resolution for the change of the highway and then proceed to execute such resolution, and in my opinion the owners of these other properties will not be in a position to complain of such action.
Public Lands—Right of Way—Lease of lands owned by state does not give lessee right of way over surrounding private property.

E. M. Griffith,
State Forester.

In your communication of June 11th you state that on May 15th your department leased to Dr. A. F. Lyon Campbell of Dunbar, Wis., island No. 1 in Coleman lake, Marinette county; that payment of the first year's rental was received on said date and that the lease takes effect on June 1, 1914. It seems that the land surrounding Coleman lake is owned by a club and they have informed Dr. Campbell that he could not pass over their land; that Dr. Campbell wishes to go on the island and erect a building as he agreed to do in one of the provisions of the lease, and that he needs ingress and egress to and from said island. You state that you have a similar case in another part of the state and that the same question is liable to arise in other instances. You ask to be advised in regard to the proper course of procedure to be followed by those parties who have leased islands from the state so that they may avail themselves of the rights and privileges granted by the lease of the island.

In answer I will say that in view of the fact that the state does not own any land surrounding the lake, the lease to Dr. Campbell will not authorize him to pass over any land owned by private parties. In fact, the state has no right to authorize any person to pass over the private property of any other person. The only way in which the difficulty may be obviated is to lay out a highway over the land owned by private parties to the lake, unless the state desires and is able to make a contract with the owner of the property in question either to purchase the necessary land or a right of way to the lake.

June 12, 1914.
In making a contract for the removal of rock and gravel from Marquette park, Mr. Glenn should be joined as a party. Such a contract should be let to the best bidder, in accordance with sec. 1494f-3m, Stats.

June 15, 1914.

E. M. Griffith,

State Forester.

In your letter of the 12th you say that the C. B. & Q. R. R. Co. is now engaged in constructing a double track through the western part of Grant county, and across certain lands in the town of Wyalusing included in the Marquette state park, which lands the state park board holds under contract from Robert Glenn. That there are two payments still due to Robert Glenn from the state on these lands. That the railroad company is desirous of securing the right to remove soil and gravel from a strip of land thirty feet wide adjoining the right-of-way line of the railroad company across three descriptions of land, and that their attorneys have written to your department to know whether the company can arrange with the state park board to secure this privilege and upon what terms. That Mr. Glenn has also written you in regard to the proposed project, and thinks there would be an advantage to the state in having the soil and gravel removed from the strip, if it were left in good condition for use as a highway. You ask whether an arrangement can properly be made with the railroad company for the privilege they desire, prior to a decision by the supreme court of the forestry case; or whether an arrangement could be made jointly by the state of Wisconsin and Robert Glenn with the railroad company which would be valid whatever decision the supreme court rendered. Also, whether, in case it proved advisable to ask the railroad company to erect and maintain a small passenger station within the park, there would be any valid objections to accepting the erection and maintenance of such station as part or entire compensation for the soil and gravel removed.

The injunction that was served in the forestry case, relates purely to the handling of the forestry lands. I do not understand that it prohibits the board from carrying on or ex-
ercising any of the powers conferred upon it relative to the state parks. While this is true, it is also true that some of the questions to be passed upon by the supreme court in the forestry case, will necessarily involve the power of the state to acquire lands for park purposes, and especially to acquire them under contracts such as the one made with Mr. Glenn. For that reason, if any arrangement is made with the railroad company, it appears to me that Mr. Glenn ought to be a party to the contract, and that it should provide that if it is determined that the state has no title to such park, then the covenants and agreements entered into on behalf of the state shall be deemed to have been entered into by Mr. Glenn, and any payments to be made the state, shall, in such event, be made to him.

Sec. 1494-3m, Stats., provides in part:

"1. The said board (state park board) shall have charge and supervision of all lands that the state may acquire for parks, and the supervision of all state parks except insofar as said supervision has been or may be by law placed in other persons or boards.

2. The board shall have power to lay out and ornament any state park and to govern and manage the same, and to lay out and construct all proper roads and bridges therein, granting rights to permit people to camp, and use the state parks under the restrictions and rules made by said park board, and to make such rules and regulations with the governor's approval as may be necessary to manage and control the same.

13. The said park board is authorized to remove or cause to be removed in such manner as they may deem advisable, wood, timber, rocks, stone, earth, or other products or attributes from said park. Such wood, timber, rock, earth, or other products or attributes shall be sold to the highest bidder upon contracts executed and signed by the state park board.

14. All money received from the sale of wood, timber, rocks, or other products or attributes of the park lands shall be paid into the state treasury."

Subsec. 4, sec. 1494-42, Stats., provides:

"The care and protection of all lands that have been, or may hereafter be acquired by the state for public park purposes, shall be under the direction of the state board of forestry, and all moneys appropriated for the purpose of
the protection and improvement of such parks shall be expended under the supervision of such board of forestry."

It would appear to me that under these sections the state park board and the state board of forestry acting together, may advertise for the removal of the earth and rocks along the right of way of the railroad company, for the purpose of constructing a highway, and provide in such advertisement that the earth and rocks so removed shall become the property of the highest bidder. It would seem quite likely that as the railroad company is desirous of obtaining the right to remove such earth and rocks, it would make the most advantageous bid therefor. The boards could accept such bid and enter into the contract with Mr. Glenn joining in. If it is deemed advantageous to have a station located at that point, I see no reason why that could not be made a part of the bid of the railroad company.

Public Lands—State Forest Reserve—In so far as necessary for protection from fire danger, contracts for the removal of dead and down timber from the state forest reserve may be made without violating the injunction issued by the supreme court.

E. M. Griffith,
State Forester.

In your letter of the 15th you state that on June 1st a large number of rights expired to remove timber that had been purchased on state land. That in several instances the parties had failed to remove all the timber and have requested an extension of time. That it has been customary to grant such an extension at the rate of ten per cent of the purchase price of the timber for one year's extension of time, or where a considerable amount of timber had been removed the rate was 10% of the value of the timber remaining, and where it was necessary for a cruiser to estimate the value of the remaining timber, the parties receiving the extension were required to pay also the time and expense of your cruiser. You further state that timber is not ordinarily sold by your department separate from land, except where there has been fire or windfall which has made it advisable to utilize the
timber before it has deteriorated in value. That on four applications for an extension of time the timber that had been purchased was from tracts that had been more or less burned over, or the timber had been mostly blown down, and in one instance the cruiser specifically stated that it was better that the timber be removed from the land as it was mostly down, tops and butts. That such timber left on lands constitutes a fire menace, and if there is some green timber left alongside of it, it is in great danger of being damaged by fire, so that it has seemed advisable in many cases to sell the timber separate from the land. You ask if in view of the injunction of the supreme court now in force, it would be proper for you to extend the time for the removal of any of the timber purchased and still remaining on such land, and if so if you could assign a cruiser to estimate the timber on such land provided payment for his time and expenses was made, not by the state, but by the parties applying for such injunction.

The injunction forbids the creating of any obligation of the state in form or in fact, for the purchase of lands under the forest reserve act or making payments upon any contracts for such lands heretofore made, the selling or contracting to sell any lands derived by the state under any grant from the United States which are claimed to have been turned over for forest reserve purposes, or any lands purchased for forest reserve purposes, and the incurring of any expense in respect to lands claimed to belong to the state forest reserve other than such as may be necessary to protect the same against damage by fires or from being injured by trespassers.

By the addition of later explanatory clauses it was provided that the order should not be construed as preventing or affecting in any way the necessary and usual operations in the care and management of the state nursery for trees, including the transplanting of trees, the making of fire lines upon old railroad rights of way or logging roads by the crews now in the field or by similar crews not greater in number than those now employed; the leasing of unsurveyed islands and lake lots for terms not exceeding five years; the prosecution by experts of the study of the management of farm wood lots in the state for the purpose of assisting farmers in an educational way along that line, the expense, however, not to ex-
ceed that now being incurred, nor the prosecution of survey work by forestry students.

The extension of these contracts, would be equivalent to the making of new contracts. Insofar as such contracts require the immediate removal of dead and down timber, thereby constituting a fire menace to the reserve, I believe they would not be in violation of this injunction. Neither would it be improper for you to assign a cruiser to estimate such timber on such state lands, at the expense of the parties applying for such an extension. Of course standing timber is a part of the real estate, and the injunction specifically prohibits contracts for the sale of any of such real estate. However, under the last clause of the injunction, expense may be incurred for protecting the forest reserve against damage by fire. If the removal of the dead timber is necessary for the protection of the reserve against fires, then it seems to me that contracts for its removal may properly be made.

Public Lands—Navigable Waters—Dams—The state may proceed by injunction or other proper action to compel the lowering of a dam which raises the water of a navigable lake above its normal level so as to flood islands owned by the state therein.

E. M. Griffith,
State Forester.

In your favor of June 15th you state that the state of Wisconsin has come into possession of islands in certain lakes in Iron county. That the level of such lakes has been raised from three to five feet by a dam located on the Turtle river in the northeast quarter of section 4-43-4 E. That the only franchise of which you have any knowledge authorizing the dam in question is the one granted by ch. 60, laws 1895, and you ask in what way, if any, you can get rid of the conditions that now prevail as a result of the water produced by the dam.

Ch. 60, laws 1895, authorizes the construction and maintenance of a dam across Turtle river in Iron county "provided that said dam or dams shall be subject to all the provisions of law relating to the flowage of lands, and shall
not interfere with the rights of any person heretofore ac-
quired.” Under such franchise the grantees thereof had no
right to cause water to overflow the lands of any person ex-
cept as they acquired the right to do so by purchase or by
the exercise of the right of eminent domain or by operation of
the statute of limitations. If the islands in question have
been recently acquired from the United States it is clear that
no statute of limitations can have run. *Diana Shooting Club
v. Lamoreux*, 114 Wis. 44, 56. Under such circumstances it
would appear that the state has the right to proceed by in-
junction or other appropriate action to compel the lowering
of the dam so as not to raise the water above its normal level
in the lakes. Before any such action is begun it would be
well for you to thoroughly investigate the situation and com-
municate with the owners of the dam as to their claims in the
premises. Possibly the railroad commission can give you
some information bearing on the situation.

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**Public Lands—Forestry**—The injunction, in *State ex rel.
Owen v. Donald*, prohibits granting a right of way for a logging
railroad across forest reserve lands.

_E. M. Griffith,
State Forester._

In your favor of June 15th you state that you are in
receipt of two applications from lumber companies for
rights of way across state forestry lands for logging rail-
roads, and that it has been the custom in the past to
grant such rights of way where necessary whether the lands
are on the market or not, and you ask whether such rights
of way can be granted under the existing injunction of the
supreme court. You have also informed me orally that it has
been the practice to convey such rights of way pursuant to
sec. 1857, Stats., and to charge therefore twenty-five dollars
per year for forty acres of land crossed by the right of way,
and that the lands over which rights of way are now asked
for are lands purchased by the state for forestry purposes.

The injunction referred to was entered in the action of
*State ex rel. Owen v. Donald*, May 28, 1914, and enjoins all
agencies of the state from “selling, or contracting to sell,
any lands derived by the state under any grant from the United States which are claimed to have been turned over for forest reserve purposes, or any lands purchased for forest reserve purposes." This broad language plainly prohibits the sale of the fee of the lands or any right therein less than the fee. The court plainly intended that the title to such lands should be preserved in statu quo pending a decision as to the constitutionality of the forestry law. The prevention of the creation or attempted creation of rights in or across such land is as much within the purpose of the injunction as a sale of the land itself.

The modification of the injunction made by the court under date of June 2, 1914, does not affect this question as the provision therein that the order of May 28, 1914, is not to be construed as preventing or affecting "the leasing of unsurveyed islands and lake lots for terms not exceeding five years is clearly insufficient to warrant the granting of a railroad right of way. This amendment of the order clearly shows that in its absence a lease is prohibited as well as a sale. The same thing must be true of a sale of something less than the entire fee.

My conclusion is, therefore, that the injunction prohibits the granting of a right of way for a logging railroad under the circumstances stated.

Public Lands — Public Officers — Taxation — Under sec. 1042j, Stats., the commissioners of public lands are given no discretion, but must purchase all mineral reservations sold for taxes, except such as are purchased by the owner of the fee.

June 30, 1914.

Commissioners of Public Lands.

In your letter of the 25th you state that you have received from the county treasurer of Florence county a list of 1268 descriptions of lands in that county, with statement of delinquent taxes levied on mining right reservations, pursuant to sec. 1042j, par. (1), Stats. 1913, amounting to $2,792.00. You ask my opinion as to whether the land commissioners, under the law, can refuse or decline to purchase any or all certificates that may be presented them for
delinquent taxes on mining right reservations, or if the law commands purchase.

Sec. 1042j, Stats., provides in part:

"1. Any and all rights and reservations to enter upon and take away any mineral from any lands within the state of Wisconsin, granted by or reserved in any deed or conveyance of such lands, the title to which right or reservation is vested or may hereafter become vested in any person or corporation other than the owner of the fee to which such right or reservation is attached, is hereby declared to be taxable; and the same shall be separately assessed for taxation, and like proceedings shall be had thereon relating to the levy, collection, and sale thereof for the non-payment of taxes against said reservation, as are in force from time to time for the levy and collection of taxes on real estate and the sale of the same for the non-payment thereof. Provided, that such reservations and rights reserved prior to the passage and publication of this act shall be sold for non-payment of taxes only to the owner of the fee to which such right or reservation is attached, or to the state as hereinafter provided; and provided further, that such reservations and rights reserved after the passage and publication of this act and sold for taxes shall be sold only to such owner or to the state. Whenever any such reservations or rights are sold to the state for unpaid taxes, the owner of the fee shall have the right at any time within three years to purchase from the state the tax certificates held by it upon such reservations or rights by paying the total amount paid by the state plus ten per cent interest per annum on such amount. The county treasurer of each county shall furnish the commissioners of public lands a list of all such rights to be sold to the state, together with a description of each parcel and the taxes and charges thereon, and the amount of such taxes and charges shall be paid to the county treasurer of such county from any moneys appropriated from the general fund of the state to carry out the provisions of this section on the order of the commissioners of public lands after being audited by the secretary of state.

"2. No such right to reservation so acquired by the state shall be completely alienated or sold but may be leased for limited periods of time on a royalty basis."

This statute seems to confer upon the commissioners of public lands no discretion whatever but absolutely requires them to purchase all the tax deeds upon such mineral rights, which are not purchased by the owner of the fee.

The statute further seems to contemplate a perpetual ownership by the state of all such mineral rights so purchased,
except such as may be redeemed by the owner of the fee, within three years from the sale. It is not, therefore, a mere statute for enforcing the collection of the tax, but contemplates permanent ownership by the state. It occurs to me that many of the questions involved in the forestry case now pending before the supreme court, especially those relating to the validity of statutes authorizing the purchase by the state of land for forestry purposes, are necessarily involved in this statute also. If the state may not legally purchase lands for forestry purposes, then, it is difficult to see upon what theory the state may validly purchase mineral rights in lands. For this reason, in my opinion, the commissioners ought not to order, and the secretary of state ought not to audit, the claim for the purchase of these mineral rights, until the supreme court has passed upon the forestry case. No time is fixed in the statute within which this payment must be made, and I believe the commissioners and the secretary of state are justified in withholding payment until such decision.

Public Lands—Swamp Lands—Outagamie County—Patent on swamp land of Outagamie county should not be issued unless the chairman of county board was authorized to issue agreement under Ch. 149, L. 1869.

October 14, 1914.

Wm. H. Bennett, Chief Clerk,
Commissioners of the Public Lands.

Under date of Oct. 10th you have submitted to this department a contract signed by W. H. P. Bogan, chairman of the county board of supervisors of the county of Outagamie, which was countersigned and sealed by W. R. Lanphear, clerk of the county board of supervisors of Outagamie county, with the seal of the board of supervisors thereto attached.

The contract is dated June 30, 1871. It purports to be an agreement by the parties of the first part, being W. H. P. Bogan, as chairman of the board of supervisors of the county of Outagamie in the state of Wisconsin, for and in consideration of the sum of forty dollars in hand paid by the party of the second part, being Patrick Mulroy, Michael
Mulroy and Morgan Cannon, the receipt of which is therein acknowledged, covenanted and agreed that the state of Wisconsin will, pursuant to ch. 94, general laws of 1866, as amended by ch. 149, general laws of 1869, on the presentation of the indenture duly signed and sealed by the board of supervisors of the county of Outagamie and countersigned and sealed by the clerk of the board of supervisors of said county to the commissioners of schools and university lands, execute and deliver to the parties of the second part, his heirs or assigns, a patent in fee simple free from all incumbrances, except taxes assessed and due thereon on the first day of January next preceding the date of the indenture.

The agreement describes the northwest \( \frac{1}{4} \) of the northwest \( \frac{1}{4} \) of section 7, township 21 north, range 15 east, containing forty acres.

You enclose a letter of the register of deeds of Outagamie county, in which he enclosed seventy-five cents and requested a patent on said land to be sent to him. You inquire whether it is sufficient that the chairman of the board of supervisors sign said indenture or whether the signature of all members of the board should be attached and whether the party of the second part should not have signed said indenture. You state that you have referred to similar papers found in the files of your office, on which patents have been issued, and that you have found that only the signature of the chairman of the county boards is attached, but that the signature of the party of the second part is also attached.

It appears that ch. 94, laws of 1866, was an act authorizing the use of the money arising from the sale of certain swamp and over-flow lands in the county of Outagamie for drainage and other purposes. Commissioners were appointed in said act, to be known as the Outagamie county swamp land commissioners. Among the powers given to said commissioners, we find the following:

"Section 8. The said 'Outagamie swamp land commissioners' may contract for the sale of any portion of said lands, at such price as they shall be reasonably worth, but not less than one dollar per acre, as shall become necessary to meet, from time to time, the payment of any sum which (may) become due on any contract for work, materials or services done, furnished and performed under such contract, and may contract for the conveyance by the state of the
title of such lands to contractors, on the performance of their contracts made with said board, according to the terms and conditions thereof; and may direct the president and secretary of their board to issue, from time to time, orders on the treasurer for moneys, as the same shall become due on any such contracts, payable out of any moneys in or which may come into the hands of the treasurer, and not otherwise appropriated: provided, that neither the said county nor the swamp land commissioners shall be made liable to pay any such orders, or for any sum due or to become due on any such contract or contracts, out of any fund except the fund created under and in pursuance of the provisions of this act."

Ch. 149, laws of 1869, was an act relating to the drainage fund of Outagamie county, and discontinued the Outagamie county swamp land commissioners and conferred all the duties and powers of said commissioners on the board of supervisors of said county. Sec. 6 of said act provides as follows:

"The board of supervisors of Outagamie county are hereby authorized to act for and on the part of said county in the execution of the trust created by said chapter 94 of the general laws of 1866, and to fill the vacancy created by the repeal of section 2 of said chapter as provided for in section one of this act, and in such capacity, shall be capable in law of taking, holding, leasing and contracting for, selling and conveying the lands or any portions thereof, described in the first section of said chapter, and appropriating the moneys arising from the sale thereof, so far as may be necessary for the purposes mentioned in said act and no further, and in that capacity may contract and be contracted with, sue and be sued, and may have and exercise all the powers, rights, privileges and immunities which are or may be necessary to carry into effect the purposes and objects of said act, as the same are therein set forth; and in all succeeding sections of said act, the powers and duties therein conferred upon the Outagamie county swamp land commissioners, are by virtue of this act conferred upon the board of supervisors of Outagamie county."

Under these provisions it appears that the county board of supervisors was authorized to make the agreement with the parties in question. I find no authority which authorizes the chairman of the county board of supervisors of a county to execute a deed in behalf of said supervisors. In view of the fact that the land in question was not land owned by the
county, but was land, the title to which was in the state, and the county board was authorized to make this agreement. I believe that a resolution by said board authorizing the chairman of said county to execute such a deed in behalf of said county would be necessary in order to give such chairman such authority. If such resolution was passed by the board of supervisors of Outagamie county prior to the execution of the instrument in question, I believe that a patent may be issued on said land.

I would, therefore, suggest that you ascertain from the officials of Outagamie county whether such a resolution is not in existence, duly passed by said board of supervisors.

The form of the instrument is such that the parties of the second part need not attach their signatures, as by the contents of said instrument it appears that the consideration for said instrument was already paid by the parties of the second part, so it was not necessary for the parties of the second part to obligate themselves to do anything further.
Public Officers—Fees—Constables—A policeman of a city who is paid a salary by a city may receive fees allowed to constables if performing the services of constables.

January 2, 1914.

Adolph P. Lehner,
District Attorney,
Oconto Falls, Wis.

In your favor of Dec. 22nd you inquire whether a police officer of a city who is paid a salary by the city may receive formaking an arrest in such city, of a man for violating a state law, the fees for such services, the county to pay them.

Under sec. 2959, Stats., it is provided that 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. The fee for constables is provided for in sec. 843, Stats. The duties prescribed to constables are provided for in sec. 842, Stats. Sec. 844 provides that when the services in the last section mentioned are performed by any other person except the party to the action, the same fee shall be allowed as constables are entitled to receive, and no more.

Your question does not pertain to any specific city in the state. Only a general answer, therefore, can be given to your question. In all cases where the chief of police of the city or the police officers are authorized to serve papers the same as a constable, such fees as the constable is entitled to receive under the statute may be paid to such other officer.

You will notice that under sec. 925–42m, Stats., in cities of the second and third class, such fees must be turned over to the fund provided for the pensioning of police officers.

Under sec. 925–268, the chief of police, policemen, city marshal and his deputies, possess all the powers and enjoy all the rights of a constable in either of the counties in which
said city or any part of it is situated and shall be subject to the same liabilities as constables. This applies only to cities organized under the general charter law, whose territory lies in more than one county.

Under sec. 925–259, the city marshal shall be known as the captain or chief of police and shall have command of the police force of the city under the direction of the mayor. He shall possess powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables and be taken as included in all writs and papers addressed to constables, and he shall be entitled to the same fees allowed to constables for similar services, and for other services rendered the city such compensation as the common council shall fix.

Your question must, therefore, be answered in the affirmative, as a city policeman who is authorized to serve papers and arrest parties as a constable is entitled to the same fees when performing such services.

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Public Officers—The regular phonographic reporter of one circuit may be appointed and act as assistant phonographic reporter in another circuit.

If the regular phonographic reporter of one circuit is appointed as assistant reporter in another circuit when acting as such assistant reporter he is entitled to the compensation provided by sec. 113.19 for assistant phonographic reporters.

Assistant phonographic reporters of the circuit courts are not entitled to be reimbursed from any public treasury for their traveling expenses and hotel bills.

Jan. 6, 1914.

John S. Donald,
Secretary of State.

In your letter of the 2nd you enclose a letter written by you to Chas. A. Cross, Hudson, Wis., together with his reply thereto and ask my opinion upon the questions raised, which may be stated as follows:

1. May the regular phonographic reporter of one of the circuits of this state act as assistant phonographic reporter in another circuit of this state?
2. If he may do so, in order that he may receive compensation from the state treasury for such services is it necessary that he be regularly appointed as assistant phonographic reporter of such second circuit?

3. If he may so act, is he entitled to receive from any public treasury his expenses while performing services in such second circuit?

By ch. 592, laws 1913, sec. 2437, Stats., is revised and amended to read:

"113.18 Every circuit judge may, in his discretion, appoint a competent phonographic reporter for the circuit * * * for which he was elected or appointed; and when he shall deem it necessary he may appoint one or more competent assistant reporters. The appointing judge or his successor may remove any such reporter or assistant reporter at pleasure and appoint a successor. Every person so appointed as reporter or assistant reporter is an officer of the court and before entering upon the duties of his office shall take and subscribe the constitutional oath, and file the same, duly certified, in the office of the secretary of state. When so qualified every reporter and every assistant reporter shall be authorized to act in any circuit court in the state. Every reporter and every assistant reporter shall attend upon the terms of court in the circuit * * * for which he is appointed whenever requested so to do by the circuit judge, and shall discharge such duties as the court or judge thereof requires."

It will be noted that this section nowhere requires the reporter to devote all of his time to the duties of his office, and nowhere prohibits him from accepting another office or other employment. Neither does it prescribe residence within the circuit as a qualification for either a reporter or an assistant reporter. Each is required to perform such duties as the court or judge may prescribe. This must mean such duties within the circuit for which appointed as the court or judge may prescribe. The court cannot act outside the circuit and the judge, when sitting in some other circuit, is, for the time being, a judge of the circuit in which he is so sitting. So long as he performs the duties so required of him, in my opinion the reporter may also act as assistant reporter in another circuit.

Sec. 2438, Stats. was, by the same chapter, laws of 1913, revised and amended to read:
"113.19 Every reporter appointed pursuant to section 113.18 shall be compensated for his services at the rate of two hundred dollars per month, payable out of the state treasury. * * * Every reporter attending a term of court outside of the county in which he resides shall be reimbursed out of the state treasury his necessary traveling expenses and hotel bills. Assistant reporters shall be paid nothing out of any public treasury except for services performed in a county forming a part only of a circuit when two judges are holding court therein at the same time; and for such services each assistant reporter shall be compensated at the rate of ten dollars per day, payable out of the state treasury. For other services he shall be compensated by the reporter. Payments authorized by this section shall be made upon affidavit of the reporter and the certificate of the judge with whom the services shall have been performed, showing performance," etc.

Taking the two sections together, it appears very plain to me that two separate offices are provided for: that of reporter, and that of assistant reporter. Qualifying for either office authorizes the incumbent to act as such officer in any circuit court of the state. It does not authorize one who has qualified as reporter in one circuit to act as assistant reporter in another circuit, but does authorize him to act as reporter. He must be appointed and qualify as assistant reporter before he is authorized to act in that capacity anywhere. A reporter is fully compensated for his services as such by his salary of two hundred dollars per month. As such reporter, he cannot receive any additional compensation from any public treasury. He is also entitled to be reimbursed his necessary traveling expenses and hotel bills when attending court outside the county in which he resides. As he cannot be required to attend court outside the circuit for which appointed, there may be some question as to his being entitled to such reimbursements when acting outside of such circuit. That question, however, is not before me, and I do not pass upon it. No provision whatever is made for reimbursement to assistant reporters for their expenses. It seems plain to me that the law contemplates that an assistant reporter must be appointed as such for the circuit in which he acts to entitle him to compensation as such. If the reporter for one circuit is appointed and qualifies as assistant reporter in another circuit then when acting as such assistant
reporter in such other circuit he is entitled to the same compensation as any other assistant reporter would be entitled to for similar services.

No provision being made for reimbursement of his expenses to an assistant reporter, he is not entitled to any such reimbursement, the ten dollars per day being all that he can draw from any public treasury, and he can only draw that in circuits in which two judges are holding court at the same time and which are composed of two or more counties.

Public Officers—Workmen's Compensation Act—A deputy sheriff is not an employee of the county in contemplation of workmen's compensation act so as to entitle him to compensation for injuries.

EDWARD W. MILLER,
District Attorney,
Marinette, Wis.

In your favor of Jan. 6th you ask whether or not a deputy sheriff who is injured by an assailant in the performance of his duty by being stabbed is subject to the compensation act and whether or not Marinette county would be liable for his medical care and nursing.

Sec. 2394-7 is part of the workmen's compensation act, in which the employer is made liable for compensation for personal injuries accidentally sustained by his employees and provides as follows:

"The term 'employee' as used in section 2394–1 to 2394–31, inclusive, shall be construed to mean:

"(1) Every person in the service of the state, or of any county, city, town, village, or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, town village or school district therein * * * ."

The term "official" undoubtedly was used in a broad and comprehensive sense in this statute and includes all such persons as would ordinarily be regarded as officials rather than employees.
A deputy sheriff is required to give a bond to the sheriff (see sec. 724) and he performs the duties required of him by the sheriff and his salary may be fixed, under sec. 494a, Stats., by the county board.

That a deputy sheriff is an officer has often been held by the courts. See Gradle v. Hoffman, 105 Ill. 147, 153. State ex rel. Walker v. Bus, 135 Mo. 325. State v. Brooks, 42 Texas, 62, 66.

The deputy sheriff is an officer coeval in point of antiquities with the sheriff. The creation of deputies arises from an impossibility of the sheriff's performing all the duties of his office in person. The powers of the deputy have consequently been ascertained at an early date. The general criterion by which to test his authority is declared in case of Levitt v. Farrar Cro. Eliz. 294, in which the court said that if a writ be directed to the sheriff by the name of his office and not by a particular name and does not expressly command him to execute it in person, the deputy sheriff may execute it.

See Tillotson v. Cheatham (N. Y.) 2 Johns. 63, 70.

I think there can be no question but what a deputy sheriff is an official and not an employee under the compensation act, and the county is, therefore, not liable for injuries under said act.

Public Officers—Courts—Municipal Court of Ashland County—Statutes—There is no such office as clerk of the municipal court of Ashland county, and no authority in any person to make an appointment of such an office.

January 9, 1914.

W. STANLEY SMITH,
District Attorney,
Ashland, Wis.

In your letter of the 6th you ask whether the judge of the municipal court of Ashland county now has authority to appoint a clerk, and whether it is incumbent on the city and county of Ashland to pay such clerk his salary of nine hundred dollars per year. You enclose a copy of a brief filed by Senator Tomkins in which he contends the judge has such authority.

43—A. G.
It appears from your letter that sec. 7, ch. 241, laws of 1893, provided for the appointment of a clerk of your municipal court, by the judge, and prescribed the qualifications and duties of the clerk. This section was expressly repealed by ch. 266, laws of 1911, and there is now no law which in express terms provides for the election or appointment of such clerk, which prescribes either the qualifications or duties of such an officer.

Sec. 13, ch. 241, laws 1893, fixed the salary of the judge and of such clerk. This section has been amended several times, but only two of these amendments can be considered material to your inquiry. Ch. 266, laws of 1911, struck out of this section the provision for a salary for the clerk, and provided that the act should not affect the present term or salary of the clerk. Senator Tomkins concedes, and I think unquestionably he is correct, that the passage of this law of 1911 abolished the office of clerk of said court, to become effective upon the expiration of his then term of office and that in the absence of further legislation there would now be no such office.

Ch. 267, laws 1913, is entitled “An act to amend sec. 13, ch. 241, laws of 1893, as amended by * * * ch. 266, laws 1911, relating to the salaries of the judges and clerk of the municipal court for Ashland county.” It again provides a salary for such clerk. The whole question is, does this, by implication, again create the office of clerk of said court?

Senator Tomkins contends that, in having the bill drawn, it was the intention of himself and of Assemblyman Bowe that the office of clerk should be re-established. That through inadvertence on the part of those who prepared the bill, sec. 7 of the original act was overlooked and no provision was expressly made for establishing such office. That arguments presented before the judiciary committees of the senate and assembly were to the effect that what was wanted was to restore the old law, and that copies of a resolution passed by the county board of Ashland county, asking that the office of clerk be again established, were filed with these committees.

He then cites authorities to the effect that the reports of committees of the legislature may be examined to ascertain the intent of the legislature, citing on this point Binns v.
RELA TING TO PUBLIC OFFICERS. 675


Our own court has probably gone as far in this respect as any, holding that the report presenting a proposed measure, made to a subsequent legislature, by a committee appointed by the preceding legislature, together with the notes of counsel employed by such committees, may properly be considered. M. St. P. & S. S. M. R. Co. v. Indus. Comm., 153 Wis. 552, 558.

Our court has further held that in construing legislative enactments, the intent of the legislature, so far as that can be ascertained, is to govern, and that in carrying out such intent it is permissible 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. R. Co. v. R. R. Comm., 137 Wis. 80.

This same case holds that legislative recognition of the existence of a law may be equivalent to positive enactment.

Another and later case holds that such recognition, although not conclusive, is evidence tending to show that such law has not been repealed. Milwaukee County v. Halsey, 149 Wis. 82, 88.

Of course this is hardly applicable where, as here, the law has been expressly repealed.

Now, taking up the present law, and assuming that the minutes of the legislative committee show just what Senator Tomkins contends are the facts, what is shown as to intent? It would appear that the representatives from Ashland county, and the Ashland county board, wanted a restoration of the old law. This was stated before both committees. Further, that the resolution adopted by the county board requested a restoration of the office of clerk, yet all that these committees had before them was a bill that, both in its title and by its express terms, made no pretense of creating or restoring any office. This bill was in the hands of the assembly committee two weeks. It was in the hands of the senate
committee from Feb. 19th to March 28th, was again re-referred to them April 7th and remained in their hands one month before they reported it for concurrence. It was introduced Jan. 31st, and finally passed, May 7th, and was approved by the governor May 19th. A printed copy of the bill was in the hands of every senator and every assemblyman at least three months before concurrence by the senate. It was a short bill, and its terms plain. Is it fair to say, that upon reading this bill any member of the legislature, outside of those merely concerned in its drafting, supposed that by its passage a new office would be created? During all this time no amendment to the bill was offered and apparently there was no discussion of it in the legislature. Although the committees had ample time to consider it, they apparently thought that it expressed on its face all that they intended to recommend for passage. They knew the board of supervisors wanted provision made for restoring the office of clerk, and they knew the proposed bill did not make such provision, unless it was by implication by the provision for a salary. It must be presumed that they were familiar with the ordinary enactments for such purpose and knew it was the universal practice to make express provision for the creation of a new office. Did they intend, by this legislation, to create the office of clerk?

Of course it is the intent of the legislature as a whole, and not the intent of any individual members or of any committees, that is to be sought. Is there any ground for saying that the legislature intended to create the office of clerk? It seems to me that no such intent can be gathered from this law, even considering the arguments that were presented to the committees. It seems plain that the legislature must have supposed there was such an office in existence, and merely intended to provide a salary. I am not convinced that such supposition on their part is sufficient to create the office.

"It is not necessary to the creation of an office that the legislature declare in express words that such office is created. The use of any language which shows the legislative intent to create the office is sufficient. And an act which empowers the governor to appoint a person to an office, and which designates the qualifications which the incumbent of the office must possess, and the duties which he must perform, is sufficient to create the office." Childs v. State, 4 Okla. Cr. 474; 113 Pac. 545.
The facts here lack considerable of bringing them within the doctrine of this case. No case that I have found holds that the mere fixing of a salary for an office is sufficient to create the office.

"Neither appointment by the mayor, nor confirmation by the council, or both, can operate to create an office. Nor can an office be legally established by the appropriation of the public money by ordinance, to the payment of the salary or compensation of the person acting as an officer." *Moon v. Mayor*, 214 Ill. 40; 73 N. E. 408; *Hedrick v. People*, 221 Ill. 374, 77 N. E. 441.

These cases do not hold that an office cannot be created by ordinance, but merely hold that an ordinance fixing the salary of an office does not create such office.


It can only be created by law duly enacted for that purpose. *State ex rel. Peyton v. Cunningham*, supra.

Another consideration is this, that if it be held that the office of clerk is created, there is no method provided for filling the office, no qualifications prescribed, and no duties imposed. It occurs to me that even though it could be held that the office was created by implication, it would be very difficult to say that it was the intention of the legislature that the office should be filled by appointment by the judge.

It is true that it is inherent in every court of record to appoint its own assistants. *In re Janitor of Supreme Court*, 35 Wis. 410.

It is probably true that no great difficulty would be found in determining the qualifications and duties of such assistants; but the municipal court of Ashland county is not a court of record. *J. C. Lewis Co. v. Adamski*, 131 Wis. 311. It therefore possesses no inherent powers.

It is my opinion that at the present time there is no such office as clerk of the municipal court of Ashland county, and no authority in any person to make an appointment to such an office. The question is by no means free from doubt, and I believe ought to be passed upon by the court. Until some court of competent jurisdiction has passed upon it, I believe it would not be safe for your county treasurer to pay any money as salary of such clerk.
Public Officers—Fisheries—State Property—Commissioners of fisheries have no right to pay a local assessment in a drainage district against the state property; neither have they the right to sell an old fish car to the Canadian government.

JAMES NEVIN,
Superintendent of Fisheries.

In your communication of Jan. 12th you state that during the summer of 1911 and 1912 the Nine Spring drainage commission built a drainage ditch across the property of the fish hatchery in the town of Fitchburg; that the assessed benefits against the same by the drainage commission amounts to $516.00, but that this assessment cannot be collected from the state; that the property, however, has been so greatly benefited and improved, especially in the handling and controlling of the water in the hatchery ponds and raceways that the commissioners of fisheries feel that they should pay the $516.00. You inquire whether your department has the right and power to pay said amount out of the funds appropriated for the operation of hatcheries.

Under sec. 1038 this property is exempt from taxation as it is the property owned by the state of Wisconsin. Under subsec. 36 of said section it is expressly exempted from special taxes or assessments for local improvements. This you concede in your letter. There is no valid claim against the state of Wisconsin. The work is already finished and if any benefits accrued to the fish hatchery it is by virtue of what has already been accomplished. This improvement, if any, was not accomplished by reason of a contract entered into with the fish commissioners. To pay the amount in question now would be in the nature of a donation. This power the commissioners have not. They cannot give away the funds of the state. I find no provisions in the law, specifying the duties of the commissioners, broad enough to authorize me to hold that they had the power to pay the amount of money in question. I am therefore of the opinion that the commissioners have not the power to pay said amount.

You also state in your letter that the commissioners have an old fish car, bought in 1893, which they wish to sell to
the Canadian government, as a new car was built last year for their use. You inquire whether they have the right to consummate the sale of the old car.

Sec. 294, Stats., provides as follows:

"The governor, secretary of state and treasurer are hereby constituted a board to examine at the request of said superintendent or on order of the governor any chattel property of the state in the hands of said superintendent which is not in use at any time and directed to be sold or otherwise disposed of in such manner as said board may deem for the best interests of the state. Sales under the provisions of this section may be made at public auction or otherwise, as said board shall direct, and when at public auction notice of sale shall be given by daily publication for at least ten days in a paper published at Madison and sale made to the highest bidder for cash."

The superintendent referred to in the above section is the superintendent of public property. The old fish car not being in the hands of the superintendent of public property, but being under the control and in the hands of the commissioners of fisheries under sec. 1497, Stats., it is clear that this statute does not cover the case under consideration. I find no provision in the statute authorizing the commissioners of fisheries to dispose of any property or chattels belonging to the state. Neither do I find any provision from which such power could be inferred.

I am of the opinion that the commissioners have no such power. The fact that the legislature saw fit to enact said sec. 294, above quoted, with explicit directions as to the disposal of the proceeds given in sec. 295, Stats., the conclusion must be drawn that it is a policy of this state not to permit public officers to sell the property of the state unless express provision in the statute can be found authorizing them to do so. I am of the opinion that the board has no right to sell the car in question.
Public Officers—It is the duty of the state superintendent of weights and measures to furnish suitable badges or insignia of authority for all sealers of weights and measures, including city sealers.

Jan. 15, 1914.

J. Q. Emery,
Ex officio State Supt. of Weights and Measures.

In your letter of the 12th you say you have received from the city sealer of weights and measures of the city of Janesville a request that you furnish him with a police badge. You call my attention to sec. 1664, Stats., and ask if this requires you to furnish each city sealer of weights and measures in the state, as well as to the sealers of weights and measures directly designated by you, suitable badges or insignia of authority to be paid for out of the state fund appropriated to the dairy and food and weights and measures department.

Sec. 1664 provides in part:

"There is hereby conferred upon the state superintendent of weights and measures, his inspectors, and all sealers of weights and measures, police power; they shall be provided by the superintendent of weights and measures with suitable badges or insignia of authority and in the exercise of their functions shall exhibit the same, upon demand, to any person questioning their powers, and they are hereby empowered and authorized to make arrests, with or without formal warrant, of any person or persons violating the provisions of any statute relating to weights and measures."

It appears from this that all sealers of weights and measures, within the meaning of that term as used in this section, are entitled to suitable badges or insignia of authority to be provided by the superintendent of weights and measures. The question to be determined, therefore, is, what is meant by the term "all sealers of weights and measures?"

Sec. 1659, Stats., makes it the duty of the superintendent of weights and measures to correct the standards of the several cities as often as once in five years, and to have and keep a general supervision of the weights and measures and the weighing and measuring devices of the state and in use in the state. He and his inspectors are required to inspect the weights, measures, balances or any weight or measuring appliance of any person, firm, or corporation and gives him the same powers as the local sealer of weights and measures.
He is required to issue from time to time regulations for the guidance of all sealers, and such regulations shall govern the procedure to be followed by such officers in the discharge of their duties. Sec. 1661 provides for the appointment of city sealers of weights and measures and requires such sealers to make reports to the state superintendent of weights and measures. Sec. 1662 provides that the inspectors of weights and measures and such assistant dairy and food commission- ers and such cheese factory, dairy and food inspectors, and such creamery and dairy and food inspectors, as may from time to time be designated by the superintendent of weights and measures, shall act ex officio as sealers of weights and measures with like authority, powers and duties as prescribed for city sealers.

It appears clear to me that the duties of the city sealers are substantially the same as are the duties of those sealers appointed by the state superintendent of weights and measures. The intent of the legislature seems to have been to give them substantially the same powers and impose upon them substantially the same duties as are imposed upon the sealers appointed by the state superintendent. Such duties as are imposed upon the sealers appointed by the state superintendent and such authority as is given them, that are not applicable to the city sealers, are imposed and conferred upon them in their capacity as inspectors and not in their capacity as sealers of weights and measures.

It is therefore my opinion that it is the duty of the state superintendent of weights and measures to furnish all sealers of weights and measures, including the city sealers, with suitable badges or insignia of authority.

*Public Officers—Public Health—Health Officers of city of Milwaukee—Health officers of Milwaukee are liable for in- curring expenses by placing butter owned by a citizen or any person for inspection with a storage company, if butter is found pure.*

J. Q. Emery,

*Dairy & Food Commissioner.*

Under date of Jan. 20th you have requested me to give you an opinion on a statement of facts given to you by
Charles J. Steffen, chief milk inspector of the city of Milwaukee, whose letter and statement of facts you enclose with your letter.

It appears that on the 15th day of Nov. last the milk inspection division of the Milwaukee health department suggested to one Mr. Raedisch, a wholesale produce dealer, that he transfer certain butter found in his possession to the plant of the Milwaukee Cold Storage Company so as to give said department the opportunity to chemically analyze the same. Mr. Raedisch consented to the removal without requiring formal orders and removed the butter to the plant of the cold storage company. Mr. Raedisch now disclaims ownership on the ground that the butter which was shipped to him had not been formally received or paid for by him. It further appears that the butter was examined by chemists of the Milwaukee Health Department; the consignment was not deemed sufficiently adulterated to warrant confiscation; that before the health department released the butter, food inspectors representing the United States government ordered that the butter be held by the Milwaukee health department until further notice from the federal government; that this was done and that recently the federal government released the consignment and that thereupon the Milwaukee health department gave notice of the release both to the Milwaukee Cold Storage Co. and to Mr. Raedisch; that Mr. Raedisch continues to disclaim ownership and in consequence the consignment has not been removed from the cold storage company; that meanwhile cold storage charges accrue; that the Milwaukee health department is now in doubt as to whether or not it can legally pay the accrued charges and remove the butter, either selling it to pay storage charges or otherwise dispose of it; that Mr. Raedisch is being prosecuted in the Milwaukee courts and has already been found guilty of having in his possession adulterated butter with the intention of selling the same. The statement of facts also contains the following:

"Furthermore, prior to any of the occasions outlined above, the Milwaukee health department together with the food inspectors of the federal government located a large consignment of adulterated butter. One of these consignments was addressed to a dealer doing business in Jefferson, Wisconsin. Prosecution was begun against this dealer.
He appeared in court and contended that the sale in question had been made in Jefferson, Wisconsin, and therefore outside of the jurisdiction of the Milwaukee courts and the Milwaukee health department. The Milwaukee district court upheld his contention. It was this same dealer who supplied the butter shipment now in cold storage and disclaimed by Mr. Raedisch. In other words, the Jefferson dealer, in testimony before the Milwaukee courts, showed to the satisfaction of the court that the consignment at that time in question, and of which the quantity now in cold storage was a part, had been sold by him in Jefferson, Wisconsin. In view of this sale it would appear to me that this Jefferson dealer had transferred title to the butter. Mr. Raedisch, in whose possession the butter was found, is merely the purchaser, but he, too, disclaims ownership."

You inquire:

"Under these circumstances, does the butter in question become the property of the Milwaukee health department? Can the Milwaukee health department remove the butter from storage, pay the charges and sell the butter for storage charges or otherwise dispose of it? Or can the Milwaukee health department compel Mr. Raedisch to remove the butter and pay such charges as may have accrued since the date of release?"

In answer to your first question I will say that I do not know of any rule of law by which the legal title to said butter would pass to the Milwaukee health department, but under the facts stated the butter is in possession of said department. It was put in the plant by the Milwaukee health department and held there until it was released. In view of the fact that the butter is not adulterated, the health department had no right to invade the property rights of the owner of the butter, and the expenses incurred for storing the same are, therefore, properly chargeable to the health department.

See Lowe v. Conroy, 120 Wis. 151. There, damages were recovered from a health officer for destroying meat which it was shown was not infected with a malignant or contagious disease and the health officer was held answerable for all damages incurred. Here, the health department of Milwaukee has incurred expenses and it has been found that the butter is unadulterated which makes them liable for the expenses incurred. Certainly the owner of the butter is not liable for these expenses. As no one is claiming this
butter and the health department is liable for the storage of it, it is up to the health department to save themselves as much expense as possible and they can either dispose of the property, under ch. 74, Stats., relating to the disposition of unclaimed property, or, in order to obviate further expenses, I think they would be justified in taking the butter, selling it in the open market for whatever it is worth and may bring, pay the storage costs and hold the balance subject to the call of the owner of the butter, and if such owner demands the total amount received for the butter I believe he would be entitled to it.

Public Officers—Extra Compensation—District attorney is not entitled to compensation in addition to his regular salary for professional services rendered to a committee of the county board.

D. E. McDonald,
District Attorney,
Oshkosh, Wis.

I have your letter of the 19th instant, in which you state:

"At the November county board meeting a special committee was appointed to investigate the condition of the Winnebago county school of agriculture and domestic economy with full power to employ counsel and also all necessary help.

"The committee employed me as counsel and also my stenographer.

"Now, the county board insists on paying me for my work in that investigation. My construction of the law is that the district attorney can not accept any money for his attendance upon a county board or any committee thereof outside of his salary.

"I am requested to write you and to ask you for your opinion in the matter."

Sec. 751, Stats., provides:

"The district attorney shall receive for compensation the salary fixed by the county board and no more; provided, that the county board may also, in addition to such salary, allow him the amount of his expenses actually and necessarily incurred in traveling within and without his county in the discharge of the duties of his office, the same to be audited
and allowed by the county board as other claims are audited and allowed; and all fees and costs recovered in civil actions in which the county is the successful party shall be paid into the county treasury; and it shall not be lawful for the county board to give or pay any fees or costs to the district attorney as part of his salary or in addition thereto."

It would appear—if not by the express provisions of this statute, then at least clearly by the manifest intent of the legislature to be gathered from the statute—that the county board is prohibited from allowing or appropriating to the district attorney any money from the county treasury in addition to his regular salary as district attorney other than for his necessary traveling expenses on official business,—that being the only exception provided for in the statute quoted.

I am inclined to be of the opinion, furthermore, that it is a part of the official duties of the district attorney, under sec. 752, Stats., to attend upon the county board or any committee thereof when requested to do so and advise them or render any other professional service required by them concerning any matter within the scope of their official duties. It is not necessary for the purpose of this inquiry to consider whether your county board had, under the law, any authority or any duty, either itself or by committee, to conduct an investigation of the kind indicated in your letter. If they had no such authority or duty officially, then, of course, they clearly could not allow the district attorney compensation from the county treasury for assisting them in such a matter.

If it was a part of the duty of the district attorney as such official to render the services in question, then clearly under several previous opinions of this department and upon the authorities cited in those opinions the county board could not authorize payment to the district attorney of any compensation for such services outside of his regular salary. Opinions of Attorney-General 1910, pp. 267, 271, 581, 589, 595, 613, 640.

Even though it were not a part of the official duties of the district attorney to render such services, it has been said, both in the opinions of this department and by the supreme court, that, while the county board could not require the district attorney to render such services, if he does render
them, the county board can not allow him compensation therefor. Thus, in the case of *Supervisors of Kewaunee Co. v. Knipfer*, 37 Wis. 496, it was said by the supreme court, with reference to the county treasurer, p. 501 of the court's opinion:

"But were it true that the selling and assigning of tax certificates belonging to the county is an extra official duty—one not imposed by law upon the county treasurer—we should still be of the opinion that no extra compensation can lawfully be allowed therefor. If the board attempts to impose duties upon the treasurer without legal authority to do so, that officer may refuse to perform them. But if he performs them, we think his official salary is the only compensation he can lawfully receive therefor."

I see no reason for departing from the principle of the previous rulings of this department upon this subject and none is suggested. I am, therefore, of the opinion that you are correct in your view of the law that the county board has no authority to pay and the district attorney may not lawfully receive compensation from the county for the services in question in addition to his regular salary.

*Public Officers—Fees*—A sheriff is not entitled to a $2 fee for executing a deed under subsec. 12, sec. 731, in addition to fee of subsec. 38.

January 22, 1914.

ALEXANDER WILEY,

District Attorney,

Chippewa Falls, Wis.

In your letter of Jan. 19th you direct my attention to subsec. 12 and 33, sec. 731, Stats. and you inquire:

"Is the sheriff empowered then to receive the $10.00 or $15.00, as the case may be, under subsec. 33, from one party, and collect also $2.00 from the grantee in such deed?"

The provisions of sec. 731 in question are as follows:

"Every sheriff shall be entitled to receive the following fees for his services, except for services in actions or proceedings before justices of the peace, for which fees are specially provided by law:
*(12) Drawing, executing and acknowledging a deed pursuant to a sale of real estate, two dollars, to be paid by the grantee in such deed.

*(33) For selling real estate under any judgment or order of court, and making all the necessary papers and notices, including deed or certificate, when the amount bid does not exceed one thousand dollars, ten dollars; when the amount bid exceeds one thousand dollars, fifteen dollars; for travel performed in making such sale, to be computed from the courthouse, ten cents per mile going and returning, besides the cost of publishing any advertisement of sale. For drawing and executing and acknowledging a deed upon a sale made by his predecessor in office, three dollars. When any such sale is made by a referee or any other officer he shall have the same fees.*

Said subsec. 33 contains the provisions for sheriff's fees in case where real estate is sold under a judgment or order of court, such as foreclosures, partition suits, etc., while subsec. 6 covers all cases where the sheriff executes a deed, pursuant to the sale of real estate as is the case when he sells it under an execution.

The provisions of subsec. 12 in its present form were already contained in the Stats., 1849, (see sec. 10, ch. 131). The same section also contained the following:

"For selling lands on the foreclosure of a mortgage by advertisement and executing a deed to the purchaser and for all services required on such sale $3."

Ch. 83, Stats. 1858, contains the provision of subsec. 12 in its present form and also the following under sec. 4 of said chapter:

"The following fees shall be allowed the sheriff or other officer for services in executing a judgment directing a sale of mortgaged premises; viz., for making sale when the amount of the judgment does not exceed five hundred dollars, the sum of five dollars; when the amount of the judgment exceeds five hundred dollars and less than one thousand dollars, the sum of ten dollars; for drawing, executing and acknowledging the deed, the sum of three dollars; for making the receipt of sale in each case, three dollars; for drawing advertisement of sale, one dollar; for travel performed in making such sale, to be computed from the courthouse, five cents per mile, going and returning."
Subsequently the last quoted provision was modified until it is applicable to all sales under any judgment or order of a court. An execution is not included in the pur-view of subsec. 33, for it is neither a judgment nor an order of court, but a writ issued directing the sheriff to execute the judgment of the court, or a process authorizing the seizure and appropriation of the property of a defendant for the satisfaction of a judgment against him. Anderson's Law Dictionary.

These two provisions of the statute, therefore, must be considered together, and as subsec. 33 specifically provides for the fee in cases where real estate is sold under a judgment and order of court it is controlling and supersedes the more general provisions of subsec. 12, but subsec. 12 is applicable to all cases where the sheriff is required to execute a deed, other than those to which subsec. 33 is applicable. Your question must, therefore, be answered in the negative.

Public Officers—District Attorney—County Board—District attorney has no general authority by virtue of his office to institute a civil action in behalf of his county without authorization by county board. Want of such authority is matter in abatement only and may be cured by ratification by the board while action is pending.

January 29, 1914.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

I have your request for opinion under date of the 24th inst. in which you ask to be advised whether it is necessary for the district attorney to have any instructions from the county board in order to bring an action in assumpsit against a person who has been maintained at the county home for the poor and who is found to have property.

Sec. 1505a, Stats. provides that, under such circumstances, the county shall have “a legal and valid claim and debt against such person” and “may sue for and collect the value of the same as against such person”; that no statutes of limitations shall be pleaded in defense to such action and that the books and records kept by the proper officers of
the county shall be prima facie evidence of the value and amount of such relief and support. The action being to recover a money judgment as for a debt assumpsit is clearly proper.

The statute does not provide expressly what officer or authorities shall have power to take the initiative on behalf of the county in commencing such action. In sec. 1505 it is provided that in case a relative of an indigent person who has been ordered by the court to pay for the maintenance of such indigent shall fail to do so, the supervisors of the town may recover in an action in the name of the town, by fair implication authorizing the supervisors of the town to commence such action.

Under sec. 1512a, it is provided that, where an indigent resident of one county is maintained as a pauper in another county and the county of the pauper's residence refuses to pay for such maintenance, the county clerk of the claimant county

"shall forthwith notify the district attorney of his county, who shall be authorized and empowered to institute an action or take an appeal in the name of the county, as the case may require, for the recovery of so much of said claim as shall be disallowed * * * ."

This statute is an instance of express authority to the district attorney to bring an action on behalf of the county to recover for the maintenance of a pauper. No such express authority is provided, however, in a case where the action is against the pauper himself. Unless such authority is embraced within the scope of the general powers and duties of the office of the district attorney, it does not exist.

Sec. 752 prescribes the general duties of the district attorney, among other things, "to prosecute or defend all actions * * * in the circuit court of his county in which the state or county is interested or a party * * * ." No decision of the supreme court of this state is found in which the question has been directly determined whether the authority prescribed in this or any other language of the statutes prescribing the duties of district attorneys includes authority in the district attorney on his own initiative to institute civil actions in the name of the county.

44—A. G.
The enumeration in certain instances in the statute of such authority in particular cases, as in sec. 1512a, would seem to indicate a legislative understanding and intent denying the existence of any such general authority. In the case of Board of Supervisors of Milwaukee County v. Hackett, 21 Wis. 613, it appears to have been assumed by the supreme court that the district attorney has no such general authority.

In a federal case it is held that the state's attorney in South Dakota has no authority to commence a suit on behalf of a county without a lawful direction to do so by the county board. It does not appear from the opinion in that case that there was any express provision in the statutes either denying to or conferring upon the district attorney such authority. Hughes County v. Ward, 81 Fed. 314.

The following authorities are to the effect that the general power and duty of the district attorney to prosecute or defend actions on behalf of the county does not include authority to institute such actions without direction from the county board. Kankakee v. Kankakee, etc., R. Co., 115 Ill. 88; Frye v. Calhoun County, 14 Ill. 132; Kirby v. Clay County 71 Kan. 683, 81 Pac. 503; Looscan v. Harris County, 58 Tex. 511; 32 Cyc. 710, 715, n.

I am of the opinion that the situation as to the district attorney in this respect was in this state intended by the legislature to be analogous to that of the attorney-general in state cases and that no general authority is conferred upon the district attorney at his own instance to institute civil actions in the name of the county or for its benefit. Should it be deemed necessary in any situation to commence such an action without authority of the county board, it may doubtless be done subject to the defect being taken advantage of by the opposite party.

It has been held that objection to the action upon that ground would be matter in abatement which could not be taken advantage of except by answer alleging the want of authority and that the effect of a dismissal upon that ground is only to suspend the right to maintain the action until such time as the authority may be supplied. Supervisors v. Hackett, supra; Town of Beloit v. Heineman, 128 Wis. 398, 401, and cases cited.

It is also held that the want of such authorization from the county board to commence the action may be supplied by
ratification by the county board during the pendency of the action. *Hughes County v. Ward, supra.*

If there be proper grounds for garnishment and you have reason to believe that the property of the debtor may be placed beyond the jurisdiction before the bringing of the action can be authorized by the county board, I am of the opinion that it would be justifiable and advisable to commence the action and sue out the garnishment at once and supply the defect of authority to commence the action by a proper ratification by the county board as promptly as possible thereafter.

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Public Officers—Salaries—County Highway Commissioner

—Where a county board failed to fix the salary of the county highway commissioner at the 1913 session, such salary is automatically fixed at the minimum, provided in subdiv. b, subsec. 3, sec. 1317m, and the county clerk shall draw his order for salary in such amount.

Thorwald P. Abel,

District Attorney,

Sparta, Wis.

January 30, 1914.

In your communication of the 27th inst. you say:

"Referring to sec. 1317m—6 and particularly to subd. (b), subsec. 3, of this statute, will you advise me what compensation the County Highway Commissioner of Monroe county is entitled to for the year 1914; the probable expenditures of highway money exceeding fifty thousand dollars ($50,000). The County Board at its annual session of 1913 failed to make any provision for the payment of the highway commissioner.

"At the time of the election of the highway commissioner in 1911, when he was elected for three years, his salary was fixed by the board at six hundred dollars ($600.00) per annum."

I had this question under consideration in an opinion rendered to the Wisconsin highway commission under date of Dec. 3, 1913, and arrived at the conclusion that:

"If the county board fail to fix the salary of a county highway commissioner in office November 1, 1913, at its annual 1913 meeting, such commissioner is entitled to draw
the minimum salary fixed by this section. The section makes it the absolute duty of the county board to so fix the salary at this meeting. It very evidently was the intent of the legislature that after 1913 no county commissioner should receive a salary less than the minimum therein fixed."

This conclusion is amply sustained by the case of O'Herrin v. Milwaukee County, 67 Wis. 142. In that case the court had under consideration sec. 95 ch. 155, laws of 1863, as amended by ch. 177, laws of 1869, which provides:

"The compensation of the county superintendent of schools shall be fixed by the county board of supervisors and shall be paid quarterly in cash by the county treasurer and * * * in counties and districts containing more than five thousand and less than ten thousand inhabitants, if the compensation be an annual salary it shall not be less than $500 nor more than $800 and in counties and districts containing more than ten thousand inhabitants it shall not be more than $1,500 nor less than $800."

The court there held that this law fixed the salary of the county superintendent at the minimum amount therein provided, but gave the county board the privilege of increasing it in their discretion to an amount not exceeding the maximum therein provided. I can see no difference between that statute and the one here under consideration, and think my conclusion correct in the opinion above referred to, and where a county board failed to fix the salary of a county highway commissioner at its annual meeting in 1913, his salary is automatically fixed by the law at the minimum provided in subd. (b) of subsec. 3 of sec. 1317m-6, which in your county would be $1200.

You also state:

"If you determine that the highway commissioner is entitled to twelve hundred dollars ($1200.00) a year, then can the county clerk of Monroe county legally draw the monthly order for the highway commissioner for one hundred dollars ($100.00), the county clerk not having been authorized by the county board to do so?"

In advising disbursing officers I always resolve all doubts in favor of the public treasury and if there appeared to be reasonable room for doubt as to the correctness of the above conclusion, I should hesitate to advise the county clerk to draw the monthly order for the salary of the highway com-
missioner in the sum of $100, but being firmly of the opinion that, under the circumstances recited in your letter, the salary of the county highway commissioner is now $1200 per annum, I think the county clerk is not only authorized, but that it is his duty to draw the monthly orders for such salary in the sum of $100.

Public Officers—A municipal judge who accepts a retainer from a telephone company thereby vacates his office.

A person who has resigned as side supervisor may still be eligible for town chairman.

County board may act in changing boundary of towns under subsection 1 of section 676, without a petition signed by thirty members.

County clerk who refuses to do his duty may be removed from office by county board.

February 3, 1914.

SAM J. WILLIAMS,
District Attorney,
Hayward, Wis.

In your letter of Feb. 1st you have submitted to me for my official opinion three questions which will now be taken up in the order in which you asked them in your letter.

1. “A municipal judge who accepts a retainer from a telephone Co.—does his office become vacant under sec. 4552m, Stats. 1911?”

Said section provides as follows:

“1. It shall be unlawful for any district attorney or assistant district attorney, city attorney or assistant city attorney or any person holding a judicial office to be retained or employed by any common carrier operating within this state or for any public utility corporation.

“2. If any district attorney or assistant district attorney, city attorney or assistant city attorney or any person holding a judicial office shall violate any provisions of this section his office shall be deemed vacant.

“3. The provisions of this section shall not apply to city attorneys or their assistants in cities of the fourth class, nor to court commissioners, nor to county judges, except such county judges as may also be judges of municipal courts.”

There can be no question but that a public utility corporation embraces a corporation which furnishes telephone mes-
sages. (See sec. 1797m-1). This section was contained in ch. 499, laws of 1907, while said sec. 4552m was enacted in ch. 542, laws of 1907. It was thus enacted by the same legislature subsequent to the enactment of the section defining a public utility corporation. If the telephone company in question is a corporation, then a municipal judge who accepts a retainer from the same is violating our statute and under the express terms of the above quoted sec. 4552m, subsec. 2, his office shall be deemed vacant.

2. "One supervisor and the chairman of the town board of Hayward resigned. The town board afterwards appointed the supervisor that resigned to the office of chairman. Is he eligible?"

In answer I will say that I am aware of no rule of law or provisions of our statute which makes a person who has resigned an office as member of a town board ineligible to the office of chairman. I am, therefore, of the opinion that the party in question was eligible to the office of chairman of the town board.

3. "Upon a petition signed by 30 resident free holders of the town of Sand Lake the county board of Sawyer passed an ordinance detaching certain territory from said town of Sand Lake and attached it to the town of Hayward. County clerk refuses to publish the ordinance claiming that one of the petitioners had died before the county board had acted upon the petition. Does the ordinance become a law without publication? What can be done with the county clerk who refuses to do his duty?"

Sec. 670, Stats. provides in part as follows:

"In addition to the general powers and duties of the several county boards enumerated in the preceding section, the following special powers are conferred upon them, subject to such modifications and restrictions as the legislature shall from time to time prescribe, to wit:

"(1) To set off, organize, vacate and change the boundaries of the towns in their respective counties, subject to the limitations hereinafter prescribed, designate and give names thereto, fix the time and place of holding the first town meeting therein, and make all necessary orders for the preservation of the records and papers of any town which may be vacated, but no town shall be vacated unless a majority of all the members entitled to seats in the county board shall so decide; and no county board, except in the counties of Ashland, Barron, Bayfield, Burnett, Douglas,
Juneau, Marathon, Oconto, Polk and Shawano, and except as provided in the next section, shall set off, establish or organize any town that, at the time of being so set off and organized does not contain a population of at least one hundred and twenty-five inhabitants, at least twenty-five of whom shall have been actual electors of this state and resident within the territory of the proposed new town at least six months prior to the time such organization shall take effect."

From the facts stated in your question it appears that the county board did not attempt to vacate any town, for which a special provision is found in sec. 671a, nor was there a division of a town into two or more towns for which provision is made in sec. 671, nor is there a formation of a new town for which provision is made in sec. 672. There was simply a detaching of certain territory from the town of Sand Lake and the attaching of the same to the town of Hayward. Authority for this action of the county board is found in subsec. 1, of the above quoted, sec. 670. I find no provision in the law which requires a petition signed by thirty members as a condition precedent to the power of the county board to pass an ordinance to change the boundaries of the town in question. It is not necessary for the county board to comply with sec. 671, 671a or 672, in order to change the boundaries of the towns in question.

In the case of State ex rel. Hiles v. Board of Supervisors of Wood County, 61 Wis. 278, which was a decision of our supreme court prior to the enactment of sec. 671a, making special provision for the vacation of a town by the county board on the petition of thirty or more freeholders; on page 280 the court said:

"The only limitation or condition imposed by the statute on the power to vacate towns is that a town shall not be vacated unless a majority of all the members elected to seats in the county board shall so decide. R. S., sec. 670. In this case such majority of the board did decide to vacate the town of Dexter."

See also State ex rel. Jensen v. Yankee, 120 Wis. 573. I am, therefore, of the opinion that it was not necessary to have the petition of thirty freeholders in order to authorize the county board to change the boundaries of the town in question. It follows that the ordinance, if otherwise prop-
erly passed, is a valid ordinance and is subject to sec. 674, Stats., which provides as follows:

"Whenever any county board shall pass any ordinance under the provisions of this chapter, the county clerk shall immediately cause the same to be published in some newspaper published in such county, and if there be none, then in such paper as shall have the most general circulation therein; and such clerk shall procure and distribute copies of such paper to the several town clerks, who shall file the same in their respective offices. The county clerk shall also send to the secretary of state a certified copy of every ordinance creating, discontinuing or changing the boundaries of any town."

It is the duty of the county clerk to comply with the provisions of this statute and cause the publication of the ordinance in question according to law. If the county clerk refuses to perform such duty, he may be compelled to do so by an application to the court for a writ of mandamus, or, the most practical and effectual remedy against such officer is that created by sec. 974, which provides as follows:

"The county board of any county may remove the county clerk, by a vote of two-thirds of all the supervisors entitled to seats in such board, when in their opinion he is incompetent to execute properly the duties of his office, or when on charges and evidence it shall appear to such board that he has been guilty of official misconduct or habitual or wilful neglect of duty, such as ought in their opinion to cause his removal; but no such clerk shall be removed for such misconduct or neglect unless charges thereof have been preferred to said board and notice of the hearing, with a copy of the charges shall have been delivered to such clerk and a reasonable opportunity given to him to be heard in his defense. Every order for the removal of a county clerk shall specify the cause or causes of such removal, and the vote by which such order was adopted shall be entered at length upon the records of the proceedings of the county board."
Public Officers—County Judges—Fees—The county board has power to pass a resolution fixing the salary of the county judge and requiring him to turn all fees into the county treasury.

Certified copies of papers in the county court are subject to a fee.

No fee can be collected from any one unless the statute expressly provides for the same.

Feb. 18, 1914.

Llewellyn Cole,

District Attorney,

Clintonville, Wis.

Under date of Feb. 11th you have submitted to me for my official opinion the question of what fees your county judge is authorized to collect under a resolution passed by your county board. The resolution adopted by the county board is as follows:

"Your committee on salary of county officers * * * * recommend that the salary of the several officers be fixed as follows: county judge $1800 * * * * we further recommend that the county judge shall not receive any fees from the county for probate work and that he shall not practice law during the term of his office and that all fees received by him shall be turned into the county treasury."

Your county board is authorized to pass this resolution by subsec. 4, sec. 694, Stats. which reads as follows:

"Whenever any county officer shall be paid by fees collected, or partly by fees and partly by salary, the county board of such county may, at any time, change the compensation of such county officer from a fee basis to a salary, and may fix the salary of such officer, and at the same time the county board and such officer shall stipulate in writing the amount of compensation which shall be received and accepted annually by such officer for the remainder of the term for which he was elected as equivalent to the fee, or fees and salary to which he was theretofore entitled; but no such county board so changing such compensation shall subsequently change the compensation of any such officer otherwise than as provided in subdivision 1 of this section. Such salaries shall be paid at the end of each month."

The specific questions submitted by you are, first, may the county judge charge any fees for certified copies furnished and required in the ordinary probate and guardian-
ship proceedings? Second, may he charge the county fees specified by statute in proceedings other than probate matters?

Sec. 2464m, Stats., provides as follows:

“The registers in probate and clerks of the county courts, and duly authorized deputy clerks, shall have the power to administer oaths, and certify to copies of any judgment, order, report, or other paper or record of the county courts, and shall collect therefor the same fees as is provided by law for clerks of the circuit courts for like services, such fees to be disposed of according to law.”

Under sec. 746, Stats., the clerks of the circuit courts are declared to be the clerks of the county court for the purpose of certifying to copies and transcripts of all the records and files of said county court to be used in any other state agreeably to sec. 905, revised statutes of the United States, and it provides that he shall have authority to authenticate acknowledgments of all instruments taken by the judge of said county and that for such services the clerk shall receive the fee allowed by law for similar services. Under this provision of the statute the clerk of the circuit court may certify copies of records and papers filed in the county court and he is to receive the compensation therefor which he receives for similar services in the circuit court. It is evident from the provision of these statutes that the parties requiring certified copies of papers in the county court are required to pay for the same. Under sec. 4140, Stats., the county judge is authorized to make certified copies of records in his court. Sec. 2959, Stats., provides as follows:

“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.”

The county judge being authorized to make certified copies of papers filed in his court and the statute expressly providing for fees for the clerk of the circuit court when making such copies and to the register in probate and clerks of the county courts and other duly authorized clerks, it necessarily follows, under the provisions of the last quoted section, that the county judge is entitled to charge the same fees. I have come to the same conclusion in an opinion heretofore rendered to Hon. Howard Teasdale, state senator, under date of November 5, 1913. In that opinion I also
said that letters of administration, letters testamentary or letters of guardianship are addressed to the parties therein named and that it is the correct practice to give the original to said parties instead of filing the same in the county court and giving them certified copies.

In view of said conclusion and the provisions of the statute providing for fees for certified copies without any exception I believe it is the proper practice to charge for all certified copies of papers that are made in the county court. I understand this is the general practice and it seems to me the correct one. The estate is properly probated or settled in the county court without copies of papers being given to any party. Certified copies of the final judgment are given for the purpose of recording them in the office of the register of deeds in the counties in which the real estate therein assigned is located. This, however, is not, strictly speaking, a part of the probating of the estate. The proceedings in the county court are settled without the recording of the certified copy in the office of the register of deeds. Certified copies of wills or other papers are often given simply because the parties desire to have such copies or use them in other courts as evidence, but of course that is not a necessary part of probating the estate. I am, therefore of the opinion that certified copies of all papers made by the county judge are subject to a fee.

Sec. 2454 provides as follows:

"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."

Under this statute the county judge of course is not authorized to charge fees for any matters pertaining to the probating of estates. Under the second paragraph of the
above section the five dollars per day which some county judges are authorized to collect is to be paid out of the county treasury. There are other provisions of the statute providing that the county judge may receive five dollars per day to be paid out of the county treasury. Under the resolution passed by your county board I believe it would be the correct practice instead of taking the five dollar per diem out of the treasury and thereafter paying the same back into the treasury, to waive collection of such fees and leave the money in the treasury, which will accomplish the same result. In all cases where the county judge is authorized to collect a fee from persons other than the county by express provisions of our statute, he must turn the same into the county treasury under this resolution. No fee, of course, can be collected from any one unless the statute expressly gives such right in the particular case. Crocker v. Supervisors, 35 Wis. 284; McCumber v. Waukesha County, 91 Wis. 442; Report of Attorney-General 1908, p. 624. I am constrained to come to the same conclusion as to fees to be collected when the county judge is performing duties of a court commissioner. In such cases he is still acting as county judge and can only collect the fees provided for by statute for county judges for such services instead of fees provided by law for court commissioners. See Report of Attorney General 1910, p. 662.

On the whole I agree with you in your conclusion that in all cases where fees may be charged under our statutes the judge of the county court is authorized to collect the same, but that he is required, under the wording of the resolution passed by your county board, to turn the fees so collected into the county treasury.

District Attorney—Public Service Corporations—District attorney is not prohibited by sec. 4452m, Stats., to be stockholder or to act without compensation as director of common carrier or public utility corporation.

THOMAS A. SANDERSON,
District Attorney,
Sturgeon Bay, Wis.

I have your request for opinion of the 18th inst., in which you refer to sec. 4552m, Stats., and ask to be advised: "Would it be a violation of this section for a district attorney
to act as a director for a common carrier operating within this state, or for any public utility corporation, where the officer receives no compensation as such director?"

The section of the statutes referred to provides:

"Section 4552m. 1. It shall be unlawful for any district attorney or assistant district attorney, city attorney or assistant city attorney or any person holding a judicial office to be retained or employed by any common carrier operating within this state or for any public utility corporation.

"2. If any district attorney or assistant district attorney, city attorney or assistant city attorney or any person holding a judicial office shall violate any provisions of this section his office shall be deemed vacant.

"3. The provisions of this section shall not apply to city attorneys or their assistants in cities of the fourth class, nor to court commissioners, nor to county judges, except such county judges as may also be judges of municipal courts."

This section is a statutory prohibition and, while it should be construed to give full effect to the legislative intent, there is no reason to suppose that the legislature did not prohibit in its terms all that it was intended to prohibit and no reason is perceived why the statute should be enlarged by construction. The statute does not, either in terms or by implication, prohibit any official therein named being a stockholder in a common carrier or public utility corporation. A director is simply one of the governing board of a corporation chosen by its stockholders to supervise in a general way the management of the business.

Under the law directors must be stockholders. The fact that they are stockholders is supposed to assure their interest in and their attention to the business on behalf of their own interests as stockholders and so on behalf of all of the stockholders. The directors may or may not receive compensation for their services, according to the articles and by-laws of the corporation.

If a director receives no compensation, directly or indirectly, for his services to the corporation as such, he is not, in my opinion, employed or retained by the corporation in any sense. He is simply acting in the management of the affairs of the corporation in behalf of his own interest therein as a stockholder. Certainly if an official within the classes named in sec. 4552m may lawfully be a stockholder of such a corporation, he may lawfully participate in the affairs of the corporation on behalf of his interest therein as such stock-
holder and if he receives no compensation, directly or indirectly, he is not, in my opinion, retained or employed by the corporation within the meaning of this statute.

I find that Attorney General Gilbert, in an opinion under date of Nov. 11, 1909, to A. C. Backus, district attorney of Milwaukee Co., advised that it would be unlawful under this statute for a district attorney to be a member of a law firm employed professionally by common carrier or public utility corporations. In that opinion it was suggested that, even though it was arranged among the members of such law firm that in the distribution of the proceeds of the business, the district attorney should not receive any share of the fees paid to the firm by such corporations, yet if the firm name were used in representing such corporations it might be construed as a violation of this statute.

In that case, however, there was a direct retainer and employment of the firm, of which the district attorney was a member, and it might well be questioned whether such a prima facie violation of the statute could be shown not to be such in fact by virtue of an agreement among the partners as to the distribution of the proceeds of their business.

The case which your inquiry presents is, however, different. Under your inquiry there is no question of retainer or employment and I am inclined to be of the opinion that your inquiry presents only at most not a question of law but a question of propriety. Of that question I think that the individuals directly interested are the ones properly to judge.

Public Officers—District Attorney—Highway Tax—A district attorney cannot bring an action for a plaintiff when the county is a proper and necessary party to such action, having interest adverse to the plaintiff.

A highway tax based upon personal property which was sold after May 1st is valid.

C. J. Strang,
District Attorney,
Granstburg, Wis.

In your letter of Feb. 25th you state that in my opinion to you under date of Feb. 19th it is evident that I misunder-
stood your question. You state that your question is as follows:

"Would the fact that I am district attorney of the county bar me from bringing the action for the real owner to quiet the title as against the county, under the facts there given?"

From the facts in your former letter it appears that the county is a proper and necessary party to an action to quiet the title to certain lands. As you are the district attorney of your county it is your duty to appear in the action to represent the interests of the county. Those interests are adverse to the interests of the plaintiff.

I am, therefore, of the opinion that it would be improper for you to bring the action for the plaintiff as you could not consistently represent the county in the same action when the interests of the county are adverse to those of the plaintiff.

You also state that you desire my advice on the following question:

"On May 1st, 1912, a party owned personal property in Burnett county and was assessed taxes on same which he paid, in the winter of 1913. The town board met according to sec. 1239 to assess highway taxes, but before this meeting the above party had sold all his personal property in the county. The property on which he was taxed for general purposes in 1912 was still on the roll as they take the 1912, or previous roll to assess such highway taxes, so a highway tax was assessed against the said party. The road superintendent not having collected this returned it as delinquent and it was then placed on the 1913 tax roll for collection."

You inquire whether the party in question can be made to pay said tax, and if not, who is liable for the same.

In answer I will say that under sec. 1040, subsec. 8, providing for the assessment of personal property, it is provided that

"No change of location or sale of any personal property after the first day of May in any year shall affect the assessment made in such year."

Under sec. 1239 the supervisors of each town are authorized to assess the highway taxes in the town for the ensuing year on the basis of the personal property as appears from the previous tax roll. Under these statutory provisions it necessarily follows that the highway tax in question is a
valid tax against the party in question and that he can be made to pay the same. No other person is liable for said tax.


J. Q. Emery,
Dairy and Food Commissioner.

I have your communication of the 26th ult., in which you call my attention to sec. 1410a and other sections of the statute touching upon the subject of pure food and the duties of the dairy and food commissioner with reference to the enforcement of the pure food laws of this state.

You also call my attention to certain other provisions of the statute imposing duties of a similar nature upon other bodies or commissions connected with the state government, which you may suspect in a measure limit your duties and perhaps operate as an implied repeal of certain provisions of the statute conferring duties and powers upon the dairy and food commissioner.

If we will keep in mind certain fundamental principles relating to the construction of statutes we will be greatly assisted in resolving the questions which seem to be giving you some concern. It should be borne in mind that various statutory provisions should be construed so as to harmonize, if possible, but where the terms of one statute are repugnant to those of another, ordinarily the later statute will prevail over the earlier and the statute dealing specifically with a given subject will prevail over the terms of another statute dealing generally with the same subject.

The principal object of pure food legislation is to prevent the sale of adulterated and poisonous foods deleterious to the public health. It may be regarded as a subdivision of a branch of legislation having for its object the promotion of the public health of the people of the state. Necessarily the board of health deals generally with the subject of the public health and has a certain jurisdiction over all things that militate against public health and operate to breed and scatter disease. Such being the case, it cannot help but come in contact here and there with the question of pure
food so that in a general sense it has a certain jurisdiction probably over the subject of pure foods and the sanitary conditions of the places in which food stuffs are prepared and kept for sale. It has this jurisdiction under the terms of general statutes.

The duties, powers and jurisdiction of the dairy and food commissioner relate more specifically to the subject of pure foods and if at any time there should be a conflict between the dairy and food commissioner and the board of health the jurisdiction and authority of the dairy and food commissioner, acting under statutes dealing specifically with the subject of pure foods would prevail over that of the board of health. However, unless there should be an actual conflict between yourself and the board of health, the powers and jurisdiction of each should be given full force and effect and so exercised as to disturb neither. As a matter of public policy and as conduct becoming officers of the state government holding somewhat coordinate jurisdiction and powers, every effort should be exercised to work in harmony and reduce any friction between the two departments to a minimum. The object sought to be obtained by the activities of each department is the same, namely, the promotion of the public health, and to this end the work should be characterized by most cordial coöperation. It is possible that, acting under the laws of the state, the jurisdiction and authority of these two bodies may sometimes merge or overlap, but they do not necessarily conflict, or at least will not conflict if proper respect for the authority of each is extended by the other.

I think, generally speaking, the foregoing views, when practically applied, will resolve most of the seeming difficulties with which you are confronted.

Referring specifically to sec. 1492ea, relating to the inspection of slaughterhouses, will say that this section of the statutes seems to reveal a legislative intent to place the supervision of slaughterhouses under the board of health. This being a statute dealing especially with slaughterhouses it will prevail over other statutes which, in general terms, would clothe you with authority to deal therewith. Such being the legislative intent, I think the proper practical construction, at least, suggests that the board of health should
assume and exercise exclusive jurisdiction and control over slaughterhouses. The terms of this statute do not, however, vest the board of health with such special or exclusive jurisdiction over retail meat markets or places where foods are sold, and does not, in my judgment, operate in any way to affect your jurisdiction over such places. Even though the board of health should assume to adopt regulations or promulgate orders with reference to meat markets, such action on the part of the board of health would not in any manner affect statutory regulations upon that subject. The board of health probably has authority to adopt regulations upon certain subjects, but such authority must be exercised conformably to and in harmony with statutory provisions and cannot conflict therewith.

So with section 1636-61 to sec. 1636-67m, inclusive, relating to the sanitation and regulation of bakeries. This is a special law dealing specifically with the subject of bakeries and probably operates to limit your jurisdiction which necessarily rests upon the terms of more general statutes, while sec. 1636-67m extends the jurisdiction of the bakery inspector and the industrial commission over all stores and other places where products of a bakery or baking establishment are sold or exposed for sale, and while such jurisdiction is probably intended to be exclusive in establishments where nothing but such products are sold, it does not affect your jurisdiction over establishments where there are other products than those mentioned kept for sale. I think as a practical proposition there should be an understanding between your department and the industrial commission with reference to your respective jurisdiction in such matters. This overlapping of authority is due very greatly, I think, to a heedlessness of the legislature as to existing laws relating to the same subject and it is not difficult to understand how such confusion has been brought about. By cordial cooperation on the part of the administrative officers, however, a great deal may be done to minimize such confusion and suppress practical exhibitions of legislative absurdity.

It seems to me that no department should be grasping or jealous of its authority, but in cases where there is an overlapping of jurisdiction a conference should be held and
each department should cheerfully relinquish jurisdiction to
the department best equipped to exercise the same.

It is possible that I have not fully answered all of your
questions, as the ground covered in your letter was quite
comprehensive, although I have attempted to do so and I
think that the principles herein laid down will point the
answer to any feature not specifically touched herein. If
not, I will cheerfully give more specific attention thereto
upon your further request.

Public Officers—County Boards—Under subsec. 8, sec.
962, Stats., a vacancy in the office of county treasurer is
created by his failure to give an additional bond, lawfully
required of him pursuant to sec. 702, Stats., which vacancy
may be filled by the county board pursuant to sec. 712,
Stats.

FRED D. MERRILL,
Assistant District Attorney,
Green Bay, Wis.

In your favor of March 3rd you state that the county
treasurer of Brown county “has apparently defaulted or at
least is short in his accounts, after a special audit has been
made;” that “he is temporarily out of office and his bond
will probably be surrendered and forfeited by the bonding
company,” and you request my opinion as to the proper
procedure for his removal from the office of county treasurer.

As pointed out by you ch. 42, Stats. which provides for
the removal of other county officers, makes no provision for
the removal of a county treasurer. Sec. 710, Stats., provides
that:

“The bond of the county treasurer shall be in a sum to
be fixed at not less than twice the amount of all taxes directed
by the county board to be levied and received by the treas­
urer during the ensuing year and have three or more sure­
ties, except said bond be furnished by a surety company, in
which case the amount thereof shall be fixed at not less than
the amount directed, by the county board” etc.

Sec. 702, Stats., provides for the execution, recording and
filing of such bonds,
“and whenever the county board shall deem any such bond insufficient said board may by resolution require an additional bond in such sum as said resolution shall direct, not exceeding the amount fixed by law in any case, to be executed, approved and recorded in like manner and filed within twenty days after notice thereof.”

Sec. 962, Stats., provides in part that:

“Every office shall become vacant on the happening of either of the following events:

* * * * * * * * * * *(8) The neglect or refusal of any officer in office to execute and file an additional bond, when lawfully required, in the manner and within the time so required or prescribed by law.”

Failure to comply with such a requirement lawfully made operates to vacate the office. State ex rel. Luftring v. Goetze, 22 Wis. 363, 6-7; State ex rel. Dithmar v. Bunnell, 131 Wis. 198, 211.

Sec. 712, Stats., provides:

“In case of vacancy in the office of such treasurer it shall be filled by the county board, and the person appointed shall hold for the unexpired portion of the term and until his successor shall be elected and qualified. If any county treasurer shall be incapable of discharging the duties of his office such board may, if they see fit, appoint a person treasurer who shall serve until such disability be removed. In either such case the person so appointed, upon giving a bond with like sureties, penalty and conditions as that above required of such treasurer, shall perform all the duties of such office, and thereupon the powers and duties of the deputy of the last treasurer shall cease.”

Reading these sections together it seems clear that in the situation presented they authorize the county board of Brown county to require the filing of a sufficient bond, and if deemed necessary of an additional bond not in excess of the statutory limitation. In case of failure to file the same within the time limited a vacancy would be created in the office of county treasurer which the section last quoted authorizes the county board to fill. See Supervisors of Washington County v. Semler, 41 Wis. 374, 9; State ex rel. Warden v. Knight, 82 Wis. 151, 165.

Sec. 4, art. VI, Const., to which you refer, provides in part:
"Sheriffs, coroners, registers of deeds, district attorneys, and all other county officers except judicial officers, shall be chosen by the electors of the respective counties once in every two years. * * * * The governor may remove any officer in this section mentioned, giving to such a copy of the charges against him and an opportunity of being heard in his defense."

Construing this provision as applicable to the office of county treasurer it is not necessarily exclusive and quite clearly does not deprive the legislature of power to provide what shall create a vacancy in the office and a method of filling the same.

I am therefore of the opinion that the statutes heretofore referred to authorize the county board to require the county treasurer to give an additional bond within the statutory limitation; that a failure to comply with such requirement creates a vacancy in the office, and that the county board may fill such vacancy.

Public Officers—County Board of Supervisors—County Board of Education—The offices of member of the county board of supervisors and member of the county board of education are incompatible.

March 5, 1914.

CHARLES E. BRIERE,
District Attorney,
Grand Rapids, Wis.

In your inquiry of the 28th ult. you ask whether or not a member of the county board of supervisors may also be a member of the county board of education. That is, are the two offices incompatible?

The county board of education is provided for by sec. 702-1 to 702-13, inclusive, Stats., created by ch. 751, laws 1913. The only provisions found anywhere in that chapter in any way connecting this board with the county board of supervisors are the following:

No member of the county board of supervisors elected from a city having a board of education shall have any voice in any matter relating to said board. Sec. 702-2.

"The county board of education is hereby authorized to exercise all the powers and privileges conferred by law
upon the county training school board by secs. 411-1 to 411-11, inclusive, of the statutes, and upon the county school board by secs. 553c to 553m, inclusive, of the statutes, if the county board of supervisors shall so determine." Sec. 702-10, par. 10.

The county board of education is required to determine the amount of money which will be necessary for carrying out the purposes of sec. 702-1 to 702-12, inclusive, and the county board must levy a tax of the amount so determined for such purposes. Sec. 702-10, par. 13.

The county board of education is required to file an itemized statement of its receipts and disbursements with the county board of supervisors annually. Sec. 702-10, par. 14.

Clearly, the only discretion vested in the county board of supervisors as to the county board of education is that relating to conferring upon it the powers and privileges of the county training school board, and the county school board.

As the members of the county board of education are paid on a per diem basis, conferring additional duties and powers upon them would probably result in increased compensation.

Sec. 976m, Stats., provides:

"No member of any * * * * county board shall, during the term for which he is elected, be appointed or elected to any office or position which has been created by, or the election or appointment to which is vested in, such * * * * county board."

The election of members of the county training school board, and of the members of the county school board, is vested in the county board of supervisors. Sec. 411-2 and 553d, Stats.

The amount of money for organization, equipment and maintenance of a county training school and of a county school of agriculture and domestic economy, is to be determined and appropriated by the county board of supervisors. Secs. 411-1 and 553c, Stats.

Members of the county training school board and of the county school board must each file a bond in an amount to be determined by the county board of supervisors. Sec. 411-2 and 553d, Stats.

Members of the county board of supervisors are specifically made ineligible to membership on a joint county train-
RELATING TO PUBLIC OFFICERS. 711

ing school board and to membership on a county school board or joint county school board. Sec. 411-7, 553d and 553e, Stats.

Incompatibility exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both. Mecham Public Offices and Officers, Sec. 422.

While the county board of supervisors does not elect the members of the county board of education and does not fix their compensation, it does have considerable voice in the matter of the county training school board and county school board. The conferring of the powers of these latter boards upon the county board of education is committed to the sound discretion of the board of supervisors. It appears to me that the question as to the incompatibility of the two offices is a close one. I believe it safer to treat them as incompatible until the question has been decided by the court.

Public Officers—Sheriffs—Restaurant—1. A resolution of the county board that a sheriff shall receive a specific amount when he brings a person to the hospital for all expenses is not permissible under sec. 677.

2. A person who gives one meal and charges for it does not need a restaurant license.

3. A county board is not limited to 20 days for its sessions.

March 7, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of the 5th inst. you state that Calumet county has a written contract with its sheriff to take insane committed to the Northern Hospital for the Insane, Oshkosh, Wis., for twenty-four dollars, for which he is to furnish transportation, attendants therefor and deliver such patient to said hospital. That by a resolution adopted by the county board of supervisors they have ordered the county clerk to issue an order in favor of said sheriff for said twenty-four dollars for each patient he delivers at the Oshkosh hospital on presentation of a receipt from the superintendent
of the hospital that such patient has been delivered by the sheriff. You inquire whether the county board may legally pass such a resolution.

In answer I will say that I know of no statute authorizing the county board to pass a resolution of that kind. Under sec. 677, Stats., it is provided that a claim of the nature of that of the sheriff of your county for the services rendered in delivering patients and other claims, shall be made in writing "setting forth the nature of his claim and the facts upon which it is founded and if the claim be an account, the items thereof separately, the nature of each and the time expended in the performance of any service charged for when no specific fees are allowed therefor by law, and if the claim be for mileage, statement shall specify dates and places so as to show between what points and when the travel charged for was had and also the purpose for which said travel was had." It also provides that such statements shall be verified by the affidavit of the claimant, his agent or attorney and filed with the county clerk and that no such claim against any county shall be acted upon or considered by any county board unless such statement shall have been so made and filed.

In the case of Northern Trust Co. v. Snyder, 113 Wis. 516, our supreme court, in giving a construction to said sec. 677, gave the history of the statute and the amendments thereto and on p. 535 used the following language:

"As the law now stands, if compliance with sec. 677, as to the manner of presenting claims, is not to be considered jurisdictional, for a county board to ignore it would be such a gross abuse of power, such a disregard of the clearly expressed legislative will, as to give any person interested a legitimate ground of complaint."

Under this statute and the decision of our court it is necessary for the sheriff to make the statement as required by this statute for every trip that he makes to the hospital and the county board should pass upon the claim as presented. I do not think that the practice of your county board in this matter is permissible under our statute.

You also inquire whether a saloon keeper who gives free lunches except that the parties are expected to buy a glass of beer is required to take out a license for a restaurant under ch. 648, laws of 1913; also whether a farmer who
gives a meal to a transient and charges for it must have a restaurant license, and a saloon keeper who gives a lunch, or a bakery who gives a hot lunch for ten cents, would also be required to take out a license for a restaurant.

In answer to these questions I will say that the giving of a single meal may be done without running a restaurant in contemplation of said ch. 648. If a saloon keeper is prepared to give lunches and charges for the same, and if a bakery is prepared to give meals or lunches and charges for them they would be running a restaurant in contemplation of this statute, but the giving of one meal and charging for the same by any person is not prohibited. Your questions must, therefore, be answered in the negative.

You also inquire whether the county board of supervisors, under the statutes of this state, can be in session more than twenty days.

In answer I will say that I find no provision in our statute prohibiting the county board from being in session more than twenty days in any one year. Sec. 695 provides that 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 by the most usual traveled route, but this statute also provides that the county board may sit and receive pay for not exceeding twenty days in each year. This however, does not prohibit the county board from holding sessions for a longer period than twenty days, but if they do they do not receive pay for such extra days.

Public Officers—Register of Deeds—Tract Index—County board has no power to increase number of assistants to the register of deeds during his term of office for the purpose of making a tract index.

C. S. Roberts,
District Attorney,
Balsam Lake, Wis.

In your letter of March 7th you call my attention to sec. 764b, Stats., and also to subsec. 1 and 4, sec. 694, as a
basis for your inquiry and you state that at the 1913 session of the county board of Polk county a resolution was passed directing the register of deeds to make and keep a tract index; that following this action a resolution was passed allowing the register of deeds, in addition

"to his present salary as fixed by law, the further sum of twelve hundred dollars as and for the compensation of one extra clerk or assistant to be by said register of deeds hired and employed for the purpose of assisting the said register of deeds while so engaged in making and establishing the said tract index, which said clerk or assistant the said register of deeds is hereby allowed in addition to his present number of assistants, * * * ."

You inquire whether the money so appropriated is available during the present term of office of the register of deeds.

Said sec. 764b, provides as follows:

"1. The county board of any county in this state, may, at their annual or any special meeting preceding the election of county officers, by resolution, change the method of compensating the register of deeds, his deputies, clerks and copyists, from fees, now provided by law, to salaries, and may at the same time fix the amounts of the salaries to be paid the register of deeds, to be elected during the ensuing year, his deputies, clerks and copyists, and the number thereof to be appointed by the register of deeds, and paid by the county.

"2. Whenever any county board shall fix the amount of the salaries of the register of deeds, his deputies, clerks and copyists and the number thereof in accordance with this section, the amount and number thus fixed shall be and remain the salaries of the register of deeds, his deputies, clerks and copyists and the number thereof, until the same are changed by the county board under this section."

In subsec. 3 of said section provision is made for the payment by the register of deeds of the fees into the county treasury at the end of each quarter of the year and for the payment of his salary at the end of each month.

From the wording of the resolution I judge that your county has prior to this time legally changed the method of compensating the register of deeds and his assistants from fees to salaries. In view of that fact, the provisions of subsec. 4, sec. 694, are inapplicable. I believe that the above quoted subsec. 1 and 2, sec. 764b, are applicable to the facts submitted by you.
While in the case of *Burgess v. Dane County*, 148 Wis. 427, 439, our court held that said sec. 746b is not a special statute and that the provisions of sec. 694 may also be considered in determining a question of this kind, there is nothing in sec. 694, Stats., inconsistent with the provisions of subsec. 1 and 2, sec. 764b, so far as the proper answer to your question is concerned. I am, therefore, constrained to hold that your question must be answered in the negative and that the resolution cannot be effective until after the election of the register of deeds in 1914.

*Public Officers—County Treasurer—Disqualification for Office—* The provision of Sec. 713, Stats., that a person who has held the office of county treasurer for two successive terms shall not be eligible for reelection within two years from the close of his second term, does not prohibit his appointment within two years to fill a vacancy.

March 11, 1914.

M. E. Davis,
District Attorney,
Green Bay, Wis.

I have your request for opinion dated yesterday in which you state:

"A vacancy is about to occur in the office of the county treasurer of this county. Our county board, which meets on the 12th of this month, is to appoint a successor to fill out the unexpired term. Mr. Frank B. Desnoyer held the office of county treasurer for two consecutive terms, and retired at the end of the term in January, 1913."

You call attention to sec. 713, Stats. and ask to be advised whether Mr. Desnoyer is eligible for appointment by the county board to fill the vacancy for the balance of the present term.

The material provision of sec. 713, Stats. is:

"Any person having held the office of county treasurer of any county for two consecutive terms shall not be eligible to a second reelection until after the expiration of two years from the close of his second term."
The question is whether, under the provision of the statute, one having held the office of county treasurer for two successive terms is eligible for appointment to fill a vacancy occurring within two years from the close of his second term.

The supreme court of this state has not construed this statute and has not passed upon this question either under this statute or under the somewhat similar provision of sec. 4, art. VI, Const. relating to the office of sheriff, nor have I been able in the limited time allowed for answer to your inquiry to find any judicial decision in any other court passing upon a question of this kind under any similar statute or constitutional provision. I find that it was held by one of my predecessors in office that this provision of sec. 713 did not prohibit one who had been appointed to fill a vacancy for an unexpired term from being thereafter validly elected to the office of county treasurer for two successive terms. (See opinions 1906, p. 536.) But the question dealt with in that opinion was different from that here and rested upon the definition of the words "two consecutive terms" as used in the statute, it being held in that opinion that this expression related to two consecutive terms of two years each as defined by the constitution and that the holding of the office by appointment to fill a vacancy for a portion of a term and holding it, for one term by election did not constitute holding the office "for two consecutive terms" so as to disqualify the incumbent for re-election to a second full term.

The question presented by your inquiry is really whether the language of the statute "shall not be eligible to a second reëlection until after the expiration of two years from the close of his second term" may be read "shall not be eligible to reëlection or appointment until after the expiration of two years from the close of his second term."

It seems that statutory qualifications for appointment to office are distinguished from statutory qualifications for election to the same office. Thus it is held that a provision that no one shall be "appointed" to two offices will not prevent election thereto. 29 Cyc. 1384, and cases cited in note 93.

Also, it has been held in Indiana under a constitutional provision that the word "elected" does not include appointed,
under Article XV, Section 3 of the Constitution of that state, which provides that an officer shall hold his office until his successor shall be "elected" and qualified. *Kimberlin v. State*, 29 N. E. 773, 130 Ind. 120, 14 L. R. A. 858; *State v. Harrison*, 16 N. E. 384, 388, 113 Ind. 434.

Similarly, it is held, under a constitutional provision of the state of Maryland, that the word "elected" is not synonymous with the word "appointed." *Magruder v. Swann*, 25 Md. 173, 215.

There are two principles of construction which argue against expanding the disqualification prescribed in our statute as a disqualification for reëlection so as to include disqualification for appointment to fill a vacancy. The first is that such disqualifications are narrowly construed in favor of eligibility and the second is the general rule of construction that statutes should be so construed as to give effect to the legislative purpose and intent.

Under the first principle above stated, it has been held in this state that ineligibility for elective office does not invalidate the election of one who is ineligible at the time of the election, but whose disability is removed before his induction into office. *State ex rel. Schuet v. Murray*, 28 Wis. 96, 99; *State et al v. Trumpf*, 50 Wis. 103, 108, 110.

The supreme court of this state has held that such provisions "should be narrowly construed in favor of eligibility." *State ex rel. Johnson v. Nye*, 148 Wis. 659, 668; *State ex rel. Ames v. Southwick*, 13 Wis. 407.

It will be observed that the only county officers as to which the constitution and laws of the state contain any such prohibition are the offices of sheriff and county treasurer; as to the former the provision being, in art. VI, sec. 4, Const. in the following language:

"Sheriffs shall hold no other office and be ineligible for two years next succeeding the termination of their offices; they may be required by law to renew their security from time to time, and in default of giving such new security their office shall be deemed vacant."

At the time of the incorporation of this provision into the state constitution, the sheriff collected the taxes and was a fiscal officer of the county. It will be seen, therefore, that as to county officers this prohibition against continuous
office-holding was limited to those officials having charge of public funds, and that the undoubted reason for this provision with respect to such offices was to require frequent changes of incumbents so as to secure frequent accountings and settlements between such officers and the county.

This purpose of the legislature in enacting sec. 713, Stats., is given full force and effect and is in no wise infringed by a construction of that statute which permits the appointment of one who had formerly held the office of county treasurer for two successive terms to fill a vacancy, although such vacancy and appointment may occur within two years of the expiration of his second term.

Such construction of the statute is, moreover, in accord with its language, which in terms only applies to a reëlection and not to an appointment to fill a vacancy, and is, furthermore, in conformity with the principle that such disqualifications should be narrowly construed in favor of eligibility.

I am, therefore, of the opinion that the county board may lawfully appoint Mr. Desnoyer to fill the vacancy in the office of the county treasurer of your county.

Public Officers—Public Land Commissioners—Under sec. 233, public land commissioners have no authority to issue quitclaim deed unless a patent has been issued and lost.

March 19, 1914.

W. H. Bennett,
Chief Clerk Land Commission.

In your communication of the 17th inst. you ask for my official opinion upon the following state of facts:

"It appears from the records in the office of the land commissioners that H. B. Blackwell entered on certificate Dec. 31, 1853, the NE 1/4 of NW 1/4 of sec. 11–13–3 W. That interest and charges were regularly paid on said certificate up to Jan. 19, 1899, when full payment of amount due the state was made, but the certificate not having been surrendered as required by law and practice of this department and no patent fee paid, no patent was ever issued for the land to any person."
It appears from a letter accompanying your communication written by Bennett & Hines, attorneys at law, Viroqua, Wis., that this land has been conveyed by mesne conveyances and is now in the hands of third parties, and it further appears from such letter that there are several breaks in the chain of title and that the record does not disclose a perfect chain of title from Blackwell to the present owners of the land. In the letter from Bennett & Hines it is said:

“In your letter dated Feb. 18th you state that your records show that one H. B. Blackwell entered upon the land Dec. 31, 1853, and that the full amount due the state was paid Jan. 9, 1899. Since communicating with you we have learned that the reason why the matter was not settled and the title cleared up in 1899 was due to the fact that it was thought that there were some certificates in existence and the matter was to be held open pending a search for the same. They were not found and the matter, it seems, was lost sight of.”

They also call attention to the fact that because a patent has never issued from the state the title to the land is still in the state, and it is suggested that title might be quieted by the issuance of a quitclaim deed, under the provisions of sec. 233, Stats., to the present owners of the land. Sec. 233, Stats. provides as follows:

“Whenever any duplicate certificate of sale shall have been lost or destroyed before the patent shall issue, or whenever any patent shall have been lost or destroyed the said commissioners, upon satisfactory proof of the fact by affidavit to be filed with them, may issue a certified copy of the original certificate of sale or of the record in their office of such patent, or a quitclaim deed in place of such patent, to the person entitled thereto, which shall have the same force and effect as the original duplicate certificate or patent. Their certificate to such copy and quitclaim deed shall recite the loss or destruction of the original.”

An analysis of the above section indicates that provision is made for two contingencies therein mentioned, viz.,

1. Whenever any duplicate certificate of sale shall have been lost or destroyed before the patent shall issue.
2. Whenever any patent shall have been lost or destroyed.

In this instance the duplicate certificate of sale has evidently been lost and in such case, as I interpret the statute, the commissioners may issue only a certified copy of the
original certificate of sale. It is not a case in which the commissioners may issue either a patent or a quitclaim deed, which may be done only in cases where the patent after issuance has been lost or destroyed. Bennett and Hines evidently interpret the statute to mean that a quitclaim deed may be issued to the person entitled thereto when the duplicate certificate of sale has been lost or destroyed. Such is not my interpretation of the statute. I interpret the statute to mean that when a duplicate certificate of sale has been lost or destroyed a certified copy of the original certificate of sale may be issued. When the patent has been lost or destroyed, then the commissioners may issue either a certified copy of the record of such patent in their office or a quitclaim deed in place of such patent. They have no power to issue a quitclaim deed unless a patent has issued. It is my opinion, therefore, that under the circumstances here disclosed it is not within the power of the commissioners to issue a quitclaim deed, even though it could be definitely determined who is entitled to it, but the power of the commissioners is confined solely to issuing a certified copy of the original certificate of sale.

Public Officers—Bonds—County Clerk—The sureties on the bond of a county clerk are liable to the state under secs. 701, 705 and 706, Stats., for money received by the clerk or his deputies pursuant to subsec. 3, sec. 1498s, Stats., and not paid over as required by that subsec.

March 20, 1914.

HON. JOHN A. SHOLTS,
State Fish & Game Warden.

In your favor of March 19th you state:

"J. S. McCabe, former county clerk of Buffalo county while still holding office, was taken sick in the fall of 1912. While ill, his work was cared for by some clerk or deputy. During his illness hunting licenses were issued, and moneys received therefrom were deposited in the bank to the credit of J. S. McCabe's personal account. Evidently the clerk or person who was authorized to issue licenses did not have the authority to make the monthly remittance to the state
treasurer, and as a consequence all of the money due the state was held at the bank.

"After the death of Mr. McCabe his estate was probated and all creditors were treated alike. It now appears that the amount of Mr. McCabe's estate was not sufficient to satisfy all of his indebtedness and there is still due the state $288.53."

You request my opinion as to whether the sureties on Mr. McCabe's official bond can be held responsible for the amount of his indebtedness to the state.

Subsec. 3, sec. 1498s, Stats., provides in part:

"The county clerk shall receive with each such application for license the sum of one dollar, ten cents of which he shall retain as his personal fee and as compensation for services rendered the state, and the remainder he shall transmit to the state treasurer."

Sec. 701, Stats., provides that every county officer shall execute an official bond and sec. 705 provides the form of such bond to be given by the county clerk. One of the conditions of such bond is that said clerk "and his deputy shall faithfully perform all the duties of the said office, and shall pay over all money that may come into his hands as such clerk, or into the hands of his deputy, as required by law."

Subsec. 1, sec. 706, Stats., provides that the clerk shall appoint one or more deputies who shall aid him in the performance of his duties and in case of his absence or disability shall perform all his duties during such absence and that "every such clerk and his sureties shall be liable upon his official bond for the acts of his deputies."

The facts you state seem to present a case clearly within the language of the above quoted statutes, and unless there are other factors in the situation I see no reason to doubt but that the sureties on the official bond of a county clerk are liable for the sums which the county clerk should have paid to the state treasurer pursuant to the terms of subsec. 3, sec. 1498s.
Public Officers—State Board of Health—Powers—The state board of health is not authorized to order the installation of a sewerage system in a village, nor the extension of the present system by specific orders.

C. A. Harper,
State Health Officer.

In your letter of March 21st you state that in a certain village of this state a resident is living within one block of the main of a sewerage system, but his house is not connected with the sewerage system; that this resident has been using a cesspool which is filled to overflowing and has become a nuisance; that he realizes this condition and has discontinued the use of the cesspool and is now endeavoring to obtain the extension of the sewerage that he may tap the house system into the sewerage system of the village; that the municipal authorities refuse this extension, although this particular resident is willing to pay his proportionate share for the extension of this sewer down the side street.

You call my attention to sec. 1407a-6, subsec. 2, which confers powers upon the board and in part provides:

"to condemn and abate conditions causative of disease; to regulate and prescribe, by means of rules and regulations, the character and location of plumbing, drainage, water supply, disposal of sewage, garbage or other waste material; the sanitary condition of streets, alleys, outhouses, cesspools and all sanitary features connected therewith."

You state that no specific rules have been made by this board and published concerning the disposal of sewage and you inquire:

"Does this section give the board power to compel an extension of this sewerage system on a special order? Or is it necessary: First to have rules and regulations made by this board, published in the official state paper and made applicable to the state as a whole? The latter proposition is difficult as we cannot foresee existing conditions."

Subsec. 3, sec. 1407a-6, provides as follows concerning rules and regulations adopted by the board:

"Such rules and regulations shall be published in the official state paper and distributed in pamphlet or leaf form to all health officers and any citizens asking for the same. Such
rules and regulations shall not be effective until thirty days after their publication."

The board has power, under the statute quoted, to condemn and abate any nuisance that is causative of diseases, but this can be done without ordering the municipality to adopt a sewerage disposal system. There is no authority given to the board to make specific orders as to the conditions in the village in question concerning the extension of the sewerage system. The statute simply gives the board power to pass rules and regulations, to regulate the character and location of plumbing, etc. These rules and regulations must be applicable to all places under similar conditions and they are not in force unless published as prescribed by law. A specific order for the village is not authorized by subsec. 2, sec. 1407a-6.

Your first question must, therefore, be answered in the negative and your second question in the affirmative.

Public Officers—Municipal Corporations—Under sec. 4549, Stats., a stockholder in a public utility corporation furnishing water and light to a city may not legally hold the office of mayor of such city.

C. E. Lovett,
District Attorney,
Park Falls, Wis.

In your favor of March 25th you state that:

"At the city of Phillips in this county a certain public utility corporation has a franchise with the city for the furnishing of water and light, and under the terms of this franchise and the service furnished by such corporation the city pays to the corporation something over $4000.00 in water and light rentals annually."

You request my opinion as to whether an officer of the corporation who is also a stockholder of the same and is also mayor of the city is guilty of official malfeasance under sec. 4549, Stats.

This department has had frequent occasion to construe sec. 4549 and has uniformly held that a city officer violates
that section if he owns stock in a corporation that has contract relations with the city. See Biennial Report and Opinions of Attorney General for 1912, p. 766; for 1910, p. 207; for 1908, pp. 702, 779; also opinion to Mr. O. H. Bruemmer district attorney, dated Sept. 18, 1913.

These opinions will give you the authorities relied on which leave no reasonable doubt but that the facts you state show a violation of sec. 4549, Stats.

That the contract between the city and the public utility corporation was executed prior to the time that the stockholder became mayor can make no difference because sec. 4549 expressly provides that any officer of a city who shall "have, reserve or acquire any pecuniary interest * * * in any contract * * * in relation to any public service * * * shall be punished" etc.

Public Officers—Salaries—County Board—1. County board may authorize payment and credit salary and bills of county superintendent during the current year while they have money in the general fund for that purpose.

2. The county board of education may do so the following year.

3. Salary of county superintendent cannot be changed during term.

April 3, 1914.

C. P. Cary,
State Superintendent of Public Instruction.

In your letter of March 30th you refer to the provisions of ch. 751, laws of 1913, which relates to the county board of education. You state that in one of the counties of this state the district attorney has ruled that ch. 751 takes from the county board its right to order paid any bills for traveling expenses of the county superintendent; that the district attorney rules that from the time of the passage and publication of said chapter no such bills of a county superintendent could be allowed by a county board of supervisors, but the superintendent must wait for payment until the county board
of education is elected, organized and has made legal provision for the payment of such bills. You submit the following questions:

"1. If the county board of supervisors can allow and pay such bills presented by the county superintendent for a certain period only, when does their power to make such allowances cease?"

The sections of the statutes under which the county board of supervisors have audited and allowed the expenses for the county superintendent have not been expressly repealed by said ch. 751. Sec. 702-10, subsec. 9, provides as follows:

"The county board of education shall fix the salary of the county superintendent of schools, but in no case shall it be less than one thousand dollars, excluding traveling expenses and expenses for printing, postage, and stationery."

Subsec. 11 provides as follows:

"At the regular meetings in May and October the county board of education shall audit and allow the county superintendent and his assistant or assistants traveling expenses, and expenses of postage, printing and office supplies, as shall be incurred in the discharge of their duties, but the county board of education shall have power to limit annually or semi-annually the amount that shall be expended for such purposes, * * * ."

Subsec. 13 provides as follows:

"The county board of education shall, at its meeting to be held on the last Friday in October of each year, determine the amount of money which will be necessary for the purpose of carrying out the provisions of sections 702-1 to 702-12, inclusive for the ensuing year. On or before the first Monday in November, in each year, the county board of education shall report the total amount required to the county clerk who shall report the same to the county board of supervisors at its annual meeting in November, and such amount shall be levied in the county tax and collected as other taxes, and shall be set aside by the county treasurer as a separate fund to be paid out by him upon the orders of the county clerk issued in accordance with schedules submitted to him by the county board of education, which schedules shall give the names of persons, the amount due each and the purposes for which issued."
It appears by these provisions that the county board of education is authorized to audit the expenses incurred by the county superintendent of schools and to order the same paid out of the funds which are set aside in the county treasury for that purpose. The county board of education has no powers conferred upon it by said ch. 751, which authorize it to audit and allow claims and have the same paid out of the general fund of the county. It follows that the county board of education in contemplation of this law is not empowered to audit any claims for which it has provided no funds. The expenses for the county superintendent of schools during the current year have already been provided for by a levy and have been paid in by the taxes collected at the beginning of this year. This money is in the general fund of the county treasury and can only be paid out when audited and properly allowed by the county board. I am, therefore, of the opinion that the county board of supervisors is authorized to audit and allow the bills for the expenses of the county superintendent incurred during this current year. The county board of education, under the provisions of said subsec. 13, above quoted, will cause a levy to be made for the expenses of the county superintendent for the ensuing year. This money when collected will be paid into the special fund created for the county board of education and as soon as said money is available the county board of education will have the right to audit and allow the bills for expenses of the county superintendent of schools. The board of supervisors will then have no right to audit these accounts for the reason that they have no funds in the treasury with which to pay.

"2. Has the county board of education as soon as organized under section 702-8 the right to perform all of its duties as prescribed in section 702-10; that is fix the salary of the county superintendent, order the salary paid and to pay other educational expenses mentioned in said section?"

"3. Or must all such payments be held up until the provisions of section 702-10 (13) are carried out?"

The answer to the first question practically answers the second and third questions also. The county board of education has all the powers conferred by law as soon as it is organized, but it has not the right at any time to audit and allow bills and order the same paid out of the general
fund of the county treasury. It can only audit bills and authorize the county treasurer to pay the same out of the fund specially created for it.

Under sec. 702-4 it is provided that the county board of education shall be elected on the first Tuesday of April, 1914. Ch. 751 was approved Aug. 2, 1913, and published Aug. 5, 1913. The legislature knew that the money for the payment of the state superintendent of schools and his expenses would be already levied and collected for the year 1914 and paid into the general fund at the time when the board is elected and organized. It must be presumed that the lawmakers intended that the county board of education should not exercise the powers of auditing claims so far as the salary and expenses of the superintendent are concerned, until they have money in the special fund from which to pay it.

Secs. 698 and 704, Stats., pertaining to salaries and expenses of the county superintendent; also sec. 461d pertaining to his expenses, and 694 pertaining to the fixing of salaries of county officers, were not specially mentioned in ch. 751. In answer to your second question I will, therefore, say that the county board of education has the right to order the salary of the county superintendent and other educational expenses paid as soon as it has money in its special fund for such purposes.

The question of fixing the salary of the superintendent will be hereinafter discussed under question 5.

In answer to your third question I will say that it is my opinion the county board has the right to pay the salary and expenses of the county board so long as it has money in the general fund for such purpose.

"Has the county board of education the right to allow and order paid expenses incurred by the county superintendent before the organization of said board? If so, what may they allow and order paid?"

This question, in view of the answers to the former questions, must be answered in the negative.

"5. Can a county board of education change the salary of a county superintendent before his present term of office expires?"
Sec. 694, subsec. 1, contains the following:

"The county board at their annual meeting shall fix the amount of salary which shall be received by every county officer, including county judge, who is to be elected in the county during the ensuing year, and is entitled to receive a salary payable out of the county treasury, and the salary so fixed shall not be increased or diminished during his term of office."

It is true that secs. 698 and 704, Stats., are special enactments pertaining to the salary and expenses of the county superintendent of schools. In neither of them is there a provision that the salary fixed shall not be increased or diminished during his term of office, but as repeal by implication is not favored by the courts it has been held by our court that where there are two affirmative statutes upon the same subject one does not repeal the other if both may consist together. *Carry v. C. & N. W. Ry. Co.* 43 Wis. 665; *Attorney General v. C. & N. W. Ry. Co.*, 35 Wis. 425.

Applying this principle of law I believe that the provision in sec. 694, that the salary fixed shall not be increased or diminished during the term of office of a county officer, applies to the superintendent of schools and there is nothing inconsistent in either sec. 698 or sec. 704 therewith. This question must, therefore, be answered in the negative.

"6. Does part 12, section 702-10 keep in force the old laws relating to the payment of salary, expense, etc., of county superintendents and their deputies and clerks until such time as the county board of education can legally carry out part 13 of section 702?"

Said sec. 702-12 provides as follows:

"The law now in force and effect relating to the election, qualifications, powers and duties of the county superintendent of schools shall be in full force and effect and in no way repealed or modified by sections 702-1 to 702-12, inclusive, save as herein specifically set forth in said sections."

In answer I will say that this section does not have that effect as the salary of the county superintendent is not therein mentioned, but as the sections of the statute authorizing the county board to fix and pay the salary and expenses of the county superintendent, have not been expressly repealed, they are still part of the statutes of this state in so
far as they are not inconsistent with the provisions of ch. 751, laws of 1913, and as hereinbefore stated, the salary and expenses of the county superintendent of schools may be paid on the audit of the county board during the year 1913 and so long as the money levied for that purpose is a part of the general fund.

Public Officers—Civil Service—An employe under civil service may act as election inspector or ballot clerk.

April 4, 1914.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

In your favor of April 4th you request my opinion as to whether there is anything in the law that would prohibit a man who is under the civil service from being an election officer such as inspector or ballot clerk.

A careful reading of the civil service law discloses no provision therein that prohibits an employe under civil service from holding another office. This department has ruled that such an employe may be chairman of a committee of a political party. See Biennial Report and Opinions of Attorney General 1910, p. 121, and for 1912, p. 808. If there is no incompatibility between the two positions and if there is no interference in the work so that one may perform the work of both offices, I think there is no reason why an employe under civil service may not act as election inspector or ballot clerk.

Public Officers—District Attorney—Witnesses—District attorney has no power to issue subpoenas for a witness to appear before him before the day of trial and testify.

April 9, 1914.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

In your letter of April 4th you submit the following:
"Is there any method provided under the law whereby the district attorney can compel in criminal cases, witnesses to appear before him and give testimony, or before any court except on the day of the trial? If so, can the witnesses claim witness fees against Chippewa county for such examination?"

In answer I will say that I know of no statute which authorizes the district attorney to issue subpoenas to appear before any one who is not authorized to conduct an examination. Under subdiv. 4, sec. 752, it is provided that it shall be the duty of the district attorney "to issue subpoenas and other processes to enforce the attendance of witnesses". This cannot be construed as authorizing him to compel the witness to come to his office and testify before him as the law does not authorize him to conduct an examination of that sort. I believe that the correct meaning to be given to this statute is that it authorizes the district attorney to issue subpoenas to appear before a magistrate or a court at a hearing authorized by law. There is no provision in the law punishing a witness for contempt who does not answer questions that are put to him by the district attorney in his office, and if a construction were placed upon this statute that the district attorney is authorized to summon witnesses to appear before him to be examined prior to a criminal trial, it would be impossible to compel the witness to answer the questions put to him by the district attorney.

Public Officers—County Judge—A county judge advertising real estate as a private business and describing himself as county judge violates no statutes, but may be criticized on the ground of propriety.

April 11, 1914.

ADOLPH P. LEHNER,
District Attorney,
Oconto Falls, Wis.

In your letter of April 8th you state that your county judge advertises real estate and does a general real estate business and that in advertising such business he signs his name "H. F. Jones, County Judge, Oconto, Wisconsin." You inquire whether he can do so as a matter of law.
In answer I will say that in the advertisement which you attach to your letter the farms and personal property advertised are enumerated and then below the same it is stated: "Address H. F. Jones, County Judge, Oconto, Wisconsin." The use of "county judge" is merely descriptive of himself, and I know of no law which is violated by this practice although it may be criticized as a matter of propriety.

Public Officers—County Board—County board is a perpetual body and a special meeting may be called by members who may not be members when special meeting occurs.

At such special meeting chairman, may be elected if it is the first meeting after election.

April 16, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your favor of April 13th you state that your county board consists of fourteen members; that on the 7th day of March, 1914, while in legal adjourned session all the members of the county board signed a call for a special session of said board and left it with the county clerk on that date, who filed it at that time, asking the clerk of the county to call a special session of said board to meet at the office of the county clerk in the city of Chilton on the 25th day of April, 1914, at ten o'clock A.M., as provided by law. You state that at the spring election only six of the same fourteen members of the old board were reëlected. You inquire whether the petition to the clerk to call a special session, signed by the then members of the county board, will authorize said clerk to call the county board in compliance therewith, although a majority of the members of the county board as constituted at the present time are newly elected members.

In answer I will say that our supreme court has held in the case of Perry v. State, 9 Wis. 16, that the board of super-
visors is a corporate body with perpetual succession and that it continues from year to year though the persons composing it may be changed. Sec. 664, Stats., contains the following concerning a special session of the county board:
"* * * 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. * * *"

In answer to your inquiry I will say that the law in question has been complied with and a special session has been regularly called and I can see no reason why the fact that the personnel of the board is changed should make any difference as to the legality of the calling of said special meeting. In view of the fact that the county board is a perpetual body corporate, and in view of the fact that the statute has been literally complied with, I am of the opinion that the special session of your county board has been legally called.

You also inquire whether the board may at the special session elect a chairman of said board. In answer I will say that sec. 667, Stats., provides:

"The county board, at the first meeting after their election, shall elect one of their number chairman, who shall continue to occupy such position and perform all the duties required of him as such chairman until the county board elected for the succeeding year shall elect his successor."

Under this provision the county board is authorized to elect a chairman at the special session.

Public Officers—The offices of jury commissioner and justice of the peace are not incompatible.

April 17, 1914.

JAMES KIRWAN,
District Attorney.
Chilton, Wis.

In your letter of April 13th you inquire whether the office of jury commissioner is incompatible with that of justice of the peace. You say that a jury commissioner aids in making up the list from which all juries are drawn; that such juries, so selected, constitute the petty jury in the circuit
court, and hear and try suits which sometimes may involve the claims of the justice against the county which are brought before the circuit court on appeal from the action of the county board, and you suggest by reason of the fact that such jury commissioner might select jurors that would be favorable to his claims and also to the appeal cases which are taken from his court to the circuit court, that it would be against public policy to have one person hold both offices.

There is no statute in this state which provides that the office of jury commissioner may not be held by a justice of the peace. Sec. 2533a contains the following:

"The persons so appointed shall be freeholders of the county and possess all the qualifications required by section 2524 and shall be known as jury commissioners."

Sec. 2524 provides:

"All citizens of the United States who are qualified electors of this state, who are possessed of the natural faculties, who are not infirm or decrepit, who are esteemed in their communities as men of good character, approved integrity and sound judgment, and who are able to read and write the English language understandingly, shall be liable to be drawn as jurors, except as otherwise provided in the statutes."

These qualifications required of jurors are also required of jury commissioners and the circuit judge of the county is supposed to select and appoint men who, in his judgment, possess these qualifications.

Three commissioners are appointed in each county and two constitute a quorum which may transact business. I have found no decision of any court of last resort from which I could draw the conclusion that these two offices are incompatible. It seems to me that the facts suggested by you are too remote to make the two positions incompatible.

In the absence of a decision by any court I must hold that the two positions may be held by the same party.
Public Officers—New Towns—Tax Assessment—1. County board has power to fix a time and place of the first town meeting in a new town created by the county board.  
2. If the assessment has been made when the division is made then the old town treasurer should collect tax.

A. J. O'MELIA,  
District Attorney,  
Rhinelander, Wis.

In your letter of April 13th you state that upon proper petition for division of a town in your county, which was filed with the county clerk and also a copy with the town clerk under sec. 671, Stats., a vote was taken and a majority voted in favor of the division in both proposed subdivisions; that this fact the town clerk certified to the county clerk and that the county board now has the power to divide said town as proposed. You inquire whether the county board has the power to set a time for a special election of officers in the newly created town, or whether the new town is to remain, for all practical purposes, a part of the old town until the next annual town meeting held in April, 1915, when they may elect their own officers under sec. 786.

Sec. 786 provides as follows:

"The first town meeting in any newly organized town shall be held on the day of the annual town meeting next after its organization; but if the inhabitants of any such town shall fail to hold their first town meeting on the day of the annual town meeting any three qualified voters of such town may call a town meeting for such town at any time thereafter by posting up notices thereof at not less than three public places therein at least ten days previous to the holding of such meeting."

In sec. 670 the county board is given special powers and in subdiv. (1) it is provided:

"To set off, organize, vacate and change the boundaries of the towns in their respective counties, subject to the limitations hereinafter prescribed, designate and give names there-to, fix the time and place of holding the first town meeting therein, and make all necessary orders for the preservation of the records and papers of any town which may be vacated, but no town shall be vacated unless a majority of all the
members entitled to seats in the county board shall so decide; and no county board, except in the counties of Ashland, Barron, Bayfield, Burnett, Douglas, Juneau, Marathon, Oconto, Polk, and Shawano, and except as provided in the next section, shall set off, establish or organize any town that at the time of being so set off and organized does not contain a population of at least one hundred and twenty-five inhabitants, at least twenty-five of whom shall have been actual electors of this state and resident within the territory of the proposed new town at least six months prior to the time such organization shall take effect."

In this statute the county board is given the power to fix the time and place of holding the first town meeting in any town which the county board has newly created. This provision of the statute must be construed together with said sec. 786. Both of these provisions in the statute have been part of our statutes since 1849. The provision of subdiv. 1, sec. 670, was contained in subdiv. 1, sec. 28, Stats. of 1849. The provision of sec. 786 was contained in subdiv. 12, ch. 12, Stats. of 1849. It is evident, therefore, that the two sections must be construed together and effect given to both so far as it is possible to do so and I am satisfied that under a reasonable interpretation the county board has power to fix the time and place of the first meeting in any town which has been newly created by the county board. Your question must, therefore, be answered in the affirmative.

You also state that if the board has the power to set a time for a special election and the officers are elected at such election that said election would take place after the first day of May and you inquire whether the newly elected assessor would be authorized to make an assessment for the new town and whether the new town would take the assessment as made by the assessor of the old town and collect the taxes on said basis or whether the taxes would also be handled by officers of the old town.

Sec. 1033 provides:

"The assessor of each assessment district shall begin on the first day of May in each year, or as soon thereafter as practicable, and proceed to make an assessment of all the real and personal property liable to taxation in such district. All personal property shall be assessed as of the first day of May in such year, except as provided in section 1040. Real property may be assessed at any time between
the first day of May and the time of the sitting of the board of review for such district."

Sec. 1151, Stats. 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 the taxes in such territory, but they shall be collected and returns made as if the territory was not detached therefrom."

Sec. 925i, Stats. provides that villages which have been newly incorporated 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 the village formerly constituted a part, and that the money should be divided under sec. 925e.

I find no similar provision in the statute concerning towns, but it would seem to me that if the newly elected assessor in the new town has sufficient time in which to make an assessment before the meeting of the board of review, it would be proper for him to do so and then the taxes could be collected by the treasurer of the new town. If, however, the property has already been assessed prior to the election of an assessor by the assessor of the town from which the territory which constitutes the new town was taken, then I believe in view of the said provision of sec. 1151, that the taxes should then be collected by the treasurer in the old town and the money divided as other property is divided between the two towns.

In an opinion by this department under date of Feb. 11, 1913, to the assistant secretary of state, practically the same conclusion was arrived at concerning the assessment of property and the collection of the taxes in newly incorporated villages.
Public Officers—Taxation—Towns—A town assessor is not subject to removal under sec. 1059a for having knowingly and wilfully undervalued property during a prior term.

April 18, 1914.

JAMES F. MALONE,
District Attorney,
Beaver Dam, Wis.

In your letter of the 16th you ask whether or not an assessor of a town is subject to removal under sec. 1059a because during a prior term he knowingly and wilfully undervalued property.

Sec. 1059a, Stats., provides for the removal of an assessor from office for the wilful or intentional assessment of property at other than its true cash value with the intent to subject such property to more or less than its lawful share of taxes.

The general rule is that an officer cannot be removed for misconduct during a preceding term. State ex rel. Gill v. City of Watertown, 9 Wis. 254; 29 Cyc. 1411; 23 A. & E. Ency. of Law (2nd Ed.) 445.

In my opinion the assessor cannot, under the circumstances stated by you, be removed from office. His subsequent election by the people would be considered a condonation of the offense.

Public Officers—Pardons—Under sec. 4944k, Stats., the governor has no authority to discharge an inmate of the state reformatory, whose term of sentence has expired.

April 21, 1914.

STATE BOARD OF CONTROL.

In your favor of April 17th you request my opinion as to whether the governor may, under sec. 4944k, Stats., discharge an inmate of the reformatory after his term has expired so that such discharge would have the effect of restoring him to his civil rights.

Sec. 4944k provides that “upon the recommendation of the superintendent and the board of control, the governor may, without the procedure required by ch. 199 of these
statutes, discharge absolutely, or upon such conditions * * * as he may think proper, any inmate of the reformatory * * * after he shall have served the minimum term of punishment prescribed by law for the offense for which he was sentenced; * * *. Such discharge shall have the force and effect of an absolute or conditional pardon, as the case may be.”

You will note that what the section authorizes is a discharge of an inmate of the reformatory and that the restoration to civil rights merely follows as the effect of such discharge. The word “discharge” as used in this sentence quite obviously means a release from the reformatory—a termination of the period for which the inmate was sentenced. Being so used it cannot well apply to a case where the term of the inmate has expired and I am therefore of the opinion that the section in question does not authorize a discharge after the inmate’s term has expired.

Pursuant to sec. 6, art. V, Const., the governor issues pardons to restore rights of citizenship after the expiration of the term of sentence which, I am informed, is done without compliance with the formalities required by ch. 199, Stats. There is a rule of the executive office that such pardons will not be granted until one year after the expiration of the term of sentence but this department has ruled that the governor may, in his discretion, abrogate, modify or suspend this rule whenever he deems it proper to do so. See Biennial Report and Opinions of Attorney General 1912, p. 606. It therefore seems that there is an easy way open to secure a restoration of civil rights in a proper case, under the circumstances stated by you, even though sec. 4944k is not applicable.

Public Officers—The offices of justice of the peace and city assessors are not incompatible.

April 23, 1914.

L. Olson Ellis,
District Attorney,
Black River Falls, Wis.

In your letter of April 20th you state that a person in your city was elected to the office of assessor and also that
of justice of the peace and you inquire whether he can lawfully hold both offices.

In answer I will say that I find no statutory provision that expressly prohibits a justice of the peace from also holding the office of city assessor; neither do I find a decision of our supreme court or any other court of last resort directly passing upon this question. It can only be determined by an examination of the duties of the two offices, whether they are such as to render it improper, from considerations of public policy, for one person to hold both offices. Considering the duties of the two offices I do not believe that they conflict in any way and I am of the opinion that the offices of justice of the peace and city assessor are not incompatible.

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Public Officers—A register in probate cannot receive pay as a phonographic reporter under sec. 4052d.

April 25, 1914.

JOSEPH T. SIMS,
District Attorney,
Wabeno, Wis.

In your letter of April 22nd you inquire whether a register in probate who was duly appointed by the county judge and is receiving an annual salary, under the provisions of sec. 2464a, may also receive compensation as county court reporter, under the provisions of sec. 452c and 452d.

Said sec. 2464a provides in part as follows:

"Any county judge may appoint, from time to time, by an instrument in writing filed with the county clerk, a competent person to act as clerk of the county court, who shall be officially designated as register in probate for the county in which such court is held. Such register shall, before entering upon his duties, take and subscribe the constitutional oath of office and file the same in the office of the clerk of the circuit court for such county. He shall perform such duties as the judge may direct. If the board of any county in which such register may be appointed and in which his salary is not fixed by law shall not fix a salary for him, the judge shall compensate such register for his services."
Said sec. 4052d provides as follows:

"The judge of any court may, whenever the occasion may require, appoint, and remove at pleasure, a phonographic reporter to attend upon the court and take the testimony of any witness, or witnesses, in any contested matter, or proceeding, that may be pending or upon trial in such court. And, whenever he shall deem it necessary, such judge may require such reporter to make and file in such court, a correct typewritten transcript of such testimony. Every person so appointed shall be deemed an officer of the court, and shall discharge such duties as the court or judge thereof shall require and before entering upon the duties of his office, shall take and subscribe and file in such court the constitutional oath of office."

Sec. 4052e provides as follows:

"The judge of the county court shall certify to the county board of supervisors of his county the number of days, and the number of half days, of actual service performed by such reporter in the performance of said duties, and such reporter shall be allowed by the county board compensation for his services, not exceeding ten dollars for each day, and five dollars for each half day of such services actually rendered by him and as certified by said judge. All claims for such compensation shall be made out and filed, allowed, and paid in the manner provided by chapter 36 of the statutes."

It appears from the provisions of said sec. 2464a that the register in probate is required to perform such duties as the judge may direct. It follows that the judge could require the register in probate to attend upon the court and take the testimony of any witness in a contested matter that may be tried before the court. Such work is within the scope of the official duties of the register in probate. The salary provided for such officer by the county board will compensate him for such services. If such register in probate should receive in addition to such salary, compensation as phonographic reporter, under sec. 4052d, he would receive double pay.

The case of Kollock v. Dodge, 105 Wis. 187, is instructive on this point. On p. 194 the court said:

"There can be no doubt of the rule that a person accepts an office with all its burdens, duties and responsibilities; that he must be content to accept such burdens and per-
form the duties appertaining to his office for the compensation provided therefor."

On page 198 the court said:

"We concede the rule, in all its amplitude, that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary, and that no very nice distinctions should be indulged as to what are and what are not official duties."

I do not believe it is permissible for a register in probate who has a fixed salary to receive extra compensation as phonographic reporter if he performs such services. Your question must, therefore, be answered in the negative.

Public Officers—Education—The offices of member of the county board of supervisors and member of the county board of education are incompatible.

Alvin M. Andrews,
District Attorney,
Shawano, Wis.

In your letter of the 6th you state that at the last election a certain person was elected chairman of his town, thus becoming a member of the county board of supervisors, and that he was also elected a member of the county board of education. That the question has arisen as to whether these two offices are incompatible. You call my attention to sec. 702-10, Stats., giving the county board of supervisors authority to confer upon the county board of education all the powers and privileges conferred by law upon the county training school board and upon the county school board. You state that this seems to be the only provision in ch. 751 which confers any power upon the county board of supervisors to in any way control or direct the duties to be performed by the county board of education. You ask if this provision creates such a conflict as to disqualify one person from holding both offices. You further state that there is neither a county training school nor a county school of agriculture and domestic economy in your county.
Under date of March 5th in an opinion given to Hon. Chas. E. Briere, district attorney of Wood county, I held that the two offices were incompatible. The election of members of the county training school board and of the members of the county school board is vested in the county board of supervisors. See secs. 411-2 and 553d, Stats. The amount of money for organization, equipment and maintenance of a county training school and of a county school of agriculture and domestic economy, is to be determined and appropriated by the county board of supervisors. Secs. 411-1 and 553c, Stats.

Members of the county training school board and of the county school board must each file a bond in an amount to be determined by the county board of supervisors. Secs. 411-2 and 553d, Stats. Members of the county board of supervisors are specifically made ineligible to membership on a joint county training school board and to membership on a county school board or joint county school board. Secs. 411-7, 553d and 553e, Stats.

Incompatibility exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both. Mechem's Public Offices and Officers, sec. 422.

In an unofficial opinion given to Mr. L. P. Fox, county superintendent of schools of Calumet county, I held that the fact that there was neither a county training school nor a county school of agriculture and domestic economy in a county did not affect this question. Sec. 411-1 provides that the county board of any county within which a state normal school is not located is authorized to appropriate money for the organization, equipment and maintenance of a county training school for teachers of the common schools. Sec. 553c, Stats., provides that the county board of any county is authorized to appropriate money for organization, equipment, and maintenance of a county school of agriculture and domestic economy. It thus appears that the county board of supervisors has full authority to establish each of these schools and when established it has full authority to turn the management of those schools over to the county board of education. The members of the county training school board are each required to file a bond in such sum as may be fixed by the county board
in the office of the county clerk (sec. 411-2) and each member of the county school board is required to file a like bond. (Sec. 553d). When the powers and privileges conferred upon these two boards are by the county boards of supervisors transferred to the county board of education, presumably the members of that board must give similar bonds. Where one officer is qualified to vote upon the question of the amount of the bond to be given by another officer, the two offices are incompatible. I see no reason at this time for coming to a different conclusion than that reached in the two opinions to which I have made reference.

_Public Officers—Marriage—Licenses—A county clerk is disqualified from issuing a marriage license to himself._

The deputy county clerk may issue a marriage license to the county clerk.

May 11, 1914.

W. A. Lawton,

_County Clerk,

Richland Center, Wis._

In your letter of the 8th you state that you are the county clerk of Richland county, and desire to marry a lady residing in the same county. You ask if you, as county clerk, may validly issue a marriage license to yourself on your own application, or if you can issue one to the lady on her application.

In my opinion it would not be proper for you to issue the license yourself. Sec. 706, Stats., provides that every county clerk shall appoint one or more deputies, and that in case of the absence or disability of the clerk such deputy or deputies shall perform all of the duties of the clerk during such absence or disability. It appears to me that you are disabled from issuing the license yourself. That being true the statute authorizes the deputy clerk to perform your duties during such disability. In my opinion this would be the proper procedure, and that the license should be signed by the deputy as “deputy county clerk acting as county clerk during the disability of county clerk.”
Public Officers—Education—County Superintendent of Education—The county board of education may not change the salary of the county superintendent during his term of office.

May 14, 1914.

PAUL R. NEWCOMB,
District Attorney,
Durand, Wis.

In your favor of May 11th you state that the county board of education at its meeting in May fixed the salary of the county superintendent for Pepin county at a thousand dollars, which is the minimum fixed by law; that this increases the salary of the county superintendent for said county and you ask whether the county superintendent is entitled to this increase at once or if not presently so entitled when is he entitled to receive it.

In an opinion to C. P. Cary, state superintendent of public instruction, under date of April 3, 1914,* this department passed on several questions relating to the construction of the county board of education law and among other things ruled that a county board of education may not change the salary of a county superintendent before his term of office expires. The reasoning is, that sec. 694, Stats., providing that the salary of a county officer shall not be increased or diminished during his term, is applicable and that there is no intention evident from the enactment of the county board of education law to do away with the rule so provided. It therefore follows that the salary of every county superintendent remains unchanged during his term of office and that he will be entitled to an increase, if any, only when he enters upon a new term of office.

*Page 725 of this volume.
Public Officers—Sheriff's—A sheriff who travels to serve an execution but fails to find property is not entitled to mileage.

In case he finds property and sells it he is entitled to mileage and a per cent fee.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

May 14, 1914.

Under date of May 7th you submit the following:

"In case an execution was delivered to the sheriff and he makes a trip say twenty miles, and fails to find property, what would his legal fees be in such case?

"If he does find property and levies, on the same, is he entitled to charge his mileage and also the per cent provided by subsec. 7, sec. 731, Stats?"

Sec. 731 provides that every sheriff shall be entitled to receive the following fees for his services:

"(2) Traveling and making service of any summons, writ or other process, except upon criminal warrants, to be computed in all cases from the court house of the county in which service is made, ten cents per mile going and returning;"

The word "service" is defined by Webster's International Dictionary, as used in law as:

"An act of bringing to notice either actually or constructively, in such manner as is prescribed by law; in a broader sense, the carrying into effect or execution of any writ or process as of an attachment by seizing the goods or person attached; an execution by levying it upon the goods or person of the defendant."

In the case of Labette County Commissioners v. Franklin, 16 Kan. 450, the statute was under consideration which provided a fee for the sheriff "for every mile necessarily traveled in serving any writ, process, order, venire, or notice, ten cents."

Justice Brewer who wrote the opinion in said case said:

"Service of a writ is the actual performance of the duty commanded by it. If that duty is unperformed there is no service."

The statute in question was held to apply to executions This case was approvingly cited by our court in the Northern
Trust Company v. Snyder, 113 Wis. 516, 545. In this latter case our court held that the statute, in subdiv. 27, sec. 731, where it provides a fee for "traveling to serve any criminal process for every mile actually traveled, ten cents per mile," would provide a fee only in a case where the trip to serve is successful, but for unsuccessful trips no mileage would thereby be authorized. The words "traveling in making service" as used in subdiv. 2 would require the same construction. See Schneider v. Waukesha Co., 103 Wis. 266; and cases cited on pages 268, 269.

In answer to your first question, therefore, I am of the opinion that no fees can be charged in case no property is found.

In answer to your second question, I will say that in case property is found and the proper levy is made the sheriff is entitled to the mileage under said subdiv. 2 and he is also entitled to the fees provided in subdiv. 7 which reads:

"Collecting and paying over all sums upon execution, writ or process for the collection of money, five per cent on the first three hundred dollars; two and one-half per cent on the next three hundred dollars or any part thereof; and one and one-half per cent on any excess over six hundred dollars; but in no case shall the whole percentage exceed thirty dollars."

Public Officers—Fees—Fees earned by police officers for serving papers must be paid into the police pension fund.

May 22, 1914.

D. E. Mcdonald,
District Attorney,
Oshkosh, Wis.

In your letter of the 20th inst. you state that Oshkosh is a city of the third class and you inquire whether the city treasurer would be obliged to place the fees earned by police officers of the city in serving papers, that are paid by the county to such officers who are entitled thereto and thereupon paid into the city treasury, into the police pension fund.
The police pension fund is provided for by secs. 925-52t to 925-52v, inclusive. Sec. 925-52m provides:

"All rewards in moneys, fees, gifts or emoluments that may be paid or given for or on account of any service of said police departments, or any member thereof, except when allowed to be retained by said member by resolution of said boards, or given to endow a medal or other permanent competitive reward, shall be paid into said fund and constitute a part thereof."

This provision of the statute is applicable to the question submitted and it is evident that it has a mandatory significance and necessitates an affirmative answer to your question.

/Public Officers—Towns—Every town chairman is a fire warden even before he takes oath as fire warden.

If he refuses to take oath of office of fire warden he may be prosecuted under sec. 1494-49.

May 22, 1914.

Hon. E. M. Griffith,

State Forester.

In your letter of May 20th you submit the following questions:

"1. Is a town chairman or a superintendent of highways a fire warden until he has taken the oath of office?"

"2. In case a town chairman or road superintendent neglects or refuses to take the oath of office as fire warden, must he do so upon a request from me as state fire warden?"

You direct my attention to sec. 1494-47, Stats., which provides that:

"Town chairmen shall be town fire wardens for their respective towns, and that superintendents of highways shall be assistant town fire wardens for their respective towns."

And to sec. 1494-48, which provides that:

"Each fire warden before entering upon his duties shall take an oath of office and file the same with the state fire warden."

Also to sec. 1494-49, which provides a penalty for any fire warden who shall refuse to carry out the provisions of sec. 1494-48.
In view of the provision that town chairmen shall be town fire wardens for their respective towns, the answer to your first question must necessarily be in the affirmative, for as soon as a person is elected town chairman he is by virtue of that office a fire warden under the provisions of this section. Your second question must be answered in the affirmative also, and if the party after being requested by you still refuses to take the oath of office as fire warden he may be prosecuted under sec. 1494-49 for having refused to carry out the provisions of sec. 1494-48.

Public Officers—Contracts—University—The University may lease a building owned by Dean Russell.

June 4, 1914.

H. C. Bumpus,
Business Manager,
University of Wisconsin.

In your letter of June 1st you state that Dean Russell has a house and lot that adjoins university property and which is vacant at the present time, that can be used for the department of entomology and that the house and lot owned by Dean Russell can be leased at a reasonable price for this purpose. You inquire whether there is any legal reason why you should not lease from an officer of the university.

In answer I will say that it is unlawful for any officer to become interested in a contract made by or with him in his official capacity or employment. Dean Russell, however, is not making a contract in his official capacity with the university. The contract is entered into with the proper officers of the university who are authorized to enter into a contract and Dean Russell is a party to this contract in his private capacity.

I know of no statute or law that is violated by the proposed contract.
Public Officers—County Board—Proceedings, Publication of—County Board cannot publish its proceedings in a newspaper published in a foreign language, except in compliance with sec. 675.

THOMAS C. DOWNS,
District Attorney,
Fond du Lac, Wis.

In your letter of June 10th you state that your county board at the last session passed a resolution, a part of which reads as follows:

"that to accord with former resolutions of this board that at the same time such bids are received, bids be also received for the publication of the proceedings of this board, as provided by chapter 298, laws of Wisconsin, in a legal newspaper or newspapers of general circulation and published in the county, all proposals to state price per folio, and to be on proposal blanks furnished by said county clerk."

You state that the resolution as originally introduced contained the words "an English" newspaper, but that it was amended by substituting the word "legal." You inquire whether the proceedings of the county board referred to could be published in the English language in a German newspaper providing the newspaper meets all the other requirements of the law.

Sec. 674a provides as follows:

"The county board of supervisors of every county in the state of Wisconsin, shall, by ordinance or resolution, provide for one publication of a certified copy of all its proceedings had at any meeting, regular or special, in one or more newspapers published and having a general circulation therein, said publication to be completed within sixty days after the adjournment of each session. If there be no such newspaper published in the county, then such publication shall be made in some newspaper published in an adjoining county and having a general circulation in the county where such proceedings are to be had."

Sec. 675, Stats. provides:

"The county board may order public notices relating to tax sales, redemption and other affairs of the county to be published in a newspaper printed in any other than the
English language, to be designated in such order, whenever they shall deem it necessary for the better information of the inhabitants thereof, and it shall appear from the last previous census that one-fourth or more of the adult population of such county are of a nationality not speaking the English language, and that there shall have been a newspaper published therein continuously for one year or more in the language spoken by such nationality; provided, that all such notices shall also be published in a newspaper published in the English language as provided by law."

Our supreme court in the case of State ex rel. Goebel v. Chamberlain, 99 Wis. 503, 509, used the following language:

"The English language is the language of the country, to be used in all legal and official notifications or proceedings, in the absence of any statute authority to the contrary."

The question presented by you was considered by our supreme court in the case of Hyman v. Susemihl, 137 Wis. 296. On page 301 the court said:

"If a county board desires to make a publication in a foreign language, it must look to the statutes for authority so to do, and, in the absence of such authority, the right to make a contract for such publication does not exist.

"Furthermore, sec. 675, providing what publications a county board may make in a foreign language, and prescribing the conditions that must exist before such publications can be made, shows a legislative intent to exclude publications in a foreign language other than those provided for."

The county board did not designate in the resolution the newspaper in which the publication should be made in the German language. This is necessary under the provisions of sec. 675. The county board is not authorized under the above cited decisions of our supreme court to publish its proceedings in a newspaper published in a foreign language except in so far as sec. 675, Stats. authorizes the same. I am, therefore, constrained to hold that under the resolution passed by your county board its proceedings cannot be published in the English language in a German newspaper.
RELATING TO PUBLIC OFFICERS.

Public Officers—Counties—A member of a county board cannot legally be appointed by the board to fill a vacancy in the office of county treasurer during the term for which he was elected.

June 16, 1914.

WILLIAM F. SCHANEN,
District Attorney,
Port Washington, Wis.

In your telegram of the 15th you ask if a member of the county board can legally be appointed by said board to succeed a deceased county treasurer, under sec. 976m.

That section provides in part:

“No member of any * * * county board shall, during the term for which he is elected, be appointed or elected to any office or position which has been created by, or the election or appointment to which is vested in, such * * * county board."

If the appointment of a successor to the deceased county treasurer is vested in the county board, then under the express terms of this statute no member of such board may be appointed to fill such vacancy during the term for which he was elected a member of such board. I see no escape from this conclusion, and this is in accordance with what has been frequently ruled by this department upon similar situations.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your favor of June 30th you ask:

“Is it legal for a Wisconsin district attorney duly elected and qualified and acting, to go into another adjoining
county and defend a person charged with horse stealing, while he is such district attorney? The stealing having been in the said other county, not in the district attorney’s county defending the accused.”

I know of no statute or principle of law which would prevent a district attorney of one county from acting as attorney for a person accused of crime in another county. Quite clearly his acting as attorney for such an accused person would not conflict with his duties as district attorney as prescribed by sec. 752, Stats., nor is such situation within the prohibition of the final sentence of sec. 754, Stats.

You also ask:

“Can a Wisconsin corporation, all of whose stockholders live out of the town, but whose main place of business is in such town, legally obtain a saloon license in a country town in this county, under sec. 1565l, Stats. 1913, in its own name?

“Can a Wisconsin corporation in its own name whose place of business is located in Milwaukee city, but who owns a saloon building in a country town in this county, none of the stockholders living at all in this county, legally get a saloon license under sec. 1565l, Stats. 1913? Does that section of the statutes only apply to human beings as to ‘residence’ in said town, or does it also apply to corporations, as asked in Nos. 2 and 3 above?”

Sec. 1565l, Stats., quite clearly permits the issuance of a license to a domestic corporation without regard to whether the corporation has its principal place of business within the licensing district or not. The residential requirement of sec. 1565l is plainly applicable only to persons other than domestic corporations. The residence of the owners of the stock of such corporation is entirely immaterial.

Public Officers—Coroners—The coroner has no authority, under sec. 4865, to hold inquests unless ordered so to do by the district attorney.

C. A. Harper,
State Health Officer.

In your favor of July 8th you request my opinion on two questions which you state as follows:

July 9, 1914.
"1. If a coroner has been informed that an individual has committed suicide, has the district attorney a legal right to forbid the coroner to investigate the case?

"2. In any case of death from violence, whether probably accidental, suicidal or homicidal, is the coroner required to obtain the permission of the district attorney before he can legally investigate the case?"

Sec. 4865, Stats., quite clearly authorizes the coroner to hold an inquest only when ordered by the district attorney. The constitutionality of this statute has been questioned on the ground that the office of coroner is a constitutional one and that it is doubtful whether the legislature has the right to take away from him the discretion that it was his right to exercise at common law with reference to holding inquests. See opinion of Attorney General Sturdevant in the Biennial Report and Opinions of Attorney General 1906, pp. 551, 2. But this department has since ruled that since our supreme court has not passed upon the constitutionality of the law it should be considered constitutional and valid and that a district attorney is justified in refusing to certify to the expenses of a coroner who acted without the knowledge and consent of the district attorney. See opinion of Assistant Attorney General Titus, Biennial Report and Opinions of Attorney General 1910, p. 620; and opinion to Chas. R. Freeman, district attorney, of Jan. 23, 1913. I agree in the conclusion reached in the latter opinion and think that the statute limiting the authority of the coroner in holding inquests in cases where he is requested by the district attorney to act should be considered constitutional until the supreme court has otherwise held.

Public Officers—County Board of Education—Compensation—Under secs. 695 and 702-9, Stats., members of the county board of education are entitled to the same per diem as is paid to members of the county board of supervisors.

STANLEY G. DUNWIDDE,
District Attorney,
Janesville, Wis.

In your favor of July 9th you request my opinion on a question which you state as follows:

48—A.G.
"The question has arisen here as to what compensation members of the county board of education shall receive. Sec. 702-9 provides that they shall be allowed and paid the per diem and mileage as provided in sec. 695, Stats., for members of the county board of supervisors. Sec. 695 provides that each member of the county board shall be allowed and paid $3.00 per day and six cents for each mile travelled in going to and returning from the place of meeting, provided that the county board may by resolution fix the compensation at any sum not exceeding $4.00 per day.

"Our county board has adopted a resolution fixing the compensation at $4.00 per day. Would the members of the county board of education receive $4.00 per day or $3.00 per day and mileage?"

Sec. 702-9, Stats., provides that:

"All members of the county board of education shall be allowed and paid a per diem and mileage as provided in section 695 of the statutes for members of the county board of supervisors."

Sec. 695, Stats., provides compensation for members of the county board of a per diem of three dollars and six cents per mile and that

"Any county board may at their annual meeting, by resolution, fix the compensation of the members of such board to be elected at the next ensuing election at any sum not exceeding four dollars per day."

Had it been the intention in enacting sec. 702-9, Stats., that members of the county board of education should be allowed only the three dollar per diem fixed by sec. 695, Stats., it seems to me that the legislature would have provided for such per diem in sec. 702-9. The intent was, rather, that members of the county board of education should be paid the same per diem in any county as is received by the members of the county board.

I am therefore of the opinion that where the county board has duly adopted a resolution fixing the compensation of its members at four dollars per day the members of the county board of education are entitled to the same per diem.
RELATING TO PUBLIC OFFICERS.

Public Officers—County Board of Education—Compensation—Members of the county board of education are entitled to the same compensation as members of the county board.

July 16, 1914.

STANLEY G. DUNWIDDIE,
District Attorney,
Janesville, Wis.

In your letter of July 15th you refer to my letter of July 10th in which I gave my opinion to the effect that members of the county board of education are entitled to the same per diem as paid to members of the county board. You state that the members of your county board of education do not wish to accept the four dollar per diem that has been fixed for members of the county board, and you ask whether they must take such per diem without mileage or whether they may take a three dollar per diem with mileage.

When the county board has fixed the compensation of the members thereof pursuant to sec. 695, Stats., the amount so fixed becomes the only amount that may be legally paid to the members of such board, and since pursuant to sec. 702—9 members of the county board of education are to be paid the per diem and mileage as provided in sec. 695 for members of the county board of supervisors, it must follow that the compensation fixed for members of the county board is the only legal compensation for members of the county board of education.

Public Officers—School Districts—The treasurer of a school district is not in default for failing to turn over the books and money of the district to his successor until the latter has qualified and has made proper demand upon him.

July 21, 1914.

D. E. MCDONALD,
District Attorney,
Oshkosh, Wis.

In your letter of July 20th you request my opinion on a question which you state as follows:

"It seems as though at the school meeting in a certain district in this county a new school treasurer was elected
and the old school treasurer failed to turn over the money to him. There were bills outstanding and the new treasurer could not pay them until he received the money from the old treasurer and suits were brought and it put the district to a considerable expense.

"The question is whose duty was it to collect this money from the old school district treasurer, whether the new treasurer was obliged to go and get the money or was the old treasurer under his bond obliged to pay over to the new treasurer, when notified of his qualifications, the money.

"It seems that the old treasurer was notified of the qualifications of the new treasurer and for some weeks after he was notified he didn’t turn over the money."

Sec. 444, Stats., provides that the treasurer of a school district at the close of his term of office “shall settle with the board and deliver to his successor said book, (his book of account), all vouchers, orders, papers and money coming into and remaining in his hands as treasurer.”

Sec. 443, Stats., provides in part that the treasurer “shall hold office until his successor be elected or appointed and qualified.” Under this language it has been held that a treasurer continues in office until his successor has qualified by giving the required bond. State ex rel. Wheeler v. Nobles, 109 Wis. 202. Until his successor has so qualified there is, obviously, no one to whom the money could rightfully be paid. Board of School Directors v. Kuhnke, 155 Wis. 343, 346.

The matter of the qualification of his successor is obviously one of which the treasurer is not required to take notice and he is, undoubtedly, correct in refraining from taking any steps to pay over the money to any one until he has been informed that his successor has qualified and is entitled thereto. Furthermore, I am of the opinion that since the delivery of the books, papers and money is not required at any fixed time nor at any fixed place, there being no official place for the school district treasurer to keep his office, the retiring treasurer is not in default in failing to deliver to his successor the books, papers and money of the district in his hands until a demand has been made upon him in person by the new treasurer or someone authorized to act in his behalf. Throop, Public Officers, sec. 295; Dreger v. People, 52 N. E. (Ill.) 372, 6-7; McPhillips v. McGrath, 23 So. (Ala.) 721, 7.
Under the above authorities, particularly the Illinois case, it seems that a written demand sent by mail would not be sufficient. This goes on the theory that the legal place for keeping the records and money of the district is at the residence of the treasurer and that such place remains the legal place until demand is there made upon the treasurer that they be turned over to his successor.

Under secs. 550, 4418 to 4421, 4550 and 4553, Stats., it seems that the treasurer would not be liable for neglect or refusal to deliver the books and papers of the district to his successor until there had been a wilful violation of his duty to deliver them, i.e., neglect or refusal after proper notification and demand. *State v. McAloon*, 142 Wis. 72.

The provisions of secs. 977 to 990a, relating to proceedings to compel the delivery of books and papers of public officers to their successors, and actions on official bonds, strengthen the conclusion already stated in that the sections referred to expressly or by inference require a demand as a condition precedent to the maintenance of the proceedings or actions therein referred to.

/Public Officers—Public Health—Secs. 1411, et seq., Stats., prescribe uniform general law for boards of health and health officers in cities and villages and supersedes conflicting provisions of special city charters.

C. A. Harper,

*State Health Officer.*

I have your request for opinion of the 22d inst., in which you state as follows:

"Under the provisions of sec. 1411, Stats., which was amended at the 1913 session of the legislature, it is provided that the health officer when appointed shall hold office for two years, and until his successor has been elected and qualifies.

"It appears that under the provisions of the charter of the city of Whitewater the term of office of the health officer is fixed at one year. We have been requested to advise the health officer of Whitewater if the provisions of the special charter are amended by the enactment of sec. 1411."
Subsec. 1, sec. 1411, Stats. reads as follows:

"The town board, village board and common council of every town, village and city, except in cities of the first class, 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. The health officer when appointed shall hold office for two years and until his successor has been elected and qualifies."

Your inquiry presents a question upon which there appears to have been considerable difficulty in the past—the question whether the terms of a general statute may be held in a given case to supersede contrary provisions of a pre-existing special city charter act.

Secs. 4986 and 4987, Stats. prescribe rules of construction, which, literally applied, would result in the holding that a special charter act could not be so affected by general legislation, unless the special charter act were expressly referred to in the general law.

However, it has apparently been held, upon the ground that one legislature can not bind its successor as to the manner and form in which it shall exercise its legislative functions, that, if a law clearly appears to have been intended to apply to especially incorporated cities, it will be held to so apply, although the purpose so to do shall not be expressly set forth therein. *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.

These decisions should be given some consideration in determining the effect of secs. 4986 and 4987 upon the question whether the general law relating to public health should be held to control over the provisions of the special charter of the city of Whitewater.

It may be fairly said that the effect given to these statutory rules of construction (secs. 4986 and 4987), as indicated by decisions of the supreme court, is that general acts will not be held to supersede conflicting special charters, unless a purpose to do so is clearly manifest from the provisions and general scope and purpose of the general law. *Prentiss v. Danaher*, 20 Wis. 311, 318; *State ex rel. McCaule v. Korsken*, 118 Wis. 287, 291; *Devine v. Fond du Lac*, 113 Wis. 61, 70–1;
There are, however, many decisions of the supreme court in which it has been held that provisions of general law supersede conflicting special city charter provisions. Some of these decisions are not readily harmonized with all that is said in the cases above cited. Appleton W. W. Co. v. Appleton, 116 Wis. 363, 375; Sheboygan County v. Sheboygan, 54 Wis. 415, 420; James v. Darlington, 71 Wis. 173, 176; Lander v. Bromley, 79 Wis. 372, 378; Schaefer v. Fond du Lac, 104 Wis. 39, 42.

The ultimate question appears to be, what constitutes in each case a clear expression of legislative intent that the general law shall supersede the special charter provision.

One class of cases in which it appears that the general law is held to be controlling is that class of cases in which the general law in express terms is declared to apply to all cities, villages, etc., and where from the character and purpose of the general law it appears that it was “designed to constitute a uniform rule for all cities and towns,” such as laws relating to matters of taxation and to the sale of intoxicating liquors. Kellogg v. Oshkosh, 14 Wis. 623, 628; Brightman v. Kirner, 22 Wis. 54, 57–8; Platteville v. McKernan, 54 Wis. 487; Raymond v. Sheboygan, 76 Wis. 335, 339; State ex rel. Faber v. Hinkel, 131 Wis. 103, 106–7.

From the provisions of sec. 1411 and following sections of ch. 57, Stats., relating to the preservation of the public health, it would seem to be reasonably manifest that the legislature intended by the enactment of these statutes to establish a general and uniform system of health regulations to be applicable throughout the state.

The language of sec. 1411, above quoted, is that “the town board, village board and common council of every town, village and city * * * shall * * * organize as a board of health, or appoint wholly or partially from its own members * * * a board of health,” as in these statutes provided. The section further provides that such board of health shall include a health officer and, in subsec. 1, provides that the health officer, when appointed, shall hold office for two years and until his successor has been elected and qualified.
I am of the opinion that this general law comes within that class of laws "designed to constitute a uniform rule for all cities and towns," and that such being the case, the language of subsec. 1, sec. 1411, above quoted, is a sufficiently plain declaration of legislative intent to supersede thereby conflicting provisions of special city charters, and that the term of the health officer of the city of Whitewater is fixed by the provisions of sec. 1411, Stats., as above indicated.

Public Officers—Vacancies—Elections—Removal of state senator from district creates vacancy, but special election should not be called until senate declares vacancy to exist.

Aug. 8, 1914.

FRANCIS E. McGOVERN,
Governor.

You have referred to me a communication addressed to you by Louis G. Widule, county clerk of Milwaukee county, accompanying which is an affidavit filed with the county clerk of Milwaukee county by Elias Lehmann who swears that about the first part of the month of July, 1913, and during the time while the legislature was in session, Hon. George H. Weissleider, who was duly elected state senator from the sixth senatorial district, at the November election in 1912, removed from said sixth senatorial district and took up his residence in the fifth senatorial district. The said Elias Lehmann, conceiving that a vacancy existed in said office by reason of such removal, and assuming as a matter of course that such vacancy would be filled at the ensuing general November election, filed nomination papers with the county clerk of Milwaukee county placing himself in nomination for the office of state senator from said district.

It seems from correspondence attached that the county clerk of Milwaukee county forwarded said affidavit to Hon. John S. Donald, secretary of state, who returned the same stating that he had no knowledge that a vacancy existed in said senatorial district and disclaiming any official duty in the premises. The county clerk asks for information for his official guidance in the situation thus presented.
In an opinion addressed to the executive clerk March 16, 1912, Biennial Report and Opinions of Attorney General 1912, p. 790, it was held that the removal of a state senator from the district from which he was elected caused a vacancy in such office. The question was very well considered in that opinion and also in a communication addressed to J. Elmer Lehr, to be found on page 796 of the same volume, and I think the conclusion reached correct.

Conceding, therefore, that the statement contained in the affidavit of Mr. Lehmann is true, and Senator Weissleder did, more than a year ago, remove from the district from which he was elected, there would appear to be a vacancy in the office of state senator from the sixth senatorial district at this time. Conceding such to be the fact, the question arises as to the manner in which such vacancy shall be filled and of the efficacy of the nomination paper filed by Mr. Lehmann with the county clerk of Milwaukee county.

Sec. 14, art. IV, Const. provides:

"The governor shall issue writs of elections to fill such vacancies as may occur in either house of the legislature."

Sec. 94/ seemingly attempts to provide for the calling of a special election under such circumstances by the secretary of state. That section, however, should, in my opinion, be read in connection with the provision of the constitution just quoted and I think it clear that the machinery for a special election to fill this vacancy must be set in operation by the governor.

The question arises whether the governor should take official notice of the fact that because Senator Weissleder has removed from his district a vacancy exists in the office of state senator from that district and proceed with the calling of a special election at this time. It will be noted that there is nothing appearing of record indicating a vacancy in that office of which official notice may be taken. Whether a vacancy exists depends upon the determination of the question of whether Senator Weissleder has lost his residence in the sixth senatorial district. This is necessarily the determination of a fact. Such fact should not be determined by any person or tribunal without giving Senator Weissleder an opportunity to be heard, and perhaps his constituents also have such an interest in the matter as to
make it proper at least that they be given an opportunity to be heard. The law does not provide for the conduct of any proceedings appropriate to the determination of this question on the part of the governor or any other administrative officer. Such a proceeding on the part of the governor or other administrative officer would necessarily be somewhat extra-official and his determination to some extent arbitrary.

Sec. 7, art. IV, Const. provides that

"Each house shall be the judge of the elections, returns and qualifications of its own members."

It seems to me that the senate itself is the proper body to determine whether a vacancy exists in this office and that the governor should not assume to call a special election to fill this vacancy until such action on the part of the senate. If a person were elected to fill this assumed vacancy, the senate would have the power to pass upon his credentials. In the event of a contest between the newly elected senator and Senator Weissleder that body could, in its discretion, refuse to recognize the right of the newly elected senator to a seat in that body.

In view of the foregoing considerations it seems to me entirely appropriate that the governor should take no action toward the calling of a special election to fill this vacancy until it has been declared by the senate itself.

Referring to the nomination paper filed by Mr. Lehmann, I will say it is without any force or effect whatever. No election has been ordered or called for the purpose of filling this vacancy and it is held in the case of State ex rel. Heim v. Williams, 114 Wis. 402, where Mr. Heim conceived that an election should be held to choose a successor to Judge Williams, a circuit judge of Milwaukee county, at the regular spring election in April, 1897, secured a number of votes for that office at the spring election, that such votes and the pretended election were void for the reason that no election had been called to fill that office. So, here, any steps taken until the special election is called will be entirely premature and of no effect. Neither the county clerk of Milwaukee county nor any other officer has any official duties to perform whatever with reference to the pretended nomination paper filed by Mr. Lehmann.
Public Officers—County Highway Commissioner—Salary—

Under sec. 1317m-6, Stats., 1911, the county highway commissioner was a public officer, and his compensation was fixed by the county board, and not by contract.

In the absence of constitutional restriction, the legislature may abolish an office, or change the salary thereof, at any time.

Daniel E. McDonald,
District Attorney,
Oshkosh, Wis.

In your letter of the 18th you say that you have been requested by the county board to pass upon the question of the highway commissioner's expenses; that in Nov. 1912, the county board entered into a contract with one James Binning, in which they agreed to pay him $1,000 for the first year, he to pay his own expenses, and $1,200 for the next two years, he to pay his own expenses; that since that time the legislature has amended sec. 1317m-6, which provides that upon his second election and annually thereafter until a different salary be fixed by the county board and approved by the state highway commission, the salary of the county highway commissioner shall be fixed by the county board at not less than $1,200 in counties doing more than $50,000 worth of work; that the board shall provide him with a suitable office and such assistants as are necessary for the proper performance of his duties; that the salary and necessary traveling expenses of the county highway commissioner and his assistants shall be paid out of the general fund of the county; and you state that the question is, whether the legislature can pass a law affecting this contract.

Under sec. 1317m-6, Stats. 1911, the county highway commissioner was to be elected by the county board. Provision was made by which, upon the request of the county board, candidates for the office of county highway commissioner should be examined by the state highway commission. Subsec. 3 provided:

"The county board shall fix the salary of the county highway commissioner at not less than six hundred dollars per annum, fix his term of office at not less than three years, make arrangements as to his bond, and delegate such powers and authority to him as shall enable him to carry out the
provisions of sections 1317m-1 to 1317m-15, inclusive. The board shall provide him with a suitable office and such assistants as are necessary for the proper performance of his duties. The salary and the necessary travelling expenses of the highway commissioner and his assistants shall be paid out of the general fund of the county."

In my opinion any county highway commissioner elected pursuant to that section was a public officer, and the matter of his compensation was not one to be determined by contract, but purely by action of the county board. In other words, the county board had no authority to enter into any such contract as you state was attempted to be done in your county. The statute expressly provided then, as it provides now, for the payment of his necessary traveling expenses out of the general fund of the county. The contract attempted to be made by your county board was in direct contravention of this provision.

It is one of the fundamental principles of law relating to public officers that, in the absence of constitutional restriction, the legislature may abolish an office or change the salary at any time. In my opinion, the legislature had ample power to make the amendment to this section to which you refer, and the contract attempted to be entered into between your county board and Mr. Binning does not prevent the applicability of such law to your county.

Public Officers—Contracts—Trustees of a village and commissioner of highways, under facts stated, being interested in contract, are guilty of malfeasance in office under sec. 4549.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of the 17th inst. you state that in your village the trustees were elected but were never sworn in, but that they are, nevertheless, acting as trustees. Some of the trustees have sold articles to the village through the firm with which they are connected. You state that the transaction was performed by the member of the partnership who
is not a trustee; that the village street commissioner is ordered by the board to buy gravel, sand and tile from certain specified firms of which firms some of the village trustees are members; that the bills presented by the commissioner for the different firms are not sworn to as required by sec. 894. You inquire whether the said village trustees who were interested in the contracts made with their firm are guilty of malfeasance in office under sec. 4549; also whether the commissioner is guilty.

Your questions must be answered in the affirmative. Sec. 4549 provides as follows:

"Any officer, agent or clerk of the state or of any county, town, school district, school board, city or village therein * * * 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, or in any tax sale, tax title, bill of sale, deed, mortgage, certificate, account, order, warrant or receipt made by, to or with him in his official capacity or employment, or in any public or official service, or who shall make any contract or pledge, or contract any indebtedness of liability, or do any other act in his official capacity or in any public or official service not authorized or required by law * * * shall be punished by imprisonment in the county jail not more than five years or by fine not exceeding five hundred dollars."

The commissioner is guilty of doing an act in his official capacity not authorized or required by law, and is, therefore, guilty.

The trustees have acquired an interest in the purchase of personal property which purchase was authorized by them. This makes them guilty also. The fact that the trustees have not been sworn in will not alter the case for it is a well settled rule of law that a de facto officer is liable to punishment for misfeasance or malfeasance in office the same as an officer de jure. See 8 American and English Encyclopedia of Law, 806.
Public Officers—Criminal Law—Town officers voting themselves expenses not provided by law guilty under sec. 4549.

L. Olson Ellis,
District Attorney,
Black River Falls, Wis.

In your letter of Aug. 24th you state that in one of the towns of your county the town board in addition to the $3 per day allowed by statute has charged the town expenses for livery hire while performing services for the town. You inquire whether this is an offense under sec. 4549.

Under sec. 850 the compensation of members of the town board is $3 per day if no different compensation is fixed at the annual town meeting. You do not expressly state in your letter that the town meeting has not fixed a different compensation, but I shall presume in this letter that such is the case. The supervisors are, therefore, entitled to $3 and no more. There is no provision in the statute authorizing them to charge for any expenses as no provision is made for paying their expenses in any way.

Sec. 4549 provides:

"Any officer *** of any *** town *** who shall *** do any *** act in his official capacity, or in any public or official service not authorized or required by law *** or who shall ask, demand or exact for the performance of any service or duty imposed upon him by law, any greater fee than is allowed by law for the performance of such service or duty, shall be punished," etc.

This is a criminal statute and, of course, should be strictly construed. There is considerable doubt as to whether the term "fee" as used in this statute comprehends and includes a charge for expenses such as livery rigs. I can see much force in the affirmative contention of that proposition and were it not for the fact that the officers mentioned in your letter have more clearly offended against another provision of the section, quoted, I am constrained to feel that they ought to be prosecuted for demanding and exacting a greater "fee" than is allowed by law for the performance of their services, but I think a conviction in this case can be more readily had upon another theory.
It is the duty of the town board to audit claims against the town. Sec. 821, Stats. The town board presumably audited these claims, including expenses for livery hire. The expenses for livery hire are not allowed by law. Consequently in auditing and allowing such claim they committed an "act, in their official capacity, not authorized by law," and are guilty of an offense under that provision of the section above quoted.

Panama-Pacific Exposition—Public Officers—Panama-Pacific Exposition commission may expend money from its appropriation to buy 25,000 feet of moving picture films and may sell them to municipalities, commercial clubs, etc., and use the proceeds for the promotion of the exposition.

August 26, 1914.

J. T. Murphy, Chairman,
Wisconsin Panama-Pacific Exposition Commission,
Milwaukee, Wis.

In your letter of Aug. 21st you state that most of the states are advertising themselves at the Panama Pacific Exposition by moving pictures and that several of the states are using this means to help finance their state exhibits; that the Wisconsin state commission has a plan to make a contract for about 25,000 feet of films, 20,000 feet of which are to be sold to advertisers throughout the state, municipalities, commercial clubs and otherwise at a profit; that 5000 films will be state matters exclusively, such as state buildings, state institutions, state roads, perhaps, and other things of general interest. You state that your plan is to use whatever profit there may be in the regular expenses of the commission just the same as though the money were appropriated by the state; that at the close of the fair whatever money there is left, either profits from moving pictures or from the regular appropriation, you will turn over to the state treasurer in accordance with the provisions of ch. 477, laws of 1913. You inquire whether there is any legal objection to this scheme.

Your commission consists of three members and was created by ch. 477, laws of 1913. In sec. 2 of said act the powers and duties of said commission are stated as follows:
“Said commission shall encourage and promote a full and complete exhibition of the commercial, industrial, agricultural, live stock and dairy interests of the state and its citizens at such exposition and celebration, and shall provide, furnish and maintain during the exposition a building or buildings for a state exhibit and for the official headquarters of the state and for the comfort and convenience of its citizens and exhibitors,” etc.

In sec. 4 the sum of $75,000 was appropriated for the accomplishment of the above specified purposes and it is provided:

“Of the money appropriated one-third shall be available in 1913; one-third shall be available in 1914; and the balance thereof available in 1915. Such money shall be paid by the state treasurer on the warrant of the secretary of state issued upon a requisition signed by the chairman and vice-chairman of the commission, accompanied by an estimate of the expenses for the payment of which the money so drawn is to be applied. Within ninety days after the close of the exposition such commission shall make a verified report to the governor of the disbursements made by them and shall return to the state treasurer the unexpended balance of money drawn in pursuance of this act. No indebtedness or obligation shall be incurred under this act in excess of the appropriation herein made.”

I believe that where the statute speaks of a complete exhibit of the commercial, industrial, agricultural, live stock and dairy interests of the state and its citizens and of a state exhibit, a construction must be placed thereon broad enough to include representation by pictures and moving pictures as well as displays of the actual articles. One of the definitions of “exhibits” in Webster’s dictionary is “to represent or make manifest as in a drawing or plan; to make a representation of.” I believe that moving pictures will better present to view in a more practical way some of the business interests and public institutions of this state than could be done in any other way. I am, therefore, of the opinion that your commission is authorized to contract for the 25,000 feet of films and to expend money from the appropriation therefor. I see no objection to accepting payments for these films from municipalities, clubs or individuals who are willing to pay for the same.
RELATING TO PUBLIC OFFICERS.

While it is the general rule that state officers must pay into the general fund of the treasury money that they receive from the sale of public property, still in view of the provisions of the statute under which this commission is created I believe the money derived from the sale of these films may properly be used for the purposes for which the commission is created, provided that the balance after the work is completed, if any there be, is turned over to the state treasurer. I believe in this case you will be promoting the commercial, industrial, agricultural, live stock and dairy interests of the state, which you are expressly authorized to do by the provisions of this statute. You are, therefore, advised that there are no legal objections to your plan.

Public Officers—An officer who does an act in his official capacity not authorized by law violates sec. 4549.

L. Olson Ellis,
District Attorney,
Black River Falls, Wis.

In answer to yours of August 27th in which you refer to the opinion given you under date of August 26th, will say that if you will read carefully the last paragraph of said opinion you will see that the offense that has been committed is that the parties have performed an act in their official capacity not authorized by law in that they have audited bills that were illegal. This is a violation of sec. 4549, as quoted in said opinion, and the penalty provided therein is the one applicable.

Public Officers—Insurance—Workmen’s Compensation—State Board of Agriculture—The state board of agriculture has no authority to procure a “blanket” policy of insurance against liability for accidents occurring on the grounds of the state fair park.

J. C. MacKenzie, Secretary,
State Board of Agriculture,
In your letter of the 28th you say:

August 29, 1914.
"At a meeting of the executive committee of this board a few days ago, the writer was instructed to ask your advice relative to securing a "Blanket" policy for the protection of this board in case of any casualties, it being understood that we would be held liable for any accident occurring from any cause whatsoever on or about the grounds of state fair park."

Under sec. 1456, et seq., Stats., it appears to me that the state board of agriculture is merely an agency of the state government. The state is specifically made subject to the provisions of the workmen's compensation act. I am inclined to believe that any employees of the state board of agriculture would be considered as employees of the state. The state has not seen fit to procure insurance against its liability under the workmen's compensation act. The industrial commission has made an order exempting the state from the provisions of the act, requiring employers to take out such insurance.

In my opinion, even in the absence of such order by the industrial commission, the state would not be required to take out such insurance. Furthermore, in my opinion, it is for the legislature to determine whether or not such insurance shall be procured. In the absence of a direction by that body I very seriously doubt the authority of any officer or board to procure such insurance. I am informed by the secretary of the industrial commission that the awards made under that act to employees of the state are not charged up to the particular department in which the employee works. Under the circumstances I presume you are not particularly interested in taking a policy for that purpose.

If I am correct in my idea that the state board of agriculture is merely an agency of the state, then the state would not be liable for any casualties or accidents to others than employees of the state. No officer or board would have any authority to procure insurance for the purpose of protecting itself against a liability that does not exist. For that reason, in my opinion the board has no authority to take out any such policy as you suggest.
RELATING TO PUBLIC OFFICERS.

Public Officers—Plumbing Inspector—Mandamus Proceedings—1. Mandamus will lie to compel the proper board in Janesville to appoint an inspector of plumbing.

2. Any taxpayer residing in Janesville may bring the action.

September 2, 1914.

C. A. Harper,
Secretary State Board of Health.

In your letter of Aug. 25th you state that you are lead to believe from the information received that there is an urgent request for a local inspector of plumbing in the city of Janesville; that neither the mayor nor the common council have made any move to appoint such inspector and you inquire what procedure must be taken to compel the board of public works to make such appointment. You also inquire who is authorized to bring an action requiring that an inspector of plumbing be appointed.

Sec. 959-57 provides in part as follows:

"In each city of the first, second and third class having a system of water works or sewerage, the board of public works, where such board exists, or the board of health of each such city shall and cities of the fourth class may appoint one or more inspectors of plumbing who shall be practical plumbers, and who shall hold office until removed by said board for cause."

Janesville is a city under the commission form of government and while you do not state that it has a board of public works or a board of health, still I shall presume that such is the case for subsec. 5, sec. 925m-308 provides that:

"All boards and commissions created and existing under laws heretofore in force in any such city shall continue to exist, and all powers, authorities, jurisdiction and duties conferred and imposed upon such boards and commissions shall remain unaffected" by the act providing for the commission form of government for cities.

Janesville is also a city of the fourth class and comes within the provisions of the above quoted sec. 959-57. This section has a mandatory significance so far as cities of the first, second and third classes are concerned. I believe that mandamus will lie to compel the board of public works, if such board exists, or the board of health of said city to
appoint an inspector of plumbing for said city. Our supreme court has held that mandamus will lie to compel a town board to appoint appraisers to assess the damages caused by the construction of a ditch to preserve a highway under sec. 1236. *State ex rel. Smith vs. Supervisors*, 66 Wis. 199; 68 Wis. 502; also that mandamus will lie to compel a county judge to appoint commissioners in condemnation proceedings for the taking of lands by railway companies. *Western R. R. Co. vs. Dickson*, 30 Wis. 389. And that the writ will also lie to compel the mayor of a city to issue a proclamation and appoint officers under a law which has become operative according to its terms. *State ex rel. Attorney General vs. O'Neill*, 24 Wis. 149.

The duty here sought to be enforced is a positive and plain duty and under the principles laid down in the above cited cases mandamus will lie to compel the appointment of an inspector of plumbing. You are also advised that I believe that any resident of Janesville may bring such action. Our court has held in the case of *State ex rel. Burnham vs. Cornwall*, 97 Wis. 565, 567, concerning an action for mandamus that

"Any citizen was competent to bring the action; for it is a settled rule in this state and is in accord with the great weight of American authority that where the relief sought is a matter of public right the people at large are the real party and any citizen is entitled to writ of mandamus to enforce the performance of such public duty. It is sufficient if he is a citizen and as such interested in the execution of the law."

I believe that the action may be brought by any taxpayer residing in the city of Janesville who is otherwise competent to bring an action.

*Public Officers*—The offices of clerk of the circuit court and register in probate are not incompatible.

James KIRWAN,
District Attorney,
Chilton, Wis.

In your letter of Sept. 4th you state that your county judge is ill and confined to his bed and will likely be unable

September 8, 1914.
to perform his duties as county judge for a number of months. You inquire whether he may legally appoint the clerk of the circuit court of Calumet county to be register in probate of said county court.

Under sec. 2464a any county judge may appoint a competent person to act as clerk of the county court who shall be especially designated as register in probate. I find no statutory provision from which I could conclude that the offices of register in probate and clerk of the circuit court are incompatible and that it is unlawful for one person to hold both. The statute does not impose any duties on either of the officers which would make it improper, as a matter of public policy, for one person to perform said duties. Our court has not passed upon this question and the only decision that is helpful in arriving at a proper solution of this question is the case of State ex rel. Moore v. Lusk, 48 Mo. 242, in which the Missouri court holds that the duties of the clerk of the circuit court are not incompatible with those of the clerk of the county court and that one person may lawfully hold both offices. The court said that the fact that both courts might hold sessions at the same time would not render the two offices incompatible as their duties could be performed by a deputy. The same rule is applicable in Wisconsin.

You are, therefore, advised that the office of clerk of the circuit court and register in probate are not incompatible.

Public Officers—Register of Deeds—Fees—Sec. 764, Stats.

James Kirwan,
District Attorney,
Chilton, Wis.

Your letter of the 11th inst., relating to fees of register of deeds, has been received. Your inquiry is restated as follows:
Is the register of deeds of your county entitled to ten cents or seven cents a folio for recording certified copies of wills, and certified copies of judgments of the county court, and such other papers and records as it is his duty to record?
Sec. 764 provides that

"every register of deeds shall receive the following fees, to-wit: 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; but to be at least fifty cents for any deed and seventy-five cents for any mortgage."

The words "or other instruments" evidently cover mortgages, as you will note that the word "mortgage" does not appear in connection with the word "deed" in the first line of the second paragraph of said section as it appears in the statute, and yet the same paragraph fixes the minimum charge for recording a mortgage at seventy-five cents. I therefore infer that the words, "or other instruments," are intended to include mortgages, certified copies of wills, certified copies of judgments of the probate court and all other papers entitled to be recorded in the office of the register of deeds except such as are specifically mentioned and described in said sec. 764. It follows, therefore, that the register of deeds is entitled to charge ten cents for each folio for recording deeds, mortgages, certified copies of wills, certified copies of judgments of the county court and such other papers as are entitled to record in his office, except where the fee is otherwise specifically fixed by law, and that he is entitled to at least fifty cents for recording any deed, and seventy-five cents for recording any mortgage. For making copies of any records or papers recorded or filed in his office a register of deeds is entitled to seven cents for each folio.

Public Officers—Insurance Commissioner—Insurance Fund—Insurance Commissioner may appoint inspectors of risks.

October 6, 1914.

Herman L. Ekern,

Commissioner of Insurance.

With your communication of the 29th ult. you submit for my consideration a proposed form of appointment of H. P. Weaver and W. C. West as fire prevention engineers for the
state insurance fund, which said proposed form of appointment is as follows:

"Hon. John S. Donald,
Secretary of State,
Madison, Wisconsin.

Dear Sir:—

Please note the appointments of H. P. Weaver and W. C. West as fire prevention engineers for the state insurance fund, for the making of an examination and investigation of state property under the control of the state board of control and the Wisconsin industrial school for girls, for the purpose of the state insurance fund in the fixing of premiums and the prevention of fires, such appointment to be at the rate of $25 per day, at least one day in three to be spent in actual field work, without any allowance for expenses, and the total compensation of both not to exceed the time specified in the proposal of the Independence Inspection Bureau under date of May 13, 1914, this appointment being subject to the approval of the civil service commission on the non-competitive examination heretofore ordered.

Commissioner of Insurance.

"The foregoing is hereby approved this day of 1914.

Governor.

You ask my opinion as to your authority to make such appointment.

Sec. 1978b of the Stats., provides:

"Upon July 1st, annually, the commissioner of insurance of the state shall provide for the insurance by the state of all state property for an amount equal to ninety per cent of the cash value of such property in the following manner:

"First, he shall determine the insurable value of each item of property and shall fix the rate of insurance which in his opinion is the average rate charged by responsible fire and tornado insurance companies doing business in this state and issuing insurance policies upon property of similar kind and exposed to risk of fire and tornado in like manner * * * ."

Par. 6, sec. 1978d provides:

"For carrying out the provisions of sections 1978a, 1978b, 1978c and this section, the commissioner, with the approval of the governor, may employ such assistants as necessary, and fix their compensation, which compensation, together
with the expenses of such assistants and of the commis-
sioner and his employees, shall be paid out of the state
insurance fund on the certificate of the commissioner,
audited by the secretary of state. The state fire marshal
shall make such inspection and report upon all property
insured under said section as may be required by the com-
m issioner."

It may be remarked that by sec. 1978a it is provided that
no state money shall be paid out on account of any insurance
against loss by fire or tornado and that sec. 1978a to 1978c,
inclusive, prescribe a legislative plan for the carrying by the
state of its own insurance and the accumulation of a state
insurance fund out of which its losses by fire and tornado
shall be paid.

Many duties in connection with this plan, aside from those
above quoted, are imposed upon the commissioner of in-
surance, and to all intents and purposes he is made the
manager of this fund.

The provisions of par. 6, sec. 1978b, above quoted, plainly
reveal the legislative assumption that it would be necessary
for the commissioner of insurance to employ various
assistants to enable him to properly manage the same. It is
also apparent that the express powers conferred upon him
by the provisions of the statute necessarily carry various
implied powers.

The real question presented by your inquiry is whether
the employment of fire prevention engineers is authorized
by any of the provisions of the law relating to this fund.
No express provision for such employment is to be found
in the law itself and it remains to be seen whether such power
can be implied from those powers expressly conferred upon
the insurance commissioner.

By that portion of sec. 1978b above quoted it is made the
duty of the commissioner of insurance first, "To determine
the insurable value of each item of property;" second, "To
fix the rate of insurance which in his opinion is the average
rate charged by responsible fire and tornado insurance
companies doing business in this state and issuing insurance
policies upon property of similar kind and exposed to risk of
fire and tornado in like manner."

From these provisions it seems to have been the legis-
lative idea that "the average rate charged by responsible
fire and tornado insurance companies doing business in this state" should be taken as a basis for fixing the amount of premium to be credited to the state insurance fund, the provision in that respect being that an amount equal to sixty per cent of such rates shall be credited to such fund. In order to enable the commissioner of insurance to accomplish this purpose it is necessary for him to give attention not only to the many elements entering into the fixing of rates by the ordinary insurance company, but to the practice of such insurance companies after the risk has been written, which properly may be said to have some relation to the maintenance of such rates.

It is a matter of general knowledge that it has now become a common practice on the part of insurance companies to cause frequent inspection of their risks to the end that helpful suggestions may be made to the insured, looking towards the prevention of fires. This is considered not only good business policy on the part of insurance companies, but essential in order to maintain their rates at the lowest schedule. Such inspection is also welcomed by the insured because it is found to be of great assistance in the prevention of fires and the incurring of loss beyond the amount of insurance carried.

The statute confers upon the commissioner of insurance the duty of "fixing the rate of insurance which in his opinion is the average rate charged by responsible fire and tornado insurance companies doing business in this state and issuing insurance policies upon property of similar kind and exposed to risk of fire and tornado in like manner." This confers upon the commissioner of insurance the implied power to do whatever may be necessary to enable him to perform this express duty.

When an insurance company fixes a rate on a given building and contracts to carry the insurance on that building for the rate so fixed, it is upon the assumption that the building will be looked after by its own inspectors and suggestions and warnings given to the insured which will reduce the likelihood of fire destroying the same. It is obvious that if the state is to take the average rate charged by responsible insurance companies as the basis of its operations, it must look after the risks assumed with the same degree of care employed by insurance companies generally because otherwise it would be subject to hazards which insurance com-
panies eliminate through their system of inspections, and a rate which would be adequate under such a system might be entirely inadequate in the absence thereof. It seems to me that when the legislature provided for the average rate charged by responsible insurance companies as the basis of its rates it had in mind circumstances similar to those under which the insurance companies' rates are fixed and assumed that the risk would be dealt with by the state in a manner similar to that with which it is dealt by the insurance companies and that the commissioner of insurance in the performance of his duties, in his capacity, as I deem it, as general manager of this insurance fund, is impliedly clothed with the power to manage said fund and the business thereof according to the recognized approved methods employed and pursued by reputable fire insurance companies generally.

It is, therefore, my opinion that you may properly make the appointment in the manner indicated by the form submitted with your communication.

"Public Officers—Game Warden—Fees—Fines—A game warden who is not receiving a salary is entitled to the one-third of the fine under sec. 4567m.

October 21, 1914.

JOHN A. SHOLTS,
State Fish & Game Warden.

In your letter of the 16th inst. you inquire whether a special deputy game warden working without compensation is entitled to receive one-third of the fine as the informer under the provisions of sec. 4567m, Stats.

Said statute provides as follows:

“One-third of the fines imposed and collected under the laws regulating the taking, killing, having in possession, or transportation of fish and game, including the violations of the acts relative to the granting and holding of licenses to hunt certain game, shall be paid by the magistrate to the person informing of the offense and prosecuting the offender to conviction. * * *"

Our supreme court in the case of Kinn v. First National Bank, 118 Wis. 537, on page 546, laid down the rule for public officers accepting a reward as follows:
“Police and other officers may recover the reward offered when the information furnished for the service performed was extra-official, but cannot recover the reward offered if the information furnished or the service performed was within the scope of the duties of such officer.”

This undoubtedly is the rule when the reward is offered by a private person, but it seems that there is a different rule that applies when the reward is provided for in the statute. 24 American & English Encyclopedia of Law, 2nd Ed. p. 954, lays down the following rule:

“A statutory offer may be accepted by public officers where they are embraced in the general description in the statute of those to whom the offer is made.”

Citing U. S. v. Matthews, 173 U. S. 381. On page 384 said court said:

“It is undoubted that both in England and in this country it has been held that it is contrary to public policy to enforce in a court of law, in favor of a public officer, whose duty by virtue of his employment required the doing of a particular act, any agreement or contract made by the officer with a private individual, stipulating that the officer should receive an extra compensation or reward for the doing of such act. An agreement of this character was considered at common law to be a species of quasi extortion, and partaking of the character of a bribe. Bridge v. Cage, Cro. Jac. 103; Badow v. Salter, Sir Wm. Jones, 65; Slatesbury v. Smith, 2 Burr 924; Hatch v. Mann, 15 Wend. 44; Gillmore v. Lewis, 12 Ohio, 281; Stacy v. State Bank of Illinois, 5 Scam. 91; Davies v. Burns, 5 Allen, 349; Brown v. Godfrey, 33 Vt. 120; Morrell v. Quarles, 35 Ala. 544; Day v. Putnam Ins. Co. 16 Minn. 408, 414; Hayden v. Souger, 56 Ind. 42; Matter of Russell’s Application, 51 Conn. 577; Ring v. Devlin, 68 Wis. 384; St. Louis &c Railway v. Grafton, 51 Ark. 504. The broad difference between the right of an officer to take from a private individual a reward or compensation for the performance of his official duty, and the capacity of such officer to receive a reward expressly authorized by competent legislative authority and sanctioned by the executive officer to whom the legislative power has delegated ample discretion to offer the reward, is too obvious to require anything but statement.”

It seems that the fact that the officer received a fixed and adequate compensation was given as one of the reasons why he should not receive the reward in Austin v. Supervisors of Milwaukee County, 24 Wis. 278.
I am of the opinion that the special deputy game wardens who were working without compensation are entitled to one-third of the fines imposed in cases where they have been the prosecutors.

Public Officers—Officer de Facto—Compensation—Court Reporter—Under sec. 113.18, Stats., a person appointed as assistant court reporter who takes the oath of office prior to entering upon the duties of the position, but does not file such oath until afterwards, is only an officer de facto.

A de facto officer is not entitled to the compensation attached to the office.

JOHN S. DONALD,
Secretary of State.

In your letter of today you enclose certain correspondence between James T. Parkes and yourself regarding the audit of his claim for services as assistant court reporter. It appears from this correspondence that Mr. Parkes is the regular reporter for Hon. Henry Graass, circuit judge. That for the week commencing Oct. 5th, last, Judge Graass was called in to act for Judge Goodland in the tenth judicial circuit. That during that same week Judge Goodland was also holding court in that circuit, and took the regular reporter for that circuit with him. That Judge Goodland appointed Mr. Parkes as assistant reporter for his circuit and made such appointment in writing, and that Mr. Parkes took the oath of office, prior to entering upon the discharge of the duties. Mr. Parkes did not, however, file such oath in your office until after the filing of his claim. No question is raised but that he performed the services, and the only question is as to whether he is entitled to compensation in view of the fact that he did not file his oath of office.

Sec. 113.18, Stats., provides in part:

"Every person so appointed as reporter or assistant reporter is an officer of the court and before entering upon the duties of his office shall take and subscribe the constitutional oath, and file the same, duly certified, in the office of the secretary of state. When so qualified every reporter and every assistant reporter shall be authorized to act in any circuit court in the state."

October 21, 1914.
RELATING TO PUBLIC OFFICERS.

It seems plain, then, that one of the acts necessary to be performed, in qualifying for the office, is that of filing the oath in the office of the secretary of state.

Mechem says of qualifying for office:

"This act generally consists of the taking, and often of subscribing and filing, of an official oath." Mechem's Public Offices and Officers, Sec. 254.

Compliance with such a provision "is a condition precedent to the officer's right to exercise the functions of the office." 23 Am. & Eng. Ency. of Law (2nd Ed.) 354, and cases cited. See also 29 Cyc. 1388, and cases cited.

Frequently the statute provides for taking and filing the oath and executing and filing the bond within a certain time, and that failure to do so vacates the office. State ex rel. Prince v. McCarty, 65 Wis. 163; Sprague v. Brown, 40 Wis. 612; Attorney Gen. ex rel. Spooner v. Elderkin, 5 Wis. 300.

Our present statute, relating to vacancies, however, contains such a provision only with reference to the bond. Subsec. 7, sec. 962, Stats.

And our court has held that under a statute requiring the appointment of an officer to be in writing and to be filed and recorded in the office of the clerk of the county, it is sufficient if such written appointment be filed. That the requirement as to recording was merely directory. Sprague v. Brown, 40 Wis. 612.

That was a case in which a sheriff sought to avoid responsibility for the acts of his deputy, and, among other things, alleged that such deputy had not properly qualified for the office. The question is not discussed at all, but undoubtedly was decided upon the broad general principle that where the defect in the qualification is not the fault of the officer, such defect does not vacate the office. 29 Cyc. 1389; 23 Am. & Eng. Ency. of Law (2nd ed.) 358.

Of course, where he filed the appointment in the proper office, it was not his fault that the officer with whom it was filed failed to perform his duty in recording it.

Furthermore, another reason given by the court is amply sufficient to sustain the ruling in that case. A person claiming to act as an officer can not set up his failure to qualify as a defense to liability. The court said:
“Moreover, it is very doubtful whether a sheriff can be heard to allege that one whom he has appointed his deputy, and who, he knows, is acting as such, is not his deputy, and thus shield himself from responsibility for the official acts of his appointee.” Sprague v. Brown, 40 Wis. 612, 619. See also 29 Cyc. 1394.

I am very certain, from a consideration of these authorities, that Mr. Parkes was not an officer de jure until he filed his oath of office in your office.

He was, however, an officer de facto. 29 Cyc. 1389, 1392; 23 Am. & Eng. Ency. of Law (2nd ed.) 355; Sprague v. Brown, 40 Wis. 612; People v. Payment, (Mich.) 67 N. W. 689; Gregory v. Woodberry, 53 Fla. 566, 43 So. 504; County Comrs. v. Brisbin, 17 Minn. 451; Nason v. Fowler, 70 N. H. 291; Tower v. Welker, 93 Mich. 332.

So far as the public or third persons are concerned, his acts are as valid as though he were an officer de jure. 23 Am. & Eng. Ency. of Law (2nd ed.) 355.

It is generally held that a de facto officer cannot recover compensation for services rendered in his official capacity. 23 Am. & Eng. Ency. of Law (2nd ed.) 355; 8 Ibid. 812; Cobb v. Hammock, 82 Ark. 584, 102 S. W. 382; Eubank v. Montgomery County (Ky.) 105 S. W. 418; Matthews v. Supervisors of Copiah County, 53 Miss. 715, 24 Am. R. 421; Stephens v. Campbell, 67 Ark. 484, 55 S. W. 856; Andrews v. City of Portland, 79 Me. 490, 10 Atl. 458; Romero v. United States, 24 Court of Claims, 331; Peck v. United States, 41 Court of Claims, 414; People v. Potter, 63 Cal. 127; Burke v. Edgar, 67 Cal. 182; Samis v. King, 40 Conn. 298; McCue v. County of Wapello, 56 Iowa, 698, 41 Am. R. 134; 29 Cyc. 1393.

In the case of Romero v. United States, supra, the court, inter alia, said:

“The judicial decisions are uniform that one claiming a salary must prove his legal title to the office, and that an officer de facto and not de jure can not maintain an action for salary.”

In Matthews v. Supervisors of Copiah County, supra, the court said:

“We have found no case where a de facto officer has been allowed to recover fees or salary from a state or municipality, * * *.

“* * *
"It seems to us self-evident that whenever a public officer propounds against a State, county or city a claim for official services, he puts his title to the office in issue, and must stand or fall by the result of that inquiry."

There is a line of cases holding that where there is no officer de jure—no other person entitled to the emoluments of the office—one who, under color of title, has performed the duties of the office is entitled to the fees or salary attached to such office. Behan v. Board of Prison Commrs., 3 Ariz. 399, 31 Pac. 521; Adams v. Directors of Insane Asylum, 4 Ariz. 327, 40 P. 185.

Those cases, however, are contrary to the great weight of authority. In the following cases there were no other persons entitled to the emoluments of the office, yet in each case the court held that the de facto officer could not collect. Cobb v. Hammock, supra; Matthews v. Supervisors of Copiah County, supra; Stephens v. Campbell, supra; Romero v. United States, supra; Burke v. Edgar, supra; Eubank v. Montgomery County, supra: Peck v. United States, supra.

In the case last cited the court specifically referred to the Arizona cases and refused to follow them.

In my opinion Mr. Parkes is not entitled to compensation from the state for services performed by him as assistant court reporter prior to the filing of his oath in your office.

Public Officers—County Board of Education—Fees—Counties—Where a county board of supervisors has adopted a resolution pursuant to sec. 695, Stats., fixing the compensation of its members at four dollars per day, neither the members of that board, nor the members of the county board of education of that county, are entitled to charge mileage in addition to the four dollars per day.

STANLEY G. DUNWIDDIE,
District Attorney,
Janesville, Wis.

In your letter of Oct. 23, 1914, you say:

"Two of the officials in the office of the state superintendent of schools, have informed members of our county board of education that they are entitled to draw a com-
pensation of $4.00 per day plus either mileage or actual and necessary travelling expenses. I can find nothing allowing the board of education any compensation except $4.00 per day and am accordingly requesting your opinion on the matter.

“Our county board of supervisors some time ago adopted a resolution fixing the compensation of the members of that body at $4.00 a day and by opinions from your department of July 10th and July 16th, 1914, I was informed that the county board of education must take the same compensation as the county board of supervisors.”

By the opinion given you July 10, 1914, it was held

“that where the county board has duly adopted a resolution fixing the compensation of its members at four dollars per day the members of the county board of education are entitled to the same per diem.”

The opinion of July 16, 1914, held:

“When the county board has fixed the compensation of the members thereof pursuant to sec. 695, Stats., the amount so fixed becomes the only amount that may be legally paid to the members of such board, and since pursuant to sec. 702-9 members of the county board of education are to be paid the per diem and mileage as provided in sec. 695 for members of the county board of supervisors, it must follow that the compensation fixed for members of the county board is the only legal compensation for members of the county board of education.”

I see no escape from these conclusions, so that the only question to be determined is as to the compensation to which members of the county board of Rock county are entitled. That is, are such members entitled to the mileage allowance in addition to the four dollars per day?

Sec. 695, Stats., was originally sec. 42, ch. 10, R. S. 1849, and read:

“Each member of the board of supervisors shall be allowed, and paid by the county, a compensation for his services and expenses in attending the meetings of the board, at the rate of two dollars per day, for the time he shall actually attend, and six cents for each mile travelled in going to and returning from the place of meeting, for any distance travelled beyond six miles from such place; but no per diem allowance shall be made for any time occupied in travelling, where mileage is allowed therefor; and no supervisor shall be allowed to draw pay for more than fifteen days attendance on the county board, in any one year.”
The only material changes that have been made in this section are:

By ch. 129, laws of 1861, the provision for mileage was changed by striking out the exception of the first six miles, and the number of days for which a member might receive pay in any one year was extended to twenty-five.

By ch. 259, laws of 1875, the number of days for which a member might receive pay was again reduced to fifteen, and a proviso was added that in counties having a population of more than 15,000 the members could receive pay for not exceeding twenty days in each year.

In the revision of 1878 there was added after the fifteen day provision these words: “except for services as a member of a committee, as provided in section six hundred and sixty-eight.”

By ch. 149, laws of 1885, the per diem allowance was increased to three dollars.

By ch. 240, laws 1909, Sundays were excepted from the days for which a member could draw his per diem allowance.

By ch. 170, laws of 1913, the provision as to travel was changed by adding the words “by the most usual traveled route,” and the following proviso was also inserted:

“Provided that any county board may at their annual meeting, by resolution, fix the compensation of the members of such board to be elected at the next ensuing election, at any sum not exceeding four dollars per day.”

While there have been some other slight changes in the phraseology of the section, the changes noted are the only ones at all material. It thus appears that from the organization of the state to the present time two phrases material to the present inquiry have remained unchanged: “compensation for his services and expenses in attending the meeting(s) of the board,” and, “but no per diem allowance shall be made for any time occupied in traveling, where mileage is allowed therefor.”

By the very terms of the phrase first quoted in the preceding paragraph the “compensation” of the member is “for his services and expenses.” It is not a case of paying an officer a certain sum for his services, and also reimbursing him his expenses, but the “compensation” is to be paid
him absolutely, regardless of the expense incurred, and he must pay his own expenses. It is true that the compensation is not the same amount for each member, but varies according to the distance travelled, but it also varies according to the time put in. Then, too, the mileage allowance is the same today, with a railroad fare of two cents per mile, as it was in 1849, when it was practically impossible to travel by rail in this state. It is the same for the man who must travel by livery rig, at an expense of from ten to twenty-five cents per mile as for the man who travels by rail at an expense of two cents per mile, or, following the example of a recent candidate for political honors, walks, at no expense other than the wear and tear of his "cowhide boots." Clearly it is not intended as a reimbursement. I see no escape from the conclusion that the six cents per mile for each mile traveled is as much a part of the compensation as is the three dollars per day.

Thus, ch. 408, laws of New York, 1870, provided in part:

"The justices of the supreme court shall receive an annual compensation of $6,000 each, payable quarterly, in lieu of all other compensation, except that they shall receive, in addition to such stated salaries, a per diem allowance of five dollars per day for their reasonable expenses when absent from their homes," etc.

In 1872, by ch. 541, the legislature of that state amended the foregoing provision by striking out the portion relating to the per diem allowance for expenses, and enacted in lieu thereof that:

"The said justices of the supreme court * * * shall receive the sum of $1,200 annually * * * in lieu of and in full of all expenses now allowed by law."

An amendment to the constitution of New York provides for retiring supreme court justices at the age of seventy, and then provides:

"The compensation of every * * * justice of the supreme court whose term of office shall be abridged pursuant to this provision, * * * shall be continued during the remainder of the term for which he was elected."

Held, that a justice whose term was so abridged was entitled to $1200 per annum, as well as to the $6000. Speaking of the $1200, the Court of Appeals, inter alia, said:
“As granted by this act, it became naturally and plainly as much a part of the compensation to the justice as though his salary * * * had been increased to compensate him further for what his office entailed upon him in the way of duties and work.” People ex rel. Bockes v. Wemple, 22 N. E. 272, 274, 115 N. Y. 302.

In Illinois, under a constitutional provision that “the county board shall fix the compensation of all county officers, with their necessary clerk hire, stationery, fuel and other expenses,” it has been held that it is not necessary to fix a specific sum for salary, and a specific sum for expenses of the office. That fixing a given sum as compensation covers the expenses as well as remuneration for expenses.

That the whole compensation includes expenses for stationery, fuel and clerk hire. Kilgore v. People, 76 Ill. 548.

“We are of opinion that the word ‘compensation,’ in its ordinary acceptation, applies not only to salaries, but to compensation by fees for specific services.” Commonwealth v. Carter, 55 S. W. 701, 702; 21 Ky. L. Rep. 1509.

It has been held that under a constitutional provision “No person holding any lucrative office under the United States or any other power, shall be eligible to any civil office of profit under this State; provided that offices in the militia to which there is attached no salary, or local officers and postmasters whose compensation does not exceed five hundred dollars per annum, shall not be deemed lucrative,” the expenses necessary to the running of the post office are not to be deducted from the amount received to ascertain the compensation. Among other things the court said:

“The pay of a postmaster consists of certain commissions, etc., allowed him by the Government; he keeps the office, furnishes rooms, an assistant, etc., at his own expense. The money is due to him directly, and it is his property to dispose of as he pleases. For all this service, the Government pays him this allowance; and the sum so received, in common understanding, and perhaps in strict grammatical accuracy, may be called his compensation. * * * The accepted meaning of the term is, that return which is given for something else; in other words, a consideration.” Searcy v. Grow, 15 Cal. 117, 123.
The authorities cited seem to me to be clearly in point and to definitely settle the contention that the mileage allowance is not a part of the, "compensation."

But there is still another reason for so holding. It will be noted that the first phrase quoted uses the term "compensation" as covering both the per diem allowance and the mileage allowance. In the second phrase quoted the two are spoken of as separate allowances, and in that are called "per diem allowance" and "mileage." If the per diem allowance is all that is included in the compensation, then it is difficult to see any reason why it is not called "compensation" in the second phrase as well as in the first. It must be presumed that the legislature used the several terms "compensation," "per diem allowance," and "mileage," advisedly, and that it did not consider any two of them as synonymous.

Coming now to the amendment of 1913, it is the "compensation" that may be changed by resolution of the county board, and not the "per diem allowance." In other words, if the county board adopts such a resolution, it is authorized to make only such a change as will leave the total compensation to be paid any member, including per diem allowance and mileage, not more than four dollars per day.

As the members of the county board of education are to receive the "per diem and mileage as provided in sec. 695, Stats., for members of the county board of supervisors," it follows that they cannot be compensated in any other manner or any different amount than the members of the county board. If the latter body has adopted a resolution fixing the compensation of its members at four dollars per day, none of its members, and none of the members of the county board of education of that county, can receive greater compensation than that, whether it be called "mileage" or "expenses" or any other term.
Public Officers—Register in Probate—Vacancy—The office of register in probate does not become vacant by the death of the county judge.

November 6, 1914.

James Kirwan,
District Attorney,
Chilton, Wis.

In your letter of Nov. 4th you state that the county judge of your county last August appointed Michael Schwarz, as register in probate of his court; that said judge died Oct. 27, 1914, leaving a vacancy in this office. You inquire whether his death creates a vacancy in the office of register in probate in his court or whether Mr. Schwarz still has the legal right to act.

Sec. 2464a, Stats. provides:

"Any county judge may appoint, from time to time, by an instrument in writing filed with the county clerk, a competent person to act as clerk of the county court, who shall be officially designated as register in probate for the county in which such court is held. Such register shall, before entering upon his duties, take and subscribe the constitutional oath of office and file the same in the office of the clerk of the circuit court for such county. He shall perform such duties as the judge may direct, and whenever such judge shall be absent from the county seat or unable to discharge his duties and any application shall be made to such court which requires notice of hearing to be given such register may cause such notice to be given and make an order directing that it be given. Such order and notice when signed ‘by the court, * * * register in probate,’ shall have the same effect as if signed by the county judge. The appointment of such register may be revoked at any time by such judge and any vacancy in such office may be filled by him. If the board of any county in which such register may be appointed and in which his salary is not fixed by law shall not fix a salary for him the judge shall compensate such register for his services. The foregoing shall not apply to any county in which a register in probate is provided for by any other statute; but any register may administer any oath required in proceedings in such court and certify to copies of records and files therein."

Under sec. 2464b, the register in probate is given the same powers as clerks of courts to certify to copies of papers, records and judicial proceedings and that all copies so
certified to shall be receivable in evidence with like effect as if certified to by clerks of courts.

Under sec. 2464m, it is provided that the registers in probate may collect the same fees for furnishing certified copies of judgments, orders, reports or other papers or records in the county courts as is provided by law for clerks of the circuit court for like services and that such fees shall be disposed of according to law.

I find no express provision in our statutes which provides that a vacancy shall exist in the office of register in probate on the death of the county judge. Neither do I know of any rule of law from which such inference could be drawn. It is true that the statute above quoted provides that the register in probate shall perform such duties as the judge may direct, but there are other duties devolving upon the register in probate which are provided for by statute. It is true that it has been held that since the act of a deputy acquires validity because it is the act of the principal, the authority of the deputy will cease upon the death of the principal. 9 Am. & Eng. Ency. of Law (2nd ed.), 382.

A register in probate is in no sense a deputy of the county judge.

A deputy is defined as one who by appointment exercises an office in another's right having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable. 9 Am. & Eng. Ency. of Law (2nd ed.), 369.

A deputy is one who acts officially for another, the substitute of an officer, usually a ministerial officer. Anderson's Law Dictionary.

A deputy is one authorized by an officer to exercise the office or right for the officer possessed for and in place of the latter. Bouvier's Dictionary.

The register in probate holding an office which cannot be said to be held as the deputy of a principal or county judge does not vacate the same because of the death of the county judge. You are, therefore, advised that the register in probate of your county is authorized to act at the present time.
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The register in probate holding an office which cannot be said to be held as the deputy of a principal or county judge does not vacate the same because of the death of the county judge. You are, therefore, advised that the register in probate of your county is authorized to act at the present time.
Public Officers—Education—County Superintendent—Sec. 702–10, subsec. 11, repeals by implication the limit to the allowance to county superintendent for expenses.

JAMES H. HILL,
District Attorney,
Baraboo, Wis.

You have asked me for my official opinion on the question whether sec. 702–10 repeals by implication the limitations as to the amount allowed for the expenses of the county superintendent as contained in sec. 704 and 461d Stats.

Subdiv. 11, sec. 702–10 provides as follows:

"At the regular meetings in May and October the county board of education shall audit and allow the county superintendent and his assistant or assistants traveling expenses, and expense of postage, printing and office supplies, as shall be incurred in the discharge of their duties, but the county board of education shall have power to limit annually, or semi-annually the amount that shall be expended for such purposes * * ."

Sec. 704 contains the following:

"The county board of supervisors shall allow for stationery, postage and printing such amount as the county or district superintendent shall certify to be actually necessary, not to exceed one hundred dollars in counties or superintendent districts, containing less than five thousand inhabitants, and not exceeding two hundred dollars in districts containing more than five thousand inhabitants," etc.

See also the provisions in secs. 461d and 698, Stats.

I am persuaded that the provision of subdiv. 11 of said sec. 702–10, as above quoted, being the statute last enacted and covering the whole subject, supersedes the former statutes and that the former statutes are thereby repealed by implication. The limitation as to the expenses incurred by the county superintendent in the discharge of his duties may be audited and allowed by the county board of education without any limitation except that they must be legal and actually incurred in the discharge of the duties of the county superintendent.

November 12, 1914.
Public Officers—Town Treasurer—Interest on Public Funds

—Interest on money in town treasury put out on interest belongs to the town and is not a perquisite of the office of town treasurer.

James H. Hill,
District Attorney,
Baraboo, Wis.

In your letter of the 7th inst. you submit the following:

"There came into the possession of the town treasurer $1000.00 of road money Aug. 15th of a certain year. Thereafter the chairman of the town ordered him to deposit the money, as was the duty of the town so to do, with the county treasurer on the 20th day of Nov. of the same year. The town treasurer did not do so, although the town was in default by his failure so to do. The town chairman again asked him to deposit the money so as to make it available for road purposes on or about the 28th day of Dec. He promised he would send it the next morning, and did not do it. The chairman made another request Jan. 10th, and the treasurer promised to do it, and did not deposit it, and it finally developed that he turned it over to the county treasurer March 14th, and by doing that he received the interest for 6 months and 27 days. By holding the money this long and for the purpose of procuring interest the town treasurer received $13.00 interest. The town was not actually obliged to borrow money because of his withholding the same, but he withheld it for the purpose of collecting interest and now refuses to account for the interest to the town. Can he be compelled so to do?"

This case is ruled by the decision of our supreme court in State v. McFetridge, 84 Wis. 473 (to which you refer in your letter) in which our supreme court held that the state treasurers who received interest on money deposited in the state treasury were not entitled to the same and were required to pay it into the state treasury. It is true that Judge Newman in deciding the case in the circuit court suggested that a different rule might be applied to local treasurers than that applicable to state treasurers for reason of the difference in the statutes applicable, but a careful reading of the decision of the supreme court in said case shows that the reasoning is applicable to local treasurers.

The money in the hands of the town treasurer was the property of the town and the title thereto was not in the town
treasurer. This is evident from the provisions of sec. 836, Stats., in which the money in his hands is referred to as belonging to the town and the town treasurer has not violated any law in depositing said money in a bank where it drew interest.

The compensation that the town treasurer receives is definitely fixed by statute and the interest received from money in his hands belonging to the town is certainly not a part of the perquisites of his office. I am of the opinion that said money belongs to the town and he can be compelled to account for it.

Public Officers—County Highway Commissioner—Bridges and Highways—County Highway Commissioner has no power to act in place of committee of county board required by sec. 1319.

November 16, 1914.

J. Henry Bennett,
District Attorney,
Viroqua, Wis.

In your telephone communication this morning you called my attention to the provisions of sec. 1319, Stats., relating to the extending of county aid for the construction of bridges by towns. You state that the claim is made by certain of your town officials that the county highway commissioner is clothed with power to act on behalf of the county in place of the committee of the county board required to be appointed by the provisions of that section to coöperate with the town board in the letting, inspecting and acceptance of the work, and you ask for my opinion on this question.

In reply I will say I have very carefully examined the provisions of sec. 1319, as well as the statute relating to the power of the commissioner of highways, and I fail to discover any provision of law conferring such authority upon the county highway commissioner.

In the case of State ex rel. Hamburg v. Vernon County, 145 Wis. 191, it was ruled that the provisions of sec. 1319 must be strictly complied with in order to entitle a town to
state aid, and in order to confer authority upon the county board to levy a tax for such aid. Subdiv. 6 of that sec. provides that at the time of acting upon the petition it shall designate two of its members who shall act as its commissioners and who shall cooperate with the board of such county in the matter of letting, inspecting and accepting the work, etc. This provision of the statutes must be strictly complied with in order to authorize the levying of a tax by the county board, the only exception being that provided in subdiv. 4, sec. 1319 where the construction or repair of a bridge is required to be made without delay, in which case the town may file its petition with the county clerk, setting forth the facts respecting such immediate necessity for construction or repairs.

In that case the chairman of the county board may appoint two of its members and where such emergencies shall have existed and the bridge shall have been built or repaired, the town is entitled to county aid after the repair or construction of the bridge, but in all other cases the aid must be granted before the bridge is built and in all cases two members of the county board must act with the town board in the letting, inspecting and acceptance of the work, and the county commissioner of highways has no power or authority to act in the place of this committee representing the county board and to be composed of two of its own members.

Public Officers—Fees—Counties—County liable for sheriff's fees in bastardy proceedings.

November 19, 1914.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

In your communication of the 17th inst. you ask whether the sheriff's fees for apprehending a defendant in a bastardy action are a proper charge against the county, where the complaining witness appears before a justice of the peace who issues a regular warrant and puts it into the hands of the sheriff and the sheriff goes to a distant part of the state, apprehends the defendant, brings him back under the war-
rant and the defendant marries the complainant, but has nothing with which to pay the expenses of his apprehension, the district attorney not having been called in to act in any capacity.

A bastardy action is not a civil action in the sense in which that term is employed in sec. 4322, but is a special proceeding. Hodgson v. Nickell, 69 Wis. 308, 311.

Neither is it a criminal proceeding within sec 7, art. I. Const. Baker v. The State, 65 Wis. 50.

It has also been held that such proceedings are quasi-criminal. State v. Mushied, 12 Wis. 561. State v. Jager, 19 Id. 235.

While this action is no more than a quasi-criminal action, yet it partakes very much of the nature thereof. It is instituted precisely the same as any other criminal action. The defendant is arrested and brought before the court on a criminal warrant. Upon an adjournment of the proceeding the accused may be recognized for his appearance upon the adjournment day and in default of the giving of a recognizance he shall be committed to the county jail. The accused shall be entitled to a removal of such action as in criminal examinations before justices of the peace. If upon such examination there shall appear to be proper cause to believe the accused person guilty the justice shall bind such person over to appear at the next term of the circuit court for the proper county and if he fail to give the usual recognizance he may be committed to the county jail to await trial.

It shall be the duty of the district attorney to appear and prosecute in all bastardy proceedings in the trial court and, whenever notified and requested by the justice or magistrate, at the preliminary examination, and the defendant must be proven guilty beyond a reasonable doubt.

The only instance in which the procedure in these cases departs from that in criminal cases is on the judgment rendered, as said in Baker v. The State, above quoted:

"It is not the object of the statute to punish the father as for the commission of a criminal offense, and, therefore, there is not, properly speaking, any 'sentence,' as upon a conviction for a crime, but the statute was intended to enforce the natural obligation which the parent is under to support and provide for his offspring, legitimate or illegitimate, and not to punish him for an offense against good morals and common decency."
In nearly every other respect, however, the proceeding partakes very much of the nature of a criminal prosecution.

It is a proceeding in which the public interests are involved. One of the objects of the proceeding is to fasten the liability for the support of the child upon the father so that it will not become a public charge and no settlement shall be made except it be approved by the supervisors of the town, of which agreement and approval the justice shall make a memorandum on his docket.

The justice seems to have ample power to issue his warrant commanding the sheriff or any constable of the county to apprehend the accused. The presence of the district attorney does not seem to be necessary at the time of the issuance of the warrant, or, in fact, at any stage of the proceedings before the justice. The sheriff must obey the commands of the warrant and apprehend the person accused. He has no discretion and cannot refuse to perform the services. The proceeding is not a civil action and provisions of law with reference to the taxation of costs therein do not apply.

In addition to all these considerations sec. 1553m provides, among other things:

"And the rule for the taxation and payment of costs therein shall be the same as in criminal proceedings and actions."

It seems very plain from this language that the costs incurred in these actions are to be paid the same as costs in criminal actions. It is my opinion that the costs of the sheriff in the case cited by you should be paid by the county.

Public Officers—Incompatibility—The offices of undersheriff and member of county board are incompatible.

The acceptance of the office of undersheriff vacates ipso facto that of member of county board if held by same person.

Alexander Wiley,
District Attorney,
Chippewa Falls, Wis.

In your letter of Nov. 21st, you submit three questions which will be taken up in their order.

November 23, 1914.
1. "Is there any reason why a member of the county board could not be appointed undersheriff?"

I find no statutory provision from which I could infer that a member of the county board cannot be appointed undersheriff, and this question must have a negative answer.

2. "If he is so appointed can he still continue to act as a member of the county board?"

The last sentence in sec. 729 is as follows:

"And no undersheriff or deputy shall at the same time act as member of the county board of any county."

This provision is decisive of the question as a statutory incompatibility is thereby created. You are, therefore, advised that a member of the county board cannot hold the office of undersheriff. Your second question must, therefore, be answered in the negative.

3. "Does the acceptance of the position of undersheriff operate so as to vacate his position as a member of the county board?"

Your third question must be answered in the affirmative under the ruling of our supreme court in the case of State v. Jones, 130 Wis. 572.

Public Officers—Criminal Law—Justice of the Peace—
What a justice may do in a criminal case on a legal holiday.
Sec. 2576.

November 27, 1914.

CHARLES E. LOVETT,
District Attorney,
Park Falls, Wis.

I have your letter dated the 20th inst., received here on the 23rd inst., to the effect that in a criminal proceeding before a justice of the peace, in your county, a warrant was issued on the 2nd day of November, and was returned into court with the prisoner on the 3rd day of November, the day on which a general election was held; that on said day a plea of not guilty was entered for the prisoner; that his bail was fixed at one hundred dollars; that for want of bail he was remanded to jail, and that the case was then ad-
journed for trial to the 10th day of November; that on the
adjourned day the prisoner was found guilty and sentenced;
that he now has pending an application for his discharge on
habeas corpus proceedings, setting up, among other things,
that the said justice had lost jurisdiction by attempting to
hold court on a legal holiday.

You desire an interpretation of sec. 2576, insofar as it re-
fers to the above statement of facts, and, as the question of
law involved is a constantly recurring one, you would like
to know what the duties of the officers are, for example, if a
party is arrested late on the day preceding a legal holiday or
on a legal holiday. Should the prisoner be brought before
the magistrate on said day or must he be held until the fol-
lowing day?

Sec. 2576 reads in part as follows:

"No court shall be open to transact business on the first
day of the week, the Fourth Day of July, Christmas or the
day on which any general election shall be held unless it be
for the purpose of instructing or discharging a jury or of
receiving a verdict and rendering a judgment thereon; but
this section shall not prevent the exercise of the jurisdiction
of any magistrate when it shall be necessary, in criminal cases,
to preserve the peace or arrest offenders."

As you are aware, this section has received a very definite
interpretation from our supreme court in the case of Mil-
wauke Harvester Co. v. Teasdale et al., 91 Wis. 59, 62, which
was a civil action, and where it was expressly held that no
court can be held open on a legal holiday for the purpose of
adjourning a cause, and that any action so adjourned must
necessarily fall.

In New York, under the code as it existed in 1901, "pro-
viding that a court shall not be opened or transact any
business on Sunday, but also declaring that a magistrate may
exercise his jurisdiction where it is necessary to preserve the
peace, or arrest, commit or discharge a person charged with
an offense," it appeared that a person charged with vagrancy
was brought before a magistrate on a Sunday; and the case
was heard and the prisoner convicted and committed on that
day. The supreme court of New York held the conviction
and commitment to be illegal, and said, among other things,
that a reservation in the law that "This section does not pre-
vent the exercise of the jurisdiction of a magistrate where it is
necessary to preserve the peace, or, in a criminal case, to arrest, commit or discharge a person charged with an offense, have no reference to a trial. They simply mean that persons arrested can be discharged on Sunday by a magistrate if there be no ground for holding them, or that they can be committed for hearing if that be the proper course." *People ex rel. Donahue v. Wallers*, 71 N. Y. S. 85; also see *Kraft v. De Verneuil*, 94 N. Y. S. 230.

You will notice that the language in the New York code is very similar to the language used in sec. 2576, but favors the jurisdiction of a magistrate in New York.

In view of the foregoing it is my opinion that sec. 2576 contains in itself all the things a magistrate may do by way of holding court on a legal holiday, viz.: "When it shall be necessary, in criminal cases, to preserve the peace or arrest offenders," and that this language cannot be extended by implication or construction to include any other acts in the nature of a judicial or court proceeding; and under the facts as stated in your letter the justice of the peace had no authority to hold court for the purpose of entering a plea of not guilty for the defendant, fixing the defendant's bail, remanding him to the custody of the officer and adjourning the case to the 10th day of Nov. 1914.

In answer to the other question, it follows from the foregoing that a magistrate must confine his jurisdiction within the language of the statute, and that in case a person be arrested on the day before a legal holiday and at a time when it is impossible to take him before the court, or in case he is arrested on a legal holiday, he should be held until the following court day.
Public Officers—Salary—Sheriff—Transfer of Prisoners—
1. County board has no right to raise salary of county officer in the year when he is elected.
2. County clerk is personally liable for signing orders for unlawful purposes.
3. Sheriff is not required to transfer prisoners in his own rigs.
4. Sheriff may sometimes use automobiles to transfer prisoners.

L. OLSON ELLIS,
District Attorney,
Black River Falls, Wis.

In your letter of the 3rd inst. you state that the clerk of the circuit court of your county was reelected to his office at this fall election; that at the November session of the county board his salary was raised $200. You state that you understand that this raise of his salary was illegal. You inquire whether the county clerk is personally liable if he issues county orders for this increased salary.

Sec. 694, Stats., provides in part as follows:

“The county board at their annual meeting shall fix the amount of salary which shall be received by every county officer, including county judge, who is to be elected in the county during the ensuing year, and is entitled to receive a salary payable out of the county treasury, and the salary so fixed shall not be increased or diminished during his term of office.”

The salary of the county officers must be fixed at the annual meeting of the county board the year before they are elected, under this statute. See *Hull v. Winnebago County*, 54 Wis. 291; and *State ex rel. Banks v. McClure*, 91 Wis. 313.

The salary having been fixed at the annual November meeting of that board during the year when the county officers were elected, this action of the county board is illegal and the salary of the county officer in question has never been lawfully changed so the legal salary is the same as it was prior to the action of the county board. It is the duty of the county clerk to draw his orders accordingly. If he draws orders that are in excess of those required he is exceeding his authority and is doing an illegal act and for such illegal
act he is personally liable as a ministerial officer. See 23 Am. & Eng. Ency. of Law (2nd ed.), 377; Robinson v. Rohr, 73 Wis. 436; Druecker v. Solomon, 21 Wis. 621; Wallace v. Menasha, 48 Wis. 79; Uren v. Walsh, 57 Wis. 98. You are, therefore, advised that the county clerk would be personally liable for issuing county orders for the increase in the salary of the clerk of the circuit court of your county.

You also inquire if a sheriff who has his own rig and who hires a rig from a third party for transferring prisoners can charge the county for the amount he pays to the third party from whom he hires the rig.

In answer to this question I will say that I find no provision anywhere in the statutes which requires a sheriff to own a rig and use it in the transfer of prisoners. If a sheriff has a rig of his own and uses it in transferring prisoners he cannot receive compensation for such rig. This was held in an opinion to you under date of August 26, 1913. I do not think that a sheriff is obliged to use his own rig in transferring prisoners as the statute expressly authorizes him to make a reasonable charge for such expense.

You also inquire if a sheriff can hire an automobile instead of an ordinary rig to convey prisoners and charge for such expensive conveyance.

This question was answered by my predecessor in an official opinion under date of Nov. 14, 1910, which you will find on p. 249 of the Opinions of the Attorney General 1912. I agree with my predecessor when he answered the question thus:

"In answer I will say that whether or not this is an actual and necessary expense under our statutes would depend upon the facts and conditions attending each individual case. There may be cases in which it is necessary and highly commendable to hire an automobile to convey a prisoner or insane person rather than convey him by team, while in another case it might not be justifiable."

This is a case where a general opinion cannot help to establish a criterion. The sheriff is to present his bill to the county board, which is authorized to require him to furnish all the facts and upon such facts the board determines whether the bill is necessary and justifiable.
Public Officers—Land Mortgage Associations—Under sec. 2024–118, Stats., the approval to be given by the attorney general and the commissioner of banking is only as to form, and not as to value of the securities offered.

Neither the state nor any state officer is in any sense a co-partner with the land mortgage associations, nor a guarantor of the value of the bonds issued, or the securities deposited by it.

Henry Johnson,
State Treasurer.

In your letter of the 10th you enclose the approval of A. E. Kuolt, commissioner of banking, of the form of the trust deed and certain mortgages recently filed by the First Wisconsin Land Mortgage Association of Eau Claire, together with my approval of the same forms. You ask if, under ch. 94, and particularly sec. 2024–118, dealing with forms of mortgages and trust deeds to be approved jointly by the attorney general and bank commissioner, this approval refers only to the forms or to the value of securities that may be deposited with the state treasurer as securities for the purpose of issuing bonds.

Sec. 2024–118 provides:

"The mortgages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately protect all parties thereto. The trustees shall provide the forms subject to the joint approval of the commissioner of banking and the attorney general."

It appears very clear to me that the approval referred to herein is merely an approval of the forms. It would be very difficult, if not practically impossible, for the attorney general to pass upon the value of the securities, and I presume the same thing is true as to the commissioner of banking.

You further ask if, when such securities are deposited with the state treasurer, he, as state treasurer, merely becomes custodian of such securities, or if, under the trust deed, he becomes trustee. In other words, you ask if the state becomes a copartner with these land associations or in any way responsible for said bonds, or if the state merely becomes a party whereby it is easier for the bondsmen to dispose
of said bonds by making it appear that the state is back of the bonds. You say that the reason you ask the last question is because there has been a tendency during the late years to fill up the treasury with a lot of securities, making the state treasurer responsible for the same and in addition to the responsibilities making a lot of extra work for private corporations. That in fact this has increased to such an extent that soon the state will have to establish a bonding department in order to care for that kind of work.

Sec. 2024-133, Stats., provides for the issuing of a collateral deed of trust to the state treasurer pledging as security for the bonds issued the notes and mortgages taken in an amount equal to or exceeding the aggregate amount of the bonds issued or to be issued.

Sec. 2024-134, Stats., provides that all mortgages pledged to secure the payment of the bonds issued shall be deposited and left with the state treasurer.

I do not find any provision by which the state or the state treasurer in any way becomes responsible for these bonds, except insofar as it is the duty of the state treasurer to safely keep the securities offered, and his further duty to see to it that there are at all times in his custody mortgages deposited, the face value of which is equal in amount to that of the outstanding bonds. The state treasurer is a trustee, merely. He is acting merely as the custodian of the papers, with the additional duty outlined above. The state does not become a copartner with the land associations, nor is it in any way responsible for the bonds except insofar as the treasurer is responsible for their safe-keeping, and it is made his duty to see that they are secured by mortgages of a sufficient face value. In no other sense is the state back of said bonds. What you say regarding the tendency to fill up the state treasury with bonds and securities has no bearing upon the legal phase of the question. That is a matter that might well be called to the attention of the legislature, but it cannot affect in any way my answers to your questions.

You also state that in sec. 2024-134 it says that the land associations may, with the approval of the state treasurer, remove said securities and said mortgages from the state treasurer. You say that if said associations are under the supervision of the bank commissioner, and he approves of the issuing of bonds, it seems to you that
the bank commissioner must issue an order to the treasurer for the release of said securities.

The statute requires merely the approval of the state treasurer for the removal of such mortgages from his custody. You may, if you see fit, make it a condition of your approval for the removal of such securities that the commissioner of banking approve thereof. The law does not make his approval necessary. This is another phase of the law that might well be called to the attention of the legislature, that they may take such action as they see fit thereon.

Public Officers—Governor—Governor has no special duties in the matter of enforcing criminal laws.

December 14, 1914.

H. J. Thorkelson, Acting Business Manager, University of Wisconsin.

In your communication of the 9th inst. you propound the following four questions for my official opinion:

"1—Does it fall within the powers, duties and functions of the governor of the state to investigate conditions, methods, policies, activities or emergencies at or in connection with any institution supported in whole or in part by the state, such investigations being for the purpose of investigating the extent of law enforcements, investigations of crimes and misdemeanors or the apprehension of offenders?

"2—Is it within the powers, duties and functions of the governor of the state to cooperate with officials of any municipality or other local political subdivision in securing the arrest and conviction of persons guilty of crimes and misdemeanors at or in connection with any institution supported in whole or in part by the state?

"3—Is it within the powers, duties and functions of the governor of the state to engage the services of expert investigators for the purposes set forth under questions Nos. 1 and 2?

"4—If the investigations set forth under questions Nos. 1 and 2 fall within the powers, duties and functions of the governor of the state, has the governor of the state power to certify such expense as may be connected therewith to be paid from either his regular appropriation or his contingent appropriation provided in sec. 172–2, Stats.?"
"The governor is the chief executive officer of the state, and is clothed with the powers and charged with the duties appertaining to the office of such executive, his powers and duties being largely prescribed by constitution or statute." 36 Cyc. 885.

I have found no authority holding that any particular duty devolves upon the governor as an incident to the office or by force of the common law. The office of governor as it is known in this country is not a common law institution, but is rather an invention of the American states, hence unlike some other offices which existed at common law, such as coroner, sheriff, etc., no powers or duties attach to the office except such as are expressly conferred. Henry v. State, 87 Miss. 1. Colbert v. State, 86 Miss. 769. State ex rel. Shields v. Benton, 8 W. Va. 74. State v. Buchanan, 24 W. Va. 362. State ex rel. Resley v. Farwell, 3 Pinney 393, 432.

We, therefore, must look to the constitution and statutes of the state for the powers and duties of the governor.

Sec. 1, art. V, Const. provides:

"The executive power shall be vested in a governor who shall hold his office for two years."

Sec. 4, art. V, Const. provides as follows:

"The governor shall be commander-in-chief of the military and naval forces in the state. He shall have power to convene the legislature on extraordinary occasions; and in case of invasion, or danger from the prevalence of contagious disease at the seat of government, he may convene them at any other suitable place within the state. He shall communicate to the legislature, at every session, the condition of the state, and recommend such matters to them for their consideration as he may deem expedient. He shall transact all necessary business with the officers of the government, civil and military. He shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws be faithfully executed."

Sec. 6, art. V, Const. confers upon the governor the power to grant reprieves, commutations, pardons, etc.

These sections referred to are the only sections in the constitution conferring powers upon the governor. The only language in any of these sections which might be considered as conferring upon the governor duties or powers with reference to the enforcement of laws are the words under-
scored above: "shall take care that the laws be faithfully executed." This or similar language is found in most of the state constitutions, but so far as I have been able to find, no court has held that this language confers upon the governor duties or powers in addition to those specifically conferred by statutory or constitutional provisions.

Speaking of this language it is said in Walker's American Law, p. 104:

"It is a duty enjoined upon the federal and state executives 'to see that the laws be faithfully executed.' It would be dangerous, however, to treat this clause as conferring any specific power which they would not otherwise possess. It is rather to be regarded as a comprehensive description of the duty of the executive to watch with vigilance over all the public interests."

And in Preston v. Bennett, 8 W. Va. 89, speaking of a similar provision in the constitution of the state of W. Va., it is said:

"The provision which requires that the governor shall take care that the laws be faithfully executed does not generally, if ever, make it the duty of the governor himself to execute the laws. But, as the language imports, it makes it his duty carefully to observe the manner in which the different officers of the government exercise their proper functions and execute the laws committed to their charge, or their failure to perform such duties; and when they fail to act, or act improperly, if he has the power to remove them from office, to do so; or if he has not, to bring the subject to the cognizance of that department of the government which has the power to remove or punish them."

I think no different construction of this language is to be found in the decisions of the courts or in the expressions of law-writers. The duties and powers conferred upon the chief executive of the state to see that the laws are duly executed are general and supervisory rather than detailed and specific.

Under our statutes it is made the duty of the sheriffs, their undersheriffs and deputies, to "keep and preserve the peace in their respective counties and quiet and suppress all affrays, routs, riots, unlawful assemblies and insurrections:" Sec. 727.
It is also made the duty of the district attorney to prosecute all actions for violations of the criminal laws occurring in his county. Sec. 752.

Under our scheme of government the county is made the unit for the enforcement of state laws. A person must be prosecuted in the county in which the crime with which he is charged was committed. The expense of the trial is borne by the county. The district attorney and the sheriff are the law officers of the county and to them is committed the duty and responsibility of enforcing the laws throughout their respective counties. Nowhere in the constitution or in the statutes is the governor charged with anything in the nature of specific duties concerning the enforcement of laws, but by the provisions of sec. 968 he is given the power to remove from office, among others, any sheriff or district attorney for their neglect of duty or malfeasance or misfeasance in office. By virtue of this power he may exercise a very decided influence in spurring these officers to a proper discharge of their duties and by this power he is enabled to see that the laws are faithfully executed.

By sec. 132, Stats., the governor is authorized to offer a reward for the apprehension or the conviction of perpetrators of crime. This, of course, is in the nature of an express grant of power to the governor, which enables him to see that those who are charged with the commission of crime are duly apprehended and prosecuted.

But aside from the provisions above quoted, I find no provision, either constitutional or statutory, even suggesting that the governor is charged with any personal duties in the matter of ferreting out crime or apprehending criminals, much less is there any specific grant of power to expend the state's money in this behalf.

From the foregoing it abundantly appears that it is not within the powers, duties and functions of the governor to institute, direct or conduct investigations for the purpose of investigating the extent of law enforcement, investigations of crimes and misdemeanors or the apprehension of offenders, nor is there any way in which he may coöperate with the local officers in such investigations further than express power is found therefor in the constitution or statutes, which, so
far as my investigation goes, seems to be to the offering of rewards in proper cases.

The form of your questions implies that in your opinion the duties and powers of the governor may be greater with reference to the investigation of crimes committed in, about or around the public institutions of the state, and you refer me to sec. 562a, Stats. This statute has reference, in my opinion, only to matters involving the internal management and affairs of the institution and was not intended to cover circumstances and situations involved in either of your questions.

Neither, in my opinion, may expenses for such investigations be paid for from the governor's contingent fund provided for by sec. 172-2.2, Stats., as that appropriation was made "to carry into effect the powers, duties and functions provided by law for said department." It being concluded that such investigations do not fall within the "powers, duties and functions" of the governor, it will necessarily follow that the contingent fund thus provided for cannot be used for such investigations.

From the foregoing it follows that each of your questions must be answered in the negative.

Public Officers—County Tuberculosis Sanatoriums—Contracts—Trustees of county tuberculosis sanatorium cannot appoint one of their own number visiting physician.

December 15, 1914.

M. E. Davis,
District Attorney,

Green Bay, Wis.

In your communication of the 12th inst. you state:

"The county board of our county elected three trustees to take charge of our new tuberculosis sanatorium. One of these trustees is a doctor. The question is can the doctor, being on the board of trustees, be chosen by such board of trustees as the attending physician at our sanatorium? I understand that the same situation exists in Appleton, Outagamie county, and that your office may have rendered an opinion to them. May I have your reply by Wednesday or Thursday of the coming week?"
Sec. 4549, Stats., provides:

"Section 4549. Any officer of any penal, correctional, 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 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, or in any public or official service shall be punished by imprisonment in the county jail not more than five years or by fine not exceeding five hundred dollars."

The above provision of the statute seems to expressly cover the situation mentioned in your letter and prohibits the board of trustees from employing one of their own number as attending physician at the sanatorium under the penalty prescribed by said section.

Public Officers—Sheriff—Boxing—Boxing exhibitions conducted under sec. 1636-241, Stats., do not differ in legal status from any other lawful entertainment or exhibition, but are private enterprises conducted for profit and controlled by proprietor, except for statutory regulation.

Sheriff has no right by virtue of his office to demand full admission at such an exhibition for himself and a large number of his deputies for the mere purpose of witnessing the exhibition, and in doing so acts outside his official authority.

December 21, 1914.

WALTER H. LIGINGER, Chairman,
Wisconsin Athletic Commission,
Milwaukee, Wis.

I have your request for opinion of recent date in which you state:

“A number of boxing exhibitions are held each year by a licensed athletic club in the Milwaukee auditorium, the club having an annual lease of the auditorium for that purpose. These exhibitions are usually of a high class and very largely attended. The writer has attended many of these exhibitions
at the auditorium and it is his personal observation that these exhibitions are conducted without any disorder or other objectionable features which would require or make desirable any larger police attendance at such exhibition than is customary at other shows or exhibitions held in the auditorium where the audience may number as high as six or eight thousand people. A few competent police officers in uniform are all that is really required for police duty at these exhibitions.

"* * * Accordingly, the athletic club, at the request of this commission, has asked the chief of police to detail police officers for police duty at each exhibition, thus limiting the number of such officers to be admitted to the auditorium to the number which in the judgment of the chief of police and of this commission may be required for that purpose."

You further state that difficulty has arisen between the management of the exhibition and the sheriff, who insists that he and his deputies have a right to demand free admission to all boxing exhibitions and that, although eight complimentary tickets have been furnished to the sheriff's office for such exhibitions, the sheriff and his deputies have forced the management to admit nearly the entire sheriff's force, "threatening to enter forcibly unless given tickets of admission or passed at the door upon showing their badges." You express the opinion that it is obvious that the sheriff and his deputies "are actuated mainly, if not solely, by the desire to see the exhibition without paying the price of admission."

You state further that the commission is interested in preventing an excessive distribution of free passes because that results in reducing the receipts and the state's percentage under sec. 1636-241, Stats. You enclose a letter from the manager of the auditorium, stating that on one occasion, after thirty-five free tickets had been issued to the sheriff and his deputies, other deputies tried to forcibly enter the hall, and that on another occasion twenty-four deputy sheriffs "came in one group, forcibly demanded admission and threatened to form into a column of two and beat down the doors."

You ask my opinion "as to whether the sheriff or his deputies may, by virtue of their office, demand admission to these boxing exhibitions and enforce that demand by entering the building by the use of force and violence if the demand is
refused." Also, you ask, if the sheriff has such right, whether he can demand admission for any number of deputies or for a reasonable number only, and, if only a reasonable number, who is to determine what would be a reasonable number.

The sheriff is the chief executive and administrative officer of the county. His principal duties are in the aid of the courts, by serving processes, summoning juries, executing judgments, holding judicial sales and the like, but he is also, although perhaps secondarily, a peace officer, and, as such, has the usual and ordinary authority incident to the enforcement of the law and the prevention of breaches of the peace.

35 Cyc. 1488, 1532.

Sec. 725, Stats., defines in general the main duties of the sheriff; but in sec. 727 it is provided:

"Sheriffs and their undersheriffs and deputies shall keep and preserve the peace in their respective counties, and quiet and suppress all affrays, routs, riots, unlawful assemblies and insurrections; for which purpose, and for the service of processes in civil or criminal cases and in the apprehending or securing any person for felony or breach of the peace they and every coroner and constable may call to their aid such persons or power of their county as they may deem necessary."

Attorney General Gilbert, in an opinion to the board of agriculture, refers to this section of the statutes and elaborates somewhat upon the duties of the sheriff as therein specified, and concludes that the sheriff and his deputies may, when in the judgment of the sheriff their presence there may reasonably be required to preserve the peace and prevent violations of law, demand admission to the state fair park and any part thereof without the payment of admission fees. Report and Opinions of Attorney General 1910, p. 647.

The only authorities cited are cited to the proposition that a sheriff is liable on his bond and subject to indictment for failure to preserve the peace. The authorities cited, however, hardly sustain the proposition or aid in the determination of this question.


State v. Wade was an action in which it was held that the sheriff was not liable to the personal representatives of a
prisoner taken from jail and lynched, as a result of the failure of the sheriff to take precaution necessary to prevent the lynching, if the sheriff was not wilfully and maliciously negligent.

*Tyler v. Gobin*, 94 Fed. 48, which is cited in support of the text in 25 Am. & Eng. Ency. of Law, 671, was a case where the sheriff and his bondsmen were held liable to the personal representatives of a prisoner, who had been taken from jail by a mob and lynched, the sheriff having aided and abetted the mob.

I fail to see that these authorities have any relevancy or bearing on the question submitted.

Upon your statement of facts, it would appear that the gathering upon the occasion of a boxing exhibition at the Milwaukee Auditorium is an orderly assembly. It is certainly, under our present statutes, an exhibition and a gathering or assembly permitted and authorized by law.

Sec. 1636-241.

In view of these facts, I perceive no ground whatever upon which any official would be justified in presuming or apprehending even that such a gathering might be or might become a riot, affray or unlawful assembly, which the sheriff would have any duty or authority to suppress or in any manner interfere with. Indeed, I am unable to perceive any distinction in law or in legal status as between a boxing exhibition conducted pursuant to and authorized by sec. 1636-241, Stats., and any other authorized exhibition, a theatrical performance, an opera or a lecture. True, it is possible that violations of law might occur at such an exhibition, either on the part of the participants or the spectators, but this is also true in the case of any of the other exhibitions or entertainments mentioned.

It would seem, therefore, that a boxing contest or exhibition conducted under sec. 1636-241 and under supervision of the state athletic commission stands in all respects on the same footing as any theater or show held and conducted by the proprietor or manager for pecuniary profit.

With respect to theaters and the like, it is very well settled that

"The proprietor of a theater exercises absolute control over the house and the audience. The theater is private property and is governed, so far as the public is concerned, by such rules and regulations as the proprietor may see fit
RELATING TO PUBLIC OFFICIALS.

It is held that a sheriff has no duty or authority to assume by virtue of his office, to guard or protect private property, and that in assuming to do so he acts and will be held to act only at the instance of and for the benefit of the owner of such private property.

St. L. etc. R. Co. v. Hackett, 58 Ark. 381; Tex. etc. R. Co. v. Parsons, 109 S. W. (Tex.) 240; Affirmed, 113 S. W. 914.

Under our statutes a sheriff has no duty to protect private property from mob violence, except upon the request of the owner. Sec. 939, Stats.

Decisions, moreover, holding that a sheriff would be liable on his bond, if even in the discharge of an official duty, he commits an assault and battery, or in overcoming resistance to the exercise of his duty he so exceeds his authority as to become the aggressor in an assault and battery (35 Cyc. 942, and cases cited), clearly indicate that a sheriff or a deputy sheriff is amenable to the law the same as other persons for unauthorized acts of violence or for injuries committed outside the scope of his proper official duties.

Upon the foregoing considerations, I am unable to perceive any pretext under which a sheriff may lawfully demand the right to enter with a force of deputies a theater, auditorium or other place of public amusement or entertainment, privately conducted, without any request to do so by the proprietor and without any complaint made to him or ground of belief that there is any violation of law at such theater or exhibition other than that which might be anticipated from the fact that a large number of people are gathered together and the possibility that among their number might be some with criminal designs or liable to do some criminal act. It would seem preposterous to assert that, under conditions which you have stated in your inquiry, a sheriff might present himself with a force of twenty-four or thirty-five deputies at his heels at the doors of a legitimate theater, for example, and demand admission thereto on the pretext that his presence there is necessary in the discharge of his official duties. No
reason is perceived why any different view should be taken of such conduct on the part of the sheriff in the case of a boxing exhibition.

The sheriff possibly has the right to go or to send a deputy or a reasonable number of deputies to any such exhibition where he is requested by the proprietor or management to attend to preserve the peace and would probably have that authority upon reasonable complaint made to him or upon having reasonable cause to believe that a breach of the peace is about to be committed. In the exercise of such authority, the sheriff may use reasonably necessary force, but the sheriff, when he exceeds his reasonable discretion in demanding admission to such an exhibition for an excessive number of his deputies for the mere purpose of enabling them to witness the exhibition without paying admission, is clearly acting outside his official authority and has no greater rights than any private person, and he or his deputies so acting may be treated in the same manner in which any other individual so acting may lawfully be treated. If their conduct under such circumstances amount to a breach of peace, they may be arrested and dealt with therefor as other offenders.

Whether the sheriff and his deputies in a given case are within or without the scope of their official authority will depend upon the facts of each case. Upon the facts as you have stated them I have no hesitancy in saying that eight officers from the sheriff's force would be all that could reasonably demand admission to such an exhibition under pretext of preventing a breach of the peace thereat, and that additional deputy sheriffs demanding and attempting to force free admission for the primary purpose of witnessing the exhibition are themselves guilty of a breach of the peace in so doing, and are outside of and not protected by their official authority.

It may be proper to add, however, that the proprietor or manager of an exhibition, or other person who will undertake to cause the arrest of or otherwise obstruct a deputy sheriff in such a case will, of course, assume the responsibility of establishing in court the facts necessary to show that the demand of the sheriff and his deputies was clearly unwarranted in any reasonable exercise of official discretion in the premises, and not prompted by considerations of official duty.
Relating to Public Officers.

Public Officers—Education—Counties—County Board of Education—A member of the county board of education who through mistake or excusable neglect, has failed to file the oath of office, is entitled to the compensation of the office.

James Kirwan,
District Attorney,
Chilton, Wis.

In your letter of the 21st you say that on Nov. 17th, last, I answered a letter of yours, asking about the salary of a member of the county board of education who did not take or file any official oath, holding that he was merely an officer de facto and not legally entitled to the compensation of the office. You say that on closer examination of ch. 751, laws of 1913, found on pages 440, 441 and 442, Stats., 1913, you find no requirement for any member of such county board of education to qualify in any way. That they are not required to take any oath nor to file any bond, and you ask if such member is not legally entitled to the compensation, or, you ask if secs. 701 and 702, Stats., 1913, apply to the members of such board of education.

The letter written you under date of Nov. 17th had no reference to the manner of qualification of member of the county board of education, but merely stated that a de facto officer was not entitled to the compensation of the office.

Sec. 702-4, Stats., relating to the election of members of the county board of education, contains, among other things, the following:

"Except as to those members whose first term shall be fixed by lot, as aforesaid, at one, two, three, four and five years, the terms of office of each member of such board shall be five years and until his successor is elected and qualified, and one member shall be elected each year following the year 1914."

Sec. 702-8, Stats., relating to the organization and officers of the county board of education, among other things, provides:

"Said president shall serve for one year and until his successor shall be chosen and shall have qualified."

From these it appears to me clearly that there was an intention that the members of the county board of education
should qualify in some way, although the manner of qualification was not stated in the act creating such board.

Sec. 701, Stats., to which you have called my attention, provides in part:

“Every county officer named in this chapter shall, before entering upon the duties of his office and within twenty days after receiving the official notice of his election or appointment, or if not officially notified, within twenty days after the commencement of the term for which he was elected or appointed, execute and deposit his official bond, if any be required, as prescribed by law; and every such officer shall also within the same time take and subscribe the oath of office prescribed by the constitution, and deposit the same with his official bond to be filed and preserved therewith, except that the county superintendent of schools shall file his oath of office with the county clerk.”

I believe that the manner of qualification of county officers in general herein prescribed is the one referred to in the sections relating specifically to the county board of education. Until the oath of office is taken and filed with the proper officer, and, where required, the official bond is executed and deposited, if there were no more to the section last referred to than the part hereinabove quoted, I should think that the officer, or the member of the county board of education, was only a de facto officer, and then the opinion heretofore given you might well apply. However, sec. 701 also contains the following:

“Provided, however, that no failure on the part of any such officer to make and file his official bond, or take the oath of office prior to the commencement of his term of office, shall cause a vacancy in such office, if such failure was not intentional but was the result of mistake, accident or excusable neglect.”

I assume that the failure of the members of the county board to take and file the proper oath of office was because of either mistake or excusable neglect. It appears to me that the legislature has here prescribed that in such case the officer is a de jure officer even though he has not complied with all the requirements as to qualification. I am therefore of the opinion that the member of the county board of education to whom you refer is entitled to the prescribed compensation.
OPINIONS RELATING TO PUBLIC PRINTING

Public Printing—Wisconsin Historical Society—Property in possession of the Wisconsin history commission must be turned over to the state historical society at the expiration of the time of existence of the former.

Money secured from the sale of published volumes of the history commission belongs to the state and should be turned into the state treasury.

The Wisconsin historical society may join with historical societies of other states in the Mississippi valley to establish a general historical review.

Feb. 14, 1914.

M. M. Quaife, Supt.,
State Historical Society.

Under date of Feb. 6th you have submitted three questions for my official opinion which will be taken in their order.

You state that at various times in the past the Wisconsin history commission has bought materials such as books, etc., to facilitate the carrying on of its work. You inquire what disposition is to be made of this property at the time when the commission expires.

Sec. 172-48 provides as follows:

"The state historical society shall, after the work of the Wisconsin History Commission, now being done is completed, and on and after December 31, 1914, exercise all the powers, duties and functions now exercised by such history commission. To enable the history commission to complete its work the amount of the unexpended balances for the year 1910, 1911 and 1912-1913 of appropriations to such history commission, as shown by the books in the office of the secretary of state, not exceeding three thousand dollars, is re-appropriated to the history commission."

The Wisconsin history commission was established by an act of the legislature (See ch. 298, laws 1905). The object of its creation was to procure and publish material

52—A.G.
pertaining to the part Wisconsin and its citizens took in the late civil war. See also ch. 378, laws 1907; 445, laws 1909, and 628, laws 1911.

The commissioners are officers of the state and the commission as a whole is an arm or agency of the state of Wisconsin. I find no express provision in any statute providing for the disposition of the property in the hands of the commission other than the provisions of said sec. 172-48, in which it is provided that after the commission has gone out of existence, the state historical society shall exercise all the powers, duties and functions now exercised by the said commission. One of the functions exercised by said commission was to have the custody and control of the property in question. It follows that under the express provision of this statute the historical society will have the right to have control of said property. It is fit and proper because said society is made trustee of the state of Wisconsin by sec. 374, Stats. which contains the following:

"Said society shall be the trustee of the state, and as such shall faithfully expend and apply all money received from the state to the uses and purposes directed by law, and shall hold all its present and future collections and property for the state; and shall not sell, mortgage, transfer or dispose of in any manner, or remove, except for temporary purposes, from the historical library building any article therein without authority of law, provided, this shall not prevent the sale or exchange of any duplicates that the society may have or obtain."

My answer to your first question is, therefore, that the property should be turned over to the state historical society. For your second question you state that most of the volumes which the commission published were distributed gratis to designated officials and individuals. That from time to time, however, requests made from other individuals to the society to be permitted to purchase these volumes have been received and the commission has, in fact, been in the habit of selling them at prices set by itself. You inquire if the commission has the legal right to use the money received from the sale of such volumes at its discretion in carrying on its work.

As an original question it might be asked whether the commission has a right to dispose of these volumes in the
manner in which this has been done. I find no provisions in the statute expressly authorizing them to do this other than sec. 5, ch. 378, laws 1907, which provides as follows:

"The printing commissioners shall cause to be published such material as may be selected by the Wisconsin History Commission in such manner as may be prescribed by such commission."

Webster gives the following as one of the definitions of the word "publish":

"To bring before the public as for sale or distribution, especially (a) to print or cause to be printed and to issue from the press either for sale or general distribution as a book, newspaper, piece of music, etc. A book is published only when it is offered for sale or put into general distribution."

This law has been given a practical construction by the commission and although it is a liberal construction I believe that the language of the statute warrants it. Said sec. 5 expressly gives the history commission the power to prescribe to the printing commission the manner of publication of the volume in question. It follows that it may direct the printing commission to sell them through the agency of the officers of the history commission.

The money secured by the sale of these volumes, however, is the property of the state under any theory. The legislature has made definite appropriations to this commission as appears by the above quoted statutes. I find no provision in the law from which it could be inferred that the money secured from the sale of books could be used for purposes of the commission. No money can be appropriated to any public purpose unless there is legislative authority for it. I find no such legislative authority in any statute and I am therefore constrained to hold that the money secured from the sale of these volumes, as indicated, is the property of the state and therefore should be turned into the state treasury as I understand has been done by the commission.

In the third proposition submitted, you state that the library committee of the state historical society has under consideration the question of using a portion of the income from its special fund known as the general and binding fund to establish in coöperation with the leading societies
of the Mississippi valley a general historical review to be known as the Mississippi valley historical review. You inquire, at the request of some of the members of said society, whether the society has the legal right to spend money from its private funds in this way.

In answer I will say that this society was created by ch. 17, general laws of 1853. A number of persons are named and their present and future associates and their successors are constituted and created a body politic and corporate by the name of the state historical society of Wisconsin and said statute provides:

"by that name shall have perpetual succession with all the faculties and liabilities of a corporation; may sue and be sued, implead and be imploled, defend and be defended in all courts and places; and for the purpose of its institution may do all such acts as are performed by natural persons."

Among the objects of said corporation is mentioned the following:

"and may take proper steps to promote the study of history by lectures and to diffuse and publish information relating to the description and history of the state."

It is authorized to create a constitution, by-laws, rules and regulations.

Sec. 1, art. I, Const. adopted, contains the following provision as to the objects of the corporation:

"Its object shall be the collection, preservation, exhibition, and publication of materials for the study of history, especially the history of this state and of the middle west: to this end, exploring the archaeology of said region, acquiring documents and manuscripts, obtaining narratives and records of pioneers, conducting a library of historical reference, maintaining a gallery of historical portraiture and an ethnological and historical museum, publishing and otherwise diffusing information relative to the history of the region, and in general encouraging and developing within this state the study of history."

Sec. 6, art. IV, speaking of the powers of the executive committee, provides as follows:

"Said committee may appoint committees of their own number, which may, subject to revision by the executive committee, exercise such administrative or executive powers
as may be entrusted to them, respecting the purposes for which they are especially appointed.”

Sec. 12 of the by-laws contains the following:

“So much of the income from said fund as the executive committee shall deem proper, may be appropriated for such purposes as they shall from time to time designate, and any remainder not so appropriated shall annually be added to the principal of said fund.”

Sec. 376 of our statutes provides that it shall be the duty of said society to collect books, maps, charts and other papers and materials “illustrative of the history of this state, in particular, and of the West generally.”

The history of the state of Wisconsin, of course, is interwoven with the history of the other states in the Mississippi valley. In order to get at the true history it is necessary to study the history of other states, especially those in this region constituting the Mississippi valley and in view of the fact that under ch. 17, laws of 1853, one of the objects of this society is stated to be the taking of proper steps to promote the study of history and to diffuse and publish information relating to the description and history of the state, and as it is made the duty of the society to secure material of the west in general, and in view of the provisions of the constitution and by-laws cited, I am of the opinion that the society is authorized to join with the other historical societies of the Mississippi valley in establishing a general historical review, if in the opinion of the members of the society it can thus promote the study of history and diffuse and publish information relating to the history of Wisconsin.

Public Printing—State Officers—Board of Regents—Public Property—Board of Regents entitled to copy of Stats.

Feb. 17, 1914.

OTTO ONSTAD,
Superintendent of Public Property.

I am in receipt of your communication of the 14th inst. in which you state that you are in receipt of a written request from M. E. McCaffrey, secy. regents university of Wisconsin,
for as many copies of the 1913 statutes as that office is entitled to. You ask whether or not your department has the right to supply the board of regents with copies of the statutes free of charge.

Subdiv. 6, sec. 20.84, Stats. authorizes you to deliver one copy of the statutes to each state officer applying therefor.

Sec. 20.83 defines a state officer, among other things, to be:

"every chairman or president of a state board or commission; the secretary, assistant and chief clerk of every such state officer, board and commission."

Sec. 378 provides that:

"The government of the university shall be vested in a board of regents. * * * "

It seems plain that the chairman or president of the board of regents, as well as the secretary, assistant and chief clerk thereof is a state officer within the definition of sec. 20.83, and that you are authorized to furnish such officers with copies of the revised statutes.

Public Printing—Public Property—Under sec. 20.89, Stats., twelve copies of the session laws may be sent to twelve different libraries on the order of a law book company that is merely the agent of such libraries.

March 24, 1914.

Otto Onstad,
Superintendent Public Property.

In your favor of March 23rd you request my opinion as to whether that part of sec. 20.89, Stats., which provides that the superintendent of public property may sell "one copy and no more" of each publication of the state to any person not a resident of the state, prohibits you from sending twelve copies of the 1913 session laws to each of twelve different libraries on the order of the Statute Law Book Co., Washington, D. C.

In the letter from that company, which you enclose, it is stated that:

"We are simply acting as agents for libraries in purchasing for them the laws and statutes of all the states, as they are
issued from time to time and by this service saving each of them from dealings and correspondence with some fifty separate distinct jurisdictions. * * * For this saving on the part of our customers they are willing to pay us a moderate compensation for our services, which compensation is even more satisfactory to them than it is to us. If we asked you to send us sixteen copies of your publications, you might be justified in viewing the matter with some hesitation, but we do not do this. We sent you labels under which to send each of these copies to a different person and asked only the one copy to be sent to us to which we are entitled under the strictest construction of the law. We think, as this method of shipping under labels to persons who have made us their agents for this purpose long ago (in many cases years before the book was published) absolutely precludes any violation of the letter of the law requiring only one copy to be delivered to one person. We think that you will see, as did your predecessor, that it is entirely consistent with the purpose of the law for you to follow this method even though all the applications for the volumes come from us, and payment for them is made by us alone.”

The provision of the law in question was evidently designed to prevent the monopolization of state publications in the hands of a dealer or dealers. The situation presented is clearly not within the reason of such provision and in view of the statements that the law book company is acting merely as agent for the various libraries I think that it is no more within the letter of the law than within its reason. If the law book company is acting merely as agent for the various purchasers, as it says it is, then the sale is made by the state to such purchasers and, of course, only one copy is sold to any purchaser. The fact that the law book company sends the order and pays for the books is not necessarily inconsistent with its acting solely as agent for the purchasers. In the absence of anything to show that the transaction is not just what the company says it is I do not think that sec. 20.89, Stats., prohibits you from filling the order.
Public Printing—State Historical Society—The proceeds of the sale of duplicates by the state historical society may be turned into the treasury of said society.

August 8, 1914.

M. M. Quaife, Supt.,
State Historical Society.

In your letter of Aug. 5th you refer to an official opinion given to you by this department under date of Feb. 14, 1914, which was to the effect that the proceeds of the sale of publications of the history commission must be turned into the state treasury. You desire an opinion as to whether or not the practice, which, so far as you are able to determine, has always prevailed hitherto on the part of the historical society, of devoting the proceeds of similar sales of its publications to the building up of its private funds is a proper and legal one.

In answer I will say that the statutes covering the state historical society are different from those applicable to the history commission. The state historical society was organized under an act of the legislature in ch. 17, laws of 1853. Under said act it was made a body corporate, having perpetual succession, with all the faculties and liabilities of a corporation, giving it the power "to sue and be sued, implead and be impleaded, defend and be defended in all courts and places."

In sec. 3 of said act, it is provided:

"Said society may have and use, and at discretion change, a common seal; may ordain and enforce a constitution, by-laws, rules and regulations, and elect such officers as the constitution or by-laws may prescribe: provided, such constitution, by-laws, rules and regulations be not inconsistent with this act, or the law or constitution of this state, or of the United States.

In sec. 4 it is provided that its funds shall ever be faithfully appropriated to promote the objects of its formation.

In sec. 374, Stats., it is provided that the state historical society shall continue to possess the powers and privileges conferred by ch. 17, laws of 1853, and subject to the limitations of ch. 24 and such laws as shall hereafter be enacted. Said section also contains the following:
“Said society shall be the trustee of the state, and as such shall faithfully expend and apply all money received from the state to the uses and purposes directed by law, and shall hold all its present and future collections and property for the state; and shall not sell, mortgage, transfer or dispose of in any manner, or remove, except for temporary purposes, from the historical library building any article therein without authority of law; provided, this shall not prevent the sale or exchange of any duplicates that the society may have or obtain.”

Under sec. 20.31 of the printing law the statutes provide that the printing commissioners shall cause the publications of the state historical society to be printed. Sec. 20.52 provides that the publications so printed shall be delivered to the state historical society.

Under the above quoted portion of sec. 374 it is provided that the society may sell duplicates. These volumes being delivered under statutory authority to the society and the society being authorized to sell the volumes it does not need, I believe the proceeds of such sale may lawfully be turned into the treasury of the society.

You are therefore advised that the practice which has hitherto obtained of using the proceeds of the sale of the publications of the society for the promotion of its objects and the increasing of its funds is lawful.
Public Utilities—Telephone Companies—License Fees—Taxation—Farmers' mutual telephone company which receives no rentals or tolls for telephone service not required to pay license fees under sec. 51.35, Stats. 1913.

February 20, 1914.

HENRY JOHNSON,
State Treasurer.

I have your letter of the 18th instant, in which you enclose the annual report of the Farmers' Badger Telephone Co. and ask to be advised whether or not this company should pay a license fee to the state.

The statute prescribing license fees to be paid by telephone companies, as amended, provides (sec. 51.35, Stats. 1913) that

"Any person, copartnership, association, company or corporation owning and operating or operating any telephone line in this state with appliances for the transmission of messages of speech or sound, and engaged in the business of furnishing telephone service for compensation as owner, lessee or otherwise, shall be deemed and held a telephone company * * * ."

The statute goes on to provide that telephone companies, as above defined, shall make reports to the state treasurer and pay the license fees therein prescribed. Under the language of this statute the question whether a company or association operating a telephone system is a telephone company within the meaning of this statute and liable thereunder for the payment of the license fees therein prescribed is determined by the facts whether such company is "engaged in the business of furnishing telephone service for compensation."
The statute was evidently designed to exempt from the payment of such license fees telephone companies or associations which are purely mutual and which, instead of receiving tolls or rentals from the persons using the service, confine the use of such service in a business sense to the members of the association and merely levy upon such members assessments sufficient to defray the expenses incurred in operation.

The report of the Farmers' Badger Telephone Co. duly verified by the officers of that company, states that the company has no gross receipts or income of any kind from exchange service; that it has no income from toll line service except that it receives $20.00 as rental from leased lines and $2.00 as pole rental, in all $22.00. In addition to that the report shows receipts of $390.00, explained as switching fees collected by the company and turned over to another telephone company, for which, presumably, it is collected. If this statement is correct and this is a correct understanding of it, this sum of $390.00 would not be earnings of the Farmers' Badger Telephone Co.

The report is accompanied by an explanatory letter, signed by the secretary of the company, under date of February 17th, in which it is stated that: "The company owns no telephones, every patron bought and owns his phone, it is his individual property just as much as his table is." It does not appear anywhere from this report that this company renders any telephone service for compensation. I do not believe that the receipt of $20.00 for rental of lines and $2.00 for rental of poles constitutes rendering telephone service for compensation within the meaning of the statute.

The situation in respect to this company is different from that in respect to the Gilmanton & Dover Farmers Telephone Co., upon whose report you were advised under date of August 9th, 1913. In that case it appeared that the company did have a number of subscribers who are not shareholders or members of the association and to whom it charged rentals of $12.00 per year each. In that case you were advised that, upon the state of facts and upon the further facts that the company had on file with the Railroad Commission a schedule of telephone rates as a public utility, that company was furnishing telephone service for compensation and liable to pay the fee prescribed in the law.
Such, however, is not the case here and I am of the opinion that, upon its report, the Farmers' Badger Telephone Co. is not liable to pay a license fee under the statute referred to.

Public Utilities—Telephone License Fee—The license fee of a telephone company bears interest at the legal rate when due, if not paid, and state treasurer should collect it.

HENRY JOHNSON,
State Treasurer.

In your favor of April 2nd you state that on March 31, 1914, the Lime Ridge Telephone Co. of Lime Ridge, Wisconsin, filed its annual report in your office for the year 1912 and paid the sum of $14.31, the actual amount of its license fee, without interest, according to the report filed; that according to law this amount was due and payable to the state of Wisconsin on or before March 1, 1913. You ask my opinion as to whether or not the state is entitled to any interest, and if so, how much, from the Lime Ridge Telephone Co.

The license fee of the telephone companies is provided for in 51.35, Stats. 1913, p. 801. It is true, as you say, that under this statute the license fee is payable on or before March 1st. I find no provision in the statute which requires the forfeiture for the non-payment of this license fee such as was formerly provided in subsec. 2, sec. 1222a, Stats., or ch. 488, laws of 1905. Said subsec. contains the following:

“If any license fee shall become due and remain unpaid it shall be deemed delinquent and shall draw interest at the rate of fifteen per cent per annum after due until paid.”

Sec. 1222a was amended in 1909 by ch. 535 and the said provision requiring the forfeiture was omitted therefrom. I believe, however, that under the general rule the amount due on the first day of March, if not paid, will draw interest thereafter at the legal rate. This was the construction given by our court to the provisions of sec. 1220, Stats. 1898, in the case of Travelers Insurance Co. v. Fricke, 99 Wis. 367, 375. In that case the insurance company had neglected to

April 7, 1914.
pay the license fee and the circuit court collected interest from the time when the same became due. The provisions of the statute requiring a payment of the license fee were similar to those in 51.35 applicable to the Lime Ridge Telephone Co. The court said on page 375:

"We perceive no error in adjudging that the unpaid license fees bear legal interest from the various dates upon which they ought by law to have been paid. The plaintiff has not only had all the benefit of its license, but has also had the use of the license moneys during all the time, and presumably has obtained legal interest thereon. During that time, also, the state has been deprived of the use of the money which it was entitled to have in its treasury. If, as held in this opinion, there was an implied agreement by the company when it obtained a license and did business thereunder, that it would perform all the requirements of the law, including the payment of the fees required at the proper time, no reason appears why the unpaid fees should not bear interest."

I am, therefore of the opinion that you are authorized to collect from the Lime Ridge Telephone Company interest at the legal rate from March 1, 1913.
OPINIONS RELATING TO REQUISITIONS

Requisitions—Extradition from Canada—Abandonment of wife is not an extraditable offense under the treaty with Great Britain.

Procedure for extradition from a foreign country is very similar to interstate extradition proceedings.

L. Olson Ellis,
District Attorney,
Black River Falls, Wis.

In your letter of the 5th you state that rule No. 17, on requisitions, as given in the Biennial Report and Opinions of Attorney General 1912, reads as follows:

"No requisition will be granted for a fugitive who has taken refuge in the British provinces."

You ask how a fugitive can be brought back from Canada. Also, where a warrant has been issued for a party for wife abandonment and he has fled to Canada, how can he be brought back. You ask me to explain what steps are to be taken in the matter or in any criminal case where the party has taken refuge in Canada.

The rule to which you refer is one adopted by the executive department with reference to the application for requisitions several years ago. This rule has never been abrogated, but it is not strictly observed.

The matter of extradition of fugitives from justice who have taken refuge in a foreign country is governed wholly by the treaties between the United States and such country. Such treaties name the specific offenses for which extradition will be granted. In the case of the treaties between this country and Great Britain, applicable to the case of fugitives who have taken refuge in Canada, abandonment of wife or children is not named as one of the offenses for which extra-
dition will lie. For that reason there is nothing that can be done unless the party is charged with some other offense than that of abandonment.

The proceedings to be had in the case of extradition from foreign countries is very similar to that of procuring a requisition for the return of fugitives from another state. The application is first made to the governor of this state and then he in turn makes application to the secretary of state at Washington. As the fugitive to whom you refer is not charged with an extraditable offense, I will not attempt at this time to define the necessary procedure. Whenever you desire the return of a fugitive charged with an offense for which extradition will lie, I shall be very glad to cooperate with you and give you full information as to just what is required.

Requisitions—Extradition—Burglary—Larceny—Under the treaty of July 12, 1889, with Great Britain, both burglary and larceny are extraditable offenses.

B. M. Jostad,
State Board of Control.

In response to your telephonic request, I have looked up the question as to whether or not the offense of burglary is extraditable under the treaties of the United States with Great Britain. Under the treaty of July 12, 1889, found in 26 U. S. Stats. p. 1508, both burglary and larceny are made extraditable. I understand these offenses to be the common law offenses of burglary and larceny.

Burglary at common law is defined as

"The breaking and entering in the night of another's dwelling house with intent to commit a felony therein."
2 Bishop on Criminal Law, 7th Ed., sec. 90.

Larceny at common law is

"The taking and removing by trespass of personal property which the trespasser knows to belong either generally or specially to another with the felonious intent to deprive such owner of his ownership therein; and, perhaps, it should be added, for the sake of some advantage to the trespasser,—a proposition upon which the decisions are not harmonious."
Requisitions—Abandonment—1. Requisition papers may be issued for a putative father either before or after birth of illegitimate child for abandonment.
2. An illegitimate child may be born in lawful wedlock.

DAVID BOUGE,  
District Attorney,  
Portage, Wis.

In your letter of the 5th inst. you submit the following three questions which I will answer in their regular order:

"Can requisition papers be secured requiring the return to this state of a putative father either before or after the birth of his illegitimate child either on the ground of abandonment or fornication or any other ground?"

This question was under consideration by this department in an official opinion rendered to E. F. Hensel, district attorney of Trempealeau County, under date of July 29, 1913, in which an affirmative answer was given to the question.

"Would it make any difference if at the time of the illegal relations, the man promised marriage provided serious results followed; i.e., provided conception followed?"

This question must be answered in the negative as such promise would not make any material difference in the relation of the parties.

"If in the above case, the mother married an innocent third party who upon finding the facts, applies for divorce, would this marriage and the birth of the child in wedlock, release the real father from liability?"

This question must be answered in the negative, as the child in question would, nevertheless, be an illegitimate child or a bastard. In Vol. III Am. & Eng. Ency. Law (2nd ed.), we find the following definition of a bastard:

"A bastard at common law, is not only begotten, but born out of lawful matrimony, or not within a competent time after its determination, or who is begotten in lawful matrimony when procreation by the husband is for any cause impossible."

In Anderson's Law Dictionary practically the same definition is given and it is stated that the test is whether
RELATING TO REQUISITIONS.

the husband of the woman who gives birth to the child is
the father.

See also Bouvier's Law Dictionary to the same effect.
The child in question would be an illegitimate child in
contemplation of our abandonment statute, sec. 4587c,
subsec. 1.

Requisitions — Criminal Law — Escaped Prisoners — One
who escapes from prison before the expiration of his sentence
is a person charged with crime within the meaning of sec.
5278 R. S. U. S.

A prisoner who violates his parole and goes into another
state is a fugitive from justice.

A certified copy of an information satisfies the requirements
of sec. 5278 R. S. U. S. that there be produced "a copy of an
indictment found or an affidavit made before a magistrate
charging the accused," etc.

October 28, 1914.

FRANCIS E. MCGOVERN,
Governor.

I have examined and return herewith the requisition of
Hon. Woodbridge N. Ferris, Governor of the State of Minne-
sota, for the apprehension and return to that state of one
John McGarvey. This requisition is accompanied by a cer-
tified copy of an information and warrant charging the de-
fendant with burglary. There is no copy of an indictment and
no affidavit made before a magistrate charging the offense.
It further appears from the accompanying papers that said
McGarvey was convicted and sentenced to the Michigan
State Prison, and that he was paroled therefrom, and that
prior to the expiration of his sentence he violated the terms of
said parole.

Sec. 5278, R. S. U. S. provides:

"Whenever the executive authority of any state or territ-
ory 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 com-
mitted treason, felony or other crime."

53—A. G.
It shall be the duty of the executive authority to which such documents are presented to cause the accused to be arrested and delivered up to the demanding authority.

I believe there can be no question that one who escapes from prison before the expiration of his sentence is still charged with crime within the meaning of this statute. *Drinkall v. Spiegel*, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486; *In re Hope*, 10 N. Y. Supp. 28.

It is also settled that a prisoner who violates his parole, and goes into another state, is a fugitive from justice. *Drinkall v. Spiegel*, supra.

The courts of the different states do not agree as to whether a certified copy of an information satisfies the demand of the statute that there be produced a copy of an indictment found or an affidavit made before a magistrate. That question, however, is not an open one in this state. Here it has been held that such copy is sufficient. *In re Hooper*, 52 Wis. 699.

I therefore approve the form of such requisition.
OPINIONS RELATING TO RESTAURANTS

Restaurants—License—A saloon keeper who sells canned goods to be eaten in his saloon is not required to take out a restaurant license.

January 7, 1914.

CHARLES E. BRIERE,
District Attorney,
Grand Rapids, Wis.

You submit the question whether a saloon keeper who sells canned goods such as sardines and salmon to be eaten by the purchaser in the saloon, requires a license. You state that the custom is that the saloon keeper furnishes the canned goods, plate, knife and fork, salt and pepper and crackers, and that the same is eaten by the customer in the saloon.

Under ch. 648, laws of 1913, every person, firm or corporation engaged in the business of conducting a restaurant, is required to take out a license and the term "restaurant" is defined as

"embracing all buildings or other structures kept, used and maintained as places wherein meals and lunches are served without sleeping accommodations for transient guests, together with all buildings or places used in connection therewith."

I do not think that a saloon keeper can be said to be engaged in the business of conducting a restaurant under this definition simply because he charges for the canned goods when he sells them to his customers, although he has facilities which show that they are intended to be eaten in the saloon.
I do not think it can be said that such a saloon keeper is serving meals and lunches as contemplated in the provisions of this statute. It must be borne in mind that this statute was not enacted to regulate the liquor traffic. The title speaks of it as an act relating to regulation of hotels and restaurants in the state. Under the facts stated by you it is evident that the sale of canned goods and the furnishing of crackers, pepper and salt free of charge is simply an incident to the main business of the saloon and that it does not constitute a substantial part of the business. I am, therefore, of the opinion that such a saloon keeper is not required to take out a restaurant license.

Restaurants—Transfer of Licenses—A restaurant license cannot be transferred to a purchaser of the premises. Such purchaser must secure a new license and pay the necessary fee.

January 19, 1914.

C. A. Harper,
State Health Officer.

In your letter of Jan. 16th you ask for my interpretation of par. 2, sec. 1408m-10, Stats., in so far as this section relates to the transfer of a hotel or restaurant license. You state that a party at Wautoma states that he recently rented certain property for restaurant purposes for which a license was obtained from the state board of health; that the party who obtained the license has now vacated the premises and the owner of the property who wishes to lease these premises again for restaurant purposes wishes to know if a new restaurant permit and an additional fee of two dollars will be required.

Said subsec. 2, sec. 1408m-10, contains the provision that "no permit shall be transferable."

Subsec. 4 of said section provides as follows:

"The board of health shall, upon request therefor, furnish to any person, firm or corporation desiring to conduct a hotel or restaurant, the necessary application blank for a permit which the applicant shall fill in, stating the full name and
address of the owner or lessee of the building, or both, the lessee and manager of such hotel or restaurant, together with a full description of the building and property to be used or proposed to be used for such business and stating the location of the same and such other information as the state board of health may require. Such application, upon its return to the state board of health, shall be accompanied by the permit fee herein required."

It is here expressly provided that the application when made shall be accompanied by the permit fee. This provision, together with the provision of subsec. 2 that the permit is not transferable, seems to me to lead to the inevitable conclusion that it was the intention of the lawmakers that the new applicant is required to pay the $2 fee as all other applicants are required to do. I am, therefore, of the opinion that the permit cannot be transferred to the new tenant and that no permit can be granted to him without the permit fee.

Restaurants—A person who conducts a boarding house for permanent guests and occasionally gives a supper to persons attending a dance is not running a restaurant and is not required to take out a permit.

C. A. Harper,
State Health Officer.

In your favor of Jan. 17th you inquire whether a permit is required under the provisions of ch. 648, laws of 1913, in cases where a party who conducts a small boarding house or other establishment serves meals for dances and other public gatherings. You state that you have an application from an individual who states that he conducts a boarding house and serves supper for dances about every six weeks, or oftener, as the occasion arises. You inquire whether in contemplation of ch. 648 it is necessary for this party to have a permit to run a restaurant.

A restaurant is defined in ch. 648 as follows:

"The term restaurant as used herein shall mean and embrace all buildings or other structures kept, used and maintained as places wherein meals and lunches are served without sleeping accommodations for transient guests, to-
gether with all buildings and places used in connection therewith."

Subsec. 2 of said chapter provides:

"On or before January 1, 1914, and each year thereafter, every person, firm or corporation now engaged in the business of conducting a hotel or restaurant or both, and every person, firm or corporation who shall hereafter engage in conducting such business shall procure a permit from the state board of health for each hotel or restaurant so conducted or proposed to be conducted," etc. * * *

The state board of health is also empowered to make rules and regulations concerning the carrying out of the provisions of ch. 648 and said board has powers to appoint assistants and inspectors and to investigate, ascertain, declare and prescribe what alterations, improvements or other means or methods are reasonably necessary for the protection of the public health and safety in hotels and restaurants. The title to ch. 648 says that it is an act relating to the regulation of hotels and restaurants in the state and providing penalties and making appropriations.

It must be borne in mind in construing this law that there is no prohibition against the serving of a meal for compensation by any person, firm or corporation, but that the requirement is that a license must be secured for the purpose of engaging in the business of conducting a hotel or restaurant. A person who is running a boarding house and has permanent boarders would not be included in the definition as the persons to whom he serves his meals are not transient guests. It is also apparent that a person, firm or corporation may lawfully charge for serving one meal to a person or persons and still not be within the purview of this statute, as the building in which such meals would be served would not be imbued with the attributes of a restaurant. It is a well known rule of law that to constitute a disorderly house an habitual violation of law must be permitted by its occupant. Brown v. State, 7 Atl. 340, 341, 49 N. J. L. (20 Vroom), 61.

And the matter of repetition or frequency of the acts of disorder is an essential element in the acts to constitute the offense of keeping a disorderly house.
RELATING TO RESTAURANTS.

Commonwealth vs. Bessler, 30 S. W. 1012, 1013, 97 Ky. 498; Overman vs. State, 88 Ind. 6, 8, citing State vs. Reckards, 21 Minn. 47; 9 Am. & Eng. Ency. of Law, 519, and cases cited under Note 4.

I do not believe that it can be said that a person, firm or corporation by giving a single meal to a person or a number of persons for a compensation, or by agreeing to serve the supper for a party at a specified time or times, is engaged in the business of conducting a restaurant or that the building in which such meals were given would thereby be kept, used and maintained as a place wherein meals and lunches are served within contemplation of this law. It often happens that certain individuals or churches or clubs give meals on specified occasions and I do not believe it was the intention of the lawmakers to require a permit to be taken for such service. Had this been the intention a prohibition would have been found in this statute against serving meals for pay, similar to the provision in the liquor law prohibiting the sale of intoxicating liquors instead of the running of a saloon so that a single sale is a violation of the law. Here it is necessary under this law to repeat the act in such a way that it can be said that the business of conducting a restaurant is carried on and that the building is kept, used and maintained as a place wherein meals are served for transient guests.

I am, therefore, of the opinion that the party in question is not required to take out a license.

Restaurants—License—1. A restaurant license is not transferable from one place to another.
2. A restaurant at a fair must be licensed.
3. Restaurants at fairs run by churches must also be licensed.
4. Portable hotels at fairs must be licensed.
5. License is given to the person.

February 4, 1914.

C. A. HARPER,
State Health Officer.

In your favor of Jan. 29th you have submitted to me a number of questions arising under ch. 648, laws of 1913,
relating to the regulation of hotels and restaurants for my official opinion. These I will take up in their regular order:

"1. Where a person or firm have had a permit issued to them, to conduct a hotel or restaurant in a certain building, or location, would a new license be required if the same party, or parties, moved their entire business to another location, and continued doing business under the same name or firm name, in the new location?"

Subsec. 2, sec. 1408m–10 provides that

"* * * every person, firm or corporation who shall hereafter engage in conducting such business, shall procure a permit from the state board of health for each hotel or restaurant so conducted or proposed to be conducted; provided that one permit shall be sufficient for each combined hotel and restaurant where both are conducted in the same building and under the same management. Each permit shall expire on the 31st day of Dec. next following the issuance. No hotel or restaurant shall be advertised or held out to the public as such or be maintained or conducted in this state, after the taking effect of this act, without a permit therefor; and no permit shall be transferable."

Subsec. 4 of said section provides as follows:

"4. The board of health shall, upon request therefor, furnish to any person, firm or corporation desiring to conduct a hotel or restaurant, the necessary application blank for a permit which the applicant shall fill in, stating the full name and address of the owner or lessee of the building, or both, the lessee and manager of such hotel or restaurant, together with a full description of the building and property to be used or proposed to be used for such business and stating the location of the same and such other information as the state board of health may require. Such application, upon its return to the state board of health, shall be accompanied by the permit fee herein required."

While the provision in the above quoted statute, that no permit shall be transferable, may be construed as applying only to a transfer from one person to another and as not including a transfer from one place to another, still I am of the opinion, in view of the fact that the statute provides that the application must contain the full name and address of the owner or lessee of the building or both, the lessee and manager of such hotel or restaurant, together with a full description of the building and property to be used or proposed to be used for such business and stating the location
of the same, that this law should be construed as not permitting a transfer of the permit from one place to another. There is no express provision in this statute authorizing the transfer from one place to another and the application for a permit under its provision must be accompanied by the permit fee.

I am of the opinion that a party who changes his location for his hotel or restaurant is, under the provisions of this statute, required to make application for a new license and secure the same before he can continue doing business as a hotel or restaurant keeper.

"2. At state and county fairs. Is it necessary for those who follow the business of supplying food and drink to visitors and exhibitors at the above named fairs, to have a license, and if so, is it necessary for them to obtain a new license at each and every location, in each town or city visited by them for the purpose of plying their trade?"

This question must be answered in the affirmative. To conduct a restaurant at a fair for four or five days is certainly within contemplation of this statute and in view of the answer given to the first question herein it naturally follows that a new license must be secured for each fair.

"3. At state and county fairs. Is it necessary for churches and local organizations who supply meals to the public, visitors, and exhibitors, at either state or county fair to obtain a license?"

There is no exception in the statutes authorizing churches and local organizations to conduct a restaurant for a short period of time. I am, therefore, constrained to hold that they are included within the contemplation of this law and this question must, therefore, be answered in the affirmative.

"4. At state and county fairs. Some companies and private individuals have of late years erected portable houses on the grounds at fairs, in order that the visitors to these fairs may sleep at the fair grounds, and they supply all the accommodations of a hotel, taking regular rates for the accommodation. Will these people require licenses, and if so, one for each house, or a general license covering their entire allotment of houses?"

Subsec. 1, sec. 1408n–10 provides as follows:

"The term 'hotel' shall mean and embrace all buildings or other structures kept, used and maintained as places wherein
sleeping accommodations are offered for pay to transient guests with or without meals in which five or more rooms are used for the accommodation of such transient guests, and shall also mean and embrace all buildings or places used in connection therewith."

I believe that a license must be secured under the facts stated in this question. If any portable house has less than five rooms it is, of course, not necessary to secure a separate license for such building, but I believe that every building which has at least five rooms should have a separate license. I also believe that if none of the buildings have five rooms or more, but that all the buildings managed and run under one establishment, if they contain more than five rooms, one license should be taken out for the business so conducted. I believe it is necessary to so construe the law in order to give effect to the last clause in the above quoted definition of a hotel where it is said that the term "Hotel shall also mean and embrace all buildings and places used in connection therewith."

"5. Is the license to be considered as issued to the man, or for the building he occupies?"

The license is issued to the man for a certain designated building.

Hotel and Restaurant Licenses—Board of Health—Sec. 1408m–10 is not mandatory upon the board of health to grant hotel and restaurant permits upon receipt of application and fee, but the board has a reasonable discretion to refuse a license for cause.

November 25, 1914.

C. A. Harper,
State Health Officer.

I have your request for opinion under date of the 17th inst., in which you state as follows:

"Ch. 648, laws of 1913, sec. 1408m–10, gives this board power to regulate the sanitary condition of hotels and restaurants.

"On or about Jan. 1st, 1914, permits were issued to hotels and restaurants without previously inspecting the same. Inspections have since been made urging the hotels and restau-
rants to come up to a certain standard. In a few instances we
find hotels and restaurants failing to meet the standard pre-
scribed, possibly cleaning up at intervals of inspection, and
then reverting to their old insanitary methods.

"The question is: Whether this board is empowered,
under this law, to refuse a permit for the year of 1915 to
these few hotels and restaurants that have failed to comply
with the orders of the board."

Subsec. 2 of sec. 1408m–10, Stats., requires that on or be-
fore Jan. 1, 1914, and each year thereafter every person en-
gaged in conducting a hotel or restaurant shall "procure a
permit from the state board of health." It further provides
that each permit shall expire on the 31st day of December
next following the issuance, and "no hotel or restaurant shall
be advertised or held out to the public as such, or be main-
tained or conducted in this state, after the taking effect of
this act, without a permit therefor; and no permit shall be
transferable."

Subsection 3 of this statute prescribes the amount of the
annual permit or license fee. Subsec. 4 provides that the
board of health shall, upon request, furnish "the necessary
application blank for a permit which the applicant shall fill
in" with certain specified information, "and such other in-
formation as the state board of health may require." This
subsection further requires that the fee prescribed by law
shall accompany the application.

These are all the provisions of the statute relating to the
issuance of licenses or permits. Other provisions of the stat-
ute empower the board of health to issue orders and make
rules and regulations with reference to the conduct of hotels
and restaurants and prescribe penalties for the violation of
the statute or of the lawful orders of the board of health by
restaurant or hotel keepers.

From this statute it is clear that there is no express man-
datory duty upon the state board of health to issue licenses
or permits under this section. Authority to do so is clearly
implied. Having regard, also, to fundamental principles of
law, by virtue of which the right to conduct a restaurant
or hotel subject to and in accordance with valid police regula-
tions is a property right, it would seem to follow that it is
the duty of the board of health to issue such permit in a
proper case and that, upon their refusing to do so, a party
injured by such refusal may have equitable relief to restrain the board from interfering with him in the conduct of his business, or a writ of mandamus to compel them to issue a permit.

The statute, however, is not mandatory in the sense that, upon the mere filing of an application accompanied by the statutory fee, the board is expressly required to issue a permit, nor is the statute in my opinion mandatory in effect or by implication.

In such a situation the rule of law is stated broadly as follows:

"The power vested in the officer or public body to grant licenses, unless mandatory in terms, carries with it the right to exercise a reasonable discretion; but this discretion is to be exercised reasonably, not arbitrarily." 25 Cyc. 622.

Upon this principle, I am of the opinion that the board of health has a reasonable discretion to refuse to issue a hotel or restaurant permit for sufficient cause. What is sufficient cause in a given case will be determined by reference to the policy of the state in respect to the conduct of such business, as appears from the statute. It is reasonably clear that the legislature intended by this statute and through the permit system thereby established to regulate the conduct of the business in question.

True, the statute provides penalties for violations of its provisions or of the lawful orders of the board of health, but it does not necessarily follow from this that prosecution for the statutory penalty is the only means which the legislature intended should be invoked under this statute to secure its enforcement in the interest of "public health and safety." Having regard to the purpose of the law, as indicated by its provisions, it does not seem reasonable to suppose that the legislature contemplated that persons who persistently violate or systematically evade the requirements of the statute or the lawful orders of the board of health should receive renewal permits.

It probably should be said, however, in this connection, that only persons who by their past conduct have clearly shown that they are unfit persons to be permitted to conduct a hotel or restaurant business, or whose premises are,—
having regard to the public health and safety,—unfit for such purposes, would come fairly within this class.

It is proper to add further that a permit should not be refused by the board without notice to the applicant of the ground upon which the issuance of the license to him is questioned and reasonable opportunity granted to him to appear before the board and to hear the evidence against him and to produce evidence in his own behalf and have it considered by the board.
OPINIONS RELATING TO STATE ATHLETIC COMMISSION AND BOXING

Boxing—State Athletic Commission—The State Athletic commission has no power to make rules as to the conduct of boxing contests, nor to refuse a license to a club that has complied with all the statutory conditions.

Jan. 10, 1914.

WALTER H. LIGINGER,
Chairman State Athletic Commission,
Milwaukee, Wis.

In your favor of Jan. 6th you request my opinion as to the power of your commission to adopt and enforce rules relative to the conduct of boxing contests.

Bill No. 206, A, being a bill "To create sec. 1636-202, Stats., relating to a state athletic commission" as originally introduced in the assembly, provided that the commission "may make such rules and regulations for the administration of their office, not inconsistent with any provision in this section, as they may deem expedient" (subd. (a), subsec. 2) and provided that "The commission may, upon sufficient cause, revoke the license of any club or organization after notice of the charges or complaints preferred against such club or organization" etc. (subsec. 5).

Substitute amendment No. 1 A, which, with minor changes, was enacted as ch. 632, laws of 1913, created secs. 1636-241 and 172-124. They omit both the above quoted provisions and give no express power to make rules and regulations so that if such power exists it must be because implied from the powers expressly given. The powers expressly granted are:

1. To "maintain a general office for the transaction of its business" and to "hold meetings at any place other than the place in which the general office is located" etc.
2. To “appoint and for cause remove a secretary of the commission, whose duty it shall be” to keep a record of the proceedings of the commission; to preserve all the books, documents and papers of the commission; to prepare for service such notices and other papers as the commission may require; and to perform such other duties as the commission may prescribe. Such secretary also has power to issue subpoenas for the attendance of witnesses before the commission; to administer oaths in all matters pertaining to the duties of his office or connected with the administration of the affairs of the commission; and to examine the books and records of a club which has failed to make report of any contest and examine under oath its officers, etc., and determine the amount of its gross receipts and the amount of taxes due.

3. To make a biennial report to the legislature.

4. To license clubs to hold exhibitions.

5. To prescribe matters to be contained in the written reports of contests furnished by clubs.

6. To appoint official representatives designated as inspectors, one of whom “shall be present at all exhibitions and matches and see that the rules are strictly observed, and also be present at the counting up of the gross receipts” etc.

7. To grant licenses to competent referees and to revoke any license so granted.

8. To cancel the license of any club which shall have forfeited the same by holding a sham or fake boxing match.

9. To pay all license fees or taxes into the state treasury.

From this enumeration it is seen that no general power to supervise or regulate boxing contests is given to your commission nor any general powers of any kind. It is a rule of construction of legislative grants of power to ministerial officers that only such powers are to be deemed granted as are expressly granted or necessarily implied from those so granted. I find nothing in sec. 1636–241 that either expressly grants or necessarily implies the existence of power in your commission to make rules and regulations as to the conduct of boxing contests. The requirement that the inspectors shall “see that the rules are strictly observed” quite plainly refers to the statutory rules contained in the subsection immediately following, which statutory rules prohibit the holding of matches on Sunday, the selling of liquor in the
building where matches are held, matches of more than ten rounds duration, rounds longer than three minutes with one minute intermission between rounds, the use of gloves of less than a prescribed minimum weight, participation in contests by minors under eighteen years of age, betting on contests, holding and hitting in contests, unsportsmanlike conduct, the rendering of any decision, the attendance of persons under sixteen years of age, etc.

Had there been a legislative intent to authorize the commission to make further or additional rules it seems that such power would not have been left to inference and implication. Especially is this true in view of the express grant of power to make such rules contained in the bill as originally introduced in the legislature and the omission therefrom in the law as enacted.

I am therefore of the opinion that your commission may not make and enforce any other rules and regulations than those prescribed by the law itself.

You also ask whether the commission has discretion to refuse a license to a club that has fully complied with all the statutory requirements.

Subd. (a), subsec. 2, sec. 1636–241 provides that no boxing exhibition shall be conducted by any club except by license issued to such club by the state athletic commission; that no club shall be entitled to a license unless incorporated under the laws of Wisconsin; that the membership of such club shall be limited to residents of this state; that the application shall be in writing addressed to the commission and verified by some officer of the club, be accompanied by the annual fee and show that the club has a bona fide lease for at least one year of the building, for athletic purposes, wherein the contests are to be held; and that before such license is granted the club must file a bond of two thousand dollars conditioned for the payment of the taxes imposed. Since no power is given your commission to impose additional conditions it must follow that where all the statutory conditions are complied with your commission has no discretion to refuse a license.

Were authority granted to revoke licenses in discretion it might be argued that you had power to refuse a license where the circumstances were such as to justify a revocation thereof, but it seems that the commission has no discretionary
power to revoke licenses. Subsec. 11, sec. 1636–241, provides that any club which shall conduct a sham or fake boxing match “shall thereby forfeit its license in accordance with the provisions of this act, which shall thereupon be by the commission cancelled and declared void.” Subsec. 13 provides that a club delinquent for a period of twenty days after notice in the payment of its taxes “shall ipso facto forfeit its license,” etc. In connection with the fact that the bill as originally introduced expressly authorized the commission to revoke the license of any club “upon sufficient cause” it seems very clear that no discretion is given to your commission as to the granting or revoking of licenses, and I am therefore constrained to hold that a license may not legally be withheld from a club that makes application therefor in full compliance with the statutory requirement.

Boxing Exhibitions—Organizations conducting boxing exhibitions under the auspices of the Amateur Athletic Union or the Young Men’s Christian Association may be granted a license to conduct such exhibition without the payment of the annual license fee prescribed in subsec. 2, sec. 1636–241. Subsec. 4, sec. 1636-241 construed.

January 27, 1914.

HENRY JOHNSON,
State Treasurer.

I have your inquiry of the 26th inst. in which you ask to be advised whether a boxing or sparring exhibition can be conducted in this state by any club or organization without a license and what effect, if any, do the provisions of sec. 85, ch. 773, laws of 1913, have upon subsec. 4, sec. 1636-241, Stats., as amended in ch. 632, laws of 1913.

As originally passed, ch. 632, laws of 1913, establishing the boxing commission, did not affirmatively and expressly require a license to be obtained by a club or organization for the conduct of a boxing exhibition. This defect in the statute was corrected by section 85 of chapter 773 of the laws of 1913, the revisor’s Curative Act. By that amendment subd. (b), subsec. 2, sec. 1636-241, as created by ch. 632, was re-
numbered as subsec. 2a of said section and the following words inserted in the beginning of the paragraph:

"No boxing or sparring exhibition shall be conducted by any club or organization except by license issued to such club or organization by the state athletic commission of Wisconsin; and no club or organization shall be entitled to receive a state license unless it has been incorporated under the laws of the state of Wisconsin, and provided, further, that the membership of such club shall be limited to residents of this state."

So far as requiring a license is concerned, it is manifest from the provisions of ch. 632, prior to this amendment, that such was the legislative purpose. The only effect of the amendment in this respect, i.e., so far as requiring a license is concerned, was expressly to declare that purpose, but not otherwise to change the provisions of the act.

In an opinion rendered Nov. 17, 1913, by this department to Walter H. Liginger, chairman of the Wisconsin athletic commission, it was held that no boxing or sparring exhibition, whether by amateurs or professionals, whether admission fees were charged or not, and whether open to the general public or only to members of the private club, could lawfully be conducted without a license obtained from the state commission.

Subsec. 4, sec. 1636-241, provides:

"Whenever such contests are held under the auspices of the Amateur Athletic Union, or the Young Men’s Christian Association, the license fee necessary under this act shall not be required of said organization."

The effect of this provision is simply to exempt a club conducting boxing exhibitions under the auspices of either of the organizations mentioned from the requirement to pay the annual license fee, provided for in subsec. 2a of the act. The exemption provided for in subsec. 4 of the act is express and positive, but it is also limited in its terms to the subject of the license fee and does not exempt organizations conducting boxing exhibitions under the auspices of either of the named organizations from the requirements of the statute in any other respect.

The amendment of par. (2a) of subsec. 2 of the acts subsequent to the passage of the original act containing subsection 4, does not, in my opinion, in any way affect the ex-
emption provided for in subsec. 4 which should be given effect according to its terms. Upon its being made to appear to the satisfaction of the boxing commission that it is the purpose of an organization applying for a license to conduct boxing exhibitions only under the auspices of the Amateur Athletic Union or the Young Men's Christian Association, a license should be issued by the commission to such organization, upon its complying with the law in other respects, to conduct boxing exhibitions under the auspices of either of the two associations mentioned, without the payment by the applicant of the annual license fee.

Boxing—Boxing exhibitions may be licensed to be conducted under sec. 1636-241 only in a “building.” A baseball park is not a “building” within the meaning of this statute.

April 28, 1914.

WALTER H. LIGINGER, Chairman,
State Athletic Commission,
Milwaukee, Wis.

I have your request for opinion under date of the 21st inst., in which you refer to the provisions of the athletic commission act, sec. 1636-241, Stats. 1913, and state that you anticipate that the commission will receive several applications for licenses to hold boxing exhibitions in baseball parks and motordromes. You ask to be advised whether the law permits the licensing of boxing contests to be held in the open in front of a grandstand or bleachers, provided that the grounds wherein such exhibitions are held are fenced in with boards to prevent any one from witnessing the exhibitions except as provided in the law.

The athletic commission act provides, in subsec. 2a that applications for licenses “must show that the club or organization has a bona fide lease for one year of the building, for athletic purposes, wherein such contests are to be held.”

Subsec. 7 provides: “No intoxicating liquor shall be given away, sold or offered for sale in any building or part thereof, in which boxing or sparring exhibitions are being conducted.”

Subd. (d), subsec. 8 provides: “No betting or wagering at any boxing or sparring contest shall be permitted by any club
or organization before, after, or during any such contest, in the building where such contest is held.”

Subsec. 9 provides: “No person shall be admitted to a boxing or sparring exhibition under the age of sixteen years, unless accompanied by his parent or guardian.”

Subsec. 14 of the act declares that any person who violates any of the provisions of the act for which a penalty is not expressly provided is guilty of a misdemeanor.

It is manifest from these several provisions of the statute that the legislature contemplated that no boxing or sparring contest should be licensed or held except in a “building.” A club applying for a license is required to show upon its application, presumably as an earnest of its good faith and responsibility and presumably, also, to enable the commission to know definitely where contests are to be held, a bona fide lease for one year, for athletic purposes, of the building where-in the contests are to be held by such club.

It is further provided that no intoxicants may be sold in such building or in any part thereof, and no betting may be permitted either before, after or during a contest “in the building where such contest is held” and the club is made directly responsible for the enforcement of these requirements. It is also, by clear implication, responsible for the exclusion of any spectator under sixteen years of age, unless accompanied by parent or guardian, and a breach of this responsibility by the club is made criminal under the statute. Consideration of these provisions make it very clear that the legislature, in enacting this law, designed to place very positive restrictions about the conduct of such exhibitions. It is the duty of the athletic commission to administer the law in harmony with the legislative intent in that respect.

From a reading of the statute this much is clear—that the legislature intended to permit a boxing contest to be held only in a “building.” The question remains, “What constitutes a ‘building’ within the meaning of that term, as used in this act?” Under criminal laws relating to burglary and arson, and in civil cases under the mechanics’ lien law and in cases relating to fire insurance, the courts have been often called upon to define the meaning of the term “building” in the law. Webster’s definition of this term is:

“A fabric or edifice, framed or constructed, designed to stand more or less permanently, and covering a space of
land for use as a dwelling, storehouse, factory, shelter for beasts, or some other useful purpose. Building in this sense does not include a mere wall fence, monument, boarding, or similar structure, although designed for permanent use where it stands. Nor a steamboat, ship or other vessel for navigation.”

This definition, in substance, has been almost universally adopted by the courts. The idea that a building is a place suitable for habitation and shelter is found generally expressed in some form in the decisions.

“A building is defined to be a structure in the nature of a house built where it is to stand; as commonly understood, a house for business, residence, or public use, or for shelter of animals or storage of goods, and very generally, though not always, the idea of a habitation for the permanent use of man, or an erection connected with his permanent use, is implied in the word ‘building.’ A building is a part of the land. One would not call a tent a building. In its broadest sense it can mean only an erection intended for the use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use, constituting an edifice, such as a house, a store, a church, or a shed. Rouse v. Catskill & N. Y. Steamboat Co., 13 N. Y. Supp: 126, 127, 35 N. Y. St. Rep. 491 (citing Truesdell v. Gay, 79 Mass. (13 Gray) 311.) I Words & Phrases, 889.

A building is a structure enclosing a space within walls and usually covered with a roof.


A fence is not a building under the mechanics’ lien law.


In some cases, involving the construction of contracts or deeds in which the word building is used and where the construction of the instrument depends upon the intent and purpose of the parties, a fence has been held to constitute a building. Examples are:

Wright v. Evans, 2 Abb. Prac. (N. S.) 308.

(A covenant, in effect, not to erect buildings which will obstruct light and air held to include a fence).


(A covenant in a grant giving the grantee the right to cut timber for building material includes the right to cut timber for fences).
Upon the foregoing, it is clear that the presumption is that the meaning of the word "building," as used in the athletic commission act, is a roofed enclosure in accordance with the general and usual definition of that term. It is clear further, from the provisions of the act above referred to, that this meaning should be attached to the word "building," as used in this act in the interest of its effective enforcement.

Manifestly, if the word "building" be construed to permit of the conduct of boxing contests in an extended area, such as a baseball park enclosed only by a high-board fence and containing probably several separate structures, such as grand stand, bleachers, sheds, etc., the difficulty of enforcing the provisions of the act designed to prevent the selling or giving away of intoxicants and wagering at the place where contests are held, and designed to prevent such contests being witnessed by persons under sixteen years of age, would be rendered very difficult, if not indeed quite impossible of enforcement. A construction inconsistent with the express requirements of the act is clearly not permissible.

Whether these considerations would apply likewise in the case of a motordrome, I am not able to state, as you do not describe in your inquiry the physical characteristics of such a structure, but I would say that, if those characteristics are such as to render difficult or impossible the strict enforcement of the provisions of the athletic commission act upon the occasion of the holding of any such contest in such a place, the act would be construed as not permitting boxing contests to be held in a motordrome.

I would add further that, in my opinion, the term "building," as used in this act, would probably be given the usual definition requiring the place wherein contests are held to be enclosed with walls and a roof.
OPINIONS RELATING TO TAXATION

Taxation—Public Lands—The capitol heating plant is exempt from a special assessment for paving an adjacent street, under subsecs. 1 and 36, sec. 1038, Stats.

John S. Donald,
Secretary of State.

In your favor of Jan. 29th you enclose claim of the city of Madison for a special assessment assessed against the capitol heating plant for paving the street adjacent thereto and you request my opinion as to whether you have authority to audit such claim.

Sec. 1038, Stats., provides in part:

"The property in this section described is exempt from taxation, to wit:

"(1) That owned exclusively by the United States or by this state; * * * .
* * * * * * * * * * * * * * *

"(36) No real estate belonging to or held in trust for this state, exempt from taxation by the laws of this state, shall be subject to special taxes or assessments for local improvements, notwithstanding any different or inconsistent provision in any city charter."

The facts stated in your letter seem to bring the case within the above language and I am therefore of the opinion that you have no authority to audit the claim in question.
Taxation—Public Officers—Village treasurers may require a taxpayer to pay in cash the taxes outside of village tax, but the village tax may be paid with village orders.

January 20, 1914.

ALEXANDER WILEY,
District Attorney,
Chippewa Falls, Wis.

In your letter of Jan. 19th you ask my interpretation as to the provisions of sec. 1091. You state your question as follows:

“If an individual comes in to pay his tax, can the treasurer receive from this individual a village order for the actual amount of this individual's village tax, and require him to pay cash for the balance of his taxes? (county, school and state portion).”

You state that if the treasurer must receive this taxpayer's village order for his entire tax, and the period is over when he is obliged to pay the state tax, and he has not money enough to pay it, and you ask what would then be his remedy.

Said sec. 1091 provides as follows:

“Town, city and village orders shall be receivable for taxes in the town, city or village where issued, and shall be allowed the treasurer on settlement of such taxes; and county orders and jurors’ certificates shall be receivable for taxes in the county where issued, and shall be allowed the treasurer on settlement of county taxes with the county treasurer; but no town, city or village treasurer shall receive orders in payment for taxes to a larger amount than the town, city or village taxes included in his tax roll, exclusive of all taxes for school purposes, nor county orders and jurors’ certificates to a greater amount than the county tax included therein.”

This section was under consideration in the case of Town of Marinette v. The Board of Supervisors of Oconto County, 47 Wis. 216. On p. 220 the court said:

“The learned counsel for the respective parties agree that under the provisions of said sect. 72 the town treasurer is only authorized to receive from each individual taxpayer in county orders, a sum equal to the county taxes charged upon the tax roll against such individual; and that it does not authorize him to receive generally, in payment of taxes, a sum
in county orders equal to the whole amount of county taxes included in the whole tax roll.

"The section thus construed (and we think no other construction can be properly given to it) authorizes the town treasurer to receive, and each taxpayer to pay, in county orders the amount of county taxes charged against him on the tax roll, and negatives the idea that such orders are receivable generally for taxes, and that the amount so receivable is only limited by the amount of county taxes charged upon the roll."

The same construction that is placed on the provision as to county orders must be placed upon the provision as to town orders. It would follow that the town treasurer is only authorized to receive from each individual taxpayer in village orders, a sum equal to the village tax charged against such individual upon the tax roll and that it does not authorize him to receive generally in payment of taxes a sum in village orders equal to the whole amount of village taxes included in the whole tax roll.

I am, therefore, of the opinion that your first question should be answered in the affirmative. This also disposes of your second question.

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**Taxation—Railroads**—Under secs. 51.04 and 51.15, Stats., one-half of the amount of taxes levied against a railroad are due Feb. 15th, even though notice thereof has not been given 30 days prior to that date.

HeNRY JOHNSON,

*State Treasurer.*

In your favor of Feb. 23rd you state that on Jan. 20th you sent a notice to the C. & M. Elec. Ry. Co. to the effect that the tax roll of the property of railroad companies in this state had been duly filed in your office; that the amount of taxes levied against the company in question is $19,423.65, and notifying said company to pay such taxes, one-half on or before Feb. 15th and the balance on or before Aug. 10th, 1914. You state also that on Feb. 17th you wrote the company requesting remittance of the amount due Feb. 15th, 1914, with interest at fifteen per cent per annum from that date, and that on Feb. 21st you received check from the
company for one-half of the taxes levied against it together with letter from their attorneys in which it is said:

"We notice the provision of the statute which says that these taxes shall draw interest at the rate of fifteen per cent per annum commencing thirty days after the notification is sent that the taxes are due. This check should reach you on the 30th day since the notification was received by the company and we therefore assume that it will be in ample time to avoid the payment of interest."

You request my opinion as to whether, under these facts, the state is entitled to any interest from this company, and if so, how much.

Sec. 51.04 provides that:

"All taxes levied pursuant to this chapter * * * which shall not be paid at the time provided by law, shall thereupon become delinquent and bear interest at the rate of fifteen per cent per annum until actually paid."

Sec. 51.15 provides that:

"The tax roll for railroad and telegraph companies shall be completed before the first day of February of each year * * * and shall thereupon forthwith be delivered to the state treasurer, who shall immediately notify, by registered mail, the several companies taxed therein to pay the tax extended thereon to the state treasurer, as follows: In the case of railroad and telegraph companies, one-half of the amount of such tax on or before the 15th day of February * * * ," etc.

From this it seems perfectly clear that thirty days' notice of the amount of the tax is not required to be given but that the first half of such taxes becomes absolutely due and payable on February 15th in each year. I know of no statute that provides that the interest shall commence thirty days after the notification is sent that the taxes are due. There is such a provision as to taxes which are reassessed in sec. 51.16, but that section is, of course, inapplicable here.

I am therefore of the opinion that taxes not paid on February 15th draw interest at the rate of fifteen per cent per annum from that date until the amount of the payment is actually received by you.
Relating to Taxation.

Taxation—Mineral Rights—Under subsec. 1, sec. 1042j, Stats., the reserved mineral rights must be separately assessed, and if assessed to the fee owner, the tax may be compromised (sec. 1210g) or the county board may order part refunded (sec. 1155), and the error may be corrected in the next year’s assessment (sec. 1058).

March 9, 1914.

S. J. Williams,
District Attorney,
Hayward, Wis.

In your favor of Feb. 26th you state that the North Wisconsin Lumber Co. of Hayward sold many thousand acres of land in the town of Lenroot, Sawyer county, and in their deed of conveyance reserved the one-third interest of all the mineral with the right to enter such land and take away such mineral; that the assessor of the town of Lenroot assessed this interest to the fee owners without their consent and you ask my opinion as to the legality of this assessment and whether the county board may, by resolution, cancel the same.

Subsec. 1, sec. 1042j, provides in part that:

"Any and all rights and reservations to enter upon and take away any mineral from any lands within the state of Wisconsin, granted by or reserved in any deed or conveyance of such lands, the title to which right or reservation is vested or may hereafter become vested in any person or corporation other than the owner of the fee to which such right or reservation is attached, is hereby declared to be taxable; and the same shall be separately assessed for taxation, and like proceedings shall be had thereon relating to the levy, collection, and sale thereof for the nonpayment of taxes against said reservation, as are in force from time to time for the levy and collection of taxes on real estate and the sale of the same for the nonpayment thereof."

This section is mandatory and the assessor was evidently in error in assessing the reserved mineral right to the owner of the fee. In such situation it seems that sec. 1210g, Stats., is applicable and that, pursuant to its terms, the county treasurer, county clerk and district attorney may compromise with the fee owner and receive in lieu of the whole taxes levied such part thereof as shall to them seem equitable and for the best interest of the county; or, if the tax has been
paid, the county board may order the portion unjustly assessed to be repaid pursuant to sec. 1155, Stats.; or if the land be sold for nonpayment of taxes the amount paid for the certificate with interest, etc., may be refunded by order of the county board pursuant to sec. 1184, Stats. The error in the assessment may be corrected in next year's assessment pursuant to secs. 1058 and 1059, Stats.

Taxation—Income Tax—Uncollected personal property taxes are charged back to the town assessing the same.
Uncollectible income taxes are losses to the state, county and town in the proportions thereof they would have received.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your favor of March 10th you ask several questions which are answered in another letter sent you herewith, but you also ask what body, the state, county or town must lose personal property and income taxes which neither the town nor county treasurer is able to collect.

Sec. 1128 provides that delinquent personal property taxes shall be charged back to the town, so that it is the town that must ultimately lose such personal property taxes that are uncollectible. As to the income tax, I think that the state, county and town each lose their proportionate share thereof in that it is only "the revenue derived from such income tax" that is to be divided between the state, county and town. Sec. 1087m–23, Stats.

You also ask whether, after the date when the delinquent returns should be made, the town, city or village treasurer may bring suit to recover personal property or income taxes.

Quite plainly the statutes require that the town, city and village treasurers shall make delinquent return of all taxes actually unpaid at the date of such return and the plain inference from sec. 1114 is that pending actions brought by such town, city or village treasurer shall be thereafter carried on by and for the benefit of the county and that no such action shall be brought after the date of such delinquent return.
by the local treasurers but that any actions thereafter brought to collect such taxes shall be brought in the name of the county and for its benefit. See secs. 1107a and 1114, Stats.

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**Taxation—Income Tax—County Treasurer is concluded by the town treasurer's delinquent return.**

An income tax erroneously assessed to the taxpayer in the wrong town is not void, but may be collected as if no such error had been made.

March 11, 1914.

**JAMES KIRWAN,**

*District Attorney,*

Chilton, Wis.

In your favor of March 10th you state that two persons living in the city of Chilton were erroneously assessed by the income tax assessor as living in the town of Charleston; that they now refuse to pay their income tax, and you ask:

1. Whether in case the persons so assessed have personal property out of which the town treasurer could collect the tax the county treasurer is legally bound to accept a delinquent return of such income tax?

It is, of course, the duty of the town treasurer to make every effort to collect personal property taxes. See sec. 1097, 1100 and 1107a, Stats.; but it is clear that the return of the treasurer that he is unable to collect any such tax is conclusive on the county treasurer. *Allen v. Allen,* 114 Wis. 615, 628.

2. Whether, where an income tax has been assessed in the wrong district there is any way to compel payment thereof?

The tax commission has ruled, and I agree in their conclusion, that an error in the assessment of the income tax consisting merely in the statement as to the residence of the person assessed is immaterial and does not avoid the tax. Sec. 1087m–18 would seem to bar such an objection. I think that the tax can be collected by the town treasurer and payment thereof enforced by him in the same manner as a personal property tax, but under the circumstances it will probably be better to have the tax returned delinquent and the collection enforced by the county treasurer.
3. Whether, if not paid this year, such income tax can be levied and collected with next year's tax?

This seems doubtful in view of the fact that the tax is not one omitted but merely one as to which, as stated, there was an immaterial error in the assessment.

4. You further ask who, in case of suit, should be the plaintiff?

The suit by the county treasurer should be brought in the name of the county after the tax has been returned to him as delinquent and prior to that time in the name of the town. See sec. 1107a, Stats. subsec. 4, sec. 1087m–22, makes all such provisions applicable to the income tax.

**Taxation—Public Officers—County Treasurer**—Under sec. 1114, Stats., the county treasurer has no authority to advance any part of the delinquent taxes to the town treasurer.

March 26, 1914.

ALEXANDER WILEY,

District Attorney,

Chippewa Falls, Wis.

You have requested my opinion, by telephone, as to whether, under sec. 1114, Stats., the county treasurer has the right at the time of settlement with a town treasurer to pay the town treasurer the amount of the delinquent taxes or any portion thereof, or whether the county treasurer must wait until the taxes are paid and then make a settlement.

Sec. 1081, Stats., prescribes the form of the warrant to be attached to the tax roll and delivered by the town clerk to the town treasurer. This warrant requires the town treasurer to collect the taxes set down in the roll and to pay to the treasurer of the county the sum of................dolars for state taxes, to retain and pay out as town treasurer the sum of................dolars, and to pay the balance of said moneys to the county treasurer for county purposes.

Sec. 1110, Stats., specifically requires the town treasurer to retain in his hands the amount specified in his warrant to be paid into the town treasury and to pay to the county treasurer the sum directed by said warrant to be paid to him.
Sections 1112 to 1114 provide for a statement of taxes which the town treasurer has been unable to collect and for his settlement with the county treasurer.

Sec. 1114 provides that the town treasurer shall be credited by the county treasurer with the amount of the delinquent taxes and provides that:

"all taxes so returned as delinquent shall belong to the county and be collected, with interest and charges thereon, for its use; * * * but if such delinquent taxes, * * * exceed the sum then due the county for unpaid county taxes such excess, when collected * * * shall be returned to the town * * * treasurer for the use of the town * * * ."

The meaning of this is that the town treasurer may use his delinquent return as so much cash in payment of the taxes due the county; that is, he is obliged to pay over to the county treasurer only the cash balance remaining in his hands after retaining the amount of town taxes. And furthermore if the amount of uncollected taxes exceeds the amount of county taxes, no cash is to be paid over by the town treasurer to the county treasurer, but when delinquent taxes are collected by the county treasurer the amount thereof necessary to make up the unpaid portion of the town taxes shall be paid over to the town treasurer. It seems to me very plain that the statute does not contemplate that at the time of such settlement the county treasurer shall pay in cash to the town treasurer. In case all the town treasurers in a county made delinquent returns exceeding in amount the county tax it would be, obviously, impossible for the county to refund to all of them at the time of settlement the deficiency in the town taxes for there would be no money in the county treasury from which to pay such sums.

This is the same conclusion that was reached by my predecessor in an opinion printed in the Report and Opinions of the Attorney General 1912, p. 988.
Taxation—Income Tax—Secs. 1087m–21 and subsec. 4, sec. 1087m–22 make the provisions of secs. 1090, 1107b and 1126 applicable to the income tax.

The proceeding under sec. 1107b, Stats., is separate from the proceedings authorized by secs. 1126 and 1127, Stats.

April 1, 1914.

N. O. Varnum,
District Attorney,
Hudson, Wis.

In your favor of March 31st you request my opinion on the following questions:

1. “Do the provisions of sec. 1126, Stats., apply to the collection of income taxes returned as delinquent to the county treasurer, and if so, does the county treasurer in making such schedule add to the income taxes placed therein the two per cent penalty?”

Sec. 1087m–21, Stats., provides that the income tax shall be entered by the town, city and village clerks upon the tax roll “and shall be collected and paid as personal property taxes are now collected and paid.”

Subsec. 4, sec. 1087m–22, provides that “all laws not in conflict with the provisions of this act, relating to the assessment, collection and payment of taxes on personal property, * * * shall be applicable to the income tax herein provided for.”

These sections quite plainly make applicable the provisions of sec. 1126, Stats., since that section is one relating to the collection and payment of taxes on personal property.

Sec. 1090, Stats., provides that: “Taxes not paid before the first day of February shall be subject to a penalty of two per cent on the amount of the tax” etc.; and sec. 1144 provides that such penalty shall be collected by the county treasurer.

It seems to me that the plain intent of the income tax law was to make income taxes collectible in the same way as personal property taxes and I think that the penalties prescribed for failure to pay personal property taxes at the time when due are clearly such an important part of the plan for collection as to be clearly applicable to the income taxes.
RELATING TO TAXATION.

2. "Under the warrant mentioned in sec. 1126, is the sheriff required to collect interest at twelve per cent from the first of Jan. on income taxes?"

This must be answered in the affirmative for the reasons already stated.

3. "Can the county treasurer institute an action of debt as provided in sec. 1107b to collect income taxes returned delinquent, and in said action of debt institute attachment or garnishment proceedings as provided in sec. 1127 without first making and placing in the hands of the sheriff the schedule and warrant provided for in sec. 1126?"

For the reasons already stated I think that sec. 1107b must be held applicable to income taxes but I think that the action therein provided for is separate and distinct from the proceedings and actions authorized by secs. 1126 and 1127. If it is desired to institute attachment or garnishment proceedings I think it is much safer and better to proceed in the manner provided by secs. 1126 and 1127, rather than to run any risk of having the attachment or garnishment proceeding defeated because not expressly authorized in connection with an action under sec. 1107b, Stats. See State v. Ry. Cos. 128 Wis. 449, 485, 500-3.

Taxation—Income Tax—Personal property tax receipts may be presented to county treasurer under sec. 1087m-26 in payment of income tax.

April 1, 1914.

JAMES KIRWAN,
District Attorney,
Chilton, Wis.

In your favor of March 30th you state that an income tax of $12.21 was assessed against Andrew Stevens in the village of Stockbridge, although he was and is a resident of the town of Stockbridge; that he paid a personal property tax of $35.00 in the town of Stockbridge; and you ask whether the county may now compel payment of the $12.21 income tax.

Sec. 1087m-26, Stats., provides that a receipt for personal property taxes may be presented to the tax collector and shall be received by him in payment of the income tax.
assessed against the person paying the personal property tax. Had the income tax in question been assessed to Mr. Stevens in the town where he resided it may be assumed that he would have paid it by use of his personal property tax receipt and it could undoubtedly have been so used by him although the personal property tax and income tax were assessed in different jurisdictions. Since the delinquent return has now been made to the county treasurer the latter, and not the village treasurer is evidently "the tax collector" referred to in sec. 1087m-26, and I see no reason why, pursuant to that section, Mr. Stevens may not present his personal property tax receipt to the county treasurer and have the same accepted by him in payment of the income tax. If the matter be taken up with the assessor of incomes I have no doubt but that this can be satisfactorily arranged.

In such situation the state, county and town will each lose its proportionate part of the tax, as pointed out in my letter to you of March 11th.

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_Taxation—Income Tax—_The county treasurer, county clerk and district attorney may cancel an income tax, which is illegal, under sec. 1210g.

JAMES KIRWAN,
_District Attorney,_
Chilton, Wis.

In your favor of March 30th you state that E, who had no taxable income, failed to receive the income tax report blanks and made no return of his income; that the assessor assessed an income tax of $5.00 against him and you ask whether such tax is legal and he can be compelled to pay the same.

Subsec. 2, sec. 1087m-10, Stats., gives the assessor of incomes "power to estimate incomes" and such power is clearly not conditional upon a return being made by the person assessed. Sec. 1087m-18 would seem to bar E from now questioning the assessment made against him, but if the tax is illegal because E in fact had no taxable income, subsec. 4, sec. 1087m-22, and sec. 1210g give the
Relating to Taxation.

county treasurer, county clerk and district attorney power, with the written approval of the assessor of incomes, to cancel such tax.

Taxation—The delinquent return made by a town treasurer of unpaid personal and income taxes is conclusive on the county treasurer, under sec. 1114, Stats.

James Kirwan,
District Attorney,
Chilton, Wis.

In your favor of March 30th you state that a town treasurer in your county has returned as delinquent the personal property and income tax of a man who has personal property that might be levied on and sold to pay such taxes; that you have advised the county treasurer not to accept such delinquent returns; and you ask my opinion as to the correctness of such advice.

I am compelled to differ with you for the reasons stated in my letter of March 11th. The statutes undoubtedly require a town treasurer to exhaust every available means for the collection of personal property and income taxes and require him to make affidavit that he has done so, but I find no authority given to the county treasurer to sit in judgment as to the truthfulness of such affidavit. Certainly the collection of the unpaid taxes was not intended to await the outcome of a dispute between the county treasurer and town treasurer as to whether the latter was able to collect them. On the contrary the return of the warrant for the collection of taxes must be made to the county treasurer on or before the 15th day of March (sec. 1080, Stats.), and pursuant to sec. 1114, Stats., the county treasurer must give the town treasurer credit for the amount of taxes returned as unpaid. On reason and authority such return is conclusive on the county treasurer (Allen v. Allen, 114 Wis. 615, 628) and he must therefore receive such return and give credit in settlement with the town treasurer for the amount returned by the latter as unpaid.
Taxation—Public Officers—Fees—Inheritance taxes are state taxes and the payment and application thereof are governed by secs. 1087-19 to 1087-23, Stats. Therefore, county treasurers are not authorized under sec. 719, Stats., to retain two per cent of such tax money turned over to the state treasurer.

JAMES F. MALONE,
District Attorney,
Beaver Dam, Wis.

I have your request for opinion of recent date, in which you say:

"Would you kindly give me your opinion as to whether or not the county treasurer is entitled under sec. 719 to deduct two per cent for fees from all inheritance taxes received by him payable to the state treasurer?"

Sec. 719, Stats., to which you refer, reads as follows:

"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, and shall collect as fees for any copy or transcript made by him ten cents for each folio and twenty-five cents for each certificate."

Payment and application of inheritance taxes collected under the inheritance tax laws is governed by secs. 1087-19, 1087-20 and 1087-23, Stats., which read as follows:

"Section 1087-19. Each county treasurer shall make a report under oath, to the state treasurer, on January, April, July, and October first of each year, of all taxes received by him under the inheritance tax laws, stating for what estate and by whom and when paid. The form of such report may be prescribed by the state treasurer. He shall at the same time pay the state treasurer all the taxes received by him under the inheritance tax laws and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury, within five days from the times herein required, he shall pay interest at the rate of ten per centum per annum."

"Section 1087-20. The county treasurer shall retain for the use of the county, out of all taxes paid and accounted for by him each year under sections 1087-1 to 1087-24, inclusive, seven and one-half per cent on all sums so collected by or paid to said treasurer."
"Section 1087-23. All taxes levied and collected under sections 1087-1 to 1087-24, inclusive, less any expense of collection, the percentage to be retained by the county, and the deduction authorized under sections 1087-1 to 1087-24, inclusive, shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government, and to such other purposes as the legislature may by law direct."

From these sections of the inheritance tax law it appears that the inheritance tax, less an allowance therein specified of seven and one-half per cent to the counties, is a state tax and made available for expenses of state government. It would seem, therefore, to come within the excepted class designated in the words "except state taxes" in sec. 719, upon which the county treasurer is not authorized to retain two per cent collection fees.

Moreover, the inheritance tax law is a subsequent statute to sec. 719 and a statute relating to the particular subject matter of the payment and application of inheritance taxes and would, therefore, be controlling upon that subject over the general provisions of sec. 719.

You are referred to an opinion rendered under date of Sept. 8, 1913, to Henry Johnson, state treasurer, covering the same point with reference to the collection and payment over by county treasurers of money belonging to the teachers' retirement fund, where the same conclusion is reached.

You will note that sec. 1087-19 requires the county treasurer to report quarterly and pay over to the state treasurer "all taxes received by him under the inheritance tax laws." Sec. 1087-20 expressly provides that the county treasurer shall retain for the use of the county seven and one-half per cent of all inheritance taxes collected. This provision would seem clearly to negative the idea that the county treasurer might retain, in addition to the seven and one-half per cent so authorized, two per cent of the remaining ninety-two and one-half per cent, which he is required, under secs. 1087-19 and 1087-23, to turn into the state treasury.

I am, therefore, of the opinion that county treasurers may not lawfully retain such two per cent of the state inheritance tax moneys received by them, or any amount in addition to the seven and one-half per cent authorized to
be retained for the use of the county under sec. 1087-20, Stats. Further, you are informed that such is the practical construction which has been followed and acquiesced in by all of the county treasurers of the state since the inheritance tax law went into operation.

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Taxation—Income Tax—Courts—The question whether the Oshkosh Grass Matting Co. should be allowed credit on its income tax for the receipt of the tax on its buildings should be determined by the courts if they refuse to pay their whole income tax.

April 18, 1914.

D. E. McDONALD,
District Attorney,
Oshkosh, Wis.

In your favor of April 4th you ask for my opinion on the following statement of facts and points of law:

"On Dec. 16th, 1912, Emil Steiger who owns the majority of the stock in the Oshkosh Grass Matting Co. bought from the Oshkosh Grass Matting Co. the land upon which the plant is situated for $10,000.00; on the 29th day of Jan. 1913, Mr. Steiger leased to the Oshkosh Grass Matting Co. the land upon which the buildings are situated for a term of ten years at $900.00 a year. The rent has been paid to Mr. Steiger. On May 1st, 1913, the assessor of the city of Oshkosh assessed to the Oshkosh Grass Matting Co. the buildings and machinery as personal property together with other personal property and fixed the valuation of the personal property of the Oshkosh Grass Matting Co. at $372,131.00.

"This was not changed by the board of review and was entered upon the tax roll of the city of Oshkosh, said tax roll being delivered to the city treasurer, and the city of Oshkosh collected the tax on the $372,131.00 and gave a receipt therefor, the tax being $6,512.30. Now, the city treasurer, under instructions from the tax commission has refused the Oshkosh Grass Matting Co. to permit them to use the personal property tax receipt of $6,512.30 as an offset in the payment of the income tax of said company."

You also state that "the city treasurer has not made his return on delinquent income tax yet, that no action was brought under a distress warrant by the city treasurer on or
before the 15th day of March, 1914, as provided by the statutes."

You inquire whether the city of Oshkosh can refuse to accept said receipt in payment of the income tax of the Oshkosh Grass Matting Co.

Under sec. 1087m-26 it is provided that any person who shall have paid a tax assessed upon his personal property shall be permitted to present the receipt therefor to the tax collector and have the same accepted to the full amount in the payment of income taxes assessed against such person. The question presents itself, therefore, whether the buildings and machinery of the Oshkosh Grass Matting Co. are personal property in contemplation of our statutes regarding the assessment and collection of taxes.

Sec. 1035 provides as follows:

"The term 'real property' and 'real estate' and 'land' when used in this title shall include not only the land itself, but all buildings, fixtures, improvements, rights and privileges appertaining thereto."

The definition of "personal property" is given in sec. 1036 as follows:

"The term 'personal property,' as used in this title, shall be construed to mean and include toll bridges, saw logs, timber and lumber, either upon land or afloat; steamboats, ships and other vessels, whether at home or abroad; buildings upon leased lands, if such buildings have not been included in the assessment of the land on which they are erected, ferry boats, including the franchise for running the same; ice cut and stored for use, sale or shipment; and all goods, wares, merchandise, chattels, and effects, of any nature or description, having any real or marketable value, and not included in the term 'real property,' as above defined."

It is true that the buildings of the Oshkosh Grass Matting Co., under the facts stated by you, are located upon leased land, but it is very apparent that not all buildings on leased lands are personal property in contemplation of said sec. 1036. It certainly was not the intention of the lawmakers to consider all buildings on real estate as personal property as soon as the real estate was leased, although the title to the building was in the same party that owned the real estate. Sec. 1035 and 1036 must be construed together in arriving at the real interpretation of this law. It would seem
that the correct construction would be that only buildings which in fact are personal property and are not a part of the real estate, in fact, should be assessed as personal property. Under sec. 1035 the real property when assessed will include all buildings, fixtures, improvements, rights and privileges appertaining thereto, and when these buildings that are attached and appertain to the real estate are assessed they will not be included as personal property under sec. 1036, but only such buildings as are not part of the real estate should be assessed as personal property. That this interpretation is the proper one is apparent by the provision in subdiv. (3) of sec. 1040, which provides that:

"Buildings on leased lands, when such buildings are personal property, shall be assessed in the district where located."

The tax commission has ruled that buildings constructed on leased lands by the lessee, which he has the right to remove and which are removable without wrecking, may be assessed to such lessee as personal property.

"On the other hand, all buildings and improvements constructed with the intention of making them a part of the free-hold and those which in their nature cannot be removed without wrecking, could be included in the assessment of the real estate as improvements thereon." Compilation of the Wisconsin Tax Laws by the tax commission, 1912, p, 9.

The fact that such buildings and machinery were assessed as personal property by the local officers should not make any difference in determining the question here presented, for I take it that if it can be shown that this was an error and that the property, in fact, was not personal property, but for the purpose of collecting the tax, must be considered as real property, that the court is authorized in an action for the collection of this tax to determine the nature of the property and decide the question whether the receipt should be accepted or not.

I must confess that the answer to the question presented by you is sufficiently doubtful so that it ought to be determined by the court. Especially is that true in view of the fact that over $6000 are involved in this very question.
Mr. Steiger and the Oshkosh Grass Matting Co., will undoubtedly contend that they have a right to put their property in any form or condition that they desire and that they have a right by contract between themselves to convert the buildings on land into personal property and that they have done so by the transactions stated in your letter. They will probably rely on Smith v. Waggoner, 50 Wis. 155; Fitzgerald v. Anderson, 81 Wis. 341; Keefe v. Furlong, 96 Wis. 219, and they will undoubtedly contend that their motive cannot alter the fact so long as they have a legal right to do the acts contained in your statement of facts. On that proposition they may cite Loehr v. Dickson, 141 Wis. 332 and Metzger v. Hochrein, 107 Wis. 267. I believe an action should be brought to test this case in court. It can then be determined whether the transactions between Mr. Steiger and the Oshkosh Grass Matting Co. were bona fide and whether the transfers have actually been made, as they contend. I have been informed that no money has passed as a consideration for the transfer of the land, but that the lease was given for ten years and a note was given in payment of the purchase price which also runs ten years. On the whole, it seems a mere paper transfer to defeat the collection of an income tax to the extent of $6512.30.

Our court has held that where personal property is transferred to the owner of real property for the purpose of attaching the same to said real property, the parties are competent to preserve the personal nature of the personal property, but the court also held that such personal property so attached will become real property as far as third parties that have an interest in the real estate, such as mortgagees, are concerned. See Fuller-Warren Co. v. Harter, 110 Wis. 80.

In the case of Williams v. Jones, 131 Wis. 361, it appeared that the grantor in a deed conveying real estate excepted from the said transfer the timber growing and standing on the land with the right at all times to enter and cut and haul, the same away during a period of forty years. The court held that the trees growing on the land were not thereby converted into personal property but that they were still real property and would pass to the heirs as such.

In the case of Corry v. Shea, 144 Wis. 135, our court held that if lands are conveyed to an infant after being sold
for taxes and after the time for redemption has begun to run against the adult grantor, such time is extended, under sec. 1166, Stats., so that the infant may redeem after becoming of age, but it was also held that if such conveyance is made without consideration and for the purpose of enlarging the time for redemption it is void against the holder of the tax certificate, under sec. 2320, Stats., which declares every conveyance “made with the intent to hinder, delay or defraud creditors or other persons of their lawful action.” The words “or other persons” in such statute was given a broad meaning, much broader than the word “creditors” standing alone.

In Berge v. Kittleson, 133 Wis. 664, said sec. 2320 was held to apply to one having a claim for unliquidated damages for breach of promise to marry; in Pierstorff v. Jorges, 86 Wis. 128, to the complaining witness in a bastardy proceeding before judgment recovered; and in Jones v. Jones, 64 Wis. 301, to a prospective wife with reference to her right of dower.

Prior to the enactment of the income tax law it was not very important as regards either the state or the municipalities and the parties paying the tax, whether the same was assessed as personal property or real property, as the rate of taxation was the same and as the tax was payable in the municipality where the property was located.

I believe that the practical construction placed upon the law by the tax commission is the construction that should be placed upon this law in order to carry out the real intent of the lawmakers and that an action should be brought to collect the income tax in question and if the court should hold that the receipt of the personal property tax should be taken in payment of income taxes, under the facts stated, then it is certainly necessary to have additional legislation, defining more definitely the terms used in the statute so that it will not be possible to defeat the collection of the income tax in such cases as the present one.
Taxation—Sale of Lands for Taxes—In selling lands for taxes the county treasurer should include the two per cent penalty as part of the charges.

May 11, 1914.

D. E. McDonald,
District Attorney,
Oshkosh, Wis.

In your letter of the 8th you ask if the county treasurer should include the two per cent penalty imposed by ch. 665, laws of 1913, as part of the costs and charges under sec. 1135, Stats. You call my attention to the opinion of my predecessor found on page 982 of the Biennial Report and Opinions of the Attorney General for 1912, holding that the two per cent should be included. You also call my attention to certain early Wisconsin cases.

Sec. 1144, Stats., as amended by ch. 665, laws of 1913, provides:

"The two per cent penalty prescribed by section 1090 on the delinquent tax list returned by the treasurer of any town, city or incorporated village to the county treasurer shall be collected by the county treasurer in the same manner as other delinquent taxes are collected and paid into the county treasury for the use of the county."

Other delinquent taxes upon real estate are collected by the sale of the lands for taxes. It appears clear to me that this two per cent penalty should be included in the amount for which such lands are sold.

Taxation—County Treasurer—The affidavit required by sec. 1776, Stats., need not be made before the county treasurer and he is not authorized to administer the oath for such affidavit.

May 19, 1914.

Alexander Wiley,
District Attorney,
Chippewa Falls, Wis.

In your favor of May 15th you request my opinion as to whether the county treasurer may act as the notary in administering the oath to a person making affidavit as to
service of notice upon the occupant of lands, etc., as a condition precedent to obtaining a tax deed pursuant to sec. 1176, Stats., or whether such affidavit may be made before some other person.

I know of no provision of the statutes authorizing the treasurer to administer the oath as a notary public and I think that the language of sec. 1176 requiring the treasurer to certify that proof of service of the notice “has been made before him” is insufficient to authorize him to administer the oath. Sec. 1176 must be read in connection with the preceding section which provides that an affidavit setting forth the required facts “shall be filed” with the county treasurer. When such affidavit has been filed I think it clear that proof “has been made before him”. Consequently I am of the opinion that there is no requirement that such affidavit must be made before the county treasurer nor do I know of any statute authorizing him to take the oath to such an affidavit.

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**Taxation**—One owning on May 1st personal property that is assessed for taxation remains liable for the tax even though he sells the property.

The purchaser is not liable therefor in the absence of agreement.

**ALEXANDER WILEY,**

*District Attorney,*

Chippewa Falls, Wis.

In your favor of June 27th you ask whether there is any statute or authority that would impose upon the purchaser of personal property, after its assessment, the obligation of paying the tax thereon where there is no express agreement as to which party shall pay the tax.

Sec. 1033, Stats., provides that personal property shall be assessed as of the first day of May in each year, except as provided in sec. 1040. Sec. 1044, Stats., requires such property to be assessed to the owner thereof and such section and the two immediately following plainly show that such owner is personally liable therefor. Secs. 1102 and
1107a indicate this still more clearly by providing for actions to be brought against the owner of any personal property assessed for taxation. I find nothing to indicate that a person owning personal property on the first of May which is assessed for taxation can escape the payment of such tax by a sale of the property. On the contrary I think it quite clear that he remains liable for the tax so assessed. I know of no section that makes the tax a lien on personal property or that imposes any liability to pay the same on the purchaser of personal property so assessed.

My conclusion is, therefore, that the owner of property on May first which is assessed for taxation is liable for the tax so assessed and that no other person is liable in the absence of an agreement making him liable therefor.

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Taxation—Public Utilities—Taxes assessed on the property of a public utility may be collected as provided in sec. 1107a and in sec. 1127, Stats.

July 28, 1914.

A. J. O'MELIA,
District Attorney,
Rhinelander, Wis.

In your favor of July 22nd you request my opinion as to the method the sheriff is to adopt in collecting taxes on property of the Wisconsin Valley Improvement Co., which, although clearly real property in character, is considered personal for the purposes of assessment and taxation.

The tax commission have handed me a copy of their letter to you dated July 27th which deals with this same question. I concur in the conclusion reached by the commission that an action may be brought pursuant to the terms of sec. 1107a, Stats., or that the sheriff may proceed under his warrant in the same way that he would proceed on execution to levy on the real estate pursuant to the provisions of sec. 1127, Stats. It seems unnecessary for me to add anything to the advice given by the commission.
Taxation—Education—School District—Where, after the annual meeting at which taxes are levied, territory is detached from a school district and attached to another district, the taxes so levied should be collected as if no change in the district had been made, and a proper division of the money so collected be made as other credits of the district are divided.

November 10, 1914.

JAMES F. MALONE,
District Attorney,
Beaver Dam, Wis.

In your letter of the 5th you state that school districts 4, 5, and 6, of the town of Westford, Dodge Co., Wis., were in existence and had definite boundaries prior to and at the time of the annual school meeting at which time each district appropriated certain money during the summer of 1914. That state superintendent Cary altered the boundaries by an order effective Oct. 3, 1914. That the county board of education for Dodge Co. will meet Nov. 12th to consider the advisability of further changes in the district. You ask if the school taxes should be levied in each district as such district existed last summer at the time of the school meeting, or as it was changed by order of Oct. 3rd, or if the taxes should be levied on the land in the district Dec. 1, 1914.

Sec. 1151, Stats., 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."

This section would seem to settle the question you ask. The taxes should be collected exactly the same as though no change had been made in the school district. That is they should be collected upon all of the territory that was in the district at the time of the assessment.

In the case of School District No. 9 v. School District No. 5, 118 Wis. 233, a new school district was created Aug. 28th, by an order of the town board which took effect Nov. 28th. The tax voted at the annual meeting was levied upon the old district as it stood prior to the creation of the new district. The question was as to whether or not the new district was
entitled to any of the money raised by such tax. The court, basing its decision upon sec. 944, Stats., held that the new district was entitled to such proportion of the tax so raised as the assessed valuation of the portion formed from the old district bore to the assessed valuation of the entire old district. While this case is not exactly in point, it sustains the conclusion arrived at from a consideration of sec. 1151.

**Taxation—Municipal Corporation**—Taxes should be collected in territory taken from one town and attached to another, after the assessment has been made by assessor in the town from which territory was taken.

Sam J. Williams,
District Attorney,
Hayward, Wis.

Under date of Nov. 6th you submit the following:

“At a meeting of the county board of supervisors of Sawyer county held during the month of June, 1914, it detached two government townships from the town of Hayward and added the same to the town of Draper. Does the town of Hayward collect the taxes in the territory detached or does the town of Draper collect them?”

In view of the fact that the change in the territory of the townships in question was made in the month of June the assessor’s work of assessing the real and personal property of the town was undoubtedly finished. See sec. 1033, Stats. Sec. 1151, Stats., provides in part as follows:

“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.”

I believe, in view of the provision of sec. 1151, that the taxes should be collected by the treasurer in the old town and the money divided, as other property is divided, between the two towns. See sec. 944, Stats., and School District No. 9 v. School District No. 5, 118 Wis. 233. See
also sec. 925i, Stats., which provides that villages which have been newly incorporated after the assessment of taxes in any year and before the collection of such taxes, the taxes shall be collected by the town treasurer in which the village formerly constituted a part, and that the money should be divided under sec. 925e. This statute does not apply to towns, but under sec. 1151, above quoted, it is evidently the policy of this state to apply the same rule to towns.

You are therefore advised that the tax in the territory in question should be collected in the town of Hayward, the town from which the territory was detached.

Taxation—Federal Revenue Law—Places of Amusement—
A hall that is only occasionally used for concerts, lectures and theatrical performances is not subject to a tax or license fee as a theater or concert hall under the federal act.

November 16, 1914.

LOUIS E. REBER, Dean Extension Div.,
University of Wisconsin.

In your letter of the 11th instant you state that the university extension division is arranging lecture and entertainment courses for the various communities throughout the state; that these communities pay you for these entertainments and you pay the people who do the entertaining, lecturing, etc.; that these courses are in charge of a local committee who make the arrangements for them with you; that the committee engages a hall, or that the entertainment is given in the schoolhouse or at a playhouse; that the question has been raised by the chairmen of these committees as to whether or not they will come under the federal tax law. You enclose a copy of that part of the federal act which you think may apply to you. You also enclose a sheet giving the programs for certain communities, and a couple of your lecture bulletins which indicate the kind of service which you render. You ask whether or not the communities which give these courses will be subject to taxation.
The portion of the act, of which you enclose a copy, provides:

"Sec. 3. That on and after November first, nineteen hundred and fourteen, special taxes shall be, and hereby are, imposed annually as follows, that is to say:

* * *

"Sixth. Proprietors of theaters, museums, and concert halls, where a charge for admission is made, having a seating capacity of not more than two hundred and fifty, shall pay $25; having a seating capacity of more than two hundred and fifty and not exceeding five hundred, shall pay $50; having a seating capacity exceeding five hundred and not exceeding eight hundred, shall pay $75; having a seating capacity of more than eight hundred, shall pay $100. Every edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance money is received, not including halls or armories rented or used occasionally for concerts or theatrical representations, shall be regarded as a theater: Provided, That whenever any such edifice is under lease at the passage of this Act, the tax shall be paid by the lessee, unless otherwise stipulated between the parties to said lease."

You will note that it is the proprietors of the theaters, museums and concert halls who are charged the tax, except that where such edifices are under lease at the time of the passage of the act, the lessee is made liable for the tax. You will also note, by the portion which I have underlined, that halls or armories, rented or used occasionally for concerts or theatrical purposes, are not included within the edifices subject to taxation. The whole question depends upon the use that is made of the halls or playhouses in which these courses furnished by you are given.

In my opinion the act does not apply to a schoolhouse, where it was not intended to be used and is not used for the purpose of giving entertainments with a view of financial gain to the community owning the same. The main purpose of a schoolhouse is, of course, educational, and, with possible rare exceptions, no financial profit to the owners of the building is derived from such concerts and other entertainments as may be given therein.

When your courses are given in playhouses, that is, in halls which were intended to be used and are used as places for giving theatrical performances and other entertainments to which an admission fee is charged, from which

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use the proprietor expects financial gain, it seems to me that such proprietor is liable to the tax. When given in halls, the question is as to the purpose for which the hall was constructed or is being used, that is, the main purpose. The mere fact that concerts, lectures and even theatrical performances are occasionally given in such halls, to which admission is charged, and for the giving of which the proprietor charges some rent from the persons giving the entertainment, does not render it liable to the tax.

You will understand that I can only pass upon this question in a general way. The facts would differ with each community and probably in some instances the buildings in which the entertainments are given are subject to the tax, while in others they are not.

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_Taxation—Federal Emergency Revenue Act—_Congress has no power to tax instrumentalities used by state in discharge of governmental functions.

Federal stamp taxes must be held not to apply to bonds, deeds or certificates executed by state officers in the discharge of governmental duties imposed upon them by state law.

JOHN S. DONALD,

*Secretary of State.*

I have your request for official opinion of the 30th ult. in which you submit as follows:

"The tax imposed by the Federal government under what is known as the emergency revenue law, which is to go into effect December 1, 1914, causes this department to ask your opinion as to the extent documents issued by the state will be affected. Will the tax apply to the state government where the state is the beneficiary; or in any case? If so, will it be necessary that stamps be placed upon certified copies of documents, and upon licenses which may be issued in registering automobiles, corporations, etc.? If so, will the state be permitted to purchase stamps to place on such documents issued? Further, shall the legal charge be increased to the party obtaining the document to cover this tax?"
Schedule A of the so-called emergency revenue act, approved Oct. 22, 1914, provides for a number of documentary stamp taxes. Among other objects of this taxation are bills of lading, express and freight, telegraph and telephone messages for which a charge of fifteen cents or more is imposed, indemnity bonds, certain forms of certificates specified, and certificates "of any description required by law not otherwise specified in this act," and deeds, conveyances, etc. In the schedule of these stamp taxes there is found no express provision of the act exempting any state or municipal corporation from the payment of these taxes.

Sec. 5 to 24, inclusive, of the act are general provisions prescribing the manner of its enforcement, penalties for its violation, etc., and, among other provisions, providing that no instrument required by the act to be stamped shall be recorded or registered until so stamped, and, by implication at least, that no such instrument not stamped shall be valid. The only express exception of instruments of the state government is that found in sec. 15:

"That all bonds, debentures or certificates of indebtedness issued by the officers of the United States government or by the officers of any state, county, town, municipal corporation, or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this act: Provided, that it is the intent hereby to exempt from the stamp taxes imposed by this act such state, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity: * * *

To this extent, therefore, the act itself in express terms recognizes the constitutional limitation upon the power of Congress to impose a tax upon the instrumentalities of state and municipal governments, at least so far as those instrumentalities may be the means used by those governments in borrowing money.

It may be taken as well settled constitutional law that Congress has no power to impose a tax on any instrumentality or means employed by a state or a municipality of a state in the exercise of its governmental or municipal functions. Jones v. Estate of Keep, 19 Wis. 369; Sayles v. Davis, 22 Wis. 225; Delorme v. Ferk, 24 Wis. 201; Harrington v.
The above cases arose under the Internal Revenue act of 1864. The earliest of these cases, Jones v. Estate of Keep, Warren v. Paul and Fifield v. Close, supra, held that the act of Congress, so far as it required a revenue stamp to be affixed to writs or processes of state courts, was unconstitutional. Our court, in Jones v. Estate of Keep, cited the opinion of Chief Justice Marshall in the leading case of McCulloch v. Maryland, 4 Wheaton, 316, where the supreme court of the United States laid down the doctrine that no state has power to tax any instrumentality of the federal government, for, in the language of Chief Justice Marshall, "the power to tax involves the power to destroy."

Dobbins v. Commissioners, 16 Peters, 435, is also cited to the effect that a state government could not tax the salary or income or office of a federal officer. So our court held:

"In view of the principles and reasoning of all these cases, it seems to the majority impossible to say that there are no exceptions out of the taxing power of Congress and that a writ or other process by which a suit is commenced in a state court is not an exception. For a tax upon such a writ is manifestly a tax upon a necessary means used by the judicial department of the state to administer justice between its citizens." 19 Wis. 377.

There will be, I take it, no difference of opinion upon the proposition stated that the federal government cannot tax the instrumentalities used by the state in the exercise of its governmental functions. The only difficulty, if any, which may arise will be in agreeing as to what instruments and what functions are governmental in character so as to be exempt. Upon this point the following from the decision in Jones v. Estate of Keep, supra, is significant:

"It has been suggested that this tax upon state process might be sustained on the ground that it was really a tax upon the party appealing to the court for redress. He is undoubtedly the person most immediately interested in the judicial proceedings, and the tax is paid by him. But this circumstance does not render the tax any less obnoxious to the objection taken to it. It is still a direct tax upon the
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means employed by the state courts to administer justice. * * * A writ or process issued by one of the courts of this state, is the mandate of the state. It is the state’s writ, going in conformity with the constitutional requirement, to bring parties before the court to have their rights adjudicated and declared.” (pp. 378-9.)

In Sayles v. Davis, supra, and in Delorme v. Ferk, supra, the supreme court of this state held that Congress had no power to require a revenue stamp to be affixed to a tax deed issued under state authority upon a sale of land for taxes, and in the latter case it was doubted whether even an act of the legislature of the state, by consenting to such tax, could give validity to an act of Congress imposing such a tax.

In Barden v. Supervisors of Columbia County, supra, it was again held that Congress could not impose a tax upon a certificate of sale of land sold for taxes, and that, where the sum of five cents for a United States revenue stamp placed upon such certificate was included in the amount for which the land was sold, this rendered the sale void. This decision was reached, notwithstanding that the state legislature, by ch. 159, laws of 1863, had provided that no officer need execute or deliver any conveyance or other instrument upon which a stamp tax was imposed by act of Congress, until the party to receive the instrument should furnish the proper stamp, and provided further that the cost of such stamp should be a lien upon the land equally with unpaid taxes, and be included in the amount for which the land was sold. Of this act the court said that it was enacted prior to the court’s decision in 19 Wis. 369, and upon the erroneous assumption by the legislature that the act of Congress was valid, and it was held not to have been intended by the legislature to add anything by way of consent upon the part of the state to the force or effect of the act of Congress, and it is again doubted whether the legislature, even had it so intended, could have so validated the act of Congress.

These cases holding that a revenue stamp could not be required upon tax deeds and certificates of tax sales because they have to do with the state’s needs of raising its own revenue, and are, in that respect, in a different class from the case of Harrington v. Smith, supra, where our court said, in the course of argument, that Congress could not require the affixing of revenue stamps to certificates or patents
issued by the commissioners of school and university lands. In the sale of these lands for the benefit of the state university, it might be argued that the state acts more in a proprietary capacity than in the exercise of a governmental function.

In the Garton Case, supra, the supreme court of Indiana held that the federal government could not require a revenue stamp to be placed upon an indemnity or surety bond, in that case a sheriff's bond, given to the state by an officer of the state as required by state law for the faithful performance of his duties as such officer.

The Supreme Court of the United States, in United States v. Railroad Company, supra, has apparently given the broadest construction and scope to the governmental functions of a state or municipality in holding them exempt from federal taxation. This case arose under that provision of our internal revenue act of June 30, 1864, which required the railroad company in terms to withhold a percentage of the interest due its creditors, bondholders or mortgagees and to pay the same as a tax to the federal government. The tax being one really upon the creditor, and in this case the creditor being the city of Baltimore, a municipality of the state of Maryland, which had loaned its credit to the amount of five million dollars in aid of the railroad, taking as security therefor a mortgage upon the railroad property, it was held that the tax was one upon the municipality and could not be collected. The revenue act there involved, as the present one, in terms limited exemptions in favor of states and municipalities "in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity."

But it was said by the supreme court that the city of Baltimore, having entered upon this enterprise by authority of the state legislature and for purposes of public benefit in the way of commercial and trade advantages to be secured to the city and its citizens by reason of the construction and operation of the railroad, the "transaction is within the range of the municipal duties of the city, and that the tax can not be collected." Sayles v. Davis, supra, is cited, and also Georgia v. Atkins, 8 Int. Rev. Rec. 113, in which it is held that the income of a state from a railroad owned and operated by it is not subject to federal taxation.
From the foregoing authorities we gather that the federal revenue law cannot be held to subject to the stamp taxes therein provided any instrument of the state government used or issued by it in the exercise of its governmental functions; that within its governmental functions would be included state activities authorized by law where the same are of a public character and for purposes of public welfare, although appertaining to proprietary enterprises such as the ownership and operation of railroads or the ownership of a mortgage interest in a railroad.

Further it may be said, upon authority above cited, that the exemption from taxation of an instrument used by the state government is not affected by the fact that the use of such instrument is invoked by or principally beneficial to an individual, or that its use may be under such circumstances that the state might require the individual to pay the tax.

It appears from the treasury department regulations, as published in Treasury Department Circular 2067, that the administrative officers charged with the collection of this tax have recognized the limitation upon the federal authority to tax instruments used by the state government. As to telephone and telegraph messages and bills of lading, the department has ruled as follows:

"Messages of officers and employes of the United States government on official business, and like messages of state officials, are exempt from tax."

Also:

"No stamp is required upon federal and state government shipments of government or state property, for which, if a stamp were issued, the federal government or state government would be required to pay."

Why similar regulations were not promulgated with respect to certificates or conveyances issued by the state or state officers, or bonds of state officers, does not appear, unless it be that it was not appreciated that the state would be affected in reference to these matters to any appreciable degree. The act contains no express authority to the Secretary of the Treasury to make any exceptions and hence the exceptions made must be made merely by way of necessary construction and in recognition of constitutional limitations which would apply equally and necessitate like excep-
tions as to any other instruments when used by a state government. So far as the regulations have a bearing on this question, I think it is fairly to be inferred from them that it is not the intention of the federal government to exact the payment of the federal revenue tax by a state or upon any instrumentality used by the state in the exercise of its governmental functions, regarded in the broad sense in which that term is in effect defined by the decision of the federal supreme court in the case of United States v. Railroad Company, supra.

Coming now more specifically to the subject matter of your inquiry, it would seem that none of the documents or instruments mentioned therein would be subject to this tax. Certificates of registration of automobiles, for instance, are issued by the state in the exercise of its governmental function, either police or taxing power, or both. Such certificate is the evidence of the enforcement of and compliance with the state law requiring the licensing of automobiles. Although issued to evidence or establish a private right, it is a public document of the state, as much as a tax sale certificate or a patent issued upon the sale of state lands. Therefore, I think these certificates are clearly exempted.

The same, I think, is true of certificates of incorporation and certificates attached to licenses issued to foreign corporations and the like. Corporate powers are conferred in the exercise of sovereign authority by the state legislature. These are special privileges, and the right of the state to grant them rests upon the proposition that the corporations are created as agencies of the state and for the promotion of the public welfare. Moreover, the provisions of law requiring articles of incorporation to be filed with some public official and entitling any person asking therefor, upon payment of the statutory fee, to certified copies of corporate charters and the like, are all a part of the scheme of government established in contemplation of law, at least for the public welfare.

Under subsec. 5 of sec. 141, Stats., it is the legal duty of the secretary of state, upon receiving the statutory fee, to make and furnish to any person such certified copies. I am, therefore, of the opinion that the issuing and certifying of certificates of incorporation, licenses to foreign corporations and certified copies of documents, which by
law the secretary of state is required to keep in his office as public records of the state and to furnish certified copies thereof under sec. 141, are legitimate functions of the state government and that, therefore, such instruments are not subject to a federal revenue tax. The same rule will apply under the decision in State v. Garton, supra, as to bonds required by law to be furnished by public officers and filed in the office of the secretary of state.

This rule will not, however, apply to a bond given by a private person to secure a private privilege or benefit and which bond does not become an instrumentality of government or an instrument in which the state is interested, until the same has been fully executed and delivered. In such a case the private person tendering such bond should affix the stamp thereto before delivery, and no such bond should be accepted without this stamp is first so affixed. United States v. Ambrosini, 105 Fed. 239.

Taxation—Federal Emergency Revenue Act—Register of Deeds—Secs. 12 and 13 of the federal act prohibit the recording of instruments subject to stamp taxes unless the same are stamped, and registers of deeds should refuse to receive for record any such instruments unless properly stamped.

The certificate of the register of deeds required by subd. 5, sec. 758, is one required by state law for governmental purposes, and need not be stamped.

December 3, 1914.

N. O. Varnum,
District Attorney.
Hudson, Wis.

I have your request for opinion, in which you ask to be advised what is the duty of a register of deeds in reference to the recording of instruments without proper internal revenue stamps attached, and also whether the certificate of the register of deeds, which he is required by subd. 5, sec. 758, Stats., to endorse upon an instrument left with him to be recorded, is a certificate required underschedule “A” of the emergency revenue act of Oct. 22, 1914, to be stamped as a certificate “not otherwise specified” in the act.
The answer to your first question is found in the following language from secs. 12 and 13 of the act:

"Section 12. That hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded until a legal stamp or stamps denoting the amount of tax shall have been affixed thereto, as prescribed by law: * * * ."

"Section 13. That it shall not be lawful to record or register any instrument, paper, or document required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed and cancelled in the manner prescribed by law."

By reason of the above quoted provisions of the federal act, it becomes the duty of the register of deeds to refuse to receive for record any instrument which, under the provisions of the revenue act, is required to have a revenue stamp affixed thereto, unless such stamp, of the proper amount, is so affixed and cancelled, as required by law.

Referring to your second question, subdiv. 5, sec. 758, Stats., prescribing the duties of the register of deeds, provides that it shall be his duty.

"To endorse upon each instrument or writing received by him for record his certificate of the time when it was received, specifying the day, hour and minute of reception and the volume and page where the same is recorded, which shall be evidence of such facts."

Subdiv. 6 of the same section requires the register of deeds to endorse on each instrument received for filing a serial number. It is doubtless the principal purpose or office of these provisions of law to safeguard and assure the proper discharge by the register of deeds of his official duties in the administration of the governmental scheme of the state for the recording and preservation of land titles, which has ever been regarded under the English law as a legitimate and important concern of the government.

The certificate in this case is one which is not sought by the person tendering the instrument for record and is not made at his request or essentially for his benefit, but is one which is made by the register of deeds in the discharge of the duty imposed upon him by law and would have to be made by the register of deeds even though the party ten-
dering the instrument for record requested otherwise. It is only made after the instrument itself, duly executed and stamped as such (if it be an instrument required by the internal revenue act to be stamped), has been delivered to the public officer and has passed out of the possession and control of the owner for purposes prescribed by law.

In view of these facts, I am of the opinion that the endorsement on such instrument of the certificate of the register of deeds, required by subdiv. 5, sec. 758, is a purely governmental act of an officer of the state, and that such certificate is within the class of instruments constitutionally exempt from federal taxation upon the grounds stated in my opinion rendered, Dec. 2, 1914, to John S. Donald, secretary of state.*

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**Taxation—Public Lands—Board of Regents of Normal Schools—Validity of tax certificate held by county of Milwaukee on land owned by state denied.**

Sec. 1038, subd. 1; Milwaukee city charter, ch. 18.

December 11, 1914.

**Board of Regents of Normal Schools.**

I have a letter of this date, signed by William Kittle, your secretary, enclosing a letter from the county treasurer of Milwaukee county, dated Dec. 3, 1914, calling attention to a certain tax certificate owned by the county of Milwaukee and sold to it on May 20, 1914, for the taxes for the year 1913 on the following described property, to wit:

A piece of land bounded N by a line drawn parallel to and 613-65/100 feet N of N line of Kenwood Boulevard, E by E line of W 1/2 of SW 1/2 of Sec. 10, S by Kenwood Boulevard and W by center line of Cramer Street extended N, in lands in W 1/2 of SW 1/2 of Sec. 10, in the 18th ward of the city of Milwaukee, which property was acquired from one Mariner by the board of regents of state normal schools by warranty deed acknowledged on the 13th day of November, 1913, and recorded in Vol. 684 of Deeds, p. 478.

It further appears from the letter of the county treasurer of Milwaukee county that this piece of real estate was assessed during the month of May, 1913; that the board

*Page 884 of this volume.*
of review of said city closed its session about the end of Aug. 1913, and that the tax levy accrued immediately thereafter.

It further appears, from a statement of said county treasurer, that the number of the certificate is 6551; the amount of the sale was $494.01; the interest is $39.72, and the fees amount to 30c, and that the total amount now claimed to be due from the board of regents to the county of Milwaukee upon said certificate is $534.03.

The question arises whether or not the said tax certificate is valid and whether or not the regents should pay the same.

Sec. 1038 provides what property shall be exempt from taxation, and under subdiv. 1 is specified, "that owned exclusively by the United States and by this state." Ch. 18 of the charter of the city of Milwaukee relates to the assessment and collection of taxes.

According to sec. 15 of said ch. the warrant attached to the tax rolls shall be delivered to the city treasurer on the second Monday of Dec. in each year.

According to sec. 18 of said ch:

"All taxes and assessments, general and special, levied under this act shall be and remain a lien upon the lands and tenements upon which they may be assessed, from the time of the filing of such assessment rolls in the office of the city clerk."

Said section further provides:

"That as between the grantor and the grantee of any land or lot, when there is no express agreement as to which shall pay the taxes or assessments that may be assessed or become chargeable thereon by the conveyance, if such land is conveyed even with or prior to the date of the warrant authorizing the collection of such taxes or assessments, the grantee shall pay the same; but if conveyed after that date, the grantor shall pay the same."

If the state is to be treated the same as an individual then, according to the above sections, it is evident that the state would be obliged to pay the taxes now due on said lands. It is my opinion, however, that these laws relating to the assessment and collection of taxes do not bind the state. It was well said by ex-attorney general Gilbert, in an opinion rendered by him, that "Laws are made to govern

The word "taxation", as used in sec. 1038, does not refer merely to the assessment of taxes but must be held to include the whole process by which the state finally succeeds in bringing the taxes to its treasury. If at any time, during said process, the state itself becomes the owner of the real estate upon which the tax is assessed and levied, all further right of the local officers or tax officials to collect the taxes ceases.

It appears that the state became the owner of the fee of said parcel of land on or about the 13th day of Nov., 1913. Thereafter the city and county officers of the city and county of Milwaukee had no legal authority to proceed with the collection of the taxes. Indeed, according to sec. 17, ch. 18, charter of Milwaukee, even after the assessment roll is completed, the rate of taxation is fixed, the taxes are extended and the tax roll is placed in the hands of the city treasurer for collection, it was the duty of the common council of the city of Milwaukee to remit, annul, and cancel any tax charged against real property when the tax "is manifestly illegal and void by reason of the exemption of the property from taxation by law."

I have therefore reached the conclusion that the county of Milwaukee acquired no right in said land by virtue of the tax certificate it pretends to hold, and that the state has the right to proceed through the courts to restrain the county authorities from issuing a deed upon said tax certificate, or may proceed to have the cloud cast upon its title, by the existence of this outstanding tax certificate, removed.


STANLEY G. DUNWIDDIE,

District Attorney,

Janesville, Wis.

Under date of the 19th inst. you state that Rock county is the owner of certain lands located in the city of Janesville
which were purchased by the county and used as a site for the courthouse; that the courthouse was built and is now located on such land. You enclose a copy of a contract entered into between the county board of supervisors and the city of Janesville in the year 1863; that since that time the city has assumed control of the land in question with the exception of the small part actually occupied by the courthouse; that a street on the south side of the land has been paved by the city and the city has now filed a claim against the county for the amount of the assessed benefits resulting from such paving, to the county. You inquire whether the county is liable for this special assessment for street improvement under the circumstances.

The contract referred to contains the following:

"Whereas, the said lands above described have never been enclosed or improved, and the said city is desirous that the same should be fenced, graded, ornamented and improved and made into a park for the use, convenience and recreation of the people,

"And whereas, it is for the interest of said county that said lands be improved as aforesaid, and it consents that the said city may immediately enter upon, fence, grade and improve the same and plant trees and shrubbery upon and about it, to the end that the same may be made into and be hereafter kept and used for a park as aforesaid,

"And also consenting that the said city shall have, to the extent of all proper and necessary police rules and regulations the exclusive control and custody of the said land, and preserving only the right to erect and build a courthouse thereon, at any future time, and keep and maintain and rebuild the same at its pleasure and to locate the same at such place on said land as it may choose and select.

"Now, therefore, this agreement,

"WITNESSETH: That the said board of supervisors of Rock county have agreed that the said city may immediately enter upon and improve, fence, grade, ornament and build walks and streets and foot and carriage ways upon and around said land and plant trees and shrubbery upon and about the same, and to improve and beautify the same from time to time and from year to year, as it shall see fit. And that said board of supervisors of Rock county have further agreed that hereafter forever the said city shall have the exclusive custody and control of the said land, to the extent of all necessary and proper police rules and regulations, and rules for the use and enjoyment of the same, and that said city shall have such custody and control so long as it shall take care of or improve the same, and keep it for the usual
pursposes of a park, reserving, however, to said county the right to erect, maintain, repair and rebuild on any part of said land, at any time, a courthouse for said county and the right to use and occupy the county buildings now on said grounds until others are procured, or rebuild and maintain others for the same purposes.

"And that said board of supervisors of Rock county have consented and agreed with said city that it will not hereafter and so long as said city shall improve or take care of said land as herein provided use, dispose of, appropriate, or devote the said land or any part thereof, or permit the same or any part thereof, to be used, disposed of, appropriated or devoted to any use or purpose whatever other than for such park and for such courthouse.

"And that the said city has covenanted and agreed that it will during the present year make upon said land some of the improvements herein contemplated. And that it will hereafter grade, fence and plant the same with trees and shrubbery and lay out and build walks and roads upon and about the same, and otherwise beautify and ornament it and to such extent and to such rapidity as it may find expedient and practicable. And that it will hereafter take the custody and control thereof and keep and use the same for the usual purposes of a park and for no other use or purpose. And that it will keep the same at all times inclosed and in order after it shall have been inclosed and graded.

"And that the said parties hereto have mutually covenanted and agreed that the said land heretofore described and bounded and so to be improved, etc., and made into a park shall at all times be free to the proper use and enjoyment of all persons; but subject to such rules and regulations as said city may make and establish with reference thereto, and that the same shall not thereafter, nor shall any part or parcel thereof, be devoted or appropriated to any use or purpose other than as hereinbefore specified."

You direct my attention to sec. 925-266, which provides:

"No lot or parcel of land in any city shall be exempted from the payment of its portion of any tax for the improvement of streets or the building or repairing of sidewalks upon which such lots or parcels of land may border, excepting only property belonging to the United States or this state."

Under the above contract the city of Janesville has agreed to grade, fence and plant the land in question with trees and shrubbery and lay out and build walks and roads upon it and about the same, etc.

I am of the opinion that the agreement is binding upon the city; that the city has such an interest in said land or
park that if any improvement is to be made in building sidewalks or streets that the city must pay for them instead of the county. You are, therefore, advised that the county is not liable for the special assessment of street improvement bordering upon the park upon which the courthouse is located.
OPINIONS RELATING TO TRADE-MARKS

Trade-marks—Marks of Ownership—Statement of marks of ownership of bottles, cans, etc., filed under the provisions of sec. 1747a-1 need not be recorded as the statutes only require that they be filed with the secretary of state.

March 4, 1914.

J. S. Donald,
Secretary of State.

In your letter of the 2nd inst. you enclose the statement and description of the names and marks of ownership used by the Green Bay Ice Cream & Dairy Co., upon its milk bottles, milk cans and ice cream packing tubs and cans, which you state you received for filing, under sec. 1747a-1, Stats., and you ask to be advised as to whether these papers should be recorded under the provisions of sec. 1747a, subsec. 2, or simply filed under sec. 1747a-1.

In answer I will say that the provisions of sec. 1747a pertain to the recording of labels and trade-marks, while the provisions of sec. 1747a-1 pertain to the filing of a written statement or description of the marks of ownership of all cans, tubs, bottles, barrels, etc.

The two sections are distinct and the fields in which they operate do not overlap. The company in question is filing the statement and description of the marks of ownership used upon its milk bottles, milk cans and ice cream packing tubs and cans under sec. 1747a-1 and it is not necessary to record the same under the provisions of sec. 1747a, subsec. 2. A filing of the same, under sec. 1747a-1, is all that is required in order to comply with the requirements of the statute.
Trade-marks—A mark which may be appropriated by others in same business with equal truth cannot be appropriated as a trade-mark.

JOHN S. DONALD,
Secretary of State.

I have received your letter under date of August 15th, together with sixteen applications from the Raymond Porch Shade Co., in which you request my official opinion as to the propriety of registering the trade-marks as requested.

The trade-marks sought to be registered consist of three or five stripes of various colors running parallel to each other representing the various paints used for the porch shades. Each application represents these various stripes arranged in a certain order, as shown by the sample, and all the applications give the stripes of the various colors arranged in all possible orders. There is no name or printed words on the proposed trade-marks, nor anything to distinguish them from any other colors except the stripes of the various colors and the order in which the stripes are arranged. The courts have held that a name or mark which would practically confer a monopoly in dealing in a certain class of articles cannot be appropriated as a trade-mark. Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. Rep. 651. In Canal Company v. Clark, 13 Wall. 311, 323, it was also laid down as a firm rule that any name, mark, symbol or device which is not capable when known in the market of distinguishing one person's goods from those of another and which other persons can use with equal truth as applied to their own goods cannot be appropriated as a trade-mark. If others may apply it with equal truth and equal right for their goods it cannot be appropriated as a trade-mark. See 28 Am. & Eng. Ency. of Law (2nd ed.) p. 358. Any words, marks or device that may be used as a trade-mark are such that may be exclusively appropriated without prejudice to the rights of others. 38 Cyc. 696.

The fact that the company in question is making application for sixteen trade-marks at the same time and that it is difficult to distinguish them from others that might be appropriated by parties in the same line of business leads me to believe that under the above quoted authorities they
should not be registered in your office. I believe it would give the company an advantage which would work prejudice to the rights of others. You are, therefore, advised that you may properly refuse to register the proposed trade-marks.
University—Trust Funds—University trust funds may legally be invested in Brown Bros. Lumber Co. bonds.

August 8, 1914.

JAMES F. TROTTMAN, President,
Regents, University of Wisconsin.

Under date of Aug. 6th, M. E. McCaffrey, Secy., board of regents, submitted to this department a request for an official opinion to be given to you as to the legality of investing university trust funds in timber bonds of the Brown Bros. Lumber Co. Accompanying said request was a letter signed by L. M. Hanks, Pres. Central Wis. Trust Co. Madison, Wis., in which he states that the proposed bonds issued by the Brown Bros. Lumber Co. are in the amount of $500,000, to be dated Sept. 1, 1914, drawing interest at the rate of six per cent, payable, semiannually, on the first days of Dec. and March; that $50,000 will mature each year, commencing with Sept. 1, 1917, and running to Sept. 1, 1926; that they will be secured by a first mortgage on nearly seven thousand acres of land in Snohomish county, Wash., on which there is located nearly seven hundred fifty million feet of fir and cedar, running about twenty-five per cent cedar; that the cruisers of the Central Wis. Trust Co., who have gone over the tract have estimated its fair value to be $3.00 per thousand feet, or $2,000,000 for the tract; that in addition to this the bonds will be endorsed by A. W. Brown, E. C. Brown and W. E. Brown, who are estimated to be worth, aside from the property mortgaged, between two and three million dollars. It appears by said statement that the said bonds are good security.

The university trust funds are moneys received by the regents from private donations by will or otherwise, to be
invested and used for the benefit of some specific purpose designated by the donor. These funds are not to be confused with the university fund provided for by our constitution and mentioned in sec. 248, Stats.

The provisions as to the investment of the university fund are, therefore, not applicable to the university trust funds mentioned in Mr. McCaffrey’s letter. I find no provision in the statutes, nor do I know any principle of law which would lead me to conclude that the university regents could not invest the university trust funds in said bonds.

I am, therefore, of the opinion that said investment in said bonds, if otherwise properly made, would be legal.

Regents of University—Power to Spend Money on Street Lights. Regents of university have power to coöperate with other property owners on streets adjoining university grounds to establish a system of street lights and pay the proportionate share of the expense.

November 17, 1914.

H. J. ThorKelson,
Acting Business Manager,
University of Wisconsin, Madison.

In your letter of Nov. 10th you state that a movement is on foot in the city of Madison to install a system of ornamental street lights to be erected on Park, State, Carroll, Main, Mifflin, Pinckney, King and Wilson streets, in the city of Madison, Wis., pursuant to the provisions of sec. 959-52m, Stats., and on condition that the cost to the abutting property does not exceed the sum of one dollar per front foot thereof. You state that this system of ornamental street lights as contemplated touches the university property on State and Park streets and you inquire whether the board of regents have the power to coöperate with the other property owners of the city and obligate themselves to pay their share of the said improvement.

You state that the board of regents are very anxious to improve the illumination of the university grounds and that the proposition will improve the illumination of the bordering lines of your property on these streets.
Under sec. 378, Stats. the government of the university is vested in a board of regents who with their successors in office constitute a body corporate and they are declared in sec. 379 to possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law. They are also given the power to enact laws for the government of the university in all its branches. Our supreme court has said concerning the language used that "these terms are in themselves of sweeping import." It thus appears that the regents have broad powers. Our supreme court, in the case of State ex rel. Priest v. Regents of the University of Wisconsin, (54 Wis. 159), said concerning the implied powers of the regents:

"Implied power is an incident of general power granted, and is peculiarly applicable to corporations governed by boards of regents, trustees, directors and the like. This court has held 'that in determining the powers of a corporation, the rule is, if the means employed are reasonably adapted to the ends for which the corporation was created, they come within its implied powers, though they may not be specifically designated by the act of incorporation'; and that it is 'entitled to choose among the means convenient and adapted to the end contemplated by its charter,'—citing cases. By parity of reasoning it may be said that it is for the board of regents to choose the means which in their judgment are necessary or convenient, provided only they are calculated to accomplish the object sought by the charter and within the scope of the general powers granted, and not in conflict with the statute."

In that case it was held that the heating and lighting of public halls and rooms of the university is an expense necessary and convenient to accomplish the objects mentioned in the statute and that the university has implied powers to incur the expenses for such purposes. It may be said that by parity of reasoning the regents of the university have the power to expend money for the illumination of the university grounds and it is for the regents to choose the means convenient and adapted to accomplish such end.

The illumination of the streets here contemplated is that of Park and State streets which certainly will greatly improve the approach to the university grounds and the main buildings. I am persuaded that the regents have the power to cooperate with the other property owners on the streets
mentioned and the city of Madison to establish a system of ornamental street lighting and to incur the expense therefor and pay its proportionate share out of funds appropriated for the University of Wisconsin. In arriving at this conclusion I have not overlooked the fact that the city of Madison cannot levy a special tax on the university of any kind and that if the city should install the system of ornamental lights contemplated without the cooperation of the board of regents the municipal authorities could not compel the university to pay its proportionate share. Still, I am of the opinion that the powers granted to the university regents are broad enough as construed by our supreme court to accomplish the purpose herein set forth.

In an opinion rendered by this department to the normal school regents under date of July 23, 1907, it was held that said regents have the power to build a sidewalk in the public streets of a city where they have normal schools and pay for the same, although they could not be compelled to pay for such sidewalk by a special tax levied if built by the city. See Biennial Report and Opinions of Attorney General for 1908, p. 928.

You are, therefore, advised that the regents of the University of Wisconsin have the power to expend money for the establishment of a system of ornamental street lights on State and Park streets in cooperation with the city of Madison, as herein set forth.
Weights and Measures—Paraffine bottles may not be used in selling cream or milk by weight unless the same are marked and sealed as provided in sec. 1666a, Stats.

February 2, 1914.

J. Q. Emery,

Ex Officio State Supt. of Weights and Measures.

Under date of Jan. 28th you have submitted to me a question raised by the Brown Bros. Lumber Co., Rhinelander, Wis., in letters dated Jan. 17th and 26th addressed to you, which letters you enclose, together with copies of your answers thereto.

It appears that the Brown Bros. are desiring to sell cream which is 32 per cent butter fat, or a little over, by weight; namely, in half pound, one pound and two pound packages, the same to be weighed on a scale which is correct and has been sealed. They desire to sell this cream in paraffine paper bottles to be used as containers, which they desire to purchase from the National Coning and Machinery Co., Indianapolis, Ind. It appears that this company has not filed a bond, as required by sec. 1666a, Stats. The question presented is, may cream or milk be sold in such manner?

Subsecs. 1 and 2 of said sec. 1666a, Stats., which I believe is decisive of this matter, provide as follows:

"1. Bottles used for the sale of milk and cream shall be of the capacity of half gallon, three pints, one quart, one pint, half pint, one gill, filled full to the bottom of the lip. The following variations on individual bottles or jars may be allowed, but the average contents of not less than twenty-five bottles selected at random from at least four times the number tested must not be in error by more than one-quarter of the tolerances: Six drams above and six drams below on the half gallon; five drams above and five drams below on the three-pint; four drams above and four drams below on the quart; three drams above and three drams
below on the pint; two drams above and two drams below on the half pint; two drams above and two drams below on the gill. Bottles or jars used for the sale of milk shall have clearly blown or otherwise permanently marked in the side of the bottle the capacity of the bottle and the word 'Sealed' and in the side or bottom of the bottle the name, initials or the trade-mark of the manufacturer and designating number, which designating number shall be different for each manufacturer and may be used in identifying the bottles. 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. 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.

"2. Any manufacturer who sells milk or cream bottles to be used in this state that do not comply as to size and markings with the provisions of this section shall suffer the penalty of five hundred dollars, to be recovered by the attorney general in an action against the offender's bondsmen, to be brought in the name of the people of the state. Any dealer who uses, for the purpose of selling milk or cream, jars or bottles purchased after this law takes effect that do not comply with the requirements of this section as to markings and capacity, shall be deemed guilty of using false or insufficient measure."

A sample of the paraffine bottles such as the Brown Bros. intend to use you have kindly shown to me. Although they are not in the form of the ordinary glass bottles, nor of glass jars, still I am of the opinion that they are included within the term "jars or bottles" in contemplation of the statute in question. Milk or cream when sold in a container has universally been sold in bottles or jars and I believe when the legislature enacted the law in question, they intended to regulate the sale of milk or cream in any container in which the same was sold. The fact that these containers are made of paraffine instead of glass does not show that they are not bottles for bottles may be made of other material than glass. We often find bottles made of skins of animals and of rubber.

A bottle is defined by Webster as follows:

"A hollow vessel usually of glass or earthenware with a comparatively narrow neck or mouth and without handles."
Webster also says that:

"Bottle is now so loosely used that its limits of application is not well defined. It is generally distinguished from vessels as the jug or demi-jug."

These paraffine containers are narrower at the top than at the bottom; they have no handles and are spoken of as paraffine bottles. I am, therefore, of the opinion that they are bottles in contemplation of the statute in question and that the Brown Brothers are not authorized to use them as containers of milk and cream when offering the same for sale unless the paraffine bottles are marked and sealed as required by said sec. 1666a, Stats.

Weights and Measures—Branding of Packages—Sub-par. 3, sec. 4601aa, Stats., requiring net contents of packages of articles of food and drink to be marked on the outside of the packages is complied with by marking on the caps or crowns of soda and beer bottles the net contents thereof, provided such marking be plain and conspicuous.

J. Q. EMERY,
Ex Officio Supt. Weights and Measures.
I have your letter of the 7th inst. in which you enclose a letter under date of March 3d from J. B. Reiter, of Milwaukee, secretary of the state bottlers' association, and you ask to be advised whether it will be a compliance with sec. 4601aa, Stats., as amended by ch. 311, Laws of 1913, to use a crown on soda and beer bottles, which has branded thereon the contents of said container.

The section of the statutes to which you refer is a penal statute. It prohibits and provides penalties for the misbranding of any article of food or drink and defines the term "mistrand" in par. 3, as applying:

"To articles of food in package form if the actual quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count; reasonable variations, however, shall be permitted from the stated weight, measure or numerical count, and the dairy and food commissioner shall establish tolerances for the same by rules and regulations."
It will be observed that the statute requires that the actual quantity be "plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count." It does not specify any particular manner in which it shall be so marked, except that it shall be plain and conspicuous. It does not prescribe any particular place where it shall be so marked, except it shall be on the "outside of the package." Provided it is plainly and conspicuously marked, it may doubtless be marked on the top, bottom or sides of the package. The manner of marking is not indicated, except it shall be in "terms of weight, measure or numerical count," provided, of course, the marking shall be plain and conspicuous.

It would seem, therefore, that the marking may be sufficiently accomplished by any appropriate means or in any manner which constitutes it a plain and conspicuous marking on the package, and may be either by writing, printing or impression in or on the surface of the package, or by label or other appropriate marking attached to the surface of the package.

I do not know that I am definitely advised as to what is "a crown" on a soda or beer bottle. If this refers to the metal cap about three-fourths of an inch in diameter which I have seen affixed to a soda water bottle and which constitutes a sort of stopper attached thereto by machinery so as to retain the contents of the bottle, then I am of the opinion that a crown on a soda water or beer bottle would be a part of the package and that marking the contents on such cap or crown would be a compliance with the statute, provided the surface thereof is sufficient to permit the marking thereon of the contents in a manner which would be plain and conspicuous.

It would seem that the marking of some such expression as "10 oz." or "½ pt." on such metal cap or crown in figures as large as a surface three-fourths of an inch in diameter or thereabouts would conveniently permit, being on the cap of the bottle which is removed by the consumer and, therefore, likely to come particularly to his notice, would be a plain and conspicuous marking and in every way satisfy the requirements of the statute.
Weights and Measures—Misrepresentation of quantity sold is prohibited by sec. 4432, Stats. What constitutes misrepresentation is a question of fact upon the statements, acts and circumstances.

May 23, 1914.

J. Q. EMERY,
Ex Officio Supt. of Weights and Measures.

I have your request for opinion of recent date in which you submit the following:

"I respectfully request an interpretation of that portion of subsec. 1, sec. 4432, Stats., which reads as follows: 'or any person who, by himself or by his servant or agent, or as the servant or agent of another, shall sell or offer or expose for sale or keep for the purpose of sale, less than the quantity he represents, in its application to transactions which come within the jurisdiction of this department. For example take the case of Limburger and brick cheese. As I am informed it has been the practice in the past to put up Limburger cheese made into one or two pound packages by means of moulds, wrap the same first in manila paper and then wrap it in tinfoil. These packages of Limburger cheese are then put into boxes, a certain number of packages to the box, for sale. My information is that in the wholesale trade the box has been regarded as tare but the weight of the cheese includes the manila paper and tinfoil. When the retailer has sold these packages the manila paper and tinfoil has constituted a part of the weight of the article sold.'"

Subsec. 1 of sec. 4432, Stats., with the provision to which you refer italicized, reads as follows:

"Any person, who, by himself or by his servant or agent or as the servant or agent of another, shall use or retain in his possession any false weight or measure or weighing or measuring device, to be used in the buying or selling of any commodity or thing which has not been sealed by a sealer of weights and measures within one year; or any person who, by himself or by his servant or agent, or as the servant or agent of another, shall sell or offer or expose for sale or keep for the purpose of sale, less than the quantity he represents; or who by himself, or by his servant or agent, or as the servant or agent of another, shall use any false weight or measure in buying or selling any commodity or thing, or shall sell or offer or expose for sale or keep for the purpose of sale any commodity in a manner contrary to law; or any person, who, by himself or by his servant or agent or as the servant or agent of another, shall sell or offer to sell or have in his pos-
session for the purpose of selling any device or machine to
be used or calculated to falsify any weight or measure, shall
be punished by imprisonment in the county jail not less than
ten days nor more than three months, or by a fine of not
less than twenty-five dollars nor more than one hundred
dollars."

The particular clause to which you refer defines a distinct
offense under this statute. The gravamen of that offense
is misrepresentation, fraud. This statute does not require
that any commodity be sold or offered for sale in any par-
ticular quantity. It requires only that there shall be no
misrepresentation with respect to the true quantity actually
sold or offered for sale. Whether such misrepresentation
was practiced or existed in any particular case would be a
question of fact to be determined by a jury from proof
of the acts, statements and circumstances attendant upon
and surrounding the transaction.

In my opinion, one who sells or offers for sale, as a pound
of cheese, and under such circumstances as to cause the pur-
chaser to believe that it is a pound of cheese, a package which
does not contain a pound of cheese, net weight, violates this
law. I see no escape from that conclusion. On the other
hand, this statute does not make it unlawful to sell cheese
in packages weighing a pound gross weight, provided the
statements, acts or circumstances of the parties do not
amount to a representation that the package contains a
pound of cheese.

There would clearly be no such misrepresentation in
such a case if, for instance, it were brought expressly to the
attention of the purchaser, by plain marking on the package
or in some other appropriate form, that the selling weight
is a gross weight or what is the actual net weight, so that
the purchaser is truly advised and knows what quantity
he is getting. A retailer dealing with a consumer or other
person not truly informed of the fact must, in my opinion,
adopt some such practice in order to be clear as against
the charge of violating this statute.

As between producers and jobbers or jobbers and retailers,
or others, between whom there exists a well-known and
established trade custom to deal in the commodity in terms
of its gross weight as customarily wrapped or packed,
such custom would, or at least might, take the place of any
express statement by the seller to the purchaser concerning the actual quantity sold or offered. In such a case, and where by virtue of such custom the parties mutually know that the terms used refer to gross weights or approximate weights, only, it seems clear that there would be no misrepresentation within the meaning of this statute.

Dairy and Food Commissioner—Superintendent of Weights and Measures—Misbranding—Fraud—Sec. 1670t, Stats., makes it a misdemeanor punishable by fine to sell or offer for sale cotton duck or canvas unless stamped as therein provided, but no duty in respect to the statute is imposed by law upon the dairy and food commissioner or superintendent of weights and measures.

J. Q. Emery,
Dairy and Food Commissioner.

I have your inquiry of recent date, in which you refer to sec. 1670t, Stats., relating to the sale of cotton duck or canvas, weight, quality and branding, and ask to be advised "what are the duties, if any, of the dairy and food commissioner, ex officio state superintendent of weights and measures in relation to said sec. 1670t or any part thereof."

Sec. 1670t, Stats., is designed to require all persons who manufacture for sale or offer for sale any cotton duck or canvas or articles other than clothing manufactured therefrom to stamp or brand thereon the true and correct weight of the same in ounces per yard. This statute also seeks to prohibit the sale of cotton duck or canvas containing filler or with preparations placed thereon which increase the weight, without the name or description of the filler being stamped upon the material. A penalty is provided by way of a money fine.

This statute does not, in terms refer to the dairy and food commissioner or the state superintendent of weights and measures. It is simply a statute prohibiting and providing a penalty for certain forms of fraud, and does not declare any statutory duty upon any particular public official to enforce it. If there is any such duty upon the
dairy and food commissioner or state superintendent of weights and measures, it must be found in the general statute prescribing the duties of those offices.

The general duties of the dairy and food commissioner are defined in sec. 1410a, Stats., and are there limited to the enforcement of the laws for the prevention of the adulteration and misbranding of articles of food and drink, condiments and drugs. There is nothing in this section of the statutes, nor in those provisions of the statutes giving the dairy and food commissioner jurisdiction and authority to regulate sanitary conditions in the dairy industry, which imposes upon the dairy and food commissioner any duty with respect to the provisions of sec. 1670t.

The duties of the state superintendent of weights and measures and his authority are defined in subsecs. 2, 3, 4, 5 and 6, sec. 1659, Stats., and consist in a general way in keeping and maintaining proper standards of weights and measures and of supervising the inspection and sealing of weights, scales and measuring devices. In subsec. 6, sec. 1659, the state superintendent of weights and measures and his inspectors are required to inspect the work of local sealers and in that connection are given the same powers as local sealers of weights and measures, whose duties are prescribed in subsec. 2, sec. 1661, Stats., and in general may be said to embrace inspection and sealing of weights, scales and measuring devices.

None of these statutes, in my opinion, impose upon the state superintendent of weights and measures the duty of inspecting cotton duck or canvas or ascertaining whether the same is sold in this state in accordance with the provisions of sec. 1670t, Stats., or any other duty with respect to the enforcement of the last mentioned statute. Should any violation of this statute come to your attention, the proper course for you is to refer any information which you may have to the district attorney of the county wherein such violation is alleged to have occurred and it will be his duty to investigate the same and upon sufficient facts found by him to institute proceedings as for the prosecution of any other statutory misdemeanor.
Weights and Measures—Overstatement of size or capacity of range boilers is misrepresentation prohibited by sec. 4432, Stats.

J. Q. Emery,

Ex Officio Supt. Weights and Measures.

Replying to your request of the 14th instant for an official opinion, you are advised that in the opinion of this department the language of sec. 4432, Stats., quoted in your inquiry, is broad enough to prohibit and was manifestly intended to prohibit misrepresentation with respect to size, capacity or quantity of articles sold and kept for sale. There would seem to be no room for doubt or construction upon the proposition that one who sells and offers for sale as a thirty-gallon range boiler one which in fact is only of sufficient size to hold twenty-five gallons, sells and offers for sale "less than the quantity he represents."

With respect to an article of this character, the number of gallons is used to represent the size and the amount of material used in the construction of the article. In such a case an overstatement of the capacity of a boiler in gallons is a direct misrepresentation as to the size of the boiler and the amount of material entering into it, affecting its value and usefulness to the purchaser, and is, in my opinion, clearly prohibited by this statute.

Weights and Measures—Applicability of the weights and measures law to the state questioned.

J. Q. Emery,

Ex officio Supt. Weights and Measures.

In your letter of July 15th you request my opinion as to what answer should be given to a letter which you enclose from D. C. James, Richland Center, which reads as follows:

"I would like to know if the state of Wisconsin is amenable to the laws governing weights and measures, as enforced to the commercial subjects of the state, where the state goes in to the manufacturing and sale of products.

"If I sell goods manufactured by the state, on short weight, to the farmer, who is responsible for the violation of the law?"
It is a general principle that "statutes in general terms do not bind the state." *State v. Milwaukee*, 145 Wis. 131, 135. Such principle has been applied to make inapplicable to the state the building ordinances of the city of Milwaukee where the board of normal school regents was erecting a normal school building. See *Milwaukee v. McGregor*, 140 Wis. 35.

Whether this principle is applicable to the weights and measures law I shall not attempt to determine in the absence of a definite statement of the violation thereof that is claimed to have taken place. I suggest that your correspondent furnish either you or the district attorney of his county a detailed statement of the transaction which he thinks may constitute a violation of the law, and if further advice is desired from this department I shall be glad to furnish the same.

*Weights and Measures—Milk and Cream Bottles—Bottles used for the sale of milk or cream need not be labeled as required by sec. 4601aa, Stats. Sec. 1666a, Stats., governs as to the marking of such bottles.*

J. Q. Emery,

*Ex officio Supt. Weights and Measures.*

In your letter of this date you enclose a letter from W. D. Hoard, in which he states that he has been informed of the passage of ch. 311, laws of 1913; that by the terms of that law, as he interprets it, he must brand every bottle of milk he sells with his name and the quantity in the bottle; and he asks you to advise him in the matter. You state that it has been your understanding that sec. 1666a, Stats., is a specific law relating to the sale of milk in bottles and that no further requirements as to labeling are made by the laws of the state. You ask my opinion upon this matter.

Sec. 1666a Stats., provides what shall be standard bottles for the sale of milk and cream, and provides that such bottles shall have clearly blown or otherwise permanently marked in the side of the bottle the capacity of the bottle and the word "Sealed," and in the side or bottom of the bottle.
the name, initials or trade-mark of the manufacturer, and a designing number to be furnished by the state superintendent of weights and measures.

The section further provides a penalty for the sale of milk or cream bottles not complying with the section and for any dealer who uses bottles not complying with the section for the purpose of selling milk or cream.

Ch. 311, laws of 1913, amends sec. 4601aa, Stats., relating to the misbranding of any article of food. This amendment, among other things, requires all articles of food in package form to have the actual quantity of the contents plainly and conspicuously marked on the outside of the package. Clearly this latter provision is a general provision relating to articles of food, while the provisions of sec. 1666a are special, relating to bottles used for the sale of milk or cream.

Applying the well known rule of construction that, where there is a conflict between the terms of a special statute and those of a general statute, the terms of the special statute shall prevail, it is my opinion that the provisions contained in sec. 4601aa, as amended, do not apply to the sale of milk and cream in bottles, but that such sales are governed by the provisions of sec. 1666a.

Weights and Measures—The provisions of sec. 1667 apply to commodities sold by hundred weight and ton and not to those sold otherwise. 

August 8, 1914.

J. Q. Emery,
Ex officio Supt. Weights and Measures.

Under date of Aug. 7th you direct my attention to the provisions of sec. 1667, which provides as follows:

"When any commodity shall be sold by the hundred weight it shall be understood to mean the net weight of one hundred pounds avoirdupois, and all contracts concerning goods or commodities sold by weight shall be construed accordingly unless such construction would be manifestly inconsistent with the special agreement of the parties contracting. When any commodity is sold by the ton it shall be understood to mean the net weight of twenty hundred avoirdupois pounds unless such construction would be manifestly inconsistent with the special agreement of the parties contracting."
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You inquire whether the term "weight" or "hundred weight," used in the section as above quoted, are to be construed as synonymous terms, or whether the term "weight," as used therein, applies to commodities when sold in quantities other than by the hundred weight.

In answer I will say that I believe the section must be construed in the same way as if the word "weight" in the second line were "hundred weight." As the statute was originally enacted (See R. S. 1858, ch. 58, sec. 10), the latter part applicable to tons was not a part of it. This was added by a subsequent amendment (See ch. 195, laws of 1895).

If the construction of this section had been such that it applied to commodities when sold in quantities other than by the hundred weight, this amendment would have been superfluous, as it would have covered sales of commodities when sold by the ton. I believe the provisions of the statute referred to apply only to sales by the hundred weight.

Weights and Measures—Cheese wrapped in parchment and tinfoil not a package within the meaning of section 4601aa.

August 12, 1914.

J. Q. EMERY,
Ex-Officio State Supt. Weights and Measures.

Under a recent date you direct my attention to the provisions of sec. 4601aa, Stats., and inquire whether the term "closed receptacle" in contemplation of said statute, is applicable to Limburger cheese which, according to prevailing custom, is put up in individual units containing approximately one pound or two pounds, first wrapped in an especially prepared parchment paper and then wrapped with tinfoil. You state that a number of these individual units so wrapped, say one dozen or two dozen, are put into cases for shipping purposes; that in wholesale quantities this cheese may be sold in these cases, but in the usual retail trade the individual unit is sold from this shipping case in the tinfoil and paper wrapping. You also state that it is a common practice to sell butter in prints of about one pound. That these one pound prints may be either wrapped in parchment paper and put into a shipping case or
they may be put into pasteboard cartons which are so manufactured that each carton can be closed. You inquire whether the parchment paper in tinfoil in which the cheese is wrapped and the parchment paper or carton in which the butter prints are placed are closed receptacles within the meaning of this statute.

The material part of said statute provides as follows:

"Any person, who by himself, or by his servant or agent, or as the servant or agent of another, shall manufacture or solicit or take orders for delivery, or sell, exchange, deliver or have in possession with the intent to sell, exchange or expose, or offer for sale or exchange any article of food within the meaning of section 4600 of the statutes which is misbranded within the meaning of this section, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail not less than ten days nor more than sixty days.

"The term 'misbranded,' as used herein, shall apply:

"(1) To articles of food, or articles which enter into the composition of food, which, or the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular;

"(2) To articles of food in package form which do not bear plainly and conspicuously marked on the outside thereof the name and address of the manufacturer, packer or dealer;

"(3) To articles of food in package form if the actual quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count; reasonable variations, however, shall be permitted from the stated weight, measure or numerical count, and the dairy and food commissioner shall establish tolerances for the same by rules and regulations; and

"(4) To articles of food in package form if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package.

"The term 'label,' as used in this section and in section 4601, or in any other section of the statutes, relating to the adulteration or misbranding of food, unless otherwise specifically described and provided therein, shall apply to any printed, pictorial, or other matter upon or attached to any package of a food product or any container thereof.

"The term 'package' as applied to articles of food shall mean a closed receptacle of any kind in which an article of food is kept in stock and which with its contents is sold to the public."
The term "receptacle" has a broad meaning. It is defined in Webster's New International Dictionary as "That which serves or is used for receiving and containing something; a repository." In the Century Dictionary and Cyclopedia, it is defined as "That which receives or holds anything for rest or deposit; a storing place; a repository; a container; any place open or closed that serves for reception and keeping." A "container" is defined as "That which contains." That the term is used in its broadest sense is evident from the fact that the phrase "of any kind" follows the word "receptacle."

The term "wrapper" is defined in Webster's New International Dictionary as follows:

"That in which anything is wrapped or enclosed; envelope; cover; as the detachable paper cover put on a book to protect the binding; the tobacco leaf used for the outside covering of a cigar or stick or plug of tobacco; a loose outer garment."

The definition of "receptacle" as above quoted conveys the idea of something of definite and permanent shape into which another object may be inserted and which will receive and hold such other object, while a "wrapper" is simply a loose outside covering used to protect or cover a given object. In one instance the "receptacle" gives shape to the package, while in the instance of the "wrapper" the object wrapped gives shape to the package. I think popular opinion recognizes a well-defined distinction between the term "receptacle" and the term "wrapper" and from the definitions above quoted I believe such distinction is pretty well stated above.

The question then is, whether the wrapping around bricks of limburger cheese according to the prevailing custom mentioned in your communication, may be called a receptacle or whether it is simply a wrapper. It seems to me that the parchment paper, together with the tinfoil used as indicated in your letter, is nothing more nor less than a wrapper and that it cannot be said in any sense of the word to be a receptacle. I, therefore, conclude that bricks of Limburger cheese put up as described in your letter do not constitute a package as that term is defined in the statute above quoted.
Weights and Measures—Net Weight—What receptacle required to be marked to show net weight, etc., of contents under sec. 4601aa, Stats.

September 24, 1914.

J. Q. Emery,
Superintendent of Weights and Measures.

I have your request for opinion of the 12th instant, in which you ask to be advised whether a box in which is packed for convenience in shipping and handling sixty or one hundred and twenty bricks of Limburger cheese in wrappers or prints of butter in wrappers, would be a container of such character as to be required to be marked with the net weight of the contents under the provisions of sec. 4601aa Stats. You say:

"My understanding is that as a rule the box containing the packages of Limburger cheese or the prints of butter is sold to retailers and the individual packages are sold from the box to the consumer. I can see the possibility that the boxes might occasionally also be sold to the consumer, and hence the question arises, in what sense is the word 'public' used? Does it apply to the trade, where the wholesaler sells to the retailer, or does it apply where the sale is made to the consuming public?"

The answer to your inquiry turns upon the character of the package to which, by the terms of this section, the requirement for the marking of the net weight of the contents is made applicable. This section prohibits under penalty the selling or offering for sale any article of food "which is misbranded within the meaning of this section." The term "misbranded" is defined as applying *inter alia* "to articles of food in package form if the actual quantity of the contents be not plainly and conspicuously marked on the outside of the package."

Then the section defines the term "package" as therein used, and it is the language of this definition which determines the answer to your inquiry. It is as follows:

"The term 'package,' as applied to articles of food, shall mean a closed receptacle of any kind in which an article of food is kept in stock and which with its contents is sold to the public."
The federal supreme court in the case of *McDermott v. Wisconsin*, 228 U. S. 115, considered this question as it arose under secs. 7 and 8 of the national pure food and drugs act, wherein drugs are defined as "adulterated" unless the true strength and contents be stated on the package, and foods and drugs are "misbranded" if the package shall bear any statement which is false or misleading in any particular. In that act the term "package", as used in these sections, was left for definition by the court and the supreme court held that the word "package," as there used, referred only "to the immediate container of the article which is intended for consumption by the public * * *." The court's reasoning on this point is indicated by the following:

"Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed." (pp. 130–131.)

The Wisconsin legislature, in enacting sec. 4601aa, defined the term "package" as therein used, and in that definition indicated very clearly the purpose to prevent the misbranding of the package which is seen and purchased by the consuming public. The Federal Court read that definition of the term "package" out of the purpose of the statute, although it was not expressed in the federal act. In our statute the definition of the term "package" is expressed, and anything omitted from that definition or anything required to make its construction clear will be supplied by reference likewise to the purpose and intent of the legislature in enacting the law.

The term "package" is declared by the statute to mean that closed receptacle in which an article of food "is kept in stock and which with its contents is sold to the public." Clearly, this language does not refer to the shipping case in
which several packages or quantities are packed for convenience in shipping and handling and from which they are removed when sold to the public. Ordinarily, the marking of the shipping case would be of no protection to the consumer in the case of those articles which are not sold to the consumer in the shipping case.

The term "public" is commonly used in statutes not so much to indicate all people in general as to distinguish those not of a particular class. The term "public trial" means in law not necessarily a trial to which everybody has a right to be admitted, but rather a trial which shall not be secret. A "public wrong" in the law means not so much a wrong against all people, as a wrong against a class, or community, or locality, or several persons, as distinguished from a mere private injury affecting one or more individuals.

So, in this statute, the manifest purpose of which is the protection of the consuming public, that is, consumers generally, the term "public" will be construed not as embracing anybody and everybody, but as embracing the general purchasing and consuming public, as distinguished from dealers in or manufacturers of the articles of food to which the act applies. The definition of package, therefore, in this act embraces that class of receptacles in which articles of food are kept in stock, and which, with their contents, are sold to the consuming public. It does not embrace the shipping case or box in which several such packages may be placed for convenient shipping and handling between manufacturer and jobber or jobber and retailer in the trade.

You suggest that the answer to this question may be affected by the possibility that in some instance or occasionally an entire shipping case or box might be sold to a consumer. Whether in that case the shipping case or box would become a package within the meaning of this act would, in my opinion, depend somewhat upon circumstances. The act, no doubt, contemplates that the package which it requires to be marked with the net weight of the contents shall be so marked at the time and place where it is put up by the manufacturer or jobber. By implication it contemplates that those packages which are intended to be and which are, in the usual course of business, kept in stock and sold with their contents to the consumer shall be so marked.
The trade customs and practices with respect to the sale of such articles of food are, of course, well known to those who prepare them for market. Those persons will be liable who offer for sale articles of food in package form, the container of which, in the usual course, does or may go to the consumer, unless such container is marked as the statute requires. The statute implies, in other words, that the person preparing such articles of food for sale in package form shall anticipate what package or container will, with its contents, be sold to the public. Such person, however, can hardly be held to anticipate that some packing case or box not so intended may, in some casual and rare instances, contrary to what is common or usual in the trade, be sold with its contents to a consumer.

Moreover, the language of the statute suggests to my mind the idea of the usual course of business. It is apt language to express that idea. The "package" is the "receptacle" in which an article of food "is kept in stock" and "is sold." That statute does not use the expression, receptacle in which an article of food may be contained or may be sold, which language might import the idea of any container in which in any case the article might be contained and which might be sold with its contents. The expressions "is kept in stock," and, "is sold to the public," suggest the idea of a usual and continuing practice or custom. They are not apt terms in which to express the idea of the casual or unusual, especially when considered in the light of the purpose and scope of the act.

My conclusion is, therefore, that if in the trade the sale to the consuming public of the articles of food in question in the box or case in which the same are packed for convenience of shipment and handling is unusual and extraordinary and not reasonably to be anticipated at the time such articles of food are prepared for sale and shipment, then such shipping case or box is not a package within the meaning of this statute.

If, on the other hand, the sale of such articles of food to the consuming public in such form is common, frequent or usual in the trade so as to be reasonably anticipated at the time such goods are prepared for sale and shipment, and if such articles of food are, in the ordinary course of business, kept in stock in such box or package and the same is sold
with the contents to the public, the statute requires that such a package be marked with the net weight of the contents. Prepared and sold under those circumstances, such box comes within the reasoning of the U. S. Supreme Court in the *McDermott Case*, above quoted. In such a case it becomes the container in which goods are sold to the consumer, and the marking upon which is the net weight of the contents, will be effectual notice to the consumer thereof.
OPINIONS RELATING TO WORKMEN'S COMPENSATION

Workmen's Compensation—State Employes—The secretary of state should not audit a claim for compensation to a state employe until the industrial commission has made an award thereon.

January 30, 1914.

JOHN S. DONALD,
Secretary of State.

In your favor of Jan. 23rd you state that you are in receipt from the capitol commission of a claim of Herman Kepke for compensation, amounting to twenty dollars, for personal injury, under the workmen's compensation act, and that the secretary of the capitol commission has certified that at a meeting of the commission held Dec. 19, 1913, the following action was taken:

"The Secretary reported that H. J. Kepke, a watchman employed by the commission, had fallen and broken his collar bone while on his way to work, and that he had presented a bill of $20.00 for professional services. It was decided that this amount should be added to the next voucher of Mr. Kepke."

You ask whether the capitol commission has power to certify such claim for payment or whether it should come through the industrial commission.

All employes of the state are subject to the workmen's compensation act and like employes of private employers are entitled to compensation when the conditions prescribed by sec. 2394-3, Stats., are present. Some board or person must decide whether such conditions are present so as to entitle the employe to compensation and must also determine the amount of the compensation, if any. In the case of private employers the employer and employe may agree, subject to review by the industrial commission, upon such
questions and in case of employes of counties, cities, towns, villages and school districts the county boards, common councils, etc., plainly have power to agree upon and allow such charges against the respective municipal corporations which they represent, as seem to them to be proper; but as to claims against the state there is no board or body other than the legislature that has power to take such action in behalf of the state. It could hardly have been the legislative intent that each officer or board having power to hire employes should have authority to decide questions as to whether such employes when injured are entitled to compensation and the amount thereof. A mistake on the part of any such board or officer as to the state’s liability or the amount thereof might result in the illegal payment of money from the state treasury.

It seems rather to have been expected that the industrial commission should pass upon such claims. It is the only board or officer that has any power so to do. Private employers and the representatives of municipal corporations who are directly responsible to their constituents may well be expected to investigate and settle claims made against them, but administrative boards and officers can hardly be expected to pass upon claims that may be made against the state. You will note that in the instant case the injury is stated to have occurred while the injured man was “on his way to work.” It may be a question whether, under such circumstances, he can bring himself within the provision of subdiv. 2, sec. 2394-3, and if he cannot he is not entitled to compensation in spite of the fact that the capitol commission have in form allowed his claim.

I am therefore of the opinion that you have no power to audit the claim against the state for compensation to be paid to an injured employe of the state under the workmen’s compensation act until the industrial commission has made an award to such employe.
Workmen's Compensation—Interstate Commerce—The industrial commission has jurisdiction under the workmen's compensation act of accidents happening on vessels engaged in interstate commerce on the great lakes.

July 16, 1914.

Industrial Commission.

You have handed me copy of an opinion of the chief counsel of the Standard Life & Accident Company on the question "whether or not the compensation laws of any of the states bordering on the great lakes will apply to vessels engaged in interstate traffic" and have requested my opinion as to whether you have jurisdiction under the Wisconsin workmen's compensation act of (1) accidents happening while such a boat is under way, and (2) accidents happening while the boat is at the dock.

It is fundamental that a personal action for personal injury is governed by the lex loci, not the lex fori. Bain v. N. P. Ry. Co., 120 Wis. 412, 417, 418; Eingartner v. Ill. Steel Co., 94 Wis. 70, 75, 81; McCarthy v. Whitcomb, 110 Wis. 113, 123.

No matter where an action is brought, the law that is applied to determine the rights of the parties is the law of the place where the accident happened. "Compensation laws, like other laws, are without effect beyond the jurisdiction enacting the law." Boyd, Workmen's Compensation, sec. 465. Consequently the general rule must be that the Wisconsin compensation act governs the rights and liabilities of all employers and employees subject to it growing out of accidents occurring within the jurisdiction of the state, but that it has no application to accidents happening outside of such jurisdiction.

An obvious exception to the generality of the foregoing rule is the case of employees engaged in interstate commerce by railroads who are within the Federal Employers' Liability Act, for, Congress having enacted a regulation of interstate commerce, "the laws of the states, insofar as they cover the same field, are superseded." Second Employers' Liability Cases, 223 U. S. 1, 55; Taylor v. Taylor, 232 U. S. 363, 368.

The fact that the vessel may be engaged in interstate commerce quite clearly has no bearing on the questions
presented, for the compensation act is plainly not a direct regulation of interstate commerce and there being no act of Congress applicable to carriers by water, the states may enact laws that indirectly affect interstate commerce until Congress occupies the field. Thus in holding that the compensation act of the state of Washington can validly apply to employers and employees engaged in interstate commerce by water, Judge Cushman of the U. S. Dist. court said:

"Congress having in no way legislated in the premises, at least so far as interstate commerce by water is concerned, the state has the right to enact laws incidentally affecting interstate commerce. This act does no more." *Stoll v. Pacific Coast S. S. Co.*, 205 Fed. 177.

The supreme court of the United States has recently held that the admiralty jurisdiction of the federal courts extends to a cause of action in tort arising out of a negligent injury to a stevedore engaged in loading a vessel lying at a dock in navigable water. *Atl. Transp. Co. of W. Va. v. Imbrovek*, 234 U. S. 52. But the jurisdiction in admiralty is not exclusive of the common law liability for negligence enforceable to action at law in the state or U. S. courts. *Steamboat Co. v. Chase*, 16 Wall. 522, 534; 1 Cyc. 811-2.

Consequently it has been held that the compensation act of the state of Washington supersedes the liability for negligence formerly existing and is a good defense to an action at law brought in the U. S. Dis. Court by a stevedore, a citizen of Washington against a California corporation engaged in interstate commerce by water for personal injuries received at Tacoma while employed in receiving and storing cargo aboard a ship. *Stoll v. Pacific Coast S. S. Co.*, 205 Fed. 169, 177.

Where a proceeding is commenced in admiralty by libel against the vessel, it has been held that the workmen's compensation acts do not affect the liability in the admiralty court. *The Henry B. Smith*, 195 Fed. 312; *The Fred E. Sander*, 208 Fed. 724, 726; *The St. David*, 209 Fed. 985, 987.

In the Smith case it was said:

"The maritime law, which the libelant invokes, cannot be altered, modified, or changed by state enactment. The right of action arising out of maritime tort, relating to the recovery of damages for personal injuries, depends upon the maritime
RELATING TO WORKMEN'S COMPENSATION. 927

law, which has been adopted by the laws and usages of the
There is, moreover, no maritime lien by the statutes of this
state to support this proceeding *in rem*, and I am constrained
to hold that in an action for personal injuries the employer's
liability act of the state has no application. Rights of action
in admiralty are *sui generis*, and controlled by the maritime
law, save in case of death, wherein the states, by legislative
enactments, have created liens and rights of action which are
not inconsistent with the maritime law." *The Henry B.
Smith*, 195 Fed. 312, 313.

In the Sander case, the court said:

"The Stoll case is distinguishable from this, in that this is
an action in admiralty where the injured party has elected
to pursue his remedy against the vessel rather than enforce
a common law liability against the owners of the vessel.
The issue here is: Does the state act abolishing civil actions
for the recovery of damages by workmen for personal in-
juries received on account of negligence of employers super-
sede all remedies and withdraw from workmen their remedy
to proceed against the vessel in admiralty for the wrong sus-

The correctness of the decision in the Sander case has
been doubted in an article in the Harvard Law Review, Vol.
XXVII, pages 578-9. But since the compensation act un-
doubtedly supersedes the liability formerly existing in ac-
tions at law for negligence brought in the state or U. S.
courts, and is applicable in cases of injuries sustained on
vessels within the jurisdiction of the state, it is probably
unimportant for your present purposes to determine whether
or not the act affects the liability in admiralty. While the
Washington act is a compulsory law and the Wisconsin act
is elective, I do not think that such fact has any bearing on
this question, for it seems doubtful whether the employer
and employee can by contract under an elective act oust
the jurisdiction in admiralty committed by the U. S. Const.
to the federal courts any more than can the legislature by
a compulsory law.

My attention has been called to some newspaper accounts
of a ruling by the U. S. Dist. Court of Ohio to the effect
that the Ohio compensation act does not affect the liability
of a vessel owner in an action at law to a seaman who was
injured while a vessel was moored to a dock in an Ohio port. Such decision seems clearly contrary to the Washington case previously referred to and unsound on principle. But I have been unable to get a copy of the decision and therefore cannot assume to discuss it intelligently.

The rulings of the attorney general of Minnesota under the compensation act of that state, to which you have called my attention, seem in harmony with the conclusions I have reached.

The question remains as to the extent of the jurisdiction of the state of Wisconsin, i. e., as to the applicability of the compensation act to accidents happening while a vessel is under way on the rivers and lakes forming the boundaries of the state.

It seems that, prior to the enactment of the compensation act, an action at law could be maintained in a Wisconsin court for a negligent injury received while a vessel was sailing on lake Erie, the law applied being the common and maritime law. *Thompson v. Hermann*, 47 Wis. 602. No statute or law of any particular state was involved in this case, the *lex loci* being evidently assumed to be the same as the *lex fori* and on principles previously noted enforceable here, the cause of action being transitory. It certainly seems doubtful whether the Wisconsin compensation act could be held applicable to an accident happening on waters not forming a boundary of the state. The law of the states adjacent to such water should rather control as being the *lex loci*.

See. 13 of the act of Congress (Act of Aug. 6, 1846; 9 U. S. Stats. at Large 57) to enable the people of Wisconsin territory to form a constitution and state government and for the admission of such state into the union provided that:

"The said state of Wisconsin shall have concurrent jurisdiction on the Mississippi and all rivers and waters bordering on the said state of Wisconsin, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same."

The above language has been interpreted to mean "that concurrent jurisdiction on the river was given so that causes of action, civil and criminal, accruing upon the water might be prosecuted in the courts of either state, and that for the purposes of each such cause of action the courts of each state should deem its laws extended to the opposite shore." *Roberts v. Fullerton*, 117 Wis. 222, 230.
So it has been held that the statutes of Indiana imposing liability in damages for negligently causing death extended over the Ohio river (by virtue of the provision of an act of Congress similar to that above quoted) and applied to persons navigating the same independent of citizenship and even though the accident happened in waters outside the territorial boundaries of Indiana, the court saying:

"It is clear from the authorities cited that this state had concurrent jurisdiction over the Ohio river at the points where it is alleged the death of appellee’s intestate was caused by the wrongful acts of appellant. The only difference is that over the territory within the boundaries of the state the jurisdiction is exclusive, while on the Ohio river it is concurrent with Kentucky. It necessarily follows that the law which governs this case, including the service of summons and return, is the same as if the Ohio river was wholly within the state of Indiana where it forms the southern boundary of the state." M. & G. Pocnet Co. v. Pike, 40 N. E. (Ind.) 527, 529.

There seems to be no reason why this principle is not applicable to the workmen’s compensation act as well as to a statute giving a right of action for a negligent injury and I think that such act must control the rights and liabilities growing out of an accident on the waters bordering on the state of Wisconsin forming a boundary common to this state and other states in proceedings in the courts of Wisconsin to enforce such rights and liabilities, not, however, to the exclusion of the concurrent right of other states bordering on such waters to enforce their own laws when the question arises in the courts of such states.

Probably the same rule must prevail as to waters forming a common boundary between this state and Canada. T. T. & W. Assn. v. McGregor, 207 Fed. 209, 217.

My conclusion, therefore, is that you have jurisdiction, under the Wisconsin workmen’s compensation act, of accidents happening on vessels engaged in interstate traffic on the waters bordering on this state and forming a boundary common to this state and other states, without regard to whether the accident happened while such a vessel is under way or lying at a dock, in cases where the injured man and his employer are subject to the Wisconsin compensation act.
Workmen's Compensation—University—An award of the industrial commission made because of injury to a workman employed at the university should be against the state.

C. H. CROWNHART,

Chairman Industrial Commission.

(In re Gallaher v. State of Wisconsin.)

Dec. 23, 1914.

I am in receipt of your letter of Dec. 21st in which you refer to my letter of the 18th in which I suggested that the award in the above entitled matter should run against the regents of the university of Wisconsin instead of against the state, Mr. Gallaher having been employed by the regents of the university.

You say that you have heretofore been advised by the secretary of state that the state provided in the general appropriation to take care of compensation for employees of various departments of state, and that all awards should run directly against the state. You ask if I will kindly investigate this matter and inform your office whether or not this is correct.

In making the suggestion I did I had in mind the provisions of sec. 379, Stats., which provides that the board of regents and their successors in office shall constitute a body corporate by the name of "The regents of the university of Wisconsin," and shall possess the very broad powers therein conferred. I also had in mind the appropriations made to the university prior to the legislative session of 1913, under which the board of regents was given very broad discretion in the expenditure of all appropriations made to the university. Furthermore, I had in mind certain expressions of our supreme court with reference to the purpose of the workmen's compensation law. Thus this act has been spoken of as follows:

"No movement in any age has made more for the elimination of waste and the economical application of personal injury cost of protection and distribution of those things which are necessary for or administer to legitimate human desires, where it belongs, and to where it must inevitably go as a final resting place, than laws of which the one in question is a distinguished type,—a crystallization, as has been said before, into legal obligation of moral duty and economic

And again:

“The law is a long step towards an ideal system requiring every consumer of any product of human industry, as directly as practicable, to pay his ratable proportion of the fair money cost of those things which he necessarily, or reasonably, destroys in conserving his life and welfare,—personal injury losses, not intentionally incurred,—losses whether through the fault of the employer or employe, or without fault of either, being considered as legitimately an element of such fair money cost as expenditures for raw material, for machinery or wages.” *Milwaukee v. Miller and Industrial Comm.*., 154 Wis. 652, 660.

It seemed to me that the compensation to be paid workmen under the provisions of this law, where such workmen were employed by the regents of the university, was a fair element of the cost of carrying on the activities of the university, to the same extent as such compensation in the case of any industry is a fair element of the cost of the products of such industry. The regents of the university being made a body corporate, it appeared to me that the cost of carrying on their activities ought to come out of the appropriations made to them for the purpose of enabling them to engage in such activities.

Since receiving your letter I have had a consultation with the force in the office of the secretary of state, which has somewhat changed my views. I still feel that it would be better if the compensation paid because of injuries to workmen employed in any separate and distinct branch of the state government, should be charged to the appropriations made to that branch, and not merely all placed together and the entire sum paid out of the general fund. It appears to me that the better way would be to have the accounts of the state show just what each separate branch of the state government is costing, including that element of cost embraced in compensation paid to injured workmen. I have come to the conclusion, however, that for some reason the legislature did not make provision for separating the sums paid for compensation to employes of the state, so that they should be charged to the separate branches of the state government.
Sec. 2394-1, Stats. defines employers, and subsec. 1 thereof provides:

"the state, and each county, city, town, village, and school district therein."

It will be noted that the state is treated as one entity, and the separate branches thereof are not considered as separate employers.

Sec. 172-53, Stats., is the section providing the various appropriations for the university. It is subdivided into forty subsections, each subsection providing specifically for the appropriation to which it refers. A reading of these various subsections convinces me that the legislature, in making the several appropriations, did not take into consideration any amounts that might be required to be paid to injured workmen or the dependents of deceased workmen. It might well be that if the compensation to be paid an injured workman, or to the dependents of a deceased workman, were required to be paid from the appropriation made for the particular activity of the university at which such workman was injured at the time of his injury, some or many of such activities of the university would be very seriously hampered, and I cannot think that the legislature intended any such result.

The only appropriation I have been able to find, and the only one to which the head bookkeeper in the office of the secretary of state could refer me, out of which awards for compensation as against the state or any branch thereof can be paid, is found in sec. 172, Stats., which 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 where such salaries, compensations or other disbursements are not by law charged or are not properly chargeable to any other appropriation."

I am not able to say that in the passage of this section the legislature had specifically in mind the compensation to be paid under the workmen's compensation act. On the contrary, it appears to me that the legislature felt that it was quite possible that some necessary expense of carrying on the state government had been overlooked in making appropriations, and that the section was enacted merely with a view of providing for any such omissions. I believe, how-
ever, it is perfectly proper to pay the compensation to injured workmen, or their dependents, out of this appropriation.

I am therefore of the opinion that I was mistaken when I suggested that the award in this matter should go against the regents of the university rather than the state. I believe this is a matter which might well be called to the attention of the legislature, that they may make provision whereby each separate branch of the state government may be charged with the compensation required to be paid under the act because of the activities carried on by that particular branch. I also believe that it would be a very good idea if, until the legislature has acted upon the matter, the amounts paid out for such compensation should be separated in the books kept in the office of the secretary of state so that any person in looking over the accounts could tell at a glance how much had been paid because of injuries to workmen employed by each separate branch of the state government.
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