

OPINIONS
OF THE
ATTORNEY GENERAL
OF THE
STATE OF WISCONSIN

VOL. VII

January 8, 1918, to January 6, 1919

NINTH BIENNIAL REPORT

July 1, 1916, to June 30, 1918

SPENCER HAVEN,
Attorney General



MADISON, WISCONSIN
DEMOCRAT PRINTING COMPANY, STATE PRINTER
1918

WIS
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ATTORNEY GENERAL'S OFFICE

SPENCER HAVEN Attorney General
WALTER H. BENDER (From Jan. 23, 1918) Deputy Attorney General
J. F. BAKER Assistant Attorney General
E. E. BROSSARD Assistant Attorney General
J. T. DITHMAR Assistant Attorney General
WINFIELD W. GILMAN Assistant Attorney General
J. E. MESSERSCHMIDT Assistant Attorney General



ATTORNEYS GENERAL OF WISCONSIN

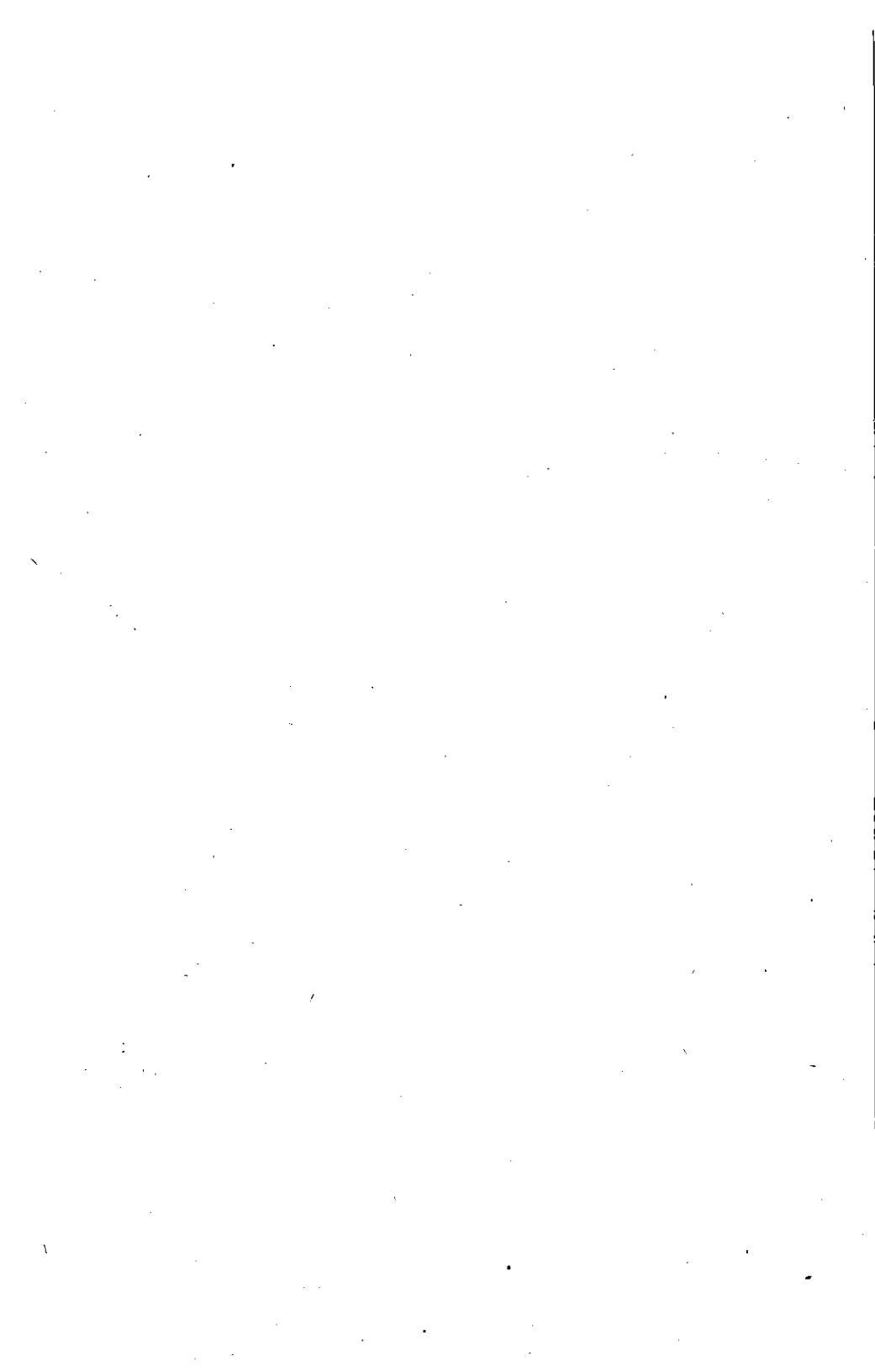
FROM THE ORGANIZATION OF THE STATE

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 R. 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, Nellsville from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison.....from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center...from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock.....from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson.....from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel.....from Jan. 6, 1919, to



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LETTER OF TRANSMITTAL

OFFICE OF THE ATTORNEY GENERAL,
STATE OF WISCONSIN.

To His Excellency, EMANUEL L. PHILIPP,
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, 1918, including the substance of all legal opinions rendered on matters of public interest from January 8, 1918, to January 6, 1919, pursuant to the provisions of section 35.32, statutes of Wisconsin for 1917.

SPENCER HAVEN,
Attorney General.

Dated Madison, Wisconsin, January 6, 1919.

LOANS FROM TRUST FUNDS

Applications for loans from the teachers' insurance and retirement fund passed upon and approved by this department:

Brown—Village of Denmark, Waterworks Bonds, Sept. 26, 1916	\$10,000
Dunn—City of Menomonie, Apr. 24, 1917.....	25,000
Forest—Town of Alvin, Apr. 15, 1918	4,500
Juneau—City of Mauston, Waterworks, Street Paving, Sewer Bonds, Mch. 22, 1917.....	25,000
Pierce—County of Pierce, Sept. 7, 1917.....	15,000
Pierce and St. Croix—City of River Falls, Sept. 7, 1917.....	12,000
Polk—Village of Osceola, Jan. 19, 1918.....	9,000
St. Croix and Pierce—City of River Falls, Sept. 7, 1917.....	12,000
Sheboygan—City of Sheboygan Falls, Waterworks Bonds, Sept. 13, 1916	15,500
Washburn—City of Washburn, Apr. 16, 1918.....	17,000

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

Adams—Towns of Lincoln and New Chester, Jt. Dist. No. 1, July 18, 1916	\$1,600
Ashland—Town of Barksdale, Dist. No. 1, Apr. 9, 1918.....	25,000
Barron—Town of Almena, village of Turtle Lake, Jt. Dist. No. 3, Dec. 8, 1916	19,000
Barron—Town of Arland, Dist. No. 2, Dec. 8, 1916.....	2,400
Barron—Town of Bear Lake, Dist. No. 4, Nov. 21, 1916.....	2,000
Barron—Town of Clinton, Dist. No. 5, May 22, 1918.....	3,500
Barron and Dunn—Towns of Dallas and Wilson, Jt. Dist. No. 1, Apr. 10, 1917	10,000
Barron and Dunn—Towns of Dallas and Wilson, Jt. Dist. No. 1, Aug. 27, 1917	2,000
Barron—Town of Dover, Dist. No. 2, Aug. 27, 1917.....	3,000
Barron—Town of Dover, Dist. No. 6, Jan. 19, 1917.....	1,200
Barron—Town of Dover, Dist. No. 6, Dec. 18, 1917.....	500
Barron—Towns of Doyle and Sumner, Jt. Dist. No. 7, Dec. 18, 1916	1,200
Barron and Washburn—Towns of Oak Grove and Long Lake, Jt. Dist. No. 7, Aug. 27, 1917	2,000
Barron—Towns of Oak Grove and Rice Lake, Jt. Dist. No. 4, Jan. 29, 1918	3,000
Barron and Polk—Towns of Turtle Lake and Clayton, Jt. Dist. No. 1, Oct. 4, 1916	2,700
Barron—Town of Turtle Lake, Dist. No. 5, Dec. 18, 1916.....	2,750
Bayfield—Town of Bell, Consol. Dist., Aug. 18, 1916.....	10,000
Bayfield—Town of Bell, Consol. Dist., Nov. 1, 1916.....	5,000
Brown—Town of Allouez, Dist. No. 1, Nov. 8, 1916.....	10,000

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Brown—Town of Allouez, Dist. No. 1, Sept. 8, 1917.....	9,000
Brown—Town of Hobart, Dist. No. 4, June 14, 1917.....	1,500
Brown and Calumet—Towns of Holland and Brillion, Consol. Dist. No. 2, Mch. 12, 1918	6,000
Brown—Town of Howard, Dist. No. 5, July 16, 1917.....	3,500
Brown—Town of Lawrence, Dist. No. 6, Mch. 21, 1918.....	6,000
Brown—Town of Pittsfield, Dist. No. 3, Dec. 26, 1916.....	2,000
Brown—Town of Preble, Dist. No. 4, Jan. 26, 1918	14,000
Brown—Town of Suamico, Dist. No. 1, Aug. 14, 1916.....	5,000
Brown—Town of Suamico, Dist. No. 4, Aug. 1, 1916.....	3,500
Brown—Town of Wrightson, Dist. No. 2, Dec. 27, 1917.....	10,500
Brown—Town and village of Wrightson, Jt. Dist. No. 7, Aug. 31, 1916	15,000
Burnett—Towns of Dewey and Rusk, Jt. Dist. No. 8, Aug. 15, 1916	1,000
Burnett—Town of Lincoln, Dist. No. 7, Oct. 4, 1916	1,200
Burnett—Town of Oakland, Dist. No. 4, Sept. 21, 1916.....	800
Burnett—Town of Roosevelt, Consol. Dist. No. 1, Sept. 5, 1917	1,500
Burnett—Town of Rusk, Dist. No. 10, Mch. 20, 1918.....	1,200
Burnett—Town of Sand Lake, Dist. No. 1, Aug. 5, 1916.....	1,000
Calumet and Brown—Towns of Brillion and Holland, Consol. Dist. No. 2, Mch. 12, 1918	6,000
Calumet—Town of Harrison, Dist. No. 2, May 16, 1917.....	2,500
Calumet—Town of New Holstein, Dist. No. 3, Aug. 1, 1916.....	4,500
Chippewa—Town of Auburn, Dist. No. 10, Mch. 12, 1918.....	3,000
Chippewa—Town of Birch Creek (formerly Cleveland), Dist. No. 5, July 3, 1917	2,000
Chippewa—Town of Birch Creek, Dist. No. 9, Mch. 21, 1918..	2,000
Chippewa—Town of Colburn, Dist. No. 2, Aug. 23, 1916.....	1,000
Chippewa—Towns of Colburn, Holcombe and Ruby, Jt. Dist. No. 5, Sept. 8, 1916	2,500
Chippewa—Town of Holcombe, Dist. No. 1, Mch. 28, 1918..	2,500
Chippewa—Town of Holcombe, Dist. No. 12, July 12, 1917....	2,000
Chippewa—Town of Ruby, Dist. No. 11, Apr. 9, 1917.....	4,000
Chippewa—Town of Sampson, Dist. No. 8, Aug. 24, 1916.....	1,200
Chippewa—Town of Sampson, Dist. No. 8, Nov. 21, 1917.....	250
Chippewa—Town of Sigel, Dist. No. 8, Aug. 18, 1916	3,000
Chippewa—Town of Sigel, Dist. No. 8, Apr. 10, 1917.....	1,500
Chippewa—Town of Sigel, Dist. No. 8, June 1, 1918	2,250
Clark—Towns of Eaton and Weston, Jt. Dist. No. 2, June 19, 1917	2,500
Clark—Towns of Grant and York, village of Granton, Jt. Dist. No. 4, Dec. 3, 1917	18,000
Clark—Town of Hendren, Dist. No. 5, Aug. 29, 1917.....	2,500
Clark—Town of Loyal, Dist. No. 3, Dec. 8, 1916.....	2,500
Clark—Town of Mead, Dist. No. 3, Sept. 27, 1917.....	2,000
Clark—Town of Mead, Dist. No. 3, May 14, 1918.....	1,000
Clark—Town of Sherman, Dist. No. 2, Jan. 9, 1918	3,500
Clark—Town of Warner, Dist. No. 3, Sept. 29, 1916.....	3,000
Clark—Town of Withee, Dist. No. 2, May 19, 1917	600
Columbia and Dodge—Towns of Fountain Prairie and Calamus, Jt. Dist. No. 2, Feb. 13, 1917	2,000
Crawford—Town of Eastman, Dist. No. 16, Dec. 18, 1916.....	1,200
Crawford—Village of Gays Mills, Apr. 19, 1917.....	3,000
Crawford and Vernon—Towns of Utica and Franklin, Jt. Dist. No. 1, Nov. 2, 1917	2,500
Crawford—Town and village of Wauzeka, Jt. Dist. No. 2, July 9, 1917.....	3,500

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Dane and Green—Village of Belleville, towns of Montrose and Exeter, Jt. Dist. No. 4, May 29, 1917	25,000
Dane—Town of Blooming Grove, Dist. No. 3, Mch. 20, 1917....	4,000
Dane—Towns of Blue Mounds and Springdale, village of Mt. Horeb, Jt. Dist. No. 1, June 12, 1917.....	25,000
Dane—Towns of Burke and Madison, Jt. Dist. No. 1, Mch. 11, 1918	15,000
Dane—Town of Burke, Dist. No. 4, Feb. 19, 1917.....	3,000
Dane—Town of Burke, Dist. No. 4, July 14, 1917.....	1,600
Dane—Town of Christiana, Dist. No. 8, Mch. 30, 1918.....	4,000
Dane—Town of Dane, Dist. No. 6, Aug. 27, 1917.....	4,000
Dane—Town of Dunn, Dist. No. 8, Oct. 31, 1916.....	10,000
Dane—Town of Dunn, Dist. No. 8, Aug. 27, 1917	8,000
Dane—Towns of Fitchburg and Madison, Jt. Dist. No. 6, Feb. 27, 1917	15,000
Dane—Town of Madison, Dist. No. 7, Mch. 14, 1917	4,000
Dane—Town of Madison, Dist. No. 7, Feb. 8, 1918	3,000
Dane—Town and village of Middleton, Jt. Union Free High School District, May 13, 1918	25,000
Dane—Town of Middleton, Dist. No. 3, Dec. 29, 1916.....	650
Dane—Towns of Perry, Primrose and Springdale, Jt. Dist. No. 2, Apr. 4, 1917	3,500
Dane—Town of Rutland, Dist. No. 1, Oct. 18, 1916	2,500
Dane—Town of Springdale, Dist. No. 3, Mch. 20, 1917.....	3,000
Dane—Town of Verona, Dist. No. 2, Feb. 27, 1917	8,000
Dane—Town of Vienna, Dist. No. 2, Nov. 8, 1916.....	4,500
Dane—Town of Westport, Dist. No. 4, Mch. 25, 1918.....	3,500
Dane—Town of Westport, Dist. No. 5, Aug. 27, 1917.....	2,500
Dodge—Town of Beaver Dam, Dist. No. 5, Oct. 26, 1916.....	2,400
Dodge and Columbia—Towns of Calamus and Fountain Prairie, Jt. Dist. No. 2, Feb. 13, 1917.....	2,000
Dodge—Towns of Hustisford and Rubicon, Jt. Dist. No. 3, Oct. 1, 1917	3,000
Dodge—Towns of Lowell and Shields, Jt. Dist. No. 11, Mch. 12, 1917	4,500
Door—Town of Gibraltar, Union Free High School Dist., Apr. 12, 1918	8,000
Door—Town of Liberty Grove, Dist. No. 1, Dec. 20, 1917.....	1,800
Door—Town of Washington, Dist. No. 2, Feb. 8, 1918	4,000
Door—Town of Washington, Dist. No. 2, June 10, 1918.....	3,000
Douglas—Town of Amnicon, Dist. No. 1, Sept. 5, 1917.....	5,000
Douglas—Town of Brule, Dist. No. 1, Aug. 15, 1916.....	4,000
Douglas—Town of Brule, Dist. No. 1, Jan. 24, 1917.....	4,000
Douglas—Town of Lakeside, Dist. No. 1, May 4, 1917.....	3,000
Douglas—Town of Parkland, Consol. Dist. No. 2, Sept. 13, 1916	10,000
Douglas—Town of Summit, Dist. No. 2, Dec. 14, 1917	1,000
Douglas—Town of Wascott, Dist. No. 6, Aug. 9, 1916.....	700
Dunn—Towns of Colfax and Tainter, Jt. Dist. No. 3, Dec. 5, 1917	3,000
Dunn—Towns of Hay River, Stanton and Tiffany, Jt. Dist. No. 1, Sept. 8, 1917	5,000
Dunn—Towns of Hay River and Sheridan, Jt. Dist. No. 7, April 13, 1918	1,800
Dunn—Town of Menomonie, Dist. No. 2, Feb. 28, 1917.....	2,000
Dunn and Barron—Towns of Wilson and Dallas, Jt. Dist. No. 1, Apr. 10, 1917	10,000
Dunn and Barron—Towns of Wilson and Dallas, Jt. Dist. No. 1, Aug. 27, 1917	2,000

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Eau Claire—Town of Pleasant Valley, Dist. No. 7, July 21, 1917	1,000
Eau Claire—Town of Union, Dist. No. 9, Nov. 8, 1916.....	2,500
Fond du Lac—Towns of Empire, Forest and Taychedah, Jt. Dist. No. 7, Apr. 8, 1918	3,800
Fond du Lac—Town of Fond du Lac, Dist. No. 6, Mch. 17, 1917	2,000
Fond du Lac—Town of Osceola, Dist. No. 1, Dec. 27, 1917....	8,000
Fond du Lac—Town of Taychedah, Dist. No. 4, Jan. 18, 1918..	4,200
Forest—Town of Laona, Union Free High School Dist., Dec. 27, 1917	24,000
Forest—Town of Laona, Dist. No. 1, Apr. 5, 1918	6,000
Grant—Town of Cassville, Jt. Dist. No. 1, Aug. 1, 1916.....	1,000
Grant—Town of Cassville, Dist. No. 2, Aug. 15, 1916.....	3,000
Grant—Town of Castle Rock, Dist. No. 4, July 18, 1916.....	1,500
Grant—Town of Ellenvoro, Dist. No. 4, May 16, 1917.....	1,600
Grant—Towns of Millville and Patch Grove, Dist. No. 6, Sept. 8, 1916	2,000
Grant—Towns of Muscoda and Watterstown, Jt. Dist. No. 3, Apr. 10, 1918	2,600
Grant—Town of North Lancaster, Dist. No. 2, June 26, 1918..	3,500
Grant—Town of Paris, Jan. 10, 1917.....	6,000
Grant—Town of Patch Grove, Dist. No. 1, Aug. 27, 1917.....	3,000
Green—Towns of Albany and Decatur, Jt. Dist. No. 3, Feb. 8, 1917	2,000
Green and Dane—Towns of Exeter and Montrose, village of Belleville, Jt. Dist. No. 4, May 29, 1917.....	25,000
Green—Town and village of New Glarus, Jt. Dist. No. 1, Oct. 12, 1916	6,500
Green Lake—Towns of Berlin and St. Marie, Jt. Dist. No. 4, Mch. 9, 1917	1,842
Iowa—Town of Dodgeville, Dist. No. 8, May 2, 1918.....	1,200
Iowa—Town of Dodgeville, Dist. No. 12, Jan. 25, 1917.....	1,200
Iowa—Town of Mifflin, Dist. No. 10, Apr. 4, 1917.....	2,000
Iowa—Town of Pulaski, Dist. No. 2, Mch. 27, 1917.....	2,000
Iowa—Village of Rewey, June 14, 1918	3,000
Iron—Towns of Carey, Montreal and village of Vaughn, Jt. Dist. No. 1, Jan. 24, 1917	16,000
Jackson—Town and village of Melrose, Town Free High School Dist., Sept. 21, 1916	10,000
Jackson—Town and village of Melrose, Union High School Dist., Oct. 24, 1917	2,500
Jefferson—Town of Waterloo, Dist. No. 1, Aug. 24, 1916.....	5,000
Juneau—Town of Necedah, Dist. No. 4, Sept. 26, 1916.....	1,000
Juneau—Town of Necedah, Dist. No. 13, Mch. 11, 1918.....	500
Kenosha and Racine—Jt. Training School for Teachers, May 2, 1918	12,000
Kenosha—Towns of Bristol and Pleasant Prairie, Jt. Dist. No. 8, Sept. 21, 1917	600
Kenosha—Town of Pleasant Prairie, Dist. No. 3, Oct. 29, 1917	1,800
Kenosha—Towns of Randall and Salem, Jt. Dist. No. 9, May 26, 1917	8,250
Kewaunee—Towns of Casco and Pierce, Jt. Dist. No. 1, July 5, 1917	6,000
Kewaunee—Towns of Casco and Pierce, Jt. Dist. No. 1. Mch. 22, 1918	7,000
La Crosse—Town of Hamilton and village of West Salem, Jt. Dist. No. 6, Aug. 30, 1917.....	25,000
La Crosse—Town of Holland, Dist. No. 4, Oct. 9, 1917.....	4,200
La Crosse—Town of Shelby, Dist. No. 1, Apr. 10, 1917.....	150

La Crosse—Town of Shelby, Dist. No. 1, Apr. 10, 1917.....	2,850
La Fayette—Town of New Diggings, Dist. No. 1, Nov. 9, 1917..	25,000
La Fayette—Town of Wiota, Dist. No. 9, Sept. 5, 1917.....	2,500
Langlade—Town of Ainsworth, Dist. No. 3, Apr. 4, 1917....	4,500
Langlade—Town of Ainsworth, Dist. No. 6, Dec. 20, 1916....	1,800
Langlade—Town of Elton, Dist. No. 1, Oct. 6, 1917.....	13,000
Langlade—Town of Elton, Dist. No. 6, Aug. 27, 1917.....	3,000
Langlade—Towns of Langlade and Price, Jt. Consol. Dist. No. 1, June 22, 1918	6,600
Langlade—Town of Summit, Dist. No. 2, Jan. 25, 1917.....	3,000
Langlade—Town of Summit, Dist. No. 4, Jan. 23, 1918.....	3,500
Langlade—Town of Summit, Dist. No. 5, Oct. 23, 1916.....	1,000
Langlade—Town of Upham, Dist. No. 7, June 1, 1918	5,025
Langlade—Town of Vilas, Dist. No. 4, Dec. 14, 1917.....	4,500
Lincoln—Town of Harrison, Dist. No. 2, Nov. 15, 1917....	1,000
Lincoln—Town of Harrison, Dist. No. 3, June 19, 1917....	3,500
Lincoln—Town of King, Dist. No. 2, Aug. 10, 1916	1,600
Lincoln—Town of Schley, Dist. No. 4, Dec. 13, 1917.....	3,600
Lincoln—Town of Schley, Dist. No. 8, June 22, 1918	2,600
Marathon—Towns of Bern and Johnson, Jt. Dist. No. 3, Jan. 10, 1918	1,500
Marathon—Town of Eau Pleine, Dist. No. 6, Mch. 20, 1918....	2,000
Marathon—Town of Frankfort, Dist. No. 6, June 12, 1918....	2,500
Marathon—Town of Halsey, Dist. No. 1, Sept. 18, 1917.....	2,000
Marathon—Town of Knowlton, Dist. No. 1, Nov. 19, 1917....	7,500
Marathon—Town of Kronenwetter, Dist. No. 3, Aug. 28, 1917	6,700
Marathon—Town of Kronenwetter, Dist. No. 4, Sept. 14, 1917	2,500
Marathon—Town of Maine, Dist. No. 4, Aug. 15, 1916.....	4,000
Marathon—Town of Maine, Dist. No. 4, Feb. 1, 1917.....	1,000
Marathon—Town of Maine, Dist. No. 6, Sept. 1, 1916.....	2,000
Marathon—Town of Maine, Dist. No. 7, Mch. 28, 1918.....	2,500
Marathon and Shawano—Towns of Norrie and Birnamwood, village of Eland, Jt. Dist. No. 6, July 6, 1916.....	10,000
Marathon and Shawano—Towns of Norrie and Birnamwood, village of Eland, Jt. Dist. No. 6, May 21, 1918.....	2,618
Marathon—Town of Plover, Dist. No. 5, Jan. 3, 1917	1,100
Marathon—Town of Ringle, Dist. No. 1, Sept. 1, 1916.....	2,500
Marathon—Town of Texas, Dist. No. 8, Mch. 26, 1917.....	2,500
Marinette—Towns of Beaver and Pound, Jt. Dist. No. 3, Oct. 17, 1916	1,500
Marinette—Towns of Beaver and Pound, Jt. Dist. No. 3, Aug. 27, 1917	750
Marinette—Town of Beaver, Dist. No. 9, Feb. 27, 1917.....	1,700
Marinette—Village of Crivitz, town of Stephenson, Jt. Dist. No. 1, Mch. 11, 1918	15,000
Marinette—Town of Grover, Dist. No. 5, Dec. 18, 1916.....	2,000
Marinette—Town of Lake, Dist. No. 1, Aug. 4, 1916.....	3,000
Marinette—Town of Porterfield, Dist. No. 21, Dec. 13, 1917....	2,000
Marinette—Town of Pound, Dist. No. 2, Sept. 21, 1917	2,000
Marinette—Town of Pound, Dist. No. 11, Nov. 16, 1917.....	2,000
Milwaukee—Town of Granville, Dist. No. 6, July 18, 1916.....	5,000
Milwaukee—Town of Granville, Dist. No. 15, June 17, 1918....	7,500
Milwaukee—Town of Greenfield, Dist. No. 2, Aug. 28, 1916....	4,000
Milwaukee—Town of Greenfield, Dist. No. 8, Dec. 8, 1916....	1,000
Milwaukee—Town of Lake, Dist. No. 5, June 8, 1917.....	9,000
Milwaukee—Town of Lake, Dist. No. 8, Mch. 25, 1918.....	3,440
Milwaukee—Town of Lake, Dist. No. 9, Sept. 21, 1917.....	15,000
Milwaukee—Town of Wauwatosa, Dist. No. 7, Jan. 2, 1917....	20,000
Milwaukee—Village of Whitefish Bay, Dist. No. 1, June 21, 1918	23,000

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Monroe—Towns of Byron and Scott, Jt. Dist. No. 7, Aug. 10, 1916	1,500
Monroe—Town of Byron, Dist. No. 8, June 26, 1917.....	3,000
Monroe—Town of Jefferson, Dist. No. 1, Dec. 18, 1916.....	2,000
Oconto—Town of Abrams, Dist. No. 7, Apr. 27, 1917.....	2,600
Oconto—Towns of Bagley and Maple Valley, Jt. Dist. No. 3, Apr. 19, 1917	3,000
Oconto—Town of Brazeau, Dist. No. 5, July 18, 1916.....	2,100
Oconto—Towns of Gillett and Maple Valley, Jt. Dist. No. 11, Dec. 18, 1917	3,500
Oconto—Town of Howe, Dist. No. 2, May 2, 1917.....	2,775
Oconto—Town of Oconto Falls, Dist. No. 5, May 3, 1917.....	2,400
Oconto—Town of Oconto Falls, Dist. No. 7, Aug. 27, 1917.....	2,500
Oconto—Town of Townsend, Dist. No. 1, July 16, 1917.....	9,000
Oconto—Town of Underhill, Dist. No. 5, May 26, 1917.....	2,500
Oconto—Town of Wheeler, Dist. No. 2, Mch. 30, 1917.....	6,525
Oneida—Town of Cassian, Dist. No. 2, Aug. 27, 1917.....	1,800
Oneida—Town of Schoepke, Dist. No. 2, Aug. 15, 1916.....	2,500
Oneida—Town of Woodboro, Dist. No. 1, Sept. 17, 1917.....	5,900
Outagamie—Town of Black Creek, Dist. No. 3, Mch. 26, 1917.....	4,500
Outagamie—Town of Black Creek, Dist. No. 5, Jan. 26, 1918.....	5,500
Outagamie—Town of Dale, Dist. No. 4, Oct. 11, 1917.....	12,000
Outagamie and Waupaca—Towns of Dale and Caledonia, Jt. Dist. No. 6, Aug. 27, 1917	6,500
Outagamie—Town of Grand Chute, Dist. No. 8, Sept. 27, 1916.....	5,000
Outagamie—Towns of Grand Chute and Greenville, Jt. Dist. No. 13, June 18, 1918	5,000
Outagamie—Towns of Oneida, Osborn, Seymour, Jt. Dist. No. 3, Nov. 11, 1916	4,500
Outagamie—Town of Osborn, Dist. No. 1, Oct. 28, 1916.....	4,500
Pierce—Village of Bay City, towns of Hartland and Isabelle, Jt. Dist. No. 1, Feb. 8, 1918	2,000
Polk and St. Croix—Towns of Alden, Stanton and Star Prairie, village of Star Prairie, Jt. Consol. Dist. No. 1, Sept. 25, 1917	18,000
Polk—Town of Alden, Dist. No. 2, Mch. 23, 1917.....	3,000
Polk—Village of Amery, town of Lincoln, Jt. Dist. No. 5, Jan. 17, 1917	6,000
Polk—Towns of Balsam Lake and Garfield, Jt. Dist. No. 1, Mch. 20, 1918	3,000
Polk—Town of Beaver, Dist. No. 3, Sept. 27, 1916	1,000
Polk—Town of Bone Lake, Dist. No. 2, Dec. 27, 1917.....	5,000
Polk and Barron—Towns of Clayton and Turtle Lake, Jt. Dist. No. 1, Oct. 4, 1916	2,700
Polk—Town of Eureka, Dist. No. 3, Nov. 13, 1917.....	900
Polk—Town of Eureka, Dist. No. 7, July 16, 1917.....	800
Polk—Towns of Apple River, Georgetown and Johnstown, Jt. Dist. No. 1, July 24, 1916	5,000
Polk—Town of Georgetown, Dist. No. 2, Apr. 4, 1917.....	6,000
Polk—Town of Georgetown, Dist. No. 4, June 14, 1917.....	2,500
Polk—Town of Laketown, Dist. No. 4, Jan. 19, 1917.....	2,000
Polk—Town of Lincoln, Dist. No. 2, June 14, 1917.....	4,500
Polk—Town of Lincoln, Dist. No. 4, Jan. 26, 1918.....	3,000
Polk—Town of Loraine, Dist. No. 4, Sept. 21, 1916.....	2,000
Polk—Town of Loraine, Dist. No. 6, Nov. 14, 1916.....	1,500
Polk—Town of Luck, Dist. No. 5, Dec. 27, 1917.....	1,200
Polk—Town of McKinley, Dist. No. 7, Aug. 7, 1916.....	1,200
Folk—Town of Oscella, Dist. No. 1, Sept. 14, 1917.....	12,000

Polk—Village of Osceola, Dist. No. 2, Sept. 1, 1916.....	25,000
Polk—Town of St. Croix Falls, Dist. No. 2, Aug. 27, 1917.....	2,500
Polk—Town of West Sweden, Dist. No. 2, Oct. 25, 1916.....	2,500
Portage and Wood—Towns of Carson and Sherry, Jt. Dist. Nos. 2 and 6, Sept. 21, 1916.....	3,000
Portage and Wood—Towns of Eau Pleine and Milladore, Jt. Dist. No. 5, Aug. 4, 1916.....	2,000
Portage and Wood—Towns of Eau Pleine and Milladore, Jt. Dist. No. 5, Feb. 14, 1917	500
Portage—Town of Stockton, Dist. No. 11, Nov. 21, 1916.....	1,200
Price and Rusk—Towns of Georgetown, Kennan, Hawkins and Lawrence, Union Free High School Dist., Aug. 31, 1916	5,600
Price—Towns of Georgetown and Kennan, village of Kennan, Consol. Dist. No. 3, Sept. 5, 1917.....	8,400
Price—Town of Knox, Dist. No. 2, Sept. 8, 1917.....	4,000
Price—Towns of Knox and Prentice, Jt. Dist. No. 2, July 19, 1917	1,000
Price—Town of Lake, Dist. No. 3, June 18, 1918.....	1,500
Price—Town of Lake, Dist. No. 8, Sept. 17, 1917.....	1,500
Price—City of Park Falls, Dist. No. 2, Aug. 14, 1916.....	25,000
Price—Village of Prentice, Feb. 13, 1917.....	3,000
Racine and Kenosha—Jt. Training School for Teachers, May 2, 1918	12,000
Richland—Towns of Akan and Richwood, Dist. No. 7, Aug. 30, 1916	2,000
Richland—Town of Eagle, Dist. No. 5, May 26, 1917.....	2,500
Richland—Town of Henrietta, Dist. No. 3, Sept. 26, 1916.....	5,000
Richland—Town of Henrietta, Dist. No. 4, Nov. 9, 1916.....	1,000
Richland—Towns of Ithaca and Richland, Jt. Dist. No. 5, Aug. 28, 1916	2,000
Richland—Towns of Ithaca and Willow, Jt. Dist. No. 6, Jan. 5, 1917	2,000
Richland—Towns of Rockbridge and Willow, Jt. Dist. No. 6, Aug. 14, 1916	2,000
Richland—Town of Sylvan, Dist. No. 6, Feb. 19, 1917.....	4,000
Rock—Towns of Center and Janesville, Jt. Dist. No. 2, Dec. 27, 1916	2,700
Rock—Town of Harmony, Dist. No. 2, Oct. 17, 1916.....	2,900
Rock—Town of Harmony, Dist. No. 8, Dec. 3, 1917.....	3,500
Rock—Town of Union, Dist. No. 3, July 17, 1916.....	1,800
Rock—Town of Union, Dist. No. 9, Nov. 21, 1916.....	2,500
Rusk—Town of Atlanta, Dist. No. 5, Feb. 4, 1918.....	800
Rusk—Towns of Big Bend and Stubbs, Jt. Dist. No. 8, June 1, 1918	2,000
Rusk—Town of Grant, Dist. No. 3, Oct. 5, 1916.....	1,000
Rusk—Town of Grant, Dist. No. 5, July 31, 1917.....	1,800
Rusk—Town of Grow, Dist. No. 3, Aug. 28, 1916.....	1,600
Rusk—Town of Grow, Dist. No. 3, Apr. 9, 1918.....	1,600
Rusk and Price—Towns of Hawkins, Lawrence, Georgetown and Kennan, Union Free High School, Aug. 31, 1916.....	5,600
Rusk—Town of Hubbard, Dist. No. 5, Apr. 1, 1918.....	1,200
Rusk—Town of Lawrence, Dist. No. 1, Nov. 21, 1917.....	4,000
Rusk—Town of Marshall, Dist. No. 6, Jan. 22, 1917.....	1,000
Rusk—Town of Murry, Dist. No. 2, Aug. 29, 1917.....	900
Rusk—Town of Thornapple, Dist. No. 3, Jan. 16, 1918.....	1,000
Rusk—Town of True, Dist. No. 4, Sept. 29, 1916.....	1,000
St. Croix—Town and city of Hudson, Jt. Dist. No. 1, Oct. 17, 1917	25,000

St. Croix and Polk—Towns of Stanton, Star Prairie, village of Star Prairie, town of Alden, Jt. Consol. Dist. No. 1, Sept. 25, 1917.....	18,000
Sauk—Towns of Baraboo and Fairfield, Jt. Dist. No. 7, Aug. 18, 1916	2,400
Sawyer—Town of Bass Lake, Dist. No. 1, Sept. 24, 1917.....	600
Sawyer—Town of Draper, Dist. No. 1, Apr. 19, 1917.....	3,000
Sawyer—Town of Edgewater, Dist. No. 2, June 22, 1918.....	3,000
Sawyer—Town of Lenroot, Dist. No. 5, Apr. 18, 1918.....	2,000
Sawyer—Town of Sand Lake, Dist. No. 7, Sept. 15, 1917.....	1,500
Shawano—Towns of Almon, Bartelme, Morris and Seneca, Jt. Dist. No. 5, Jan. 10, 1917.....	12,000
Shawano and Marathon—Town of Birnamwood, village of Eland and town of Norrie, Jt. Dist. No. 6, July 6, 1916.....	10,000
Shawano and Marathon—Town of Birnamwood, village of Eland and town of Norrie, Jt. Dist. No. 6, May 21, 1918.....	2,618
Shawano—Village of Bonduel, town of Hartland, Jt. Dist. No. 1, Sept. 14, 1917.....	1,500
Shawano—Town of Fairbanks, village of Tigertown, Union Free High School Dist. No. 1, Nov. 10, 1917.....	10,000
Shawano—Town of Pella, Dist. No. 3, Mch. 26, 1918.....	9,000
Sheboygan—Village of Glenbeulah, town of Greenbush, Jt. Dist. No. 7, Dec. 29, 1916.....	5,000
Taylor—Town and city of Medford, Jt. Dist. No. 1, Jan. 3, 1917.....	12,000
Taylor—Town of Roosevelt, Dist. No. 7, Nov. 10, 1916.....	1,200
Taylor—Town of Roosevelt, Dist. No. 8, Dec. 13, 1917.....	1,200
Trempealeau—Towns of Burnside and Chimney Rock, Jt. Dist. No. 9, June 14, 1918.....	2,500
Vernon—Town of Coon, Dist. No. 5, Feb. 28, 1917.....	1,500
Vernon and Crawford—Towns of Franklin and Utica, Jt. Dist. No. 1, Nov. 2, 1917.....	2,500
Vernon—Town of Wheatland, Dist. No. 5, Nov. 10, 1916.....	1,500
Vilas—Town of Lincoln, Dist. No. 1, Sept. 21, 1916.....	1,500
Vilas—Town of Phelps, Dist. No. 1, Aug. 18, 1916.....	1,500
Vilas—Town of Washington, Dist. No. 1, July 30, 1917.....	1,500
Walworth—Towns of Darien and Sharon, Jt. Dist. No. 10, Sept. 13, 1916	3,000
Walworth—Towns of Linn and Walworth, Jt. Dist. Nos. 3 and 11, June 25, 1918.....	4,000
Washburn—Towns of Barronett, Bashaw, Beaver Brook, village of Shell Lake, Jt. Dist. No. 1, Nov. 3, 1916.....	18,000
Washburn—Town of Bass Lake, Dist. No. 2, Feb. 13, 1917.....	1,200
Washburn—Towns of Beaver Brook, Long Lake and Madge, Jt. Dist. No. 5, Jan. 14, 1918.....	724
Washburn and Barron—Towns of Long Lake and Oak Grove, Jt. Dist. No. 7, Aug. 27, 1917.....	2,000
Waukesha—Town of Delafield, Dist. No. 6, Dec. 8, 1916.....	3,000
Waukesha—Town of Mukwonago, Dist. No. 5, Feb. 7, 1918.....	3,000
Waukesha—Town of Pewaukee, Jt. Dist. No. 1, Aug. 15, 1916..	25,000
Waupaca and Outagamie—Towns of Caldonia and Dale, Jt. Dist. No. 6, Aug. 27, 1917.....	6,500
Waupaca—City of Clintonville, Dist. No. 1, Feb. 13, 1918.....	25,000
Waupaca—Town and village of Fremont, Jt. Dist. No. 3, Oct. 7, 1916	10,000
Waupaca—Towns of Harrison and Iola, Jt. Dist. No. 1, Jan. 11, 1917	1,500
Waupaca—Towns of Larrabee and Matteson, Jt. Dist. No. 1, Aug. 1, 1916.....	1,500

Waupaca—Town of Lebanon, Dist. No. 1, July 30, 1917.....	2,000
Waupaca—Town of Lebanon, Dist. No. 6, Mech. 9, 1917.....	2,500
Waupaca—Towns of Lind, Waupaca and Weyauwega, Jt. Dist. No. 1, May 29, 1917.....	3,500
Waupaca—Town of Little Wolf, village of Manawa, Jt. Free High School Dist., July 6, 1916.....	25,000
Waupaca—Village of Ogdensburg, town of St. Lawrence, Jt. Dist. No. 1, Sept. 13, 1916.....	10,000
Waushara—Town of Aurora, Dist. No. 5, Apr. 10, 1918.....	2,000
Waushara—Town of Deerfield, Dist. No. 1, Aug. 30, 1917.....	1,500
Waushara—Town of Marion, Dist. No. 7, Jan. 20, 1917.....	1,800
Wood—Town of Grand Rapids, Dist. No. 2, Mech. 6, 1917.....	4,000
Wood and Portage—Towns of Milladore and Eau Pleine, Jt. Dist. No. 5, Aug. 4, 1916.....	2,000
Wood and Portage—Towns of Milladore and Eau Pleine, Jt. Dist. No. 5, Feb. 14, 1917.....	500
Wood—Town of Rock, Dist. No. 2, Dec. 18, 1916.....	2,000
Wood and Portage—Towns of Sherry and Carson, Jt. Dist. Nos. 2 and 6, Sept. 21, 1916.....	3,000

CASES DISPOSED OF AND PENDING

CIVIL CASES DISPOSED OF IN UNITED STATES SUPREME COURT

Northwestern Mutual Life Insurance Co. v. State, 163 Wis. 84.

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 life companies. After decision of the supreme court sustaining demurrer to original complaint plaintiff amended, and demurrer to amended complaint sustained judgment entered dismissing complaint without costs. Motion for rehearing denied. Writ of error sued out of the supreme court of the United States to review the decision of the supreme court of the state. Affirmed.

State ex rel. Sally Moon Co. v. Tax Commission, 166 Wis. 287.

Certiorari in circuit court of Dane county to review the action of the tax commission assessing an income tax based on dividends received after the Income Tax Act was passed, but which were paid out of surplus existing prior to that time. From a judgment of the circuit court holding such dividends exempt from the Income Tax Law the defendant appealed. Judgment reversed. Motion for rehearing was denied. The relator sued out a writ of error in the United States supreme court. Writ dismissed upon stipulation.

CIVIL CASES DISPOSED OF IN UNITED STATES CIRCUIT COURT OF APPEALS

In re Valecia Condensed Milk Co. and Footville Condensed Milk Co. Myrlan v. Warner, 240 Fed. 310.

Action in circuit court of appeals to review and revise an order of the district court of the United States for the western district of Wisconsin. Said order adjudged Myrlan in contempt of court for refusing to produce income tax reports in his custody as secretary of the Wisconsin tax commission. Contempt order reversed. Held that sec. 1087m—24 forbids production of such reports except before other bodies or in other proceedings relating to the assessment of the tax.

CIVIL CASES DISPOSED OF IN UNITED STATES DISTRICT COURTS

The Farmers' Loan & Trust Co. v. City of Racine, Racine Water Company, and Railroad Commission.

Action brought in the United States district court for the eastern district of Wisconsin by the trustee for the bondholders of the Racine Water Company, challenging the attempt of the city of Racine to acquire

the water plant of the Racine Water Company. The challenge is based upon the claim that the statutes of the state of Wisconsin under which these proceedings were instituted are unconstitutional and void. Injunction permanently restraining further proceedings to acquire the plant was asked. Case heard before Judge Anderson, sitting for Judge Geiger. After the trial of the case had been completed, the trial court indicated that he was about to deny the relief sought and dismiss the complaint on the merits. Thereupon, the plaintiff moved for leave to dismiss without prejudice, and this motion was granted.

Insurance Trust Co. et al. v. Halford Erickson et al.

Suit brought in the United States district court for the western district of Wisconsin to determine the constitutionality of the so-called "Blue Sky Law," regulating the sale of securities. Dismissed.

Semet-Solvay Co. 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 the validity of income tax assessment of foreign corporation. This department acted as of counsel for defendant. Demurrers interposed by defendants sustained. Case dismissed.

CIVIL CASES DISPOSED OF IN WISCONSIN SUPREME COURT

Wisconsin Association of Master Bakers v. George J. Weigle, Dairy and Food Commissioner, 167 Wis. 569.

Original proceeding in the supreme court of the state to compel the dairy and food commissioner to issue licenses for bakers under the provision of sec. 1410d-6 without the payment of the license fee provided. The court held that part of the law fixing the license fee unconstitutional and granted the writ of mandamus.

State v. Lange Canning Co., 164 Wis. 228.

This action was originally instituted by the state for forfeiture for violation of the Women's Hours of Labor Law. The law was held invalid in the lower court, and on appeal the law was sustained. On motion for rehearing modified and affirmed.

C. & N. W. Ry. Co. v. R. R. Commission, 167 Wis. 185.

An action to review an order of the commission providing for a separation of grades in Milwaukee county. Order of commission sustained.

In re Petition of Wausau Investment Co. and others for an order requiring the state to pay for tax certificates held by them against lands in the so-called forestry reserve, in connection with the so-called *Forestry cases*, 163 Wis. 283.

After the legislature made provision therefor and upon report of the referee, the court disposed of all the claims.

State ex rel. Wisconsin Trust Co. v. Widule, 164 Wis. 56.

Certiorari in circuit court of Milwaukee county to set aside the tax assessed on income received by plaintiff as trustee from sources without the state and paid to a nonresident *cestui que trust*. From a judgment affirming the tax the plaintiff appealed. Affirmed.

Chippewa & Flambeau Improvement Co. v. Railroad Commission, 164 Wis. 105.

This action was brought to test the validity of the commission's order fixing certain water levels, and also to test the power of the commission

over Wisconsin waters. From a judgment affirming the order and sustaining the authority of the commission the plaintiff appealed. Affirmed.

State ex rel. Baker v. Haugen, 164 Wis. 443.

Certiorari in the circuit court of St. Croix county to test the decision of the tax commission equalizing assessed valuations of the taxing districts of said county. Judgment was entered sustaining the jurisdiction of the commission, and on appeal the judgment was affirmed.

State ex rel. Kleist v. Donald, 164 Wis. 545.

Mandamus in the supreme court to compel the secretary of state to issue to the relator a certificate of election as circuit judge, branch No. 6, Milwaukee county. Respondent's motion to quash the alternative writ was granted.

Bohemian Mutual Loan & Building Association v. Kuolt, Commissioner of Banking, 164 Wis. 581.

Action in Dane county circuit court to enjoin the defendant from taking possession of plaintiff's affairs and winding up its business. It involved the construction of the statute requiring such associations to maintain reserve funds. Demurrer to complain was sustained and on appeal to the supreme court the order was affirmed.

State ex rel. Owen v. Wisconsin and Minnesota Light & Power Co., 165 Wis. 430.

Mandamus in circuit court for Dane county to compel the defendant to comply with an order of the railroad commission fixing water levels and regulating flow at Long Lake, which order was made under authority granted by ch. 755, laws of 1913. The circuit court held the order valid and entered judgment requiring compliance therewith. Defendant appealed. Said chapter was held unconstitutional as denying the equal protection of the law to the defendant.

Culliton v. Bentley, 165 Wis. 262.

Action brought by a taxpayer in the superior court for Douglas county to prevent a reassessment of the town of Summit which had been ordered by the tax commission. Order entered overruling a demurrer to the complaint and continuing the temporary injunction. On appeal to the supreme court the order was reversed and the action remanded with directions to sustain the demurrer and deny the motion for temporary injunction.

Bradley Co. v. Rock Falls, 166 Wis. 9.

Action in circuit court for Lincoln county to recover real estate taxes paid under protest. From a judgment for the plaintiff the defendant appealed. Affirmed.

State ex rel. Pfister v. Widule, 166 Wis. 48.

Certiorari in circuit court for Milwaukee county to set aside assessments of income upon the ground that certain corporation dividends were distribution of capital. Judgment went for plaintiff. Upon appeal it was held that ordinary dividends of a going corporation are conclusively presumed to be from profits and are taxable as income to stockholders.

State ex rel. Nunnemacher v. Widule, 166 Wis. 55.

This action is in every way like the *Pfister* case.

State ex rel. Hickox v. Widule, 166 Wis. 113.

Certiorari to test validity of income tax based upon the earnings of a trust created in favor of the widow of Samuel A. Field. Judgment was entered in the Milwaukee circuit court setting aside the assessment. Such income has been held not assessable to beneficiary in *State ex rel. Kempsmith v. Widule*, 161 Wis. 389. On appeal to the supreme court the judgment was reversed and the income held subject to taxation.

State ex rel. Owen v. Rogers, 166 Wis. 628.

Original action of mandamus to compel a town clerk to insert in the tax roll proper items for raising an installment due upon a loan made from the state trust funds. Peremptory writ issued.

Estate of Carter: *State v. Carter*, 167 Wis. 89.

The state and Winnebago county appealed from the order of the county court fixing the inheritance taxes due upon the transfer of said estate. The circuit court affirmed the action of the county court and upon appeal from the judgment of the circuit court it was affirmed under the rule by an evenly divided court.

Menasha Woodenware Co. v. Railroad Commission.

Wisconsin and Northern Railroad Co. v. Railroad Commission, 167 Wis. 19.

Action brought to set aside an order of the railroad commission authorizing the Chicago & North Western Railway Company to construct a spur track. The order was affirmed by the circuit court of Dane county, and on appeal the judgment was affirmed by the supreme court.

Northwestern Mutual Life Insurance Co. v. State (second suit).

Original action in the supreme court, similar to the action of the same title, *supra*, brought to recover license fees paid in 1914 and 1915, amounting to \$1,089,778.41 and interest. Proceedings in this action were by mutual consent held in abeyance pending the decision of the supreme court of the United States in the first action. Dismissed by stipulation.

A third similar suit was brought for taxes paid subsequent to 1915. Same stipulation as in the second suit.

State ex rel. Attorney General v. John Stevenson et al., members of the County Board of Supervisors of Columbia county and the County Clerk, 164 Wis. 569.

A mandamus action started by the attorney general to secure a writ of mandamus, to compel the county board of supervisors of Columbia county to appropriate or raise one-sixth of the cost of a proposed bridge across the Wisconsin river, connecting the village of Prairie du Sac, in Sauk county, and the town of West Point, in Columbia county. The lower court decided against the plaintiff and refused to issue the writ. An appeal was taken to the supreme court, and the order appealed from was reversed and the cause remanded to the circuit court, with directions that a peremptory writ of mandamus issue commanding the county clerk and the county board of supervisors of Columbia county to proceed as required by law to appropriate the amount certified to the county clerk by the state highway commission as the amount which Columbia county is to pay as its proportionate share of the cost of the bridge, pursuant to the provisions of sec. 1321a.

State ex rel. Owen v. Schotten, 165 Wis. 88.

Action to enjoin defendant from maintaining a saloon in the village of Norwalk, because no valid license was issued to him, the village having exceeded the ratio under the Baker Law after having been dry for one year, the village council going on the theory that they could grant as many licenses as they had previous to the time when the village was dry. Action tried in the circuit court and decision rendered in favor of plaintiff. On appeal to the supreme court, the judgment of the lower court was affirmed.

State ex rel. Owen v. McIntosh, 165 Wis. 596.

Action was brought on behalf of the state by the attorney general to enjoin the defendants from selling intoxicating liquors on certain premises in the city of Bayfield. Issue arose on the demurrer to the complaint. The lower court overruled the demurrer and on appeal to the supreme court the order was affirmed.

State ex rel. McKay v. Randall, 166 Wis. 573.

Action in the circuit court for Douglas county under sec. 3180a, to abate as a nuisance defendant's wholesale liquor business in the village of Oliver, Douglas county. It appears that the village of Oliver was incorporated out of a town which constituted dry territory. The village authorities granted a liquor license in said village, and it was contended by plaintiff that under the excise laws this was unlawful. The question arose on the demurrer to the complaint. The court overruled the demurrer. On appeal to the supreme court, the order overruling the demurrer was affirmed.

State ex rel. School District No. 8, Town of Wauwatosa v. Cary, State Superintendent, 166 Wis. 103.

A writ of certiorari from the circuit court of Milwaukee county was directed to the state superintendent to test the validity of an order made by him condemning the buildings in School District No. 8 and ordering the erection of a new one in said district. Upon trial, judgment was entered vacating such decision of the state superintendent, from which judgment an appeal was taken to the supreme court. The judgment of the circuit court was affirmed.

State Board of Control v. Knoll, Guardianship of Henry Knoll and Marie Knoll, Minors, 167 Wis. 461.

These children were committed to the state public school on the ground that their father had abandoned them and their mother was not a fit and proper person to have their care, custody, and control. Petition by the mother to the county court of Walworth county asking that she be appointed guardian of her children and that the care and custody be entrusted to her. County court decided it had no jurisdiction. Appeal was taken to the circuit court, in which the order of the county court was reversed. On appeal to the supreme court by the state board of control, the order of the circuit court was in part confirmed, and it was decided that the county court had jurisdiction, and the matter was remanded to the county court for further proceedings. Further proceedings were had in the county court before Judge Jenks, who was called in to try the case, and the custody of the minors was given to the petitioner, she having proved to the satisfaction of the court that she was able to take care of the children, and that she was a proper person to have charge of them.

State of Wisconsin v. C. Rice Coal Co. et al.

Two actions against the coal dealers and dock companies of Ashland: one action under sec. 1747e to recover forfeiture for violation of the antitrust statute; the other in equity to dissolve the combine because in restraint of trade. Tried in Ashland county circuit court November, 1917, Judge Quinlan presiding. Judgment for defendants.

Jerry Gardner et al. v. State of Wisconsin.

An action commenced in the circuit court of Shawano county for the recovery of some land patented by the United States to the state of Wisconsin. The plaintiffs are Indians and contend that, under the treaties and dealings with the federal government, they are the legal owners of the land in question. On stipulation, the case was removed from Shawano county to Dane county. The case was duly tried before Judge Stevens. The court held that the title to the land was in the state when patents were issued, and that the plaintiffs have no grounds for action. Judgment dismissing the complaint was entered on December 1, 1916. No appeal has been taken.

O. H. Hanson et al. v. Chicago & Lake Superior Ry. Co. et al.

Receiver was appointed for the defendant company by the circuit court, and a claim was filed for the unpaid taxes of said company, for part of taxes due in 1915, for the taxes for 1916 and 1917. Claim was allowed, and the taxes were fully paid with interest up to the date of payment.

State ex rel. Owen, Attorney General, v. Wisconsin Pea Packers Association.

Action under Wisconsin antitrust statute to dissolve alleged combine in restraint of trade. Action dismissed upon stipulation.

Town and Village of Omro v. C. A. Clark, Wisconsin Highway Commission and Wausau Iron Works.

Action in Winnebago circuit court to restrain defendant Clark from interfering with traffic on temporary bridge. Clark filed a cross-complaint alleging fraud on the part of the highway commission in obtaining contract for temporary right of way over Clark's premises. On motion of the defendant, highway commission, the place of trial was changed to Dane county. Judgment was entered in favor of the plaintiffs as prayed for against Clark, and in favor of the highway commission against Clark.

John Schaefer et al. v. Railroad Commission.

Action in Dane county circuit court to review an order fixing the water levels of Muskego Lake. Trial was had. Judgment entered affirming the order of the railroad commission.

Wisconsin, Bayfield County and Town of Mason v. White River Lumber Co. et al.

Action in Bayfield county circuit court to recover the amount of a judgment obtained upon a delinquent income tax that had been assessed against the White River Lumber Company. Action settled and dismissed on payment by defendants of \$4,596.42.

Bayfield County v. Iron River Lumber Co., Edward Hines Lumber Co. et al.

Action begun in Bayfield county circuit court. Motion made by defendant, Edward Hines Lumber Company, to remove case to federal court. Certified copy of record filed in the district court for the western district of Wisconsin. On plaintiff's motion the cause was re-

Sutliff v. State of Wisconsin.

Application for an award of compensation against the state because of the death of applicant's husband. Compensation was awarded.

Miller v. State of Wisconsin.

Application for an award of compensation against the state, which application was later withdrawn.

Glidden v. State of Wisconsin.

Application to the industrial commission for an award of compensation against the state. Award was made.

Fred Stahl v. Joseph Kahle, County of Lincoln and State of Wisconsin.

This was a proceeding brought by the applicant to secure compensation for loss of an eye. The applicant was employed by Joseph Kahle on road work in Lincoln county and claimed that he had sustained an accidental injury which caused the disability. The industrial commission discharged the state of Wisconsin from all liability.

Homer Ramsdell v. State of Wisconsin.

Application to the industrial commission for an award against the state on account of an injury to applicant alleged to have been received while performing services as an employe in the Mendota state hospital. Application dismissed.

Sophia Nimmer v. Janesville Company, Wisconsin National Guards.

Application to the industrial commission for compensation by applicant for the death of her son, Carl Nimmer, caused by alleged injuries received as guardsman while at Camp Douglas, Wisconsin, on duty. Application denied.

manded to the state court. The action was to recover income tax assessed against Iron River Lumber Company. Action settled upon payment of tax.

In re Estate of Christ L. Hagen.

The judge of the county court gave notice that the estate of the deceased might escheat to the state. Persons appeared claiming to be heirs of the deceased. At the conclusion of the hearing to determine heirship of said deceased the court found that said claimants are heirs.

Hanson v. Kounell and Finnegan.

This was an action brought in circuit court of Marinette county charging the defendant, Finnegan, as deputy state fire marshal, with malicious prosecution and false imprisonment. The matter was tried before Judge Quinlan. At the close of the testimony on the motion of the defendant a verdict was directed for defendants.

Abraham Fur Co. v. L. H. Boomer and George Stahl.

This was an action brought in justice court in Brown county for replevin of furs seized by the defendants as deputy conservation wardens. Pending an appeal the matter was dismissed upon stipulation without costs to either party.

Appeal of Bergman from the Decision of the Board of Examiners in Optometry.

This was an action brought in the circuit court of Milwaukee county first, appealing from the decision of the board of examiners in Optometry. The opinion of the board was sustained by the circuit court, whereupon mandamus was brought to compel the board to grant a permit to said Bergman. The writ was denied.

State of Wisconsin v. Kate Pier.

This was an action brought by the state of Wisconsin in the circuit court of Oneida county to quiet title on about 3,320 acres of land purchased by the state for its forest reserve on which lands the defendant had secured tax deeds. The facts in the case were the same as in the case of *State of Wisconsin v. Guaranteed Investment Co.*, and when that case was finally decided by the supreme court the defendant quit-claimed to the state her interest in said land and the state paid to her the amount due on tax deeds and tax certificates which she held.

CIVIL CASES DISPOSED OF BEFORE INDUSTRIAL COMMISSION

Vinnie R. Sutherland v. Board of Normal School Regents.

Application to the industrial commission for an award against the state on account of the death of W. J. Sutherland, her husband, president of the state normal school at Platteville. Application was refused.

Snyder v. State of Wisconsin.

An application to the industrial commission for an award of compensation against the state. The commission refused compensation as against the state, but made an award of compensation as against the Citizens Savings & Trust Co.

Olson v. State of Wisconsin Military Reservation.

An application to the industrial commission for an award of compensation against the state because of injuries claimed to have been received while in the service of the state. Compensation was granted.

State ex rel. Owen v. Schotten, 165 Wis. 88.

Action to enjoin defendant from maintaining a saloon in the village of Norwalk, because no valid license was issued to him, the village having exceeded the ratio under the Baker Law after having been dry for one year, the village council going on the theory that they could grant as many licenses as they had previous to the time when the village was dry. Action tried in the circuit court and decision rendered in favor of plaintiff. On appeal to the supreme court, the judgment of the lower court was affirmed.

State ex rel. Owen v. McIntosh, 165 Wis. 596.

Action was brought on behalf of the state by the attorney general to enjoin the defendants from selling intoxicating liquors on certain premises in the city of Bayfield. Issue arose on the demurrer to the complaint. The lower court overruled the demurrer and on appeal to the supreme court the order was affirmed.

State ex rel. McKay v. Randall, 166 Wis. 573.

Action in the circuit court for Douglas county under sec. 3180a, to abate as a nuisance defendant's wholesale liquor business in the village of Oliver, Douglas county. It appears that the village of Oliver was incorporated out of a town which constituted dry territory. The village authorities granted a liquor license in said village, and it was contended by plaintiff that under the excise laws this was unlawful. The question arose on the demurrer to the complaint. The court overruled the demurrer. On appeal to the supreme court, the order overruling the demurrer was affirmed.

State ex rel. School District No. 8, Town of Wauwatosa v. Cary, State Superintendent, 166 Wis. 103.

A writ of certiorari from the circuit court of Milwaukee county was directed to the state superintendent to test the validity of an order made by him condemning the buildings in School District No. 8 and ordering the erection of a new one in said district. Upon trial, judgment was entered vacating such decision of the state superintendent, from which judgment an appeal was taken to the supreme court. The judgment of the circuit court was affirmed.

State Board of Control v. Knoll; Guardianship of Henry Knoll and Marie Knoll, Minors, 167 Wis. 461.

These children were committed to the state public school on the ground that their father had abandoned them and their mother was not a fit and proper person to have their care, custody, and control. Petition by the mother to the county court of Walworth county asking that she be appointed guardian of her children and that the care and custody be entrusted to her. County court decided it had no jurisdiction. Appeal was taken to the circuit court, in which the order of the county court was reversed. On appeal to the supreme court by the state board of control, the order of the circuit court was in part confirmed, and it was decided that the county court had jurisdiction, and the matter was remanded to the county court for further proceedings. Further proceedings were had in the county court before Judge Jenks, who was called in to try the case, and the custody of the minors was given to the petitioner, she having proved to the satisfaction of the court that she was able to take care of the children, and that she was a proper person to have charge of them.

State ex rel. Conway v. Donald and others, Commissioners of Public Lands, 164 Wis. 468.

This was a proceeding by writ of certiorari to review the action of the commissioners of public lands in refusing their consent to an order made by the superintendent, transferring to another district 120 acres of land owned by the relator and included in a school district which is indebted to the state trust fund. The attorney general took the ground that the question involved was not of any material interest to the people at large, and that the supreme court therefore should decline to exercise its original jurisdiction therein. The case was argued in the supreme court November 7, 1916, and on December 5, 1916, the court declined to take jurisdiction of the case, and the writ of certiorari was dismissed without prejudice to such other procedure as the plaintiff may be advised to institute in the proper court. No other proceedings have been instituted, and the matter can therefore be considered settled.

George Apfelbacher v. State of Wisconsin et al. (Equity), 167 Wis. 233.

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 the state had control of the dam. The case was tried before Judge Lueck, and the judge granted an injunction restraining the defendant from using the water in the Bark river in such a way as would injure the plaintiff. An appeal was taken to the supreme court, and the case argued on the 7th day of March, 1918. The judgment of the circuit court was affirmed.

DeMund v. State, 167 Wis. 40.

A bastardy case tried in the circuit court of Dodge county before Judge Lueck, in which the defendant was found guilty. On appeal to the supreme court the judgment was reversed and the cause remanded for a new trial.

Jefferson Transfer Co. v. Merlin Hull, Secretary of State et al., 166 Wis. 438.

This was a mandamus proceeding growing out of a bankruptcy matter, E. M. Shealey, bankrupt. The Jefferson Transfer Company had secured a judgment against E. M. Shealey before he was declared a bankrupt. Mr. Shealey was a professor at the university and received a salary from the state. The trustee in bankruptcy served notice on the secretary of state of his appointment and demanded that certain moneys due from the state of Wisconsin be turned over to him as trustee. The Jefferson Transfer Company had filed a transcript of its judgment with the secretary of state as provided by sec. 3716a, Stats. 1917. The constitutionality of said section was attacked by the trustee in bankruptcy. The supreme court upheld the constitutionality of said section and affirmed the judgment of the circuit court.

State v. Guaranteed Investment Co., 163 Wis. 292, 166 Wis. 111.

This is an action to quiet title of the state to about 7,174.5 acres of forest reserve land in Oneida county to which lands the defendant claimed title under certain tax deeds. A judgment was rendered by the circuit court to the effect that the title be declared in the state providing the state paid to the Guaranteed Investment Company the amount of all taxes, interest and expenses in connection with the securing of said tax deeds. An appeal was taken to the supreme court and the supreme court, in 163 Wis. 292, affirmed the decision of the circuit court, but continued the case until after the legislature of 1917 had an

opportunity to declare the policy of the state as to its forest reserve lands. At the August, 1917, term the supreme court finally disposed of the matter. Thereafter the state paid to the Guaranteed Investment Company the amount of its claims and received a quitclaim deed to said lands from the Guaranteed Investment Company.

CIVIL CASES DISPOSED OF IN LOWER COURTS

City of Eau Claire v. Railroad Commission.

Action brought in circuit court for Dane county to review an order of the railroad commission providing for a grade separation in the city of Eau Claire. Judgment entered dismissing action.

State of Wisconsin v. Door County Telephone Co.

Forfeiture action brought in the circuit court for Dane county to recover penalties for violation of an order of the railroad commission. Judgment for plaintiff.

Frank H. Jones v. City of Janesville, Railroad Commission et al.

Suit brought by trustee of 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 Utilities Law. Dismissed without costs.

Janesville Water Co. v. Railroad Commission.

Action brought in the circuit court for Dane county to review an order of the railroad commission fixing the valuation of the Janesville Water Company for purchase by the city of Janesville under the Public Utilities Law. Possession of the property surrendered to the city pursuant to an agreement between the company and the city. Dismissed by stipulation.

Wisconsin Telephone Co. v. Railroad Commission.

Action brought in the circuit court for Dane county to review and set aside an order of the railroad commission requiring physical connection service between the Wisconsin Telephone Company and the Rock County Telephone Company at Janesville. Dismissed by stipulation.

Wisconsin Telephone Co. v. Railroad Commission.

Action brought in the circuit court for Dane county to review the supplemental order of the railroad commission fixing a charge for physical connection service between the Wisconsin Telephone Company and the Rock County Telephone Company at Janesville. Dismissed by stipulation.

Rock County Telephone Co. v. Railroad Commission.

Action brought in the circuit court for Dane county to review the orders of the railroad commission in the *Janesville Physical Connection* case and to set aside said orders in so far as the same fix a physical connection charge in excess of five cents. Dismissed without costs.

State ex rel. Donahue-Siratton Co. v. Tax Commission.

Certiorari in circuit court for Dane county to review income tax assessment. Order entered superseding writ on motion of defendant.

Wisconsin Central Railway Co. v. Iron County.

Action to enjoin sale of lands for taxes on ground that the assessment was excessive. Case tried. Judgment for defendant dismissing the complaint.

State of Wisconsin v. C. Rice Coal Co. et al.

Two actions against the coal dealers and dock companies of Ashland: one action under sec. 1747e to recover forfeiture for violation of the antitrust statute; the other in equity to dissolve the combine because in restraint of trade. Tried in Ashland county circuit court November, 1917, Judge Quinlan presiding. Judgment for defendants.

Jerry Gardner et al. v. State of Wisconsin.

An action commenced in the circuit court of Shawano county for the recovery of some land patented by the United States to the state of Wisconsin. The plaintiffs are Indians and contend that, under the treaties and dealings with the federal government, they are the legal owners of the land in question. On stipulation, the case was removed from Shawano county to Dane county. The case was duly tried before Judge Stevens. The court held that the title to the land was in the state when patents were issued, and that the plaintiffs have no grounds for action. Judgment dismissing the complaint was entered on December 1, 1916. No appeal has been taken.

O. H. Hanson et al. v. Chicago & Lake Superior Ry. Co. et al.

Receiver was appointed for the defendant company by the circuit court, and a claim was filed for the unpaid taxes of said company, for part of taxes due in 1915, for the taxes for 1916 and 1917. Claim was allowed, and the taxes were fully paid with interest up to the date of payment.

State ex rel. Owen, Attorney General, v. Wisconsin Pea Packers Association.

Action under Wisconsin antitrust statute to dissolve alleged combine in restraint of trade. Action dismissed upon stipulation.

Town and Village of Omro v. C. A. Clark, Wisconsin Highway Commission and Wausau Iron Works.

Action in Winnebago circuit court to restrain defendant Clark from interfering with traffic on temporary bridge. Clark filed a cross-complaint alleging fraud on the part of the highway commission in obtaining contract for temporary right of way over Clark's premises. On motion of the defendant, highway commission, the place of trial was changed to Dane county. Judgment was entered in favor of the plaintiffs as prayed for against Clark, and in favor of the highway commission against Clark.

John Schaefer et al. v. Railroad Commission.

Action in Dane county circuit court to review an order fixing the water levels of Muskego Lake. Trial was had. Judgment entered affirming the order of the railroad commission.

Wisconsin, Bayfield County and Town of Mason v. White River Lumber Co. et al.

Action in Bayfield county circuit court to recover the amount of a judgment obtained upon a delinquent income tax that had been assessed against the White River Lumber Company. Action settled and dismissed on payment by defendants of \$4,596.42.

Bayfield County v. Iron River Lumber Co., Edward Hines Lumber Co. et al.

Action begun in Bayfield county circuit court. Motion made by defendant, Edward Hines Lumber Company, to remove case to federal court. Certified copy of record filed in the district court for the western district of Wisconsin. On plaintiff's motion the cause was re-

CRIMINAL CASES DISPOSED OF IN SUPREME COURT

From July 1, 1916, to June 30, 1918

Title of Case	County	Offense	Disposition
State v. Adams.....	Waukesha.....	Desertion.....	Affirmed
State v. Huott.....	Ashland.....	Concealing stolen goods.....	"
State v. Bruno.....	Clark.....	Assault to do great bodily harm.....	"
State v. Weldon.....	Rusk.....	Enticing for prostitution.....	"
State v. Watko.....	Winnebago.....	Abandonment of child.....	"
State v. Kahl.....	Grant.....	Manslaughter in fourth degree.....	Reversed
State v. Rodermund.....	Dane.....	Abortion.....	Affirmed
State v. Simmons.....	St. Croix.....	Rape.....	"
State v. Ryan.....	Lafayette.....	Selling liquor in dry territory.....	"
State v. Butler.....	Dunn.....	Rape.....	Reversed

CRIMINAL CASES DISPOSED OF IN LOWER COURTS

From July 1, 1916, to June 30, 1918

Title	County	Offense	Disposition
State v. Johnson.....	Door.....	Arson.....	Acquittal
State v. Marshner.....	Dodge.....	Murder and Arson.....	Conviction
State v. Hackett.....	Frank.....	Arson.....	Nolled on state's motion.
State v. Granberg.....	Trempealeau.....	".....	"
State v. Sudol.....	Langlade.....	".....	Acquittal
State v. Hill.....	".....	".....	Nolled on state's motion
State v. Sam Block.....	Shawano.....	".....	Acquittal
State v. John Lemon.....	St. Croix.....	".....	"
State v. Richard Block.....	Manitowoc.....	".....	Conviction
State v. Nathan Smith.....	Iowa.....	".....	Acquittal
State v. Stelnbach.....	Kenosha.....	".....	"
State v. Daisy Rose.....	Langlade.....	".....	Conviction
State v. John Kanatki.....	Marathon.....	".....	Acquittal
State v. Mike Drer.....	Taylor.....	".....	"
State v. John Baranek.....	Price.....	".....	"
State v. Norman and Ax-tell.....	Marinette.....	".....	"
State v. Julius Meyer.....	Clark.....	Murder.....	Conviction

FORFEITURE CASES DISPOSED OF

From July 1, 1916, to June 30, 1918

Title of Case	County	Offense	Disposition
State v. Barron Co. Canning Co.	Barron.....	Women's hours of labor law	Dismissed on payment of costs by defendant
State vs. Strausser.....	" "	" "	Judgment entered; paid \$30 and costs
State v. Big Four Canning Co.	Chippewa....	" "	Judgment entered; paid \$150.
State v. Lango Canning Co.	Eau Claire...	" "	Judgment entered; paid \$300 and costs
State v. C. A. Benjamin... .	Douglas.....	" "	Dismissed on defendant's payment of costs
State v. Abraham.....	La Crosse....	" "	Judgment paid \$50
State v. Thorp Manufg. Co.	Clark.....	" "	Judgment paid \$50 and costs
State v. Young & Quongkee	Eau Claire...	" "	Judgment paid \$50 and costs
State v. Jordan.....	Dane.	" "	Judgment paid \$50 and costs
State v. F. H. & W. S. Smith	Dunn.....	" "	Judgment paid \$20 and costs
State v. Elba Canning Co.	Dodge.....	" "	Judgment paid \$50 and costs
State v. Hurd.....	Kenosha....	Child labor.....	Judgment paid \$100 and costs
State v. Interlake Pulp & Paper Co.	Outagamie...	Women's hours of labor law	Dismissed with costs
State v. North American Telegraph Co.	Waukesha...	Child labor.....	Dismissed with costs
State v. Reuben J. Ellsworth.....	Iowa.....	" "	Judgment \$125 and costs
State v. Oscar Fringe.....	Racine.....	" "	Judgment \$80 and costs
State v. T. J. Stoeckel.....	Waukesha...	" "	Judgment \$80 and costs
State v. George Kraft Co.	Dane.....	" "	Dismissed with costs
State v. Turnbull	Douglas....	Women's hours of labor law	Judgment \$60 and costs; paid

WORKMEN'S COMPENSATION CASES DISPOSED OF

In the following cases the order of the industrial commission granting an award of compensation was confirmed both in the circuit court and in the supreme court.

- Hammond-Chandler Lumber Co. v. Industrial Commission and Nels O. Nelson V. General Guardian of Roy W. Peterson, a Minor.
Hewitt v. Ryan and Industrial Commission.
Casper Cone Co. and Workmen's Compensation Mutual Liability Ins. Co. v. Industrial Commission and Martinek.
Great Northern Ry. Co. v. King and Industrial Commission.
Hackley-Phelps-Bonnell v. Industrial Commission and Drewetski.
The William Rahr Sons Co. v. Industrial Commission and Margaret Meister, Minor, by her General Guardian, East Wisconsin Trustee Co.
Johnstad v. Lake Superior Terminal & Transfer Ry. Co. and Industrial Commission.
Wiesedeppe v. Zwetzel and Industrial Commission.
Gough v. Industrial Commission and Flanner-Steger Land & Lumber Co.
Manitowoc Boiler Works v. Industrial Commission and Zander.
Hall v. Industrial Commission and City of Barron.
Wausau Lumber Co. v. Industrial Commission and Durkee.
Ferdinand Edward Kuetbach v. Industrial Commission and Washington Cutlery Co.
F. C. Gross & Bros. Company and Wisconsin Employers Exchange v. Industrial Commission and Loferski.
Jordan & Georgia Casualty Co. v. Weinman and Industrial Commission.
Wisconsin Lakes Ice & Cartage Co. and Wisconsin Employers Exchange v. Industrial Commission and Pankonen.
Racine Rubber Co. v. Industrial Commission and Frank Macaluse.
C. S. McDonald and The Travelers Insurance Co. v. Industrial Commission of Wisconsin and Fred Edwards.
A. Breslauer Co., a corporation, and General Accident Fire & Life Assurance Corporation v. Industrial Commission and Clara Bergenthal.
John Vasey and Employers Liability Assurance Co. v. Industrial Commission and Evangeline Whitcomb.
A. O. White v. Industrial Commission and Agnes Behrend.

In the following cases the award was reversed in the circuit court for Dane county and the judgment of that court was reversed and the award of the commission confirmed in the supreme court.

- Etta Kuetbach v. Industrial Commission and Washington Cutlery Co.
Holmen Creamery Association and Workmen's Compensation Mutual Liability Insurance Co. v. Industrial Commission and William Wallum.

In the following cases the award of the commission was reversed by the circuit court and the judgment of that court affirmed by the supreme court.

- Foster-Latimer Lumber Co. v. Industrial Commission and Duane.
Nick Karges v. Industrial Commission and National Terra Cotta & Window Cleaning Co.

In the following case the judgment of the circuit court for Dane county confirming the award of the industrial commission was reversed in the supreme court.

Neff v. Industrial Commission and Markman.

In the following case the award of the commission was affirmed in part and reversed in part both in the circuit court and in the supreme court.

Jackson v. Industrial Commission and Rintala.

In the following cases an action was begun in the circuit court for Dane county which was dismissed on motion for failure to serve upon the adverse party and that order of dismissal later affirmed in the supreme court.

New Dells Lumber Co. v. Industrial Commission and Robillard.

New Dells Lumber Co. v. Industrial Commission and Vennen.

New Dells Lumber Co. v. Industrial Commission and Gullickson.

New Dells Lumber Co. v. Industrial Commission and Holst.

New Dells Lumber Co. v. Industrial Commission and Christianson.

New Dells Lumber Co. v. Industrial Commission and Arneson.

New Dells Lumber Co. v. Industrial Commission and Ringer.

In the following cases the order of the industrial commission granting compensation was confirmed by the circuit court for Dane county and appeal taken to the supreme court and that appeal later dismissed.

Town of Pine Valley and Town of Weston v. Industrial Commission and Karl Kessler, Jr., a Minor, by Karl Kessler, Sr., General Guardian.

Village of West Salem v. Industrial Commission and Voeck.

In the following cases the award of the industrial commission was confirmed by the circuit court for Dane county.

City of Ashland v. Industrial Commission and Fred Johnson.

Frank Carter Co. v. Industrial Commission and Dedual.

Minneapolis, St. Paul and Sault Ste. Marie Ry. Co. v. Industrial Commission and Hinds.

Hensgen v. Industrial Commission and E. Hackner Co.

Reiter v. Industrial Commission and Jonah Williams & Sons Co.

Anstedt Leather Co. and Employer's Liability Assurance Corporation v. Spoerl and Industrial Commission.

Town of Lima v. Industrial Commission and Mundon.

Damico v. The Falk Co. and the Industrial Commission.

Rogers-Ruger Lumber Co. v. Erickson and Industrial Commission.

Marathon Paper Mills Co. v. Industrial Commission and Kwiatowski.

Brnak v. Industrial Commission and Bain Wagon Co.

Smith v. Industrial Commission and Marathon Paper Mills Co.

Union Land Co. v. Industrial Commission and Christenson.

Cascio v. Robert A. Johnston Co. and Industrial Commission.

Lakeside Paper Co. v. Industrial Commission and Ost.

Town of Westford v. Industrial Commission and Achterberg.

Standard Oil Co. v. Industrial Commission and Potts.

Nelson v. Dahlenberg and Industrial Commission.

Slyver Steel Casting Co. and Workmen's Compensation Mutual Liability Ins. Co. v. Industrial Commission and Kosclesza,

Lampe Highland Mining Co. v. McGuire and Industrial Commission.
J. I. Case Threshing Machine Co. and Gen. Accident Fire & Life Assurance Corporation v. Industrial Commission and Soetenza.
Edwards v. Industrial Commission and Globe Seamless Steel Tubing Co.
Egelhoff v. Hohensee and Industrial Commission.
Chadwick v. Industrial Commission and City of Milwaukee.
Amelia Bartz v. Industrial Commission and Ambrosia Chocolate Co.
Manitowoc Gas Co. v. Industrial Commission and Emma Novy.

In the following case an action was started in the circuit court to set aside the order of the commission dismissing the application for an award, and the order of the commission confirmed.

Louis Dahl v. The Wisconsin Construction Co. and Industrial Commission.

In the following cases the award of the commission was reversed by the circuit court of Dane county.

Falteisek v. Tylor and Industrial Commission.
Nelson & Polk v. Industrial Commission and Peterson.

In the following case the award of the commission was reversed in part by the circuit court for Dane county.

Flanner-Steger Land & Lumber Company v. Industrial Commission and Elbe.

In the following cases actions were begun in the circuit court for review of the order of the industrial commission making awards of compensation, and such actions were later dismissed by stipulation.

Western Malleables Company v. Stanczewski and Industrial Commission.
Robert L. Reisinger Company v. Industrial Commission and Andresz.
Waukesha Moor Bath Company and Workmen's Compensation Mutual Liability Ins. Co. v. Industrial Commission and Kayser.

F. R. Dengel Mfg. Co. v. Industrial Commission and Reich.
T. A. Chapman Co. v. Industrial Commission and Paul Kavel.
Frontier Mining Co. and Workmen's Compensation Mutual Liability Ins. Co. v. Industrial Commission, Andrew Sandquist and Hannah Sandquist.

Westfahl File Co. v. Industrial Commission and Roth.
American Seating Co. v. Industrial Commission and Krause.
Schumann & Roden and Workmen's Compensation Mutual Liability Ins. Co. v. Industrial Commission and Wolf.
Gibson and The Travelers Ins. Co. v. Schneider and Industrial Commission.

City of Milwaukee v. McGee and Industrial Commission.
Frankfort Gen. Ins. Co. v. Industrial Commission, Thatcher, and Trisciani.

Hump Development Co. v. Kilcolm and Industrial Commission.
Hump Development Co. v. Smith and Industrial Commission.
Hump Development Co. v. Industrial Commission and Peterson.
Lange Canning Co. v. Myren and Industrial Commission.
Frank Tetzlaff and Builders' Limited Mutual Liability Insurance Co. v. Industrial Commission and Jacob Etzel.
Jacob Etzel v. Frank Tetzlaff, Builders' Limited Mutual Liability Insurance Co. and Industrial Commission.

REPORT OF THE ATTORNEY-GENERAL

In the following cases after the action for review was begun in the circuit court, upon stipulation of the parties the matter was remanded to the industrial commission for approval of a compromise agreement.

Morgan Company v. Industrial Commission and Samer.
M. A. Hannah Dock Co. v. Gunski and Industrial Commission.

In the following case the award of the commission was reversed in the circuit court by stipulation and the controversy remanded to the commission by stipulation.

Co-operative Orchard Co. and Travelers Ins. Co. v. Wilkey and Industrial Commission.

In the following case an action was started in the circuit court to set aside the order of the industrial commission dismissing the application for an award, and the action was thereafter dismissed by stipulation.

Charles F. Martin v. John H. Kaiser Lumber Co. and Industrial Commission.

In the following case an action was begun in the circuit court for a review of the order of the industrial commission, and on motion of the attorney general the action was dismissed for failure to make the complaint definite and certain.

Kingl v. Pelton Steel Co. and Industrial Commission.

The following case was begun in the circuit court, and upon motion of plaintiff the court held that the attorney general was disqualified to act because of membership in a firm acting as attorneys for the codefendants of the commission.

Nyland v. Industrial Commission, John R. Williams as Special Administrator of the Estate of J. C. Williams, deceased, and J. C. Williams & Sons.

CIVIL CASES PENDING IN UNITED STATES SUPREME COURT

State of Minnesota v. State of Wisconsin.

Action begun by the state of Minnesota in the supreme court of the United States, to determine the boundary line between the state of Minnesota and the state of Wisconsin as the same extends through Lake Pepin.

Curtice Brothers Company v. George J. Weigle.

This case has been pending for some time on appeal of George J. Weigle, dairy and food commissioner, to the supreme court of the United States from a decision of the United States district court for the western district of Wisconsin. Briefs have been prepared and served by this office, and the case is awaiting argument when reached at Washington.

CIVIL CASES PENDING IN UNITED STATES DISTRICT COURT

State of Wisconsin, Bayfield County and City of Bayfield v. Frank Boutin.

Action in the United States district court for the western district of Wisconsin to recover from the defendant a delinquent income tax of \$31,875.58.

CIVIL CASES PENDING IN WISCONSIN SUPREME COURT

Milwaukee Northern R. R. Co. v. Railroad Commission of Wisconsin and

Chicago & Milwaukee Electric Ry. Co. v. Railroad Commission.

Actions brought in the circuit court for Dane county to require joint use of street railway tracks belonging to the plaintiffs by the Milwaukee Electric Ry. & Light Co., and fixing compensation for such use. Pending on complaint and answer.

State ex rel. Downey-Farrell Co. v. George J. Weigle, as Dairy and Food Commissioner of the State of Wisconsin.

This is an original action commenced in the supreme court of the state, for the purpose of enjoining the defendant from interfering with the use of trading stamps in the business conducted by the plaintiff. The complaint alleges that the plaintiff's business is not within the Trading Stamp Law of Wisconsin, and if it is covered by that law, then the law is unconstitutional and void. Issues of fact were raised by an answer interposed by the defendant. These issues were tried before Honorable A. G. Zimmerman, as referee, to make a return to the supreme court of his findings of fact. The case was thereafter heard in the supreme court on the findings of fact so made and returned, and judgment was rendered, denying, except in one minor respect, all of the relief prayed for in the complaint. A motion for rehearing is pending in this case.

The Milwaukee Electric Railway & Light Co. v. Railroad Commission and City of Milwaukee, Intervenor.

This is the so-called original *Milwaukee Fare* case. It involves the legality of an order of the railroad commission reducing the fares in the city of Milwaukee so as to provide for the sale of thirteen tickets for fifty cents on the city lines. This order was set aside by the circuit court on the ground that it was unreasonable. Appeals were perfected, both by the city of Milwaukee and the railroad commission, and are now pending in the supreme court.

Kate F. Murphy v. Teachers Insurance and Retirement Fund.

This is an action of mandamus brought in the circuit court for Dane county to compel the defendant to allow an annuity under the provisions of secs. 42.01 to 42.18, Stats. The circuit court gave judgment to the plaintiff for a peremptory writ. From this judgment the state appealed to the supreme court. The case was on the January, 1918, calendar.

CIVIL CASES PENDING IN LOWER COURTS

In re Estate of Henry Wolf, alias Joachim H. Wolf, deceased.

September 6, 1916, judgment of the Sauk county court was entered adjudging that said estate had escheated. March 18, 1918, said court ordered that the petition of Henry Mussle, Swiss consul, attorney in fact for Sophie von Howe et al., setting out that they are heirs of said deceased, be heard May 7, 1918. Hearing had that day and adjourned without date.

St. Louis Button Co. v. Wisconsin Department of Agriculture.

Action in Dane county superior court. Summons and complaint served June 3, 1918. Demurrer thereto served June 19, 1918.

State ex rel. Standard Oil Co. v. Merlin Hull.

This is an action of mandamus brought to compel the secretary of state to receive and file the annual report of the petitioner, as a foreign corporation. It involves the question of whether the statutory fees required to be paid by foreign corporations are determined with reference to their authorized capital stock or their issued capital stock. The case has been heard in the circuit court for Dane county, before Honorable E. Ray Stevens, Judge, on a motion interposed by the defendant to quash the alternative writ. The matter is still under advisement.

Standard Oil Co. v. Merlin Hull et al.

This is an action for injunction restraining the secretary of state from entering the forfeiture of the plaintiff's license as a foreign corporation to do business in the state of Wisconsin and restraining the defendant attorney general from instituting any proceedings to enforce penalties or forfeitures. By agreement of counsel this case is being held in abeyance until the determination of the companion case of *State ex rel. Standard Oil Co. v. Merlin Hull*.

State of Wisconsin v. Emil Giljohann and R. E. Giljohann and C. K. Kalvenlage.

An action pending 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. Zeno M. Host and Aetna Indemnity Co.

An action pending in the circuit court for Dane county, in which it is sought to recover fees alleged to have been collected by Zeno M. Host during his term as insurance commissioner, which fees were not turned into the state treasury. Answer denies the allegations of the complaint.

State of Wisconsin v. William A. Fricke, Charles F. Pfister, and Rudolph Giljohann.

Action pending in circuit court for Dane county, to recover fees alleged to belong to the state and collected by William F. 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.

State ex rel. Maude Gallet v. C. P. Cary, Superintendent of Public Instruction of the State of Wisconsin.

A writ of certiorari was issued by the circuit court of Calumet county directed to the state superintendent, questioning the order denying the application of Maude Gallet, a teacher in School District No. 3 of the town of Charlestown, in Calumet county, for additional state aid, as provided in sec. 40.14, Stats. The case was argued in March, 1917, and afterwards briefs were submitted by both sides. No decision has as yet been rendered.

State of Wisconsin v. City of Milwaukee.

This is an action in the circuit court of Milwaukee county to recover from the city of Milwaukee the interest on the fines collected in the municipal and district courts of said city for and on account of violation of the penal laws of Wisconsin, for the years 1910, 1911, 1912, 1913, 1914, and 1915. The fines collected during the said time amounted to \$72,473. This amount was paid into the state treasury, but the city of Milwaukee refused to pay interest on the same from the time the fines were payable to the state in each year, the interest amounting at the time of the commencement of the suit to \$15,711.35. Issue not yet joined. Case is pending.

August Anderson v. State of Wisconsin.

Action commenced in circuit court for Shawano county for the recovery of the cost of timber, logs, etc., seized by the officers of the state, on the ground that they were cut on government land. Plaintiff alleges that he is the owner of the land. The title to the land is in question.

O. A. Lukken v. O. H. Ellason and W. R. Claussen.

Action brought in Dane county circuit court to recover large damages claimed on account of the unlawful killing by the defendants of six pedigree Holstein cows, the property of the plaintiff. The defendants were state veterinarian and assistant state veterinarian and claimed to be acting as such under the state statutes for the control and eradication of bovine tuberculosis. The action is regarded as very important. It involves the validity of the state statutes for the control and eradication of contagious diseases among domestic animals and the dependability of the tuberculin test for determining the presence of tuberculosis in cattle. The action was tried before the court without a jury, Judge Stevens presiding, on June 24-25, 1918, and taken under advisement.

Estate of Charles B. McCanna: State and Racine County v. C. R. McCanna, Administrator.

The state and Racine county appealed to the circuit court for Racine county from the order of the county court determining the inheritance taxes due upon the transfer of the said estate. It is intended to make the same a test case to obtain a construction of sec. 1087-1, subd. (3), Stats. relating to transfers "made in contemplation of death."

State ex rel. Town of South Range and P. O. Peterson v. Tax Commission.

Certiorari in circuit court for Dane county to set aside the decision of the tax commission ordering a reassessment of said town. Motion made by defendant to supersede writ. Motion argued and taken under advisement.

State ex rel. Cantwell Printing Co. v. Merlin Hull, Secretary of State.

This is an action of mandamus brought by Cantwell Printing Company against the secretary of state to compel him to audit its alleged

claim of \$4,526.63 for doing work, labor and services under its printing contract with the state. The action is pending in the circuit court for Dane county.

M. A. Robinson v. Board of Trustees of Teachers Insurance and Retirement Fund.

This is an action of mandamus pending in the circuit court for Dane county to compel the defendant to audit and allow his claim for an annuity under the provisions of secs. 42.01 to 42.18. The state demurred to the complaint. The argument of the demurrer has not been had.

The Milwaukee Electric Railway & Light Co. v. Railroad Commission
and

Milwaukee Light, Heat & Traction Co. v. Railroad Commission.

Actions brought in circuit court for Dane county to review orders of the railroad commission in the so-called *Uniform Fare* cases, fixing street and interurban railway fares in the city of Milwaukee and territory adjacent thereto. Cases are pending awaiting results of a re-investigation of the subject matter of the order in suit by the railroad commission.

Falls Light & Power Company v. Railroad Commission.

Action brought in the circuit court for Dane county to review an order of the railroad commission determining the compensation to be paid by the city of Sheboygan Falls for electric utility property taken by the municipality under the Public Utilities Law.

Wisconsin Gas & Electric Company v. Railroad Commission.

Action was brought in circuit court for Dane county to review an order of the railroad commission providing for grade separations in the city of Kenosha. Stipulation entered extending time to answer.

State of Wisconsin v. Chicago & Wisconsin Valley Railway Company.

Action commenced in the circuit court for Dane county by the plaintiff to recover unpaid taxes from the defendant. Defendant is in default, but no judgment has yet been entered, as defendant has given assurances that the taxes will be paid with interest.

Chicago, St. Paul, Minneapolis & Omaha R. R. Co. et al. v. Railroad Commission of Wisconsin.

This is an action to challenge and review an order of the railroad commission of Wisconsin, directing the physical connection of the roads of the plaintiffs at a point where they intersect. The complaint is based on the theory that there is no power to require physical connection where the roads do not intersect at grade. The plaintiffs have demurred to the answer of the railroad commission, and the demurrer has not yet been argued.

Herzfeld-Phillipson Co. v. George J. Weigle.

This is an action brought by the plaintiff, popularly known as The Boston Store of Milwaukee, to enjoin the defendant from interfering with the use by the plaintiff of the so-called Sperry Hutchinson trading stamps. This case is at issue on complaint and answer, and a temporary restraining order has been entered therein without contest. The case has awaited the determination of the supreme court in the case of *State ex rel. Downey-Farrell Company v. Weigle*. That case having been determined adversely to the plaintiff, further steps will be taken in this case, as soon as the motion for rehearing in the *Downey-Farrell* case has been passed upon by the supreme court.

REPORT OF THE ATTORNEY-GENERAL

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The Sperry-Hutchinson Co. v. George J. Weigle

This is a companion case to the Herzfeld-Phillipson Company action above noted. After that case was begun, the dairy and food commissioner, on advice of this office, announced that it would prosecute users of Sperry-Hutchinson stamps in this state. Thereupon, this action was commenced to enjoin any such prosecutions or interference. This case is in exactly the same situation at the present time as the *Herzfeld-Phillipson* case.

State of Wisconsin v. The Pullman Co.

This is an action brought to collect from the defendant an unpaid balance remaining due on the tax levied by the state against the defendant for 1913. The case involves difficult investigation of the facts relative to the activities of the defendant, and a compilation of voluminous data. It has been partially prepared for trial.

CRIMINAL CASES PENDING

From July 1, 1916, to June 30, 1918

Title	County	Offense
State v. Frank Richardson	Taylor.....	Arson
State v. Frank Richardson	Buffalo.....	"
State v. Mike Drler	Taylor.....	Perjury
State v. Mike Drler	Dane.....	bank fraud embezzlement
State v. Pierstorff.....	Fond du Lac.....	Arson
State v. Winger Bros.	Outagamie.....	"
State v. Louis Steiner.....	Forest.....	"
State v. Mary and Mamie Wade.....		

FORFEITURE CASES PENDING

From July 1, 1916, to June 30, 1918

Title of Case	County	Offense
State v. H. Strelow.....	Dane.....	Burning bituminous coal near capitol

WORKMEN'S COMPENSATION CASES PENDING

In the following case, the order of the industrial commission granting an award of compensation was confirmed both in the circuit court and in the supreme court. A motion was made in the supreme court to grant a rehearing and the matter is still pending.

Newport Hydro-Carbon Co. v. Industrial Commission and Nettie Kohn.

In the following cases the awards of the commission were confirmed in the circuit court for Dane county and appeals taken to the supreme court which are still pending.

- Workmen's Compensation Mutual Liability Ins. Co. v. Industrial Commission, Nichols, and Wirth.
Bekkedal Lumber Co. v. Industrial Commission and Perry.
Ellingson Lumber Company and Employers Mutual Liability Ins. Co. v. Beaulieu and Industrial Commission.
Waldum v. Lake Superior Terminal Transfer & Railway Co. and Industrial Commission.
City of Milwaukee v. Waldemar Peterson and Industrial Commission.
Frontier Mining Co. and Workmen's Compensation Mutual Liability Insurance Co. v. Industrial Commission, William Hynes and Julia Hynes.
Rust-Owen Lumber Co. and Wisconsin Employers Exchange v. Industrial Commission and Carl Olson.

In the following case the award of the commission was reversed in the circuit court for Dane county and an appeal taken to the supreme court, which is still pending.

- Edward Steigerwald and General Accident Fire & Life Assn. Corporation v. Industrial Commission and Nelson.

In the following case the awards of the commission have been confirmed by the circuit court for Dane county but the time for appealing to the supreme court has not yet expired.

- F. Eggers Veneer Seating Co. and Wisconsin Employers Exchange v. Industrial Commission and Lesperance.

In the following cases actions have been begun in the circuit court for Dane county to review the orders of the industrial commission, which actions are still pending.

- Holt Lumber Company and Wisconsin Employers Exchange v. Industrial Commission and Bebeau.
Gaulke and Workmen's Compensation Mutual Liability Ins. Co. v. Industrial Commission and Zimmerman.
J. L. Case Threshing Machine Co. and General Accident Fire & Life Assurance Corporation v. Gundlach and Industrial Commission.
Frint Motor Car Co. v. Industrial Commission and Healey.
Meade v. Wisconsin Motor Manufacturing Co., Employers Mutual Liability Ins. Co. and Industrial Commission.
Superior Box Co. v. Baker and Industrial Commission.
A. F. Wagner Architectural Iron Works v. Guenther and Industrial Commission.
A. H. Stange Co. v. Industrial Commission and Fredericks.
Andell v. Industrial Commission and the Consumers Co.
Payling & Harnischfeger Co. and Workmen's Compensation Mutual Liability Ins. Co. v. Meldenberger and Industrial Commission.
Armstead Laundry and Dry Cleaning Co. and Employers Indemnity Exchange v. Lasander and Industrial Commission.
Newport Hydro Carbon Co. v. Industrial Commission and Dedian.
Dedian v. Newport Hydro Carbon Co. and Industrial Commission.
Jarenczak v. Northwestern Malleable Iron Co. and Industrial Commission.

REPORT OF THE ATTORNEY-GENERAL

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- Van den Boom v. Industrial Commission and Milwaukee Refrigerator Transit & Car Co.
N. Ludington Co. and the Fidelity Casualty Co. v. Industrial Commission and McKay.
Employers Liability Assurance Corporation v. Industrial Commission, Harrison and Boe.
Shawano Lumber Co. and the Employers Mutual Liability Ins. Co. v. Industrial Commission and Elertson.
Tanas v. Pawling & Harnischfeger Company and Industrial Commission.
Schroeder & Daly Co. and Employers Mutual Liability Insurance Co. v. Industrial Commission and Toll.
Appleton Roofing Co. and Georgia Casualty Co. v. Industrial Commission and Emilie Deeg.
William Huebner and Master Plumbers' Limited Mutual Liability Insurance Co. v. Industrial Commission and Irma Van Lare.
Kenfield-Lamoreaux Co. v. Industrial Commission and Patrick Lawler.

In the following cases actions have been begun in the circuit court for Dane county to set aside the order of the industrial commission dismissing the application for an award, which actions are still pending.

- Meta Ollier v. Industrial Commission and John G. Wollaeger Co.
John Lund v. Industrial Commission and Park Falls Lumber Co.
Martha Lee v. Plankinton Hotel Co., Standard Accident Insurance Co., and Industrial Commission.

REQUISITIONS.

RULES OF THE EXECUTIVE OFFICE RELATING TO APPLICATIONS FOR REQUISITIONS.

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

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, 40, 52; 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, 34, 37, 40, 50, 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. 40, 54; 1908, p. 48; 1910, p. 40; Vol. I, p. 567.

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. 34, 37, 40, 49; 1908, pp. 47, 48, 49, 52; 1910, pp. 38, 43; Vol. II, p. 811; Vol. IV, p. 128.

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. 41; Vol. II, p. 817.

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. I, p. 566; Vol. II, p. 812.

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. 25, 37, 50; 1908, p. 47; 1910, p. 40; Vol. I, p. 566.

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, 56; 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. 41; Vol. I, p. 567.

10. It must appear by affidavit that the accused was in this state at the time the offense is charged to have been committed, and that he subsequently fled therefrom, and the time and circumstances of his departure must be shown as particularly as may be. It must also appear where the accused is, or is believed to be, at the time the application is made. See Opinions of Attorney General: 1904, pp. 35, 41, 45; 1906, p. 56; 1910, p. 41; 1912, p. 962; Vol. V, pp. 532, 622; Vol. VI, pp. 268, 414; Vol. VII, p. 533.

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. 35, 38, 41, 54, 55; 1906, p. 56; Vol. II, p. 317.

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, pp. 33, 50.

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. 35, 38, 54, 55; 1906, p. 60; 1908, p. 48.

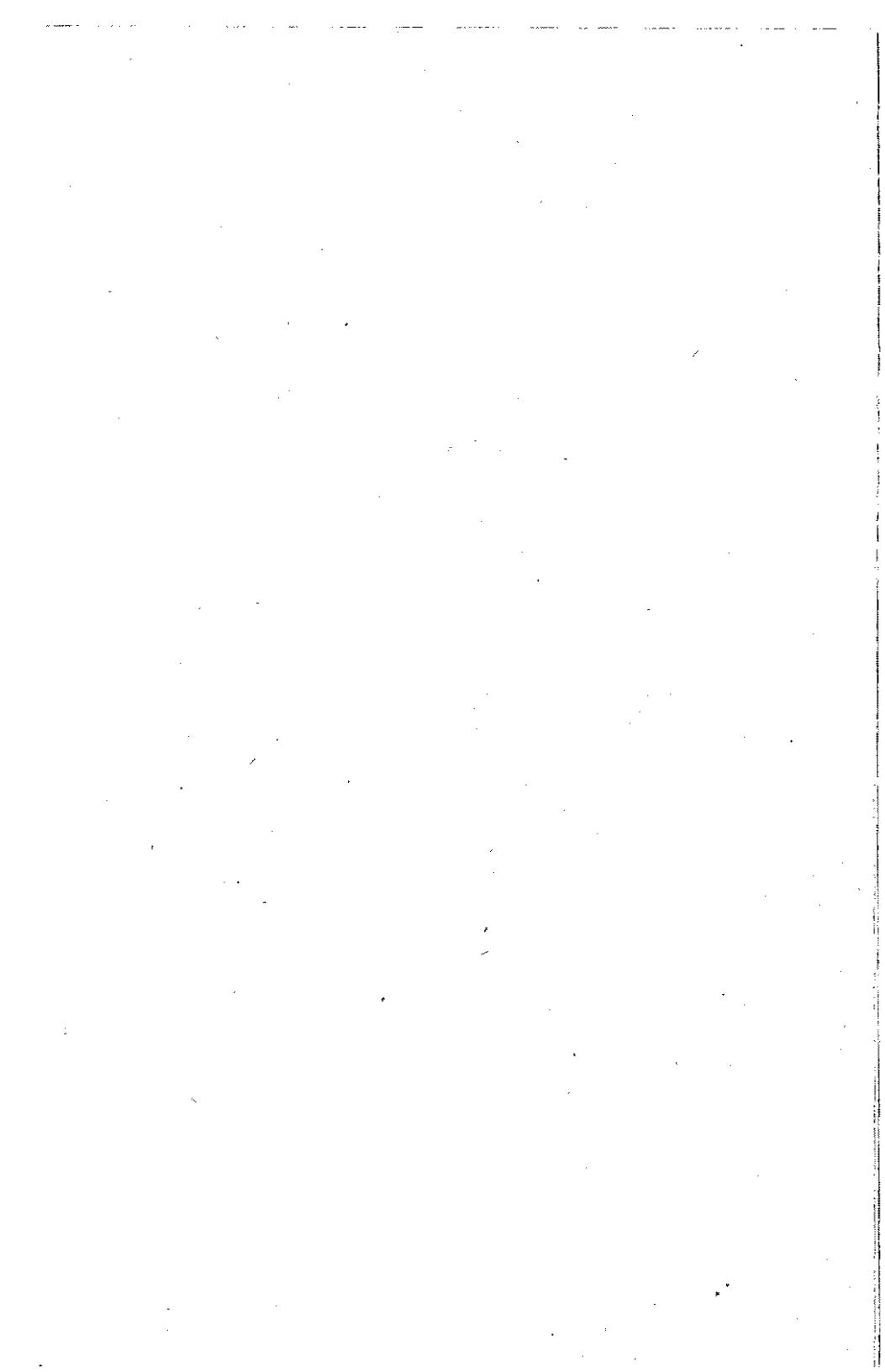
14. The official character of the officer before whom the affidavits are taken must be certified to by the clerk of the circuit court. See Opinions of Attorney General: 1904, p. 55; 1908, p. 48; 1912, p. 958; Vol. I, p. 567.

15. All papers must 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. 41, 55; Vol. I, p. 566; Vol. II, p. 317.

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. 49, 51, 54; 1906, p. 57; 1908, pp. 48, 50; Vol. II, p. 817.

17. No requisition will be granted for a fugitive who has taken refuge in the British provinces. See Opinions of Attorney General, Vol. III, p. 830.

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 sur-



OPINIONS
OF
ATTORNEY GENERAL
OF
WISCONSIN

VOLUME VII

Indigent, Insane, etc.—Rights and liabilities of counties and divisions thereof as to support of indigent strangers considered.

January 8, 1918.

J. R. PFEIFFNER,

District Attorney,

Stevens Point, Wisconsin.

I have your letters of December 8, 1917, and January 2, 1918, requesting my opinion as to the liability, primary, secondary and otherwise, of your county and subdivisions thereof for support furnished by the city of Stevens Point to poor persons.

The material facts, as I understand them, are these: A man having a legal residence and settlement in the town of Hull intermarried with a resident of the town of Carson. A few days thereafter he established his residence or home in Stevens Point and within a year from the time he left Hull he was sentenced to the penitentiary and his wife and child were given poor relief by the city, acting, as it claims, under sec. 1512, Stats. The city clerk at once notified the county clerk of the fact that relief had been furnished the wife and child, and further, that she claimed a legal settlement in Carson. Thereupon, the county clerk gave the statutory notice to the town clerk of Carson and promptly received a counternotice to the effect that said indigent persons were not resident in Carson. She had made an affidavit when the help was extended that she resided in Carson. What are

the resultant rights and liabilities among these towns, the city and the county?

The legal settlement of the husband at the time relief was extended was in the town of Hull, his legal settlement continuing in that town for at least a year after he removed from it.

"(4) Every person of full age who shall have resided in any town in this state one whole year shall thereby gain a settlement in such town," and

"(7) Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town in which such legal settlement shall have been gained for a whole year or upward; and upon acquiring a new settlement upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost." Sec. 1500, Stats.

The husband had not acquired a legal settlement in Stevens Point, because he had not resided there an entire year, and he has not been voluntarily absent from the town of Hull for a year, even at this date, unless prisoners in Waupun can be said to be voluntarily absent from home.

The legal settlement of the wife and child are fixed by that of the husband.

"(1) A married woman shall always follow and have the settlement of her husband if he have any within the state; * * *

"(2) Legitimate children shall follow and have the settlement of their father if he have any * * * but if the father have no settlement they shall in like manner follow and have the settlement of their mother if she have any." Sec. 1500, Stats.

Hence, by force of statute, the legal settlement of the wife upon the marriage was transferred from Carson to Hull, so that it seems plain and beyond dispute that when this relief was furnished by Stevens Point the town of Hull was under legal obligation to relieve their necessities.

"Every town shall relieve and support all poor and indigent persons lawfully settled therein whenever they shall stand in need thereof except as hereinafter provided." Sec. 1499, Stats.

The only other provision which applies here is found in sec. 1512, and that leaves the ultimate liability resting upon the town of Hull, the place of legal settlement. Therefore, the real ques-

tion is whether or not the proper steps have been taken by Stevens Point to charge the county with this expenditure and by the county to entitle it to reimbursement from the town of Hull. Under no possibility can the town of Carson be held liable, assuming that the statement of facts as above recited is correct. The liabilities of counties and towns and municipalities for the support of the poor, either direct or indirect, is wholly statutory.

"At common law, no remedy over against the town wherein the person relieved has a legal settlement exists. * * * Hence the statute creating the liability must be strictly construed, and that giving such remedy and prescribing the procedure must be followed. To that effect have been all the decisions of this court on the subject." *Milwaukee Co. v. City of Sheboygan*, 94 Wis. 58, 63-64.

The procedure is set out in sec. 1512:

"When any person not having a legal settlement therein shall be taken sick, lame, or otherwise disabled in any town, city or village, or from any other cause shall be in need of relief as a poor person * * * the supervisors or other proper authorities shall provide such assistance to such persons as they may deem just and necessary * * *. The expenses so incurred shall be a charge against the county. The account therefor shall be audited by the county board and paid out of the county treasury, and to be by said county recovered of the town, city or village in which such person so relieved has a legal settlement; * * *. It shall be the duty of the town, city, or village clerk to ascertain, if possible, the town, city or village in which such person has a legal settlement, and within ten days after such person becomes a public charge, to serve upon the county clerk of his county a written notice which shall state the name of the person who has received public aid, the name of the town, city, or village where such person *claims a legal settlement*, or, if such place could not, after due diligence, be ascertained, a statement of such fact, and the date on which the first aid or support was furnished. In case such notice is not given within ten days, the same may be given at any other time, but in such case the county shall be liable only for the expense incurred for the support of such person from and after the time of the giving of such notice. The county clerk shall file such notice in his office, and shall within ten days after the receipt thereof serve a written notice, containing the information so received, * * * if such county is not under the county system of maintaining its poor * * * to the clerk of the town, city, or village in which such person *claims a legal settlement*. In case such notice is not

given within such ten days the same may be given by the county clerk at any other time, but in such case the * * * town, village, or city so notified shall only be liable for the expense incurred by such county for the support of such person from and after the time of the giving of such notice. * * *."

I should have stated before that the distinction between town and county poor is maintained in Portage county.

In no event could the town of Hull be held directly liable to Stevens Point. The divisions of a county in this matter deal solely with the county. The statutory procedure makes the county a party to every action of this kind and does not provide suit by one town against another. *Ebert v. Langlade Co.*, 107 Wis. 569.

Nor is the town of Hull, it seems to me, liable to your county. No notice has ever been given that town under said sec. 1512, and such a notice is vital to the county's right to reimbursement. This is made plain by the provisions of the statute above quoted and by the decisions of the supreme court. Of course the town of Hull is not shown to have suffered any loss or disadvantage by want of a proper notice. But these matters are not ruled by equitable considerations, and when it is borne in mind that

"the liability is purely statutory, and the remedy given by the statute must be strictly followed," *Plymouth v. Sheboygan Co.*, 101 Wis. 200, 202,

we must conclude that the town of Hull has escaped the liability it would be under had proper and timely notice been given to it by the county.

The town of Carson is under no obligation to reimburse the county. The person relieved was not living in that town nor residing there and had no legal settlement within it. The mere fact that notice was given to that town by the county clerk cannot be held sufficient to make the town liable. The claim must have a better foundation. It is essential to such a claim that the legal settlement of the person relieved be in the town, otherwise giving of a notice is a futile act. Both the settlement and the notice are indispensable conditions to the liability of a town to a county where the latter has relieved poor persons. *Plymouth v. Sheboygan Co.*, 101 Wis. 200.

There remains for consideration the liability of the county

to the city. There could be no question as to such liability had the notice which the city clerk gave the county clerk correctly stated the place of legal settlement of the person relieved. The statute says the city must "if possible" ascertain that place. That would seem to require that all reasonable effort should be made by the city authorities to learn the fact. Whether or not it was possible for the city authorities to ascertain the place of legal settlement of these poor persons is a question of fact. On first consideration it would seem to have been very easy, certainly possible, to have learned the facts.

Now, when we come to consider the notice which the city clerk must give, we find that it must state the place where the person

"claims a legal settlement, or, if such place could not, after due diligence, be ascertained, a statement of such fact."

The language just quoted indicates clearly the kind of effort which must be put forth to ascertain the place of legal settlement, and thereby quite strongly indicates that the city authorities are not to content themselves merely with ascertaining the place where such person *claims* a legal settlement, but are to ascertain where such settlement is, in fact. Ordinarily, it would require no diligence to ascertain the claims of the person. In this connection, we are also to consider the reason for informing the county clerk of the place of legal settlement. The city authorities have the poor person before them and can inquire; the county clerk is not ordinarily so circumstanced. To entitle the county to reimbursement, it is essential that it give the town or county which may be liable to it for reimbursement prompt notice that the relief is furnished such poor person. Hence it follows if the county is not informed as to the place of legal settlement, or, what is worse, is misinformed, the county loses the right of reimbursement. It would seem only just and therefore, probably the legislative intention, that where the county loses that right through the fault of the city which furnished the poor person relief the loss should fall on the party at fault, that is, on the city.

I am persuaded that a municipality which renders relief to a poor person having no legal settlement therein, must, as a condition of its right to recover from the county, inform the county clerk either that the place of legal settlement cannot be ascer-

tained, after due diligence, or inform the county clerk correctly as to the legal settlement.

In short, I am of the opinion, from the facts stated, that the city of Stevens Point has no legal claim against the county and that the county, even though it should allow and pay the city's claim, would have no cause of action or legal claim against either of the towns mentioned.

Public Officers—County Highway Commissioner—Term of Office on Reëlection—The term of office of a reëlected highway commissioner is fixed at two years by sec. 1317m—6; the county board cannot change it.

January 9, 1918.

WISCONSIN HIGHWAY COMMISSION.

In your favor of January 8 you ask for interpretation of subsec. 2, sec. 1317m—6, in reference to its application to the election of highway commissioner in the county of Florence by the county board of that county.

The facts as stated by you are as follows: The minutes of the county board regarding the election of J. F. Barry as highway commissioner for said county at its session in 1915 read as follows, to wit:

"December 1, 1915. On motion duly made, seconded and carried, J. F. Barry was appointed highway commissioner for ensuing year at a salary of \$100 per month."

At the December session of the board, in 1916, said J. F. Barry was reëlected, the minutes reading as follows, to wit:

"December 1, 1916. On motion made, seconded and carried, J. F. Barry was appointed road commissioner for the ensuing year at a salary of \$120 per month."

Upon this record you submit the question to this department whether the county board could limit the commissioner's second election to one year; or if the effect of the motion as passed is to elect him highway commissioner for a period of two years.

See. 1317m—6, subsec. 1, in part, reads as follows:

"The county board of each county shall elect a competent man as county highway commissioner."

Subsec. 2, subd. (a), of said section reads:

"Upon his first election the county highway commissioner shall serve until the first Monday in January of the second year succeeding the year of his election."

Subd. (b) of said subsec. 2, in part, reads as follows:

"If a county highway commissioner shall be reelected, he shall serve two years from the expiration of his previous term unless sooner removed for cause by a majority vote of all members of the county board."

These are the only sections that we find in the statutes directly bearing upon this question, and, considering these statutes alone, there would seem to be no question but that upon said J. F. Barry's reelection the term of office would be two years, as provided by the statute.

The minute of his election, on December 1, 1916, contained a provision apparently limiting his term to one year by the use of the term "ensuing year." In order to have this minute or action of the county board as to the length of term affect the term of his office, it would be necessary to hold that the county board could change the term of office and make it different from that provided for by the statute. This we are satisfied the county board could not do. His term of office, as provided by the statute, is clearly made two years. The county board is not vested with any authority to alter, amend or change the provision of statute. The statute undoubtedly fixes the term. The provision in the minute of the proceedings of the county board by which he was reelected, which purports to shorten the term of office, is of no force or effect, and is mere surplusage.

It would seem almost unnecessary to cite any authorities in support of this holding. The case of *People ex rel. Lane v. Case*, 19 N. Y. Supp. 625, is instructive if any such authority is needed. It is a case involving the election of a commissioner of highways in the state of New York. The term of office there was three years. The ballot by which Lane was elected contained a recital on its face limiting the term of office to two years.

In deciding the case, the court uses this language:

"The term of office of commissioner of highways is fixed by statute at three years, and neither the occupant of the office,—except by death or resignation—the election officers nor the

electors can shorten or lengthen such term of office. The statute fixes the term of office not the electors. Whether the words on the ballot were placed there by design or mistake no effect can be given to them. To do so would permit the act of the legislature fixing the term of office in any case to be nullified."

In the case of *State ex rel. Hench v. Chapin*, (Ind.) 11 N. E. 317, was involved the question of whether the commission of the governor in appointing to office, reciting a different term of office than that prescribed by statute, could affect the term of office provided by the statute; and the court there holds, page 319, that the recital of a different term of office in the commission, signed by the governor, than that provided by the statute was of no force or effect.

I therefore advise you that the limitation to one year contained in the minute of the proceedings of the county board of Florence county was ineffective and that his election was for the term of two years, as fixed by the statute.

Public Officers—County Board—Bridges and Highways—
County board cannot pay expenses of or salary to members while attending a road school.

January 9, 1918.

C. F. MORRIS,

District Attorney,

Washburn, Wisconsin.

Your letter of January 3, 1918, states that the Bayfield county state road and bridge committee ask whether they can compel the county to pay their expenses and for services in attending the road school to be held at the capitol by the state highway commission, and whether the county board may, in its discretion, allow them their traveling expenses; that you are unable to find any statutory provision which requires or permits the county to pay such expenses or compensation; and that members of that committee from other counties have repeatedly attended such school at the expense of their counties.

You ask to be advised whether the county is liable for such expenses and whether it is liable for compensation for attendance at the road school, and if not, whether it is in the discre-

tion of the county board to appropriate money to cover either such expenses or compensation.

Your letter indicates that you had in mind the rule which holds that county boards can expend public funds only pursuant to or under statutory authority. No statute has been found by you and we have found none that compels or permits the county board to pay the expenses of, or a per diem to, members of the county board while attending a road school or any other school or convention. In that situation, we must assume for present purposes that no such statute exists and render an opinion accordingly.

In an opinion given the district attorney of Taylor county, June 7, 1917, Vol. VI, Op. Atty. Gen., p. 399, it was said that a county is not liable to members of the county state road and bridge committee for time and money expended in attending the good roads school or convention which is annually conducted at Madison by the state highway commission. No reason is now perceived for receding from that position.

To hold that the county is not liable to members of the county board or of such committee for expenditures of time and money is nearly, if not quite, tantamount to holding that the county board may not lawfully reimburse or compensate them therefor or authorize them to incur such expense upon the county's account. Members of the county board cannot be paid for services or expenses unless rendered or incurred in the discharge of official duties. That much is settled beyond question. The committee you mention is required to perform specified duties, none of which is to attend school, and generally

"to perform such other duties as may be delegated to it by the county board." Subsec. 8, sec. 1317m—5, Stats.

May the county board require this committee or any member of it to attend school? Would that be within the scope of duties which the county board may delegate or impose? The name of the committee implies very strongly the character of its duties. They are constructive rather than educational. It would be an unwarranted stretch of the meaning of the words used to say that the county board could delegate to or impose upon the members of the road and bridge committee the privilege or duty of qualifying in the way of improving their technical education to better serve on the board or the committee. Surely, a committee could

not take a four years' university course in engineering at the county's expense and as a matter of duty or privilege. While this is an exaggeration of what is proposed and while mere differences in degree are frequently recognized in law, still, the illustration, I think, serves to expose the unsoundness of the contention that public funds may be expended by the county board for the purpose mentioned. There is a conclusive legal presumption, I believe, that members of the county board are qualified as to education to discharge their duties, and from that it must be inferred that the legislature did not intend that public funds of a county should be expended in fitting the members of the county board to do the work they were elected to perform—even to the extent of a few days' schooling.

It is my opinion, therefore, that the county is not liable for such expenses and attendance and that the law does not permit the expenditures of public funds for that purpose.

Fish and Game—Guide Licenses—Statute regulating licensing of guides considered.

January 10, 1918.

HONORABLE W. E. BARBER, *Chairman,*

Wisconsin Conservation Commission.

Your letter of January 3 reads as follows:

"We are in receipt of a communication asking that the attorney general's office analyze subsec. 3 of sec. 29.22 of the Fish and Game Laws of 1917.

"1. Is it lawful to hire a man on the street of Minocqua to row for me while I fish for the part of the time I am there, whether the man has a guide license or not?

"2. Or, to take a man from home to camp with me who will do my rowing while I am in the north, whether he has a guide license or not?

"3. Or, if my boy rows for me and I for him while we are camping in the north, while neither of us has a guide license?"

"These questions were asked in a communication to us asking us to refer them to the attorney general. We have answered the questions but he does not feel satisfied with our interpretation of the law."

Subd. (3), sec. 29.22, ch. 668, laws of 1917, reads as follows:

"(3) Guide licenses. No person shall engage, or be employed, for any compensation or reward, to guide, direct, or assist any other person in hunting, trapping, or fishing unless a license therefor, subject to the provisions of section 29.09, has been duly issued to him by the state conservation commission. The fee for each such license is one dollar. The applicant shall deliver to the state conservation commission a bond running to the state of Wisconsin, in the sum of two hundred dollars, with two sureties, and conditioned that if the applicant shall well and faithfully observe and comply with all the requirements of this chapter, and the guide license issued thereunder, said obligation shall be null and void, otherwise to remain in full force. But this subsection does not apply to the employment of labor by, or services rendered to, the licensee of any net fishing license."

I do not believe that this section should be given a strained or narrow construction. Under this section a person is prohibited for a compensation or a reward to guide, direct or assist another person in hunting, trapping or fishing without a license. The acceptance of compensation or reward constitutes an essential element in a statutory definition of a guide. Where a person accepts no compensation or reward such a person may guide, direct or assist another person in hunting, trapping or fishing, and need not have a license as provided for in said section.

The licenses the law provides for are called "guide licenses." In portions of our state where fish and game abound certain persons, for a consideration, hold themselves out and offer to guide, direct and assist other persons in hunting, trapping and fishing, and this has become a means of livelihood for a large number of people and has developed into quite a calling or business. These persons profess to be familiar with the lands, woods, marshes, lakes and streams, and to know the places where fish and game can be found, and often pretend to have a peculiar acumen or skill in the art of taking, catching and killing wild animals.

The legislature has given recognition to this class of persons and to regulate their calling has provided that they should take out guide licenses. The provision has been made, not only for the purpose of protecting professional guides against irresponsible competitors, but also for the purpose of enlisting these guides in the work of conserving the fish and game of this state and of enforcing the laws enacted for their protection. As the

law does not require of the applicant for a license any particular qualifications and does not prescribe any particular powers or duties or specify a schedule of fees, it would seem that the main purpose of the Guide License Law is to enlist responsible persons in the service of the conservation movement and to provide for their appointment or employment as deputy conservation wardens by the commission, when deemed necessary, as provided by statute. This seems to be the broad purpose of the act. As the law has a tendency to reduce the number of persons who will care to engage in the business and to eliminate many irresponsible guides who are unable to pay the license fee or are unable to furnish the required bond, it will secure to those who do obtain guide licenses a sort of monopoly of the guide business.

Professional guides to hunters, trappers and fishermen not only lead, direct and conduct them to places where fish and game abound but usually perform a goodly share of the labor in transporting and toting the camp outfits, the food supplies, the guns, the traps and the fishing tackle. They row the boats, locate and build the camps, prepare the food and do the cooking. A good guide is usually possessed of more or less of these various accomplishments; and yet a man may take out a guide license who does not know anything about cooking, rowing or even of hunting, trapping or fishing. All a person need do under the law is to pay the dollar license fee and give the two hundred dollar bond and be eligible to a guide license.

Now, as to the first question submitted in your letter: fish have their habitation in lakes, ponds and streams and, in order to catch them, one must go where they are and one must be provided with bait and the necessary hook, line and tackle. In going to such places one may be obliged to go by rail, team, horse, automobile, row boat, motor boat, launch or other form of conveyance, and may be obliged to have his bait and fishing tackle transported thereto for him. A company or person owning such form of conveyance, may, it would seem, for compensation and reward transport another person, or his bait and tackle, to the fishing grounds without thereby coming within the definition of a guide and within the prohibition of the statute above quoted. On arriving at the lake or stream, one may fish from shore, pier, raft or boat. When fishing amid stream, or on a lake, a person usually employs a boat. As I understand it,

the use of a row boat is not necessarily a part of a fishing operation. It ordinarily provides a means of water transportation and a means for going from place to place, as fancy dictates, or to where one deems the fishing to be good. A launch or a motor driven boat would answer the same purpose.

Like horseback riding, automobiling, hunting, fishing, etc., rowing is recognized as a separate sport, and has its own form of exercise or amusement. It may be followed as a business or vocation. Indeed, many persons at water resorts make rowing for others a means of livelihood. The statute above quoted does not require a person who follows the business of rowing, or a person who is casually employed by another to row a boat for compensation or reward, to take out a license. Such a person does not come within the purview of the statute.

The mere rowing of a boat for a fisherman does not constitute guiding, directing or assisting in fishing. A fisherman may employ one person to conduct him to the fishing grounds, to instruct, direct and assist him in fishing, while he employs another person to row the boat for himself and his guide; and he may also employ a third person to look after the camp and to do the cooking for all. Under such a state of facts it is clear that of all the persons so employed only the first one mentioned should be provided with a guide license. The oarsman, under the statement of facts, is no more engaged in guiding, directing or assisting in fishing than the man who attends to the cooking.

There are, however, certain kinds of fishing where the forward movement of the boat directly aids a fisherman in angling for fish. Where there is an active participation on the part of the paid oarsman in such a fishing operation it might seem that the oarsman is assisting in fishing and comes within the law. The moment that there is a coöperation between the fisherman and the paid oarsman for the purpose of catching fish, that moment the oarsman is assisting in fishing. Admittedly, it cannot in all cases be readily determined when the rowing of a boat for a fisherman constitutes guiding, directing or assisting in fishing. Whether it does or not depends upon the facts in each case, to be determined from the words, acts and conduct of the parties. It is entirely a question of fact to be determined by the jury. Certain it is that the mere rowing of a boat for compensation and reward does not of itself constitute guiding, directing or assisting in fishing. Had such been the intention of the legislature,

it would by appropriate language have expressed such intention in the act.

Confining my answer to the bare facts as incorporated in the first question, I would say that they do not show that the man who was hired to row was thereby employed to guide, direct or assist in fishing, and, it is therefore my opinion that said question should be answered in the affirmative.

As to the second question: in connection with what has been said above, it does not seem to me that the section quoted is intended to require the servant or general employe of a fisherman to secure a guide license in order to row the boat for his master. Such a servant or employe may as lawfully row a boat as he may perform any other service necessary for the convenience and enjoyment of his master. It is my opinion, therefore, that this question should be answered in the affirmative.

As to the third question, it is my opinion that the above section was not intended to hinder, restrict or curtail the enjoyment afforded by two or more persons on a fishing trip. They have a right to be of mutual help and assistance to each other during the expedition. The reciprocal assistance so given ~~is~~ ^{is} not constitute the giving and acceptance of compensation ~~as~~ ^{as} reward. This applies peculiarly to members of the same family. It is, therefore, my opinion that this question also should be answered in the affirmative.

As stated before, it is my opinion that this section of the statute should not be given a technical construction. The law was intended, primarily, for persons who follow the calling or business of a guide—persons who hold themselves out to the public as such. It was not intended to cover a mere casual act of servant, friend, companion or fellow fisherman. Any other construction, it would seem, would bring the statute into public ridicule and contempt and would make it an instrument of oppression.

The law should have the respect and coöperation of both guides and sportsmen, and its proper observance by them will do much toward the conservation of the fish and game of this state.

Education—Normal Schools—Course of Instruction—Board of regents not authorized to extend course of instruction further than the equivalent of a two years' college course.

January 14, 1918.

HONORABLE GEORGE B. HUDDNALL,

Executive Counsel.

In your letter of January 10 you submit the following:

"On February 4th, 1914, the board of regents of normal schools passed resolution No. 36, providing, among other things, that 'the course of study for the training of high school teachers is hereby extended to three years beginning September 1, 1914.' See page 43 of the report of the proceedings of the board of regents of normal schools, 1914."

"On July 27, 1917, the board of regents of normal schools passed the following resolution: Resolution 244. 'Resolved that the several normal schools are authorized and directed to establish beginning with September, 1917, four year courses for persons preparing to teach in high schools.' See page 31, report of the proceedings of the board of regents of normal schools, 1917.

"Subsec. 5, sec. 406a of the statutes of 1915 (which subsection was renumbered to be sec. 404a of the statutes by chapter 14, laws of 1917), reads, 'The board of normal school regents may extend the course of instruction in any normal school so that any course, the admission to which is based upon graduation from an accredited high school or its equivalent, may include the substantial equivalent of the instruction given in the first two years of a college course. Such course of instruction shall not be extended further than the substantial equivalent of the instruction given in the first two years of such college course without the consent of the legislature.' "

You also state in your communication that you are informed that the instruction provided for by both of the resolutions above quoted is more than the substantial equivalent of the instruction given in the first two years of a college course, and you ask whether or not the two resolutions above quoted, or either of them, are authorized under the statute, assuming that your information is correct—that the instruction provided for by both of said resolutions is more than the substantial equivalent of the instruction given in the first two years of a college course.

The legislature has the power to fix the scope and nature of the school curriculums of the various schools in the entire school system of the state. The governing boards and bodies of the

various schools have only such powers with reference thereto as are delegated to them by the legislature.

The first question is to determine what the legislature has done directly as to fixing the course of instruction for normal schools in this state.

Subsec. 5, sec. 406a, Stats. 1915 (renumbered to be sec. 404a, Stats., by ch. 14, laws of 1917, and again renumbered by ch. 453, laws of 1917, to be sec. 37.12, Stats.), reads:

"The board of normal school regents may extend the course of instruction in any normal school so that any course, the admission to which is based upon graduation from an accredited high school or its equivalent, may include the substantial equivalent of the instruction given in the first two years of a college course. Such course of instruction shall not be extended further than the substantial equivalent of the instruction given in the first two years of such college course without the consent of the legislature."

Subd. (5), sec. 404, Stats. 1915, reads, in part, as follows:

"* * * But when any state normal school shall offer a course for the express purpose of training teachers for country schools, the completion of which shall entitle one to the certificate mentioned in section 405, as amended by this act, the course of study shall be the full and fair equivalent of the course of study prescribed for the county training schools by the state superintendent."

As far as I have been able to find the above quoted sections are the only acts of the legislature that relate to the fixing or limiting of courses of study in normal schools by direct legislation.

The next question to be considered is what authority the legislature has delegated to the board of normal school regents to regulate the scope of instruction given in the normal schools. Among the general powers of the board of normal school regents is subsec. 5, sec. 404, Sanborn & Berryman's Ann. Stats. 1889:

"To prescribe the courses of study and the various books to be used in such schools. * * *."

This provision, with some slight amendment, continues in the statute. It seems to be the only provision of the statute under the heading of general powers of the board that attempts to delegate authority to fix the curriculum of studies.

The legislative act giving this general power to the board to fix the courses of study must be read together with all of the other provisions of the statute relating to normal schools which were then in existence, and especially must this be read in connection with the apparent intent of the legislature as to the scope of the instruction given in such schools.

In ch. 116, laws of 1866, being an act to incorporate the board of regents of normal schools, in sec. 4, appears the following language:

"State normal schools shall be established * * *; the exclusive purpose of which shall be instruction and training of persons, both male and female, in the theory and art of teaching, and in all the various branches that pertain to a good common school education; also, to give instruction in agriculture, chemistry, in the arts of husbandry and mechanic arts, fundamental laws of the United States and of this state, and in what regards the rights and duties of citizens."

Ch. 151, laws of 1869, which was an act to codify the laws relating to normal schools and to amend ch. 116, laws of 1866, relating to such schools, sec. 28, referring to the purposes of the school, left it exactly the same as it was in the original act above quoted.

By ch. 5, laws of 1875, sec. 28, ch. 151, laws of 1869, was amended by adding subjects in which persons might be instructed, in the following language:

"And in all subjects needful to qualify for teaching in the public schools of the state." Sec. 2.

In sec. 402, Sanborn & Berryman's Ann. Stats. 1889, appears a revision of the statute as to the purpose and objects of normal schools as follows:

"The exclusive purposes and objects of each normal school shall be the instruction and training of persons, both male and female, in the theory and art of teaching, and in all the various branches *that pertain to a good common school education*, and in all subjects needful to qualify for teaching in the public schools; also to give instruction in the fundamental laws of the United States and of this state, in what regards the rights and duties of citizens."

Sec. 402, as above quoted, remains unchanged.

Attention is called to the statute relating to the purposes and

objects of normal schools for the purpose of showing that throughout the history of the legislation on this subject the legislature has evinced an intention to limit the objects and purposes of the normal school instruction and training to such subjects as are needful to qualify for teaching in the public schools; and this intention is further specifically manifested by the provision in subsec. 5, sec. 406a, Stats. 1915, now sec. 37.12, Stats. 1917, which reads as follows:

"* * * Such course of instruction shall not be extended further than the substantial equivalent of the instruction given in the first two years of such college course without the consent of the legislature."

The course of instruction referred to in subsec. 5, sec. 406a, above quoted, admission to which is based upon graduation from an accredited high school or its equivalent, I assume, is the most advanced course with which normal schools have to deal. Assuming that this is true and that the two resolutions prescribe for normal schools a course of study extending further than the substantial equivalent of the instruction given in the first two years of a college course, there would seem to be no question upon those assumptions of fact but that both of the resolutions were unauthorized, as it is clear from all of the legislation on the subject and the course of its history, as above outlined, that it was, and is, the intention of the legislature to so limit the instruction to be given in all normal schools that it should not extend further than the substantial equivalent of the instruction given in the first two years of a college course.

I therefore advise you that it is my opinion, assuming the facts above stated, that both of the resolutions above quoted as No. 36 and No. 244 were unauthorized and prohibited by the statute.

Intoxicating Liquors—Village Ordinances—A legal ordinance of a village duly passed is an order and a liquor license may be revoked for its violation.

A special notice to liquor dealers is not necessary.

January 14, 1918.

CLARON A. MARKHAM,

District Attorney,

Beaver Dam, Wisconsin.

In your communication of January 8 you submit, at the request of the village attorney of Fox Lake, a number of questions concerning the regulation of the liquor traffic within the village of Fox Lake. It appears, by the enclosed communication from W. C. O'Connell, that the village of Fox Lake is organized under the general laws of Wisconsin; that the ordinance relating to the closing of saloons in said village is as follows:

"Ordinance No. 11

Relating to the closing of saloons

"Section 1. That every saloon within the limits of the village of Fox Lake shall be closed at or before the hour of eleven o'clock at night and remain closed until six o'clock the next morning.

"Section 2. That if any tavern keeper or saloon keeper shall sell, give away or barter any intoxicating liquors or drinks within the limits of this village on the first day of the week, commonly called Sunday, or on the day of the annual village or the annual fall election, between the opening and closing of the polls thereof, such tavern keeper, saloon keeper or other person so offending who shall violate the provisions of section one or two of this ordinance shall upon conviction thereof, pay a fine of not less than one dollar and not more than fifty dollars, besides the costs of suit, and in default of payment of said fine and costs, be committed to the jail of Dodge county for a term of not more than sixty days."

It also appears that said ordinance was adopted May 22, 1893, and published January 19, 1894.

The first question submitted is as follows:

"1. Is the foregoing ordinance of the village of Fox Lake an order of the village board within the meaning of 'an order,' as referred to in sec. 1558, Wis. Stats. 1915?"

Under sec. 1558, one of the grounds given for the revocation of a license is that the licensee

"has not observed and obeyed any order of said supervisors, trustees, aldermen or county superintendent of the poor, or any of them, made pursuant to law."

In the case of *State ex rel. McKay v. Curtis*, 130 Wis. 357, our court had under consideration the interpretation to be given to the word "order." On page 362 the court said:

"The appellants claim that the word 'order,' in sec. 1558, *supra*, does not refer to an ordinance of the city council, but only to the order or notice authorized to be given under the terms of sec. 1554 by said officials to licensed persons forbidding the sale of liquor for one year to spendthrifts. We are unable to agree with this contention. Had this order been the sole thought of the legislature it would have been not only easy, but natural, to refer to it as an order made under the provisions of sec. 1554. On the contrary, it seems evident from the use of the broad words 'any order * * * made pursuant to law' that the legislature intended to include many possible orders rather than one particular order. The word 'order' is a word of broad and general meaning. It includes all commands, precepts, or rules made by competent authority. An ordinance passed by the board of aldermen which has been approved and published so as to become a valid ordinance is in the highest sense an order or command of the aldermen. If it be within their power, it is an order made pursuant to law. If it be an order legitimately regulating the saloon business, we can entertain no doubt that it is one of the orders referred to in the statute. To hold otherwise would seriously emasculate the statute, the evident purpose of which is to secure obedience by means of a penalty more effective than paltry fines; *i. e.* by revocation of license."

Under this decision of our court, the foregoing ordinance of your village is an order within the purview of sec. 1558, provided that the village board has the power given by statute, either expressly or impliedly, to pass such ordinance.

In sec. 893, par. (17), the village board is given the power by order, resolution, law or vote to prohibit and suppress "immoderate drunkenness" or "drinking," and, under par. (18),

"To exercise such powers in respect to licensing and regulating the sale of malt, ardent or intoxicating liquors as are conferred by the general statutes in respect thereto."

Par. (26) of the same section reads, in part:

"To ordain and establish all such ordinances and by-laws for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefits of trade and commerce and the promotion of health not inconsistent with the constitution and laws of the United States and of this state, as they shall deem expedient; * * *."

The powers conferred, especially in the last paragraph, are certainly very broad. Our court has said, in the case of *Zodrow v. State*, 154 Wis. 551, 555, concerning the liquor traffic:

"Unrestricted, it leads to drunkenness, poverty, lawlessness, vice, and crime of almost every description."

It would seem, therefore, that your village had the power to pass the ordinance in question, and it follows that it is an order made pursuant to law, as contemplated by sec. 1558. Your first question is therefore answered in the affirmative.

"2. Under existing state laws, and the ordinance above mentioned, of the village, has the village board power to close the saloons on Sunday, if any are found to be open?"

You will note that the above ordinance does not expressly provide for the closing of the saloons. It simply prohibits the giving away, sale or barter of any intoxicating liquors on Sunday. See. 1564, of the statutes, contains similar provisions and the sale made in violation thereof may be punished by a prosecution under it. While the saloon cannot be closed under this ordinance, it may be closed, however, under sec. 4595, of the statutes, it being a shop within contemplation of said section. See Vol. II, Op. Atty. Gen., pp. 298, 322.

"3. If the above ordinance does not constitute 'an order,' as referred to in said sec. 1558, would the publication of an ordinance or resolution requiring closing of saloons and taverns on Sunday, in the local newspaper, be sufficient notice, or would it be necessary to have a written or printed notice served by an officer on each licensed liquor dealer?"

In view of the decision of our court in the case of *State ex rel. McKay v. Curtis, supra*, I believe that it would not be necessary to have a written or printed notice served by the officer on each

licensed liquor dealer. The passing of the ordinance in due form, and publication of the same, would certainly be sufficient notice.

Labor—Minors—A minor may lawfully engage in an agricultural pursuit without a permit.

January 15, 1918.

HONORABLE GEORGE P. HAMBRECHT, *Chairman,*
Industrial Commission of Wisconsin.

Your letter of January 12, 1918, quotes sec. 1728e, Stats., and calls attention to chs. 633 and 674, laws of 1917, amending the Child Labor Laws, and asks for my opinion as to whether the law now requires labor permits to be issued as a condition to the lawful employment of children in agricultural pursuits.

Ch. 633, laws of 1917, merely charges the matter of making proof of children's ages, and has no bearing on this question.

The general plan of law regulating child labor does not, it seems to me, appear to have been changed by ch. 674, laws of 1917. The main change wrought by that chapter is to require further or additional attendance at industrial, continuation, or commercial schools, where such schools are maintained in the town, village, or city where a child works or resides. The statute which specifically relates to farm labor was not amended. It is entirely general in its phraseology, and it seems to me that if it had been the intention to restrict or limit its operation, such intention would have been expressed and not left to inference or implication. Besides, I see no reason for inferring that it is to be given a different meaning now from the one which was before attributed to it. The provision under consideration is sub-sec. 4, said sec. 1728e, and reads thus:

"Nothing contained in sections 1728a to 1728j, inclusive, shall be construed to forbid any child from being employed in agricultural pursuits, nor to require a permit to be obtained for such child."

I am persuaded that the legislation of 1917 did not work any change in the Child Labor Law involved in your question, and that it is not now required that permits be issued to minors as a condition of their engaging in agricultural pursuits.

Bridges and Highways—Right to take surplus road materials from highway discussed.

Courts—Evidence—Execution of Documents—Sec. 4192, Stats., merely dispenses with proof of signature of an instrument and is a favor to the plaintiff.

January 15, 1918.

CLIVE J. STRANG,

District Attorney,

Grantsburg, Wisconsin.

In a letter dated January 8, 1918, you say:

1. "There is a large, clay hill across the highway in one town in this county and an adjoining town is taking the clay for their highways with the consent of the abutting owner along the highway. The town board of the town in which the clay hill is located objects to the taking of the clay into the other town for use. Are those taking the clay committing an offense and if so has the town in which the clay is located a right to stop the hauling of more clay from such hill? Or has the abutting owner the right to sell this clay? The town in which the clay is located may not have use for the clay just at present and I am unable to find if they will ever need it, but the town board seems to think they will.

2. "I would also like to ask advice on the meaning of sec. 4192, of the statutes. This section states that an instrument purporting to have been signed by coparty shall be proof that he did so sign it until he shall deny the same. The question is: Will this apply in a criminal case where a party is prosecuted for forgery? I have a party charged with forgery of his father's name and the father is out of the state and of course will not appear and deny the signature. Can the defendant claim the advantage of this section in a criminal prosecution?"

1. Upon the facts stated, I am of the opinion that the town taking the clay is committing no offense and that the town in which the hill is located has no right to interrupt the operation, and that the abutting owner has the right to sell this clay to the town which is taking it.

The general rule as to the rights of abutting owners and of the public in the soil and other materials within the highway limits and the use they may make of the same may be stated thus:

The laying out of a highway gives to the public a right of

passage and the incidental right to fit the way for travel, and the owner of the soil is not thereby divested of his title to the land. Notwithstanding the use thereof by the public for travel, the title and all uses of the land consistent with the existence and use of the public easement remain perfect not only to the land but to all the materials within its boundaries, except such as may be needed to build or to maintain the road. He therefore has title to any superfluous earth, gravel or rock not necessary or useful to the construction or repair of the highway and all mines or quarries, trees, grass and crops growing in and on the same. To fit the highway for travel and maintain it, the proper public officers may change the grade, remove trees and use the earth within the limits of the highway in any reasonable and proper manner. 37 Cyc. 203-204.

It has, I think, been the universal practice of abutting owners at all times to take surplus earth and other materials from the roadside and within the highway limits whenever they wished and without asking leave of the town supervisors. While such a practice does not make law and is not decisive of what the law is upon the subject, still the practice is quite persuasive of what a land owner's rights are and, indirectly, the public's. As before stated, he may use the surface and what is below it and above it as he will but subject always to the condition that he must not interfere with the public easement and the public control for highway purposes. Surplus materials at one point may be used at needed points within the town at least and to that extent the rights of the town thereto are superior to the owner's; but this need, I think, must be real and known. It must be present or within the reasonably near future. The mere remote possibility that materials may be needed in the distant future is not enough to stop the owner from appropriating them to his use. Of course the town board has a rather wide discretion in the matter.

The right of the abutting owner to take such surplus materials, i. e., his title thereto, carries with it the right to authorize others to take the same with or without compensation to him. He may sell such dirt to a private individual or to an outside town for use upon town highways. Probably town lines have no significance in this connection, where the highway on which the material is to be used happens to be a county or a state road.

Having stated the general rule, we are next to inquire to what

extent, if any, that rule is modified by statute. See. 1236 is the only one I find bearing upon the question, and from it I quote:

"* * * In case there shall be within the limits of any highway in any town or district any stone, gravel or sand suitable for any highway the same may be taken to improve any highway therein; but no such material shall be removed from such town or district without the previous consent of the supervisors of the town in which it is located."

I notice, first, that no mention is made of clay in the enumerated substances and, next, that the power here expressly given exists at common law and is not a grant of new power but the statutory expression of an existing power. It is next noted that the concluding clause is a prohibition that contains an implied grant of power to the supervisors of a town to permit stone, gravel or sand within the highways of the town to be taken and used on the highways of other towns. But this prohibition and implied grant are confined to the enumerated materials. Under this clause a town may forbid another town from taking gravel from the former's highways, even where the gravel is not needed for the highways of the town in which it exists and where the abutting owner consents to its being taken, but I conclude that the rule is different with reference to clay.

Clay hills and banks in a highway but not needed for the highways of the town are the absolute property of the abutting owner and may be removed by him or those he authorizes to remove the same, provided always that the portion of the highway fitted for traffic is not interfered with nor the highway in any way injured or made unsafe.

The conclusion reached has the merit of serving a present, practical public use as against a purely problematical, future one that might be served by a contrary holding.

2. I am of the opinion that sec. 4192, Stats., is applicable to both civil and criminal proceedings. Stated differently, upon the offer in evidence of a written instrument in a criminal trial, the presumption that the instrument was signed by the person it purports to be signed by will arise whenever such presumption would arise if the issue were civil, and to the same extent.

Speaking of the distinction between the law of evidence in criminal actions and civil ones, Professor Greenleaf says:

"The better opinion seems to be that the rules of evidence are in both cases the same." 1 Greenl. Ev. (14th ed.) § 65.

Whether or not the statute applies in the case you state is a somewhat different matter.

A criminal prosecution is an action. (See, 2598, Stats.) The section to which you refer is found in ch. 176, Stats., entitled "Evidence," and that chapter forms the first general division of "Title XXX. Provisions Common to Actions and Proceedings in All Courts." Many of the sections in that chapter apply to criminal actions, beyond question. Some of them are limited to civil actions by force of constitutional guarantees afforded defendants in criminal actions.

Sec. 4192 is the first one under the subdivision "Presumptions," and the part thereof we are considering reads as follows:

"Every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until the person by whom it purports to have been so signed or executed shall specifically deny the signature or execution of the same by his oath or affidavit or by his pleading duly verified. * * *."

This statute is a rule of evidence. It furnishes, under the conditions stated, a rebuttal presumption that the signature is genuine. It makes the instrument itself *prima facie* proof of the signing and executing and obviates the necessity under the common law of first supplying proof thereof outside of the instrument itself. To hold that this section excludes all proof to the contrary and establishes an absolute presumption would work disaster and rank injustice in many instances and open a wide door to fraud and dishonesty. In fact, it would make prosecutions for forgery and for uttering forged instruments impracticable.

This statute is not, strictly speaking, a rule of pleading like those which exclude evidence as to partnership, corporate existence, appointment as administrator, executor, guardian or trustee (secs. 4197, 4199 and 4200), unless the allegations thereof are put in issue in the way prescribed by statute. The evidence is excluded because there is no foundation for it. It is not addressed to any issue and hence is irrelevant. The facts in those cases are settled by the pleadings, and like every fact settled in that way may not be disturbed by evidence. Proofs are ad-

dressed to issues only, and the issues are made by the pleadings.

Proof as used in sec. 4192 is not the equivalent of "determined" and "adjudicated" but simply means that the signature is itself evidence of its authenticity and of the execution of the instrument.

Proof means "In law, evidence before a court or jury in a judicial way." 32 Cyc. 636.

"The word proof when used in a legislative enactment means competent and legal evidence or in other words testimony that conforms to the fundamental rules of proof." *State ex. rel. v. Brodie*, 41 So. 180.

This is quoted with approval from *Inglis v. Schreiner*, 32 A. 131.

"Proof when used in a legislative enactment means legal evidence upon which judicial action may be rested." *Githens v. Mount*, 44 A. 851.

The supreme court of Iowa, construing a somewhat similar statute in *Shaw v. Jacobs*, 56 N. W. 684, at first held that the absence of a specific denial of the signature or execution under oath made by the person whose signature it purports to be, made the instrument itself conclusive proof of the fact. But upon the re-hearing the court receded from that position and said:

"It is a well-settled rule that the genuineness of such a signature may be placed in issue by a denial not made by the person whose signature it purports to be, and that in such cases the burden of proof as to that issue is upon the party making the denial. Therefore, evidence to show that the signature in question was not genuine was material. The error of the opinion, in assuming that it was not, does not affect the result in this court, however, for the reason, that the evidence submitted was not sufficient to authorize a finding that the signature was not genuine."

This question has not been squarely passed upon by our court. The nearest approach thereto was in the *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 32. There an instrument purporting to be a lease was offered by the plaintiff to show that the defendant's predecessor in possession had held under the plaintiff's grantor. Oral evidence was then admitted to prove that the lessee's signature was not genuine. On page 33, it appears that all that

was claimed by the plaintiff's counsel for sec. 4192 is that the instrument proved its own execution, *prima facie*.

In *Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, there is language which might, if taken independently of the facts in that case, lead the reader to infer that an instrument whose execution has not been denied in the manner specified in sec. 4192 when offered in evidence is a finality as to the fact of execution. But no such question was really before the court. The question there was upon the assignment or endorsement of a note. There was no specific denial of the assignment or of the plaintiff's ownership and no evidence was attempted to be introduced by the defendant attacking the endorsement or assignment. Beyond question, the endorsement or assignment was competent proof, and, being the only proof in the case, controlled the finding upon the validity thereof.

Minnesota is the only state wherein a statute precisely like ours is found. The supreme court of that state, in *McGinty v. St. P. M. & M. Ry. Co.*, 77 N. W. 141, held that the statute was a rule of evidence merely and that it did not prevent the validity of any instrument declared on being put in issue by a proper pleading, and when so put in issue is itself sufficient to establish, *prima facie*, its genuineness.

In *Moore v. Holmes*, 70 N. W. 872, 873, that court said, in speaking of the same statute and sustaining a ruling admitting a note in evidence without any outside proof of its genuineness:

"The defendant did not by her oath or affidavit deny the signing or execution of the note, nor did she deny such signature or execution on oath at the trial. While the general denial in the answer, verified upon information and belief by the defendant's attorney, put in issue the execution of the note, this is a rule of pleading; but the statutory requisite above quoted with reference to the necessity of signing and execution of a written instrument is a rule of evidence, not of pleading. The failure of the defendant to comply with the statute in this respect, by denying her signature or the execution of the note by her oath or affidavit, entitled the plaintiff to put the note in evidence without plaintiff being required to first prove its execution. * * * When this was done the plaintiff had established *prima facie* a cause of action, and the failure of the defendant to meet this by denial of her signature or execution of the note, or other competent evidence, justified the trial court in directing a verdict in behalf of plaintiff."

The foregoing quotation, I believe, correctly states the effect of sec. 4192 where it had any application at all. So construed, it has simply the effect of wiping out a rule of the common law and is a favor to the party who relies upon the instrument.

"At common law, a party thus offering an instrument in evidence was required to prove its execution before it could be admitted. But, as a matter of convenience, and to lessen the expense of litigation, the General Assembly has dispensed with such proof, where a copy of the instrument sued on is filed with the pleadings, unless rendered necessary by a plea denying the execution under oath." *Bonner v. Ames*, 82 Ill. App. 93.

If what has already been said on the subject is correct, it follows that you will not be greatly troubled by this section of the statute, even if it is applicable, for without this section you would need to prove not only that the signature is a forgery but that it was forged by the defendant. Had you his father's affidavit that he never signed or executed the note, you would still have the burden of proof that the defendant did the signing.

But it seems to me that the section has no application here. It applies where a document is offered as genuine and is relied upon by the person offering it. An instrument which is a forgery is in law no instrument at all and in this case when the state offers this paper not as a note, but as a forgery, it should be received for that purpose and without any regard to sec. 4192, Stats. The denial contemplated by that section is one coming from a person who would be benefited by the denial. It is unreasonable to expect in this case that the defendant would deny the genuineness of the signature in question, and it is too much to expect his father to do. I cannot believe that the legislature intended the defendant in a forgery case should receive any help from this statute. You are advised that you should proceed as though this particular section of the statute did not exist.

Mothers' Pensions—When county collects from towns the total sum expended for mothers' pensions the county is liable to the towns, pro rata, for at least the amount paid by the state to the county as reimbursement.

January 17, 1918.

RAY BOWERS,

District Attorney,

Delavan, Wisconsin.

Under date of January 15, 1918, you submit the following for my opinion:

"During the year 1916 the county of Walworth expended for aid under sec. 573f, of the Wisconsin statutes, the sum of \$5,181. The county charged back to the respective towns, villages and cities the whole amount so paid by the county, and same went into the tax rolls of the various towns, villages and cities, and was paid in the taxes in January, 1917. The county treasurer certified to the state treasurer January 1st, 1917, for the year preceding, for the one-third of the amount expended, which was by statute to be paid by the state. The appropriation made by the state for aid under this section of the statute was not sufficient to pay the one-third, or the state's share, and the amount received from the state abated pro rata, the actual amount received by the county treasurer being \$774.81.

"The question now arises, what disposition shall be made of the sum of \$774.81 so received from the state. Does this money belong to the county, or should it be distributed and paid by the county treasurer to the several towns, villages and cities in the proportion in which such towns, villages and cities participated in the tax collected, bearing in mind that the full amount of the aid expended has been collected from the various towns, villages and cities?"

Your question is virtually answered by the opinion rendered the board of control November 26, 1915, Vol. IV, Op. Atty. Gen., p. 1019.

I am of the opinion that the various subdivisions of your county should be credited their pro rata shares respectively of the sum received from the state, and that they have valid claims against the county to that extent at least.

Mother's Pensions—Order may be made continuing or extending pension although it is evident the pension must cease within a year.

January 17, 1918.

RAY BOWERS,

District Attorney,

Delavan, Wisconsin.

Under date of January 15, 1918, you submit the following for my opinion:

"We have in this county a widow who has a child that will be fourteen years of age next July. Aid under sec. 573f, Wis. Stats., has been granted to the mother for such child, which aid will expire during the present month, and if further aid is given a new investigation and a new order granting aid will of course be necessary. Under the statute as now amended, the child shall be under the age of fourteen, or between the ages of fourteen and sixteen and unable to secure permit to work. The child in question being under fourteen at the present time, cannot get a permit to work. Whether the child can get a permit to work next July, when it becomes fourteen years of age, is a query. Can aid under the statute as now amended be granted in this case at the present time?"

An order may be entered extending or continuing the pension till such minor arrives at the age of fourteen years. This is in accordance with an opinion given the district attorney of Sauk county March 6, 1917. Vol. VI, Op. Atty. Gen., p. 147.

Intoxicating Liquors—A tenant who has been granted a liquor license at a new place on the ground that the building of his landlord burned down cannot be licensed thereafter in the new building erected by his former landlord.

January 21, 1918.

MARION F. REID,

District Attorney,

Hurley, Wisconsin.

In your communication of January 15 you submit the following for an opinion:

"A. is the owner of a building entitled to a license under the Baker Law. B. is his tenant conducting a saloon business in said building. The building burns, and B. is granted a license

for another location which has never been licensed since prior to June 30, 1907. The old building having been completely destroyed, A. builds a new building on the same location as his former building stood, and does so as soon as may reasonably be expected considering the size and nature of the building.

"(1) May the town board grant A. a license in his new building?

"(2) May B., upon the completion of A.'s new building, surrender his license for the building in which he has been doing business since the fire, and obtain a license in A.'s new building?"

Sec. 1565d, the so-called Baker Law, after providing for the ratio of one saloon for every five hundred of the inhabitants and authorizing the municipal authorities to grant licenses equal in number to those that were issued and in force on the 30th day of June, 1907, in their respective municipalities, contains the following proviso:

"* * * And provided further that licenses be granted or issued to persons for those places or locations for which licenses were issued or granted on or prior to the thirtieth day of June, 1907, unless by reason of a refusal of the owner to lease the same for such purposes, their destruction by fire or the elements or the same be refused by operation of law or under the provisions of this act, then and in either of such cases such license may be issued or granted to some other location."

Under your statement of facts, it does not appear whether B. had been a tenant of A. and duly licensed continuously since the 30th day of June, 1907, but I assume that that is the case, for only then could a valid license be given to him in a new location, under the decision of our supreme court, in the case of *State ex rel. Marvin v. Larson*, 153 Wis. 488. In said case it was also stated that in construing sec. 1565d, the so-called Baker Law,

"The theory evidently was that the law might operate too harshly and summarily if provision were not made to protect, in some degree at least, investments already lawfully made."

In *Zodrow v. State*, 154 Wis. 551, 557, our court said:

"The idea was to protect existing liquor business in such a way as to create as little hardship as possible."

A liquor license having been legally granted to B. in a new location, I believe B. cannot be licensed in any other location. The location which he selected for his license is the one in which a license can be granted to him. There is no authority in the

Baker Law for granting a license to him at any other location. This being so, I do not see how a license could be granted to him in the building erected by A. After B. had received his license in a new location, the right to a license in the old location, for A. was lost. Certainly two licenses could not have been granted at the same time,—one to A. and one to B.—for that would have increased the number of licenses in the town.

I am constrained to hold that your first question must be answered in the negative, and your second question must also be answered in the negative. If A. surrenders the right to a license in his new location, then both places have lost the right to be licensed, so long as the number of licenses granted in the town exceeds the ratio of the Baker Law.

Mother's Pensions—A mother who is receiving aid under sec. 573f for her dependent children is not thereby prevented from changing her residence from one county to another.

January 22, 1918.

JUDGE H. P. AXELBERG,

Washburn, Wisconsin.

Your letter of January 17, 1918, says:

"A mother receiving aid under the 'Mothers' Pension' provisions from Price county moved to this county more than a year ago. Her pension year expired last December, or thirty days ago, and she is now applying for aid in this county. The fact that she has had public support all this time from her home county would appear to have acted against her gaining a residence in this county. What county—Price or Bayfield—should she look to for an allowance at this time?"

It is perfectly clear, I think, that aid under sec. 573f cannot be granted these persons by Price county. I understand that the mother has established her home or permanent domicile in Bayfield county and has a legal residence there, unless there was some "legal impediment to her acquiring such residence in Bayfield county. Legal residence and legal settlement are not synonymous." Neither are they inseparable. It is residence and not settlement that furnishes the basis for the aid known as mothers' pensions. Vol. V, Op. Atty. Gen., pp. 124, 465.

"Mothers' pensions" is really a misnomer. This law relates

to dependent children and is intended to furnish aid for children who are "dependent upon the public for proper support." Such children may be living with or in the custody of grandparents or other persons, as well as with their mother. Such grandparents or other persons may be entirely independent as to themselves and the aid in such cases is presumably limited to such sums as will enable those persons "to properly care for the children." The granting of such aid does not constitute the parent or other custodian of the child a pauper, nor is the mother of such children to be classed as a pauper merely because aid for the proper nurture of the children is being granted under this law. Vol. VI, Op. Atty. Gen., p. 160.

I am of the opinion that the receipt of such aid by a mother or other person caring for the children does not prevent the mother or other person from changing her place of residence. Sec. 1500 plainly implies, if it does not expressly state, that even a pauper may acquire a residence while receiving aid, though he may not acquire a legal settlement in the town which is supporting him.

"(4) Every person of full age who shall have resided in any town in this state one whole year shall thereby gain a settlement in such town; but no residence of a person in any town while supported therein as a pauper shall operate to give such person a settlement in such town." Sec. 1500, Stats.

It is concluded, therefore, that this mother is a resident of Bayfield county and her minor children have the same residence, unless their father is still living. Be that as it may, her residence satisfies the demands of the statute.

"Aid for dependent children shall only be granted upon the following conditions: There must be one or more children living with or dependent upon the mother or grandparents or person having the care and custody of such children, * * *; the mother or grandparent or such other person must have resided in this state one year and in the county in which application is made for aid six months prior to the date of such application * * *." Subsec. 5, sec. 573f, Stats.

The language quoted bars this mother from obtaining aid from Price county and it seems to me the language entitles her to aid in Bayfield county, so far as the matter of residence is concerned.

Up to the time of the amendment made by ch. 589, laws of 1917, no period of residence in a county was necessary to warrant the extending of aid. A mother could then have transferred her residence to another county and immediately become entitled to aid therefrom. The amendment just referred to required a six months' period of residence as a condition precedent to the extension of such aid; that, I believe, is the only change which the amendment effected.

Bonds—County Depository—Committee on salaries and bonds, of the county board, may approve bond of county depository.

January 22, 1918.

RAY BOWERS,

District Attorney,

Delavan, Wisconsin.

In your communication of January 19 you state that in your county there is a committee called the committee on "Salaries and Bonds;" that the duty of this committee is to recommend to the county board the salaries to be paid to the various county officials and the county employes, and also to pass upon the bonds filed, whether they be county official bonds or any other bonds running to the county in matters in which the board is interested; that at the last meeting of the county board the banks of the city of Whitewater were designated as the county depositories for the year 1918. You state that no special committee was appointed to pass upon the bonds of the county depository. You inquire whether the committee on salaries and bonds may pass upon this matter.

Under subd. 5, sec. 693, it is expressly provided:

"Said bond shall, before being so filed, be approved by the county board or a committee of such board appointed for such purpose."

Under this provision of the statute it is not necessary that the committee be appointed for the sole purpose of passing upon the bond. Your standing committee has been appointed for the purpose of passing on the bond and said committee has the power to approve the bond for your county board. Of course, your

county board may as a body approve the bond or the county board may appoint another committee, if they so desire, to pass upon the bond, but I believe that all that is required is for this committee to approve the bond, unless the county board otherwise decides.

Bridges and Highways—Public Officers—The county board may compensate and pay expenses of the county state road and bridge committee in purchasing road machinery.

January 22, 1918.

WISCONSIN HIGHWAY COMMISSION.

Under date of January 17, 1918, you inquire whether a county state road and bridge committee which has been charged by its county board with the duty of purchasing road machinery may come to Madison at county expense for the purpose of examining the machinery which is to be exhibited here during the good roads school, with a view of making a purchase.

In that connection you state that many counties have authorized extensive purchasing of machinery, and that it is your belief that the exhibition of machinery, particularly such machinery as is required for maintenance work, will be more extensive this year than ever before, and that it is highly desirable, if not necessary, for these committees to make some examination and investigation in order to serve their counties intelligently in making purchases.

Of course, these committees cannot be expected to make investigation on personal account or at their individual expense. It is my opinion that the committee in question may make such investigation and travel at county expense for the purpose of making purchases of machinery, so long as they keep within bounds, and obtain the sanction of the county board for the expenditures made in that behalf.

In this connection it is important to note that the purchasing of road machinery is directed by statute to be made through this committee. In the enumeration of powers of the county state road and bridge committee is the following:

“(a) To purchase and sell county road machinery as authorized by the county board.” Subd. (3), subsec. 8, sec. 1317m—5, Stats.

In subd. (1), subsec. 8, said sec. 1317m—5, is found this language:

“* * * The members of such committee shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties and shall be paid the same per diem for time actually and necessarily spent in the performance of their duties as is paid to members of other county board committees, not, however, exceeding two hundred dollars for both per diem and expenses to any one member in any one year; provided that a lesser amount may be fixed as the maximum by any county board.”

That part of said section first above quoted makes it the duty of said committee to purchase and sell county road machinery, as authorized by the county board, while that part of said section last above quoted provides for the compensation.

I am satisfied that the county board under these provisions of the statute would have power and authority to compensate members of these committees in compliance with this statute.

Public Officers—Village marshal may serve a warrant of arrest signed by a court commissioner.

He is entitled to the same fees as a constable when performing the same duties as a constable.

January 22, 1918.

E. S. JEDNEY,

District Attorney,

Black River Falls, Wisconsin.

In your communication of January 18 you state that complaint has been made before a court commissioner at Merrillan, Wisconsin, for the violation by a certain saloonkeeper at Alma Center, Wisconsin, of the statutes forbidding the sale of intoxicating liquors to a minor; that a warrant was issued on said complaint, and that it now seems to be the disposition of the magistrate to deliver this warrant to the village marshal; that the sheriff of your county has raised the question whether the village marshal may lawfully serve this warrant. You state that you have advised the magistrate to deliver the warrant to the sheriff for service and thus avoid the necessity of determining this question; but you inquire whether or not a warrant issued

under the circumstances above stated can lawfully be served by a village marshal, and whether or not he can collect his fees for such service. You also inquire whether or not such village marshal must pay such fees into the village treasury.

Sec. 884, Wis. Stats., provides that the village marshal shall "possess the 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."

Under sec. 842 it is provided that the constable shall be a ministerial officer of justices of the peace, but it is also stated that it shall be his duty,

"(1) To serve within his county any writ, process, order or notice, and execute any order, warrant or execution lawfully directed to or required to be executed by him by any court or officer."

The only forms for warrant of arrest given in our statutes are the ones in sec. 4774 and in sec. 3611. In both cases the warrant is directed by the state of Wisconsin "to the sheriff or any constable of said county." I know of no rule of law to the effect that the court commissioner has not the right to issue a warrant directed to the sheriff or constable. If it is directed to the sheriff or constable, it is the duty of the constable or village marshal to serve it, under said secs. 842 and 884, for under the latter section, when a writ is directed or addressed to a constable it includes a village marshal.

I also believe that the village marshal is entitled to the fees, the same as the constable or sheriff, for performing the same services, for sec. 2959 provides:

"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."

Workmen's Compensation—Appropriations and Expenditures
—Medical Treatment—The medical treatment furnished an injured employee by the employer is a part of his compensation and is in addition to any amount accruing by reason of his disability.

Where a department of the state provides medical treatment for an injured employee and pays for same there is no provision of law for reimbursing that department for such payment.

January 23, 1918.

HONORABLE M. J. TAPPINS, *Secretary,*
State Board of Control.

In your letter of January 23 you state that one, Harry M. Keyes, received an injury from a boiler explosion at the state reformatory at Green Bay which caused his death; that application was made by his widow, Mrs. Carrie M. Keyes, to the industrial commission of Wisconsin for compensation, and an award of \$3,000 was made; that Mr. Keyes lived for several days after the accident, during which time Dr. J. P. Lenfesty rendered some medical services for which he made a charge of \$25.00; that the invoice for this amount was sent to your board and payment made, after which you were advised of this award of \$3,000 to Mrs. Keyes.

You state that the compensation to Dr. Lenfesty should have been made out of the \$3,000, and that you are of the opinion that the state should be refunded the \$25.00 out of the \$3,000 allowed by the commission. You ask what method to pursue in order to recover for the state from the \$3,000 allowance the \$25.00 improperly paid.

You are in error in supposing that the \$25.00 should be paid out of the \$3,000. Sec. 2394—9, Stats., provides that the employer shall furnish such medical, surgical and hospital treatment, medicines, medical and surgical supplies, crutches and apparatus as may be reasonably required, for ninety days immediately following the accident, to cure and relieve from the effects of the injury, the same to be provided by the employer. The same section provides that in addition thereto there shall be the compensation, and among others, the death benefit provided for under which Mrs. Keyes was awarded \$3,000. Thus, it was the duty of the state to furnish to Mr. Keyes the necessary medical attendance and had it failed to do so, he could have procured such medical attendance at his own expense and his widow could

then have been reimbursed such expense in addition to receiving the death benefit of \$3,000.

For that reason, in my opinion, there is no way in which you can recover this \$25.00 from Mrs. Keyes.

Subsec. 8, sec. 20.57, Stats., as enacted by ch. 14, laws of 1917, appropriates to the industrial commission such sums as may be necessary for compensation of persons injured while in the state's service. This is the appropriation out of which this \$3,000 would be paid, and out of which the \$25.00 would have been paid had it been a reimbursement to Mrs. Keyes. As no award was made for the \$25.00, and as the industrial commission had nothing to do with that payment, it would seem that it cannot be paid from that appropriation.

In view of the present state of the law, it would seem to be better, where an employe of the state is injured, to advise him to procure his own medical, surgical and hospital treatment and then let proper provision be made for the reimbursement thereof in connection with the award of the industrial commission.

As things stand, it would seem that there is no way for the board of control to be reimbursed for the \$25.00 paid.

Public Officers—County Board—The question of authority of special committee to hire superintendent of poor farm considered.

January 23, 1918.

VILAS H. WHALEY,

District Attorney,

Racine, Wisconsin.

Your letter of recent date says that the matter of electing a superintendent of the Racine county poor farm for the year 1918 came before the board at its last annual meeting and in the regular order of business; that the then superintendent of said poor farm addressed a letter to the board, stating that he would not be a candidate for reëlection; that a motion was carried referring the selection to a special committee which was to act with the poor agents of the county; that one week after the appointment of the special committee and without any report having been made by it the annual meeting adjourned; that serious complaints had been made against the superintendent and it was

thought because of those complaints he had declined to be a candidate for the place; that after such adjournment it was reported that the committee and the poor agents contemplated the making of a written contract of hire with the superintendent; that immediately a petition signed by a majority of the members of the board was made to the chairman to use his influence to prevent such a contract being made; that a special meeting of the county board was duly called for and was held upon December 27 for the purpose—expressed in the call—of electing a superintendent of the county poor farm for the year 1918; that after the members of the board, including said special committeemen, had been notified of the call and its purpose, and on the day preceding the special meeting, two of the poor agents and three of the special committeemen made a written contract with the superintendent to act for another year; that you, as district attorney, were requested to draft the agreement but refused and that it was drawn by the superintendent's attorney; that the special meeting called witnesses and took testimony upon the charges made against the superintendent and by a vote of 19 to 16 refused to ratify the action of the special committee and then elected a new superintendent.

Upon that state of facts, you ask to be advised whether the board could delegate to the special committee authority to make such contract and, if so, whether it did delegate the power and whether the power was validly exercised.

It does not appear from your statement of facts whether a distinction between town and county poor has been abolished and in what way the county is administering poor relief. The statutes allow considerable latitude to county boards in the administration of the poor laws. Secs. 1518 to 1525, Stats.

In counties where that distinction exists "the county board may appoint an agent to take charge of" the county poor and of lands and buildings which have been provided as a place for maintaining them. Sec. 1518.

Whenever that distinction has been abolished the county board

- (1) may elect three "county superintendents of the poor," or
- (2) "may provide for the support and maintenance of such poor without the election of superintendents in such manner as they shall direct."

(3) Where a poorhouse and county insane asylum are maintained the trustees of the latter are superintendents of the poor unless the county board orders otherwise. Sec. 1520.

I understand, however, that Racine county has dispensed with "superintendents of the poor" and has elected so-called county agents to administer its poor affairs, and that as part of the scheme it has provided for what is known as a superintendent of the poor farm. This superintendent is an employe, rather than an officer, and his services, from a legal standpoint, are obtained by hire, rather than by election in the strict sense; but I also understand that the scheme or plan of that county provides that the superintendent shall be chosen by the county board. That selection or hire could be delegated by the county poor to a committee or perhaps to other persons. But the matter is, nevertheless, a corporate matter and must be handled by the county board or pursuant to a *resolution or ordinance*.

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

It appears that no resolution or ordinance was adopted. The committee was appointed upon the adoption of a simple motion. The legislative intent was that matters of this kind should be acted upon with more deliberation and that the purposes should be more carefully expressed than is ordinarily done by an oral motion.

Ordinances, in particular, are required to be formal, sec. 670, subd. (10), and must be published, sec. 674.

The necessity of observing the requirements of sec. 652 whenever the delegation by the county board of any of its county powers is attempted is pointed out and emphasized in *Johnson v. Buffalo Co.*, 111 Wis. 265, 269, and in *French v. Dunn Co.*, 58 Wis. 402. The matter involved in the last cited case was the purchase of a poor farm. Authority to make the purchase was in terms given by "a resolution adopted by the board," p. 405, and the delegation was held valid, the court italicizing a portion of the section which prescribed the manner in which the power of the board may be delegated, p. 406. For the general rule as to the delegation by a public officer or board of power conferred upon the officer or board, see *Lord v. Oconto*, 47 Wis., 386; 11 Cyc. 396.

There being no resolution or ordinance delegating the county board's power to the special committee, the committee could not elect or hire the superintendent. It was in duty bound to report its doings to the board and obtain its ratification as a condition to making the arrangement and a binding contract.

But it seems to me that the county has still more solid ground on which to sustain the action of the county board. The facts as stated indicate a palpable fraud upon the county and the former superintendent was an active party to, and one who benefited from, the fraud. He certainly did not deal fairly with the county board, but on the contrary, by trickery sought to obtain a personal advantage which he knew he could not otherwise obtain, and in this he was aided and abetted by three of the committee. A court would not sustain his contract unless forced by statute and rigid rules of law to do so. He has no equities in his favor.

If we assume that the county board intended to leave the matter entirely to the committee, still it is apparent that when the county board did so it was relying upon the superintendent's statement that he was not to be considered for the employment or place, and the special committeemen must have inferred in the beginning that the board did not expect the committee would hire or recommend the hiring of the former superintendent; and before the committee undertook to execute the contract it was informed in most emphatic terms that the majority of the members of the board were opposed to rehiring the superintendent. Your refusal as official adviser to the committee to draft a contract was sufficient to arrest their further proceeding in the matter, and their action in getting or permitting the superintendent's attorney to draft a contract is a strong badge of fraud and bad faith.

But whatever may be the legal rights of the former superintendent, the county cannot recede from the position it has taken. The county board has hired a new superintendent and he is in charge of the poor farm. It seems plain that he is lawfully employed by the county board and the county must compensate him for his services. As to the former superintendent, if he was an employe and not an officer and his contract of hire was valid, he simply has a cause of action for breach of contract. The county, like every other employer, may discharge an employe and prevent him from performing his part of the contract of hire. The

remedy is damages for breach of contract, and the measure of damages is the difference between what he would have earned under the employment and what he earned or reasonably could have earned at other employment.

To repeat, I am of the opinion that the writing entered into by the former superintendent and others claiming to represent the county is not valid or binding; and if binding, the county has breached the contract and is merely liable for damages which he suffered on account of such breach.

Fish and Game—Courts—Where exclusive jurisdiction is not lodged in certain courts by statute a circuit court commissioner may hold a preliminary hearing and hold to trial in circuit court one charged with violating statutes relating to attaching deer tags.

January 24, 1918.

STATE CONSERVATION COMMISSION.

In your letter of January 22 you ask whether a preliminary hearing for the offense of not properly attaching deer tags, as provided in sec. 29.40, Stats., can be had before a court commissioner and the defendant bound over to the circuit court, or whether, that being an offense triable by a justice of the peace, such justice has exclusive jurisdiction of both the trial and the preliminary hearing.

See 8, art. VII, of the state constitution, gives to circuit courts "original jurisdiction of all matters civil and criminal within this state, not excepted in the constitution, and not hereafter prohibited by law; * * *."

Circuit courts are given the power to hear and determine all cases of crimes and misdemeanors of whatever kind not exclusively cognizable by a justice of the peace committed within their respective circuits.

In *Faust v. State*, 45 Wis. 274, it was held that nothing but a clear declaration that an offense created by statute shall be cognizable only by some inferior court, can deprive the circuit courts of jurisdiction thereof.

The general statutes relating to justices of the peace which give them power to try all offenses within certain limits do not

expressly exclude the jurisdiction of other courts, and the circuit courts have jurisdiction of said offenses.

In the case of *Wieden v. State*, 141 Wis. 585, the defendant was charged with a violation of sec. 1564, of the statutes, prohibiting a keeper of a saloon from selling liquor on Sunday, and also for violation of sec. 4595, of the statutes, for keeping his shop open on Sunday. There was a plea in abatement, and the defendant contended that a circuit court commissioner has no jurisdiction to hold a preliminary examination in such cases, for the reason that they were triable in justice court and that the court commissioner could not, therefore, hold the preliminary and bind the accused over for trial to the circuit court. The court said, on p. 588:

"So the mere fact that offenses of the character of the one involved here were created, and authority given to administer the law by prosecutions in justice's court, does not militate against the circuit courts exercising their constitutional jurisdiction in such cases, and, incident thereto, examining magistrates, such as court commissioners, holding preliminary examinations as in other criminal cases."

It is my opinion that in localities where exclusive jurisdiction is not given to certain courts, a circuit court commissioner may properly hold a preliminary hearing of a person charged with the offense of failing to properly attach deer tags, as provided in sec. 29.40, Stats., and may hold such offender to trial in circuit court.

Public Health—Armories—The owner, manager, representative, officer or other person having control or custody of an armory used as a public assembly hall is responsible for a complainer with orders of the industrial commission.

January 24, 1918.

INDUSTRIAL COMMISSION OF WISCONSIN.

In your letters of November 21, 1917, and January 18, 1918, you state that you have found the national guard armories throughout the state used quite generally for dances and other public gatherings, that you have classified them, for the purposes of administering the safety and sanitation laws of the state, as

"public assembly halls," and that as such they are subject to certain requirements in regard to exits for fire protection and other provisions relating to safety to life and limb.

You state that you are having some difficulty in ascertaining who the proper party is to appeal to for correction of the dangers that are pointed out, in compliance with your duties under the law, and you ask whose duty it is to supply the safety requirements recommended by the commission for such armories.

I assume from your statement that the buildings in question are "public assembly halls," and are within the classes of buildings over which the industrial commission has supervision and authority with reference to issuing orders and compelling compliance therewith for safety to life and limb.

Sec. 2394—48 provides in part:

"* * * Every employer and every owner of * * * a public building now or hereafter constructed shall so construct, repair or maintain such * * * public building * * * as to render the same safe."

Subd. (5), sec. 2394—52, Stats., relating to powers, duties and jurisdiction of the industrial commission, provides:

"To ascertain, fix and order such reasonable standards, rules or regulations for the construction, repair and maintenance of places of employment and public buildings as shall render them safe."

Sec. 2394—70, Stats., provides:

"If any employer, employe, owner, or other person shall violate any provision of sections 2394—41 to 2394—55 * * * or shall fail or refuse to perform any duty lawfully enjoined, within the time prescribed by the commission, * * * such employer, employe, owner or other person shall forfeit and pay * * *."

The word "owner" is defined in subd. (13), sec. 2394—41, as follows:

"The term 'owner' shall mean and include every person, firm, corporation, state, county, town, city, village, manager, representative, officer or other person having ownership, control or custody of any place of employment or public building, or of the construction, repair or maintenance of any * * * public building, or who prepares plans for the construction of any place of employment or public building. * * *."

It should be noted here that the term "owner" is broad enough to cover not only the person who has the legal title, but the person who has the control or custody, either for himself or as a representative or officer of another person, either a natural or legal person. The law seems to contemplate that the protection of the people in their life and limb is paramount to any contractual consideration that may exist between a landlord and a tenant, and the law imposes upon both the person who has legal title and the person who has control or custody the responsibility of complying with the orders of the industrial commission with reference to these safety requirements, whenever they are required to do so by said commission.

Consideration has been given to the fact that in some instances the buildings are owned by the national guard, and not leased by them, and under sec. 649—19e, Stats. 1915 (sec. 21.61, Stats.), control is given to state officers, and the state, being sovereign and in charge of these armories, is not bound by any act of the legislature unless specific provision is made with reference thereto.

Sec. 649—19e, with reference to control by state officers, provides:

"Such armory, when erected or purchased, shall be under the control and in charge of the governor, the quartermaster-general, and the commanding officer of the company or companies of the national guard for which it has been provided. * * * The governor, quartermaster-general, * * * may, from time to time, make such orders, rules and regulations as they may deem proper for the observance of all officers and persons having charge of such armories, or occupying any part thereof."

It is true that, as a general proposition, the state, being sovereign, is not bound by the acts of the legislature unless the state is specifically named therein and by specific words brought under operation of the law. In other words, the general statutes passed by the legislature do not prescribe rules for the conduct of the state. 36 Cye. 918; *Milwaukee v. McGregor*, 140 Wis. 35.

There are, however, exceptions to the above general rule. In order to come within the general rule and be protected under it, the acts of a public servant must have the character of governmental functions. *Fitts v. McGhee*, 172 U. S. 516; *Pennoyer v. McConaughy*, 140 U. S. 1.

It appears in the case you present, that the buildings are used for dances and other public entertainments, and that it is because of this use that the industrial commission feels it has a duty to perform in safeguarding the people who attend such entertainments.

The fact that these entertainments are given in places controlled by officers does not render them governmental functions. The mere embarking of the state in an enterprise the nature and character of which lends itself to operation by individual persons or companies, does not give to that enterprise the character of a governmental function.

"When a State embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character and is subject to like regulations with persons engaged in the same calling." *Western & Atlantic Ry. Co. v. Carlton*, 28 Ga. 180, 182.

The legislature, in defining the term "owner" in subd. (13), sec. 2394—41, *supra*, said it

"shall mean and include every person, firm, corporation, state
* * *,"

indicating thereby, that the industrial commission was to have charge of the places of employment and public buildings in the control of the state.

It would seem, therefore, that regardless of where the ownership of said building was lodged, whether in the national guard company or a private person, and whether controlled by state officers or local guard officers or custodians, under the statute, they are subject to the supervision and orders of the industrial commission.

You are therefore advised that the proper person to hold responsible for a compliance with your orders in the case of individual ownership is the individual owner, and this regardless of any contract or lease that he may have with a national guard company. If the armory is not owned by an individual, then the representative, manager, officer, or other person having control or custody thereof, is the proper person upon whom to serve such order.

Legislature—Special Session—The governor may amend his call for a special session of the legislature, adding new subjects, or may issue a new call for the same time, adding new or additional subjects.

January 24, 1918.

HONORABLE E. L. PHILIPP,
Governor.

You have heretofore issued a proclamation calling the legislature in special session to be held on the 19th day of February, 1918, at two o'clock in the afternoon, in which you have specified certain subjects to be considered by the legislature in such special session.

You now desire to know if you can amend your proclamation or issue a new proclamation so as to include an additional subject for the consideration of the legislature at such special session.

This question is governed by sec. 11, art. IV, of the constitution of this state, which reads as follows:

"The legislature shall meet at the seat of government at such time as shall be provided by law, once in two years and no oftener, unless convened by the governor in special session, and when so convened no business shall be transacted except as shall be necessary to accomplish the special purposes for which it was convened."

The above provision of the constitution is the only one having any bearing on this subject. It will be noted that there is a positive prohibition against the legislature in such special session, when so convened, transacting any business except such as shall be necessary to accomplish the special purposes for which it was convened. Therefore, in order to add a new subject of legislation to those included in your proclamation already issued, something additional would need to be done by you in order for the legislature to be authorized to enact any provision not included within your proclamation or call.

It will be noted that this provision of the constitution leaves the matter wholly within your hands. You are hampered by no machinery, and no limitations. The time of issuing the proclamation, the time when the session shall convene, the subjects to be considered thereat, the length of notice to be given to the members, the method of notifying them, all are left entirely to

your discretion. Undoubtedly you could call a second, third, or more special sessions, should you think fit. Undoubtedly you could issue an amendment to your present call or proclamation, so as to include within the subjects to be legislated upon additional subjects; and I have no doubt that you could issue a new proclamation calling the special session of the legislature to consider the additional subject, fixing the same time and place in your second proclamation for the holding of the session as that provided in your first call.

Similar constitutional provisions are found in the constitutions of other states of the union, but this identical question has been passed upon, so far as I have been able to learn, by the court of only one state. The constitution of the state of Pennsylvania has almost an identical provision regarding the calling of special sessions of the legislature. Sec. 25, art. III, of the constitution of the state of Pennsylvania provides:

"When the general assembly shall be convened in special session there shall be no legislation upon subjects other than those designated in the proclamation of the governor calling such session."

In the case of *Pittsburg's Petition*, 217 Pa. St. 227, the court considers and passes upon substantially the identical question propounded here. There the governor had issued a second call or proclamation, adding a new subject for consideration of the legislature, and the act of the legislature passed in pursuance thereof was contested on the ground that it was not included in the first call or proclamation; and the court, in sustaining the act, says, on page 230:

"Whether the general assembly ought to be called together in extraordinary session is always a matter for the executive alone. How it shall be called, and what notice of the call is to be given are also for him alone. The constitution is silent as to these matters, and wisely so, for emergencies may arise such as riots, insurrections, widespread epidemics, or general calamities of any kind, requiring the instant convening of the legislature, and, in the power given to the governor to call it, no time for the notice is too short, if it can reach the members of the general assembly; and with telephones and telegraphs the uttermost portions of the commonwealth can at any time be reached between the rising and the setting of the sun. In this connection it may be noted as significant that the governor is not even required by art. IV, sec. 12, empowering him to call the general assembly

Criminal Law—Fish and Game—A circuit court commissioner may hold preliminary examination and bind over to circuit court for violation of game laws, whether a felony or misdemeanor.

February 4, 1919.

A. F. MURPHY,

District Attorney,

Marinette, Wisconsin.

In your letter of January 31 you ask whether or not a circuit court commissioner can hold a preliminary examination in prosecutions of violations of the game laws.

Your attention is directed to the following authorities:

In *Faust v. State*, 45 Wis. 273, 274, it is held:

"Court commissioners, * * * may take examinations in all cases of crimes or misdemeanors," etc.

It was further held that nothing but a specific declaration that an offense created by statute is cognizable only by some certain court can deprive circuit courts and their commissioners of jurisdiction. *State v. Grunke*, 88 Wis. 159.

In *State v. Wieden*, 141 Wis. 585, 588, it was held:

"So the mere fact that offenses of the character of the one involved here were created, and authority given to administer the law by prosecutions *in justice's court*, does not militate against the circuit courts exercising their constitutional jurisdiction in such cases, and, incident thereto, examining magistrates, such as court commissioners, holding preliminary examinations as in other criminal cases."

In an opinion rendered by this department May 15, 1917, to Albert W. Grady, district attorney, Port Washington, VI Op. Atty. Gen. 318, 320, in commenting upon the *Wieden* case Attorney General Owen said:

"It explicitly holds that persons charged with misdemeanors may be examined by the court commissioners and committed to the circuit court for trial."

The authorities, therefore, hold uniformly that in the absence of specific statutory enactment designating certain other courts court commissioners have jurisdiction to hold preliminary hearings in both felonies and misdemeanors and to bind the accused over for trial to the circuit court.

The game laws are no exception to the above rule. Your question is therefore answered in the affirmative.

Constitutional Law — Wisconsin Statutes — Appropriations and Expenditures—Taxation—Donations by towns, villages, cities and counties to the Red Cross and other war work organizations may be validated by statute.

February 5, 1919.

HONORABLE AL. C. ANDERSON,
State Senator.

Pursuant to your request I have examined Bill No. 3, A., with a view of determining whether, if enacted into a statute, the statute would be constitutional.

This proposed act is intended to legalize and validate appropriations of money made by any county, city, town, village or school district to the American Red Cross, or to the organizations participating in the United War Work campaign.

You are advised that, in my opinion, such a statute would be constitutional and would have the desired effect. Contributions to the organizations named are contributions for a public purpose.

In prosecutions for violations of the United States espionage act, the federal courts have thus far uniformly held that the American Red Cross and also the organizations which participated in the United War Work campaign are instrumentalities of the government, and helpful in the prosecution of the war, and that persons who willfully obstructed or interfered adversely in the collection of funds for these organizations violated that act.

The reason that the contributions made to these funds by towns, counties, and municipalities were illegal and invalid is that the statutes do not grant them authority to make such contributions or appropriations. But I feel very certain that the legislature could confer such power upon them, and it is

1. You are advised that it is lawful for the state dairymen's association to publish paid advertising in connection with its annual report. The incorporation of such advertising with reports of "state officers, departments, boards, commissions and commissioners" is expressly prohibited by statute. In speaking of that class of reports, the statute says:

"* * * No report shall contain any advertising matter nor any copying of the Wisconsin session laws or statutes except minor extracts explanatory of and incorporated in the text." See. 35.26, Stats. (sec. 26, ch. 336, Laws 1917).

This express prohibition as to that class of reports would seem to indicate that the legislature considered it necessary to forbid it, and it furnishes grounds for implying that work not prohibited, is permissible. Authority for printing the state dairymen's association's annual report is given by subsec. 3, sec. 35.30, Stats. (sec. 31, ch. 336, Laws 1917).

You are thereby empowered in your discretion to print the annual transactions of that association, being limited to 3,000 copies and 200 pages. The purpose of said advertising is to reduce the cost to the state of printing the transactions; and let it be understood that this opinion goes no further than to say it is lawful to print the paid advertisements where doing so will lessen the expenditure of public money. If confined within those limits the advertising is indirectly remunerative to the state and harms no one. If this construction I put upon the statutes is incorrect, still there is no one harmed by it and no one to make complaint. Of course that would be no justification for disregarding a plain statute or making a palpable misconstruction of one, but it is a good excuse for resolving the doubt if there be any in permitting the advertising in connection with the report.

2. There is appropriated annually to the potato growers' association by subsec. 4, sec. 20.61, Stats. (sec. 100, ch. 14, Laws 1917), \$2,000

"for the promotion of the potato growing interests of the state; and any moneys paid into the general fund by said association are appropriated therefrom and added to this appropriation."

What was said in answer to the first question applies here also. The language just quoted clearly contemplates the receipts of moneys by the potato growers' association from sources other

than the state treasury. For aught that can be learned from the statute, the legislature may have had in mind the publication of paid advertisements as a source of revenue. At any rate, I do not find that forbidden, and it seems to me that, as a practical matter, it should be permitted, and that the law does permit it. The money so received is put into the public treasury, becomes a revolving fund, and is a public benefit. You are therefore advised that the association may insert paid advertisements in pamphlets issued by it and that if the advertising does not pay the entire expense of publication, the deficiency may be paid out of its state appropriation.

3. The meaning of the words "job printing" as contained in sec. 35.80, Stats., is to be found in sec. 35.34, Stats. (Sec. 35, ch. 336, Laws 1917.) That is a statutory definition and I can add nothing to it. Printing that is not fairly embraced within the language of the last named section is not job printing and must be classified under some other subdivision of sec. 35.01, Stats.

4. Orders for publishing the laws, advertisements, proclamations and other notices required to be published are made by the "state officer, board or commission required by law to cause the newspaper publication." Sec. 35.68, Stats. (sec. 69, ch. 336, Laws 1917.)

In this connection, your attention is called to the fact that in the enumeration of powers and duties of the printing board, particularly in the matter of issuing orders for public printing, there is excepted the "printing of the first, fifth, sixth and seventh classes." Sec. 35.03, Stats. The fifth class is "newspaper publications." Sec. 35.01, Stats. I conclude therefrom that the officer making the order for the newspaper publication should make it direct to the paper. The auditing of claims therefore falls under the general rule of auditing claims against the state. Such claims are to be audited by the secretary of state.

Public Officers—Notary Public—Bonds.—The surety upon the bond of a notary public is liable for the acts of the notary as such during his term of office.

Action upon such bond may be begun at any time before the running of the statute of limitations.

Such surety is not liable for acts committed after the notary has filed his resignation with the secretary of state.

January 25, 1918.

HONORABLE MERLIN HULL,

Secretary of State.

In your letter of January 21 you enclose a letter from the Fidelity and Casualty Company of New York in which they state that under date of January 30, 1914, they wrote the bond of a notary public, which was filed in your office, and that they have received information that this man is no longer a notary, and ask as of what date they may consider their future liability terminated.

You state that this notary resigned June 24, 1916, and you ask my opinion upon the question asked by the casualty company.

Under sec. 174, Stats., the bond given by the notary is one for the faithful discharge of the duties of his office. The surety upon the bond is liable for any acts committed by the notary as such during the continuance of his office. Action for such liability may be brought at any time before the running of the statute of limitations. The surety would not be liable for acts committed after the filing of the resignation.

Fish and Game—Words and Phrases—“Green skin of deer”
defined.

January 25, 1918.

FELIX A. KREMER,

District Attorney,

Phillips, Wisconsin.

In your communication of January 22 you direct my attention to ch. 668, Laws 1917, sec. 29.40, par. (3), which provides that

“no person shall have in his possession or under his control the green head or green skin of a deer between the tenth day of January and the succeeding 21st day of November of each year,”

and you say that the majority of the people are not familiar with this law, and you would like to have a construction from this department as to what is a "green skin," in contemplation of this statute.

You state that you believe that there are quite a number of hides still in the possession of the persons who lawfully shot deer during the last hunting season, and where these hides have not been stretched out and dried that the condition would be very much like that of a hide from a deer which was shot more recently.

The question submitted by you is one of fact rather than one of law. In an official opinion rendered by my predecessor, Vol. II, Op. Atty. Gen., p. 387, the same question was answered as follows:

"This term has not been defined by our statute. Neither have I been able to find any definition placed upon it by any court of last resort. Webster defines 'green' of pelts, etc., in tanning, as 'fresh from the animal, not salted or dry.'

"It seems to me that this would be the definition that the courts would give this term." P. 388.

The real purpose of the provision of this statute is to prevent the unlawful killing of deer in the closed season. November 30 is the last day in the year on which deer may be lawfully shot. See sec. 29.18. The above quoted provision makes it unlawful to have green skins of deer in possession after January 10.

This gives every person who has shot a deer and has the green hide of such deer in his possession ample time to dry the same, so that it is unnecessary for him to have it in his possession as a green skin after January 10. This law makes it possible for you to convict a man who has unlawfully shot a deer in the closed season, although you have no other proof than the fact that he has in his possession the green skin or hide of such deer.

If, however, you are satisfied that the deer was not shot during the closed season but was shot in the open season, and merely because the parties were ignorant of the law they have not strictly complied with the provision to get the hide in such a condition that it could no longer be considered as a green hide, you would be justified in exercising your discretion and desisting from bringing a prosecution.

In all cases, however, where you are in doubt or where you

are satisfied that the deer was killed during the closed season, a prosecution should be brought; and in those cases it becomes a question of fact whether the skin is fresh from the animal or green, in contemplation of this statute. All doubtful cases must be determined by the testimony of experts and submitted to the jury as a question of fact. Each individual case must be decided on its own merits. No other definition can be prescribed than the one laid down by my predecessor.

Insurance—Life Insurance—The special charter of the Northwestern Mutual Life Insurance Company permits the company to issue a life policy with a waiver of payment of premiums upon the insured becoming disabled.

Sec. 1951 amends the special charter of said company so as to permit it to invest its funds under said section.

January 28, 1918.

HONORABLE M. J. CLEARY,

Commissioner of Insurance.

In your favor of January 11 you state, regarding the Northwestern Mutual Life Insurance Company, of Milwaukee:

"Under the provisions of this [its] charter and its amendments the company is authorized to transact the business of life insurance and to grant and purchase annuities. Recently the company adopted, and is now issuing policies which provide that if the insured becomes totally and permanently disabled, all future premium payments by him to the company will be waived. This is, in substance, granting sick and accident benefits; in other words, it is doing a disability insurance business. The original charter and the amendments to the original charter do not provide that the company may do a disability insurance business. The general statutes of the state, however, do provide that a domestic life insurance company may do a disability business."

And you ask:

"Does a general statute, authorizing domestic life insurance companies without specific reference to the fact that they are organized under general or special charter to do a disability insurance business, confer this power upon a company organized under a special charter, as the Northwestern is organized?"

You further state:

"Under sections 10 and 11 of the original charter of the company, it is specifically authorized to invest its funds in certain ways and in named securities. Section 1951 of the Wisconsin law specifies these [those] securities in which domestic life insurance companies are authorized to invest their funds. The provisions of section 1951 differ from those contained in the charter of the Northwestern. Did the adoption of section 1951 have the effect of amending the charter provisions of the Northwestern Mutual Life Insurance Company on the subject of the investment of its funds?"

The original charter of the Northwestern Mutual Life Insurance Company is contained in ch. 129, Private and Local Laws 1857. This charter was granted to the Mutual Life Insurance Company of the state of Wisconsin. By subsequent amendment the name was changed to Northwestern Mutual Life Insurance Company. The provisions of the charter affecting the questions you ask have never been amended specifically, so that the original charter, as regards the questions you ask, stands as first enacted, unless amended by the general law.

Sec. 3, ch. 129, Private and Local Laws 1857, reads, in part, as follows:

"The corporation hereby created, shall have the power to insure the lives of its respective members, and to make all and every insurance appertaining to, or connected with life risks, and to grant and purchase annuities."

Sec. 7 thereof reads as follows:

"Every person who shall become a member of this corporation by effecting insurance therein, shall, the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees; and no premium so paid shall ever be withdrawn from said company, except as hereinafter provided, but shall be liable to all the losses and expenses incurred by this company during the continuance of its charter."

Sec. 8 of said charter reads as follows:

"The trustees shall determine the rates of insurance and the sums to be insured."

The above provisions quoted from the charter of the company are the only ones having any bearing on the question of whether

the company can do a strictly disability business, so-called, and it would seem that a mere reading of those provisions would be sufficient to show that the company is not thereby authorized to do a strictly disability business; and by the term "strictly disability business" is to be understood a business whereby the company is to pay the policy holders something as might be provided in the policy because of his disability. With this understanding of the term "disability insurance" I would say that the company is not authorized under its original charter to do that kind of business.

Sec. 1897 authorizes the formation of insurance companies thereunder for certain purposes, and a mention of several subjects or risks of insurance in any subsection thereof indicates that any one or more or all may be included. Subsec. (3) thereof reads as follows:

"(3) Life Insurance.—Upon the lives or health of persons, and every assurance pertaining thereto, and to grant, purchase or dispose of annuities and endowments."

Sec. 1897a provides:

"Companies may be formed upon the stock or the mutual plan to transact any kind of insurance authorized by section 1897."

Subsec. 3, said sec. 1897a, in part, reads as follows:

"* * * And policies under subsection 3 may contain any provision operating to safeguard the insurance against lapse, or giving a special surrender value or an annuity providing for payments not exceeding in any year one-tenth of the sum insured during the lifetime of the insured, with or without reduction of the sum insured, in the event that the insured shall become totally and permanently disabled from any cause."

These provisions of the statutes, together with subsec. (4), sec. 1897, undoubtedly give companies organized thereunder the right to do disability insurance business, but as a whole they do not seem to apply to a company like the Northwestern Mutual, organized under a special charter.

It has been suggested that the phrase quoted from subsec. 3, sec. 1897a, above—that is, "and policies under subsection 3 may contain any provision," &c.—really applies to any company organized under the laws of this state entitled to do life insurance business, and, therefore, that it would apply to the North-

western Mutual. This suggestion does not seem entirely clear, in view of the fact that these statutes seem particularly designed to apply to companies organized under special charters. These statutes, however, may be said to have a bearing upon the construction of the charter provisions of the Northwestern Mutual Life Insurance Company as to what is the general policy of the state, and these statutes show that as to life insurance companies organized thereunder the policy of the state is to permit life insurance companies to be organized for the purpose of doing a life insurance business combined with disability business, and even permit combining in the same policy risks for both life and disability business. In other words, this legislative policy of permitting both life and disability business to be written in the same insurance policy possibly might be said to call for a more liberal reading of the provisions of the special charter of a company in determining whether its special charter provisions permitted it to do both of these classes of business, or modifications thereof.

As I understand it, the real question here is whether the Northwestern Mutual Life Insurance Company can issue policies which provide that if the insured becomes totally and permanently disabled, all future premiums by him to the company will be waived. It will be noticed that such a provision in the policy calls for no payment by the company to the insured because of his disability, and calls for no payment by the company to the insured as an annuity because of such disability, so that the writing of such an insurance policy by the company is not the doing of a strictly disability business. The disability feature as exercised by this company only pertains to the remitting of the premiums, upon disability, of a life policy.

Sec. 3 of the company's special charter permits the company to make all and every insurance pertaining to or connected with life risks. The policy in question is purely a life policy, and it is not at all difficult to see that the feature in question, by which the company waives the payment of future premiums by the insured, upon the insured becoming totally disabled, is a feature that pertains to or is connected with life risks, within the meaning of said clause 3. Moreover, this feature of the policy in question has greater relation to "rates of insurance" which by sec. 8 of the company's charter is left wholly to be determined by the trustees. Under said sec. 8 the trustees and the com-

pany undoubtedly have the power to fix the premiums to be paid for a straight life policy, and the premiums to be paid for a term policy. The only difference between a term policy and the policy in question, as regards rates, is that the premiums to be paid on a term policy terminate at a time certain, while on the policy in question they terminate at a time uncertain, depending upon a contingency, to wit, the total disability of the insured. The practice is to make the premiums on a term policy less than those of a straight life policy, and undoubtedly the premiums on a policy such as the one in question are likewise greater than those of a term policy, the theory being to make the rates on each class of policies adequate to carry that class of insurance.

If the company has power, under the terms of its charter, to terminate the payment of premiums at a time certain, as in the case of term policies, I can see no valid reason why it would not have power to terminate the payment of premiums of the class of policies in question upon the happening of the disability of the insured. Undoubtedly the insured pays an additional rate because of this waiver of payment of future premiums upon the insured becoming totally disabled, and I am unable to see why, under the terms of the company's charter, if the trustees have power to fix the premiums to be paid on a straight life policy and the premiums to be paid on a term policy, they would not also have the power to fix the rate of premium to be paid on policies such as the one in question, terminating the payments upon the insured becoming totally disabled. We have no statute prohibiting the trustees doing so. There is nothing in the charter of the company prohibiting it, while on the other hand the charter does give the company power "to make all and every insurance appertaining to or connected with life risks," and giving the trustees power "to determine the rates of insurance." It would seem that the feature of the policy here in question was a feature "appertaining to or connected with life risks," and the provision that the premiums should be waived, upon the insured becoming totally disabled, is a determination by the trustees and the company of the "rates of insurance" within the meaning of the language of the special charter.

True, the rule is that corporations possess only such powers as are expressly granted, or such as are necessary to carry into effect the powers expressly granted.

In the case of *Dartmouth College v. Woodward*, 4 Wheaton (U. S.) 518, 636, Chief Justice Marshall said:

"A corporation, being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."

An incidental power was referred to as one that is directly and intimately appropriate to the execution of the specific power granted; and not one that has a slight or remote relation to it. But corporations are given certain implied powers, and these implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those expressly granted, but comprise all that are necessary in the sense of being appropriate, convenient and suitable for such purposes, including the right of a reasonable choice of means to be employed. 10 Cyc. 1096.

"It is a general principle of law that every corporation has by necessary implication the power to do whatever is necessary to carry into effect the purposes of its creation, unless the doing of the particular thing is prohibited by law or by its charter." 4 Thompson's Comm. on Corporations, sec. 5641.

"If the means employed are reasonably adapted to the needs for which the corporation was created, they come within its implied or incidental powers, though they may not be specifically designated by the act of incorporation." 4 Thompson's Comm. on Corporations, sec. 5641.

In sec. 5642 of the authority last cited we find this language:

"Corporations take by implication the right to use all reasonable modes of executing their express powers which a natural person might adopt in the exercise of similar powers. They must have a choice of means and are not to be confined to any one mode of operation."

To the same effect see *Madison &c. Plank Road Co. v. Watertown &c. Plank Road Co.*, 5 Wis. 173, 181.

In the case of *Winterfield v. Cream City Brewery Co.*, 96 Wis. 239, 242, we find this language:

"The general rule, no doubt, is that except as restrained by law corporations have the implied power to make all such contracts as will further the objects of their creation, and their dealings in this regard may be like those of an individual seeking to accomplish the same ends. * * * They are not lim-

ited in law to the use of such means as are usual or necessary to the objects contemplated by their organization, but where not restricted by law, may choose such means as are convenient and adapted to the end, though they be neither the usual means, nor absolutely necessary."

The same idea is borne out in the case of *Calumet Service Co. v. Chilton*, 148 Wis. 334, 353.

I am satisfied that the Northwestern Life Insurance Company, in writing the policy in question, providing for a waiver of payment of premium by the insured upon his becoming totally disabled, is doing a life insurance business within the clear meaning of its charter and the general understanding of the term "life insurance," and the provision regarding the waiver of premium payments is a means or method of transacting business within the rule of the above authorities.

I, therefore, advise you that the Northwestern Mutual Life Insurance Company has, under its charter, the power to write life insurance with a provision in the policy that upon the total disability of the insured the premium payments thereafter will be waived by the company.

Your other question is:

"Did the adoption of sec. 1951 of our statutes have the effect of amending the charter provisions of the Northwestern Mutual Life Insurance Company on the subject of the investment of its funds?"

Sec. 1951 has the following introduction:

"Every life insurance company organized under the laws of this state may invest its assets as follows."

This language is so clear that it leaves no room for construction. It was intended by the legislature to apply, as the language says, to "every life insurance company organized under the laws of this state," which certainly includes the Northwestern Mutual Life Insurance Company. So that I have no hesitation in advising you that this section of the statutes amended the charter of the Northwestern Mutual Life Insurance Company, provided it was ever acted upon or accepted by the company, and I assume that there is no question about that, that the company has acted upon and accepted this amendment of its charter. If the company has ever exercised the authority granted it by sec. 1951 by any substantial course of conduct or dealing under said

section, then it has accepted the provisions of that section. Certainly the state could not complain, having granted this power to the company, under sec. 1951 of our statutes, if the company should choose to exercise it at any time.

I, therefore, advise you that the company is authorized to invest its funds as provided in sec. 1951 of our statutes, and that that section amends its charter in that regard.

Live Stock—Sec. 4, ch. 504, laws of 1917, construed to give the department of agriculture authority to sell condemned animals at live weight to private individuals to be used for quarantine purposes for raising their progeny.

January 29, 1918.

DR. O. H. ELIASON,
State Veterinarian.

In your letter of January 24 you ask for my interpretation of the following quotation from ch. 504, laws of 1917, with respect to the following questions:

1. "Can this department condemn animals and then sell them at live weight to private individuals to be used for quarantine purposes and the raising of purebred calves from such cattle?"
2. "Can the department of agriculture with any of the moneys described in the above mentioned section pay for the transfer necessary in this connection, which is from twenty-five cents to one dollar per head, according to the by-laws of the different associations?"

See. 4, ch. 504, Laws 1917, provides, in part:

"* * * The department of agriculture shall dispose of reacting animals in a manner most advantageous to the state, and from any moneys received as net proceeds may pay for temporary care, pasturage, feeding of such animals and for renting and handling farm lands used for that purpose."

The language used is very broad and lodges a wide discretion in the department of agriculture. It is reasonable to assume that the legislature had in mind the fact that a progeny free from tuberculosis can be had from animals showing reaction and that it is both economical and humane in many cases to make use of the so-called "Bang quarantine farms," where reacting

animals are kept temporarily for the purpose of saving the progeny.

You are advised, in answer to your first question, that the language of the statutes "in a manner most advantageous to the state" is broad enough to include the disposing of animals condemned to private individuals to be kept in quarantine for the purpose of raising pure bred calves from such cattle.

Your first question is answered, therefore, in the affirmative.

There is nothing in the statutes that provides for the use of moneys received from the sale of reacting animals to pay for the registration of their progeny. In the absence of any specific authority given in the statute, no such authority is lodged in the department of agriculture.

Your second question, therefore, is answered in the negative.

Public Officers—The railroad commission of Wisconsin can employ and contribute to the salary, jointly with the railroad commissions of other states, of an expert who is located at Washington, D. C., and furnishes to all commissions necessary information affecting railroad transportation.

January 29, 1918.

RAILROAD COMMISSION OF WISCONSIN.

In your letter of January 26 you state that several of the state railroad commissions are contributing to the salary of a joint representative at Washington, D. C.; that this representative is in touch with the interstate commerce commission and various war committees having to do with transportation throughout the country; that said representative is in position to, and does, furnish to said railroad commissions information which is valuable and necessary in the performance of their respective functions; and that said service is in the nature of expert service.

You ask if the Wisconsin railroad commission can legally employ said representative as a member of the commission staff, under the circumstances as stated, and contribute to his salary not to exceed five hundred dollars per year, it being understood that he will also serve other commissions simultaneously and

that he will receive a part of his salary from such other commissions.

This opinion is predicated upon the following facts stated in substance in your letter:

1. That the federal government has assumed general control of transportation facilities as a war measure.
2. That present conditions call for more complete uniformity and coördination of the functions of the various state railroad commissions than in normal times.
3. That the nature of the Wisconsin commission's functions are such that it is necessary to take into account plans and orders of war committees and the interstate commerce commission in administering transportation in Wisconsin.
4. That in the judgment of the Wisconsin commission, in order to give adequate transportation facilities and make and enforce reasonable regulations and perform all its functions properly under existing conditions, it is necessary to have in Washington, D. C., a representative of the Wisconsin commission who can render for them expert service by furnishing timely and accurate information.

Sec. 1797—1, subd. (h), provides:

"Said commission * * * may employ such experts and temporary employees as may be necessary to perform any service it may require of them. The experts employed under this section shall be exempt from the operation of sections 990—1 to 990—32, inclusive."

It will be noted here that the commission is given authority to employ such expert service as they need to carry out the functions of the commission.

That it becomes necessary, and was in the legislative mind when the power was given to the commission, to make investigations in conjunction with the interstate commerce commission is evidenced by sec. 1797—1, subd. (m), as amended by ch. 108, Laws 1917:

"The commission may confer by correspondence, or by attending conventions, or by appearance in any proceedings, or otherwise, with the railroad commissioners of other states, and with the interstate commerce commission, on any matters relating to railroads or other carriers."

It would therefore seem that expert investigation under the direction of the Wisconsin commission, in conjunction with other

state commissions and the interstate commerce commission, touching upon matters of transportation in Wisconsin, is authorized by the statute.

The only remaining question is whether the commission may employ an expert jointly with other commissions, thereby having upon its staff a part time employee. Subd. (h), sec. 1797—1, above quoted, especially exempts expert service from the provisions of the Civil Service Law.

The nature of expert service is such that it lends itself to temporary employment as well as permanent, and this was no doubt in the legislative mind when the section above quoted was enacted, exempting expert employment from civil service rules and providing that such employment might be classed with temporary employees.

Any expense incurred by a member of the railroad commission's staff, outside of the state, would be subject to the provisions of sec. 14.32, which provides, in substance, that the secretary of state shall not

"audit items of expenditure for expenses of any officer or employee of the state or of any department or institution thereof incurred while attending any convention or other meeting held outside the state unless such expense is authorized by the governor, or specific statutory authority exists therefor." Ch. 622, Laws 1917.

I know of no provision of the statute that prohibits, either in specific terms or by reasonable implication, the employment of expert services under the circumstances and for the purposes above stated.

Your question, therefore, is answered in the affirmative.

Physicians and Surgeons—Public Health—Chiropractors—Quarantine—Only licensed physicians may visit quarantined places to treat patients therein.

The health officer only is vested with authority to declare a quarantine.

When the home of a physician is quarantined he may treat members of his family, but must remain at home, or else live away from home and conduct himself as any other physician is required to do.

January 31, 1918.

STATE BOARD OF HEALTH.

You have requested an opinion upon the following matters:

"1. The question arises concerning the visitation of cases quarantined for communicable diseases by practitioners of the chiropractic school. In a certain village in this state there is an epidemic of smallpox; the cases are under quarantine. It appears that the chiropractor visits promiscuously the quarantined homes, claiming in one case that he had given the patient an adjustment. It so happens that seven families, all related to this man, have smallpox, and that this chiropractor has visited from one family to another, staying all night, taking meals, and in one instance, as before stated, giving an adjustment. The question arises as to whether a chiropractor is authorized under the law to treat communicable diseases, such as smallpox, diphtheria, scarlet fever, etc., as they are permitted under sec. 1435e, of the statutes, to practice their profession in this state, provided they do not represent themselves to be registered or licensed.

"2. In the home where this chiropractor stayed there was smallpox, and after several in the household had the disease he went to the town chairman and told him there was smallpox in the home and wanted a sign on the house. The sign was given him to be tacked up in a conspicuous place, which was done. The question is: Was this house legally quarantined as provided in 1416—15 of the statutes?

"3. It has been the practice, although not specifically designated in the law, that if a quarantinable, communicable disease is in the home of a physician, the physician either remains in the home or takes up his residence outside and visits the sick in his home at such times as he deems necessary. Is not a physician, therefore, placed in the same position as a layman when he has a communicable disease in his home, either he must remain in the quarantined home, or, after disinfection of his person and clothing, take up his residence outside, and thereafter remain outside and exercise the same relation to the sick person in his

home as he would exercise toward a sick person he was called upon to attend in some other home?"'

1. Chiropractors are not privileged to disregard the quarantine of dangerous communicable diseases. If they treat persons suffering from any such diseases, or any one within the quarantined premises, they must consider themselves quarantined. A chiropractor is not a physician within the meaning of the statutes of Wisconsin. He is not licensed as a physician or surgeon or certified to be such, and is strictly forbidden to use the title of doctor or any of the letters which indicate it.

"It shall be unlawful for any person not possessing a license to practice medicine, surgery or osteopathy to use or to assume the title 'doctor' or to append to his name the words or letters 'doctor,' 'Dr.,' 'specialist,' 'M. D.,' 'D. O.,' or any other title, letters, combination of letters or designation which in any way represents or may tend to represent him as engaged in the practice of medicine, surgery or osteopathy in any of its branches." Sec. 1435h, Stats.

"Wherever either the words physician, surgeon, or osteopath are used in the statutes of the state of Wisconsin, they shall be construed to mean and include any and all persons holding a license or certificate of registration to practice either medicine, surgery, or osteopathy, and to no others." Sec. 1436b, Stats.

The statute prescribes the form of quarantine notice which must be upon the quarantine placard that is posted in a conspicuous place upon the quarantined premises, and is in the following words:

"* * * All persons are forbidden to enter or leave these premises without a special written permit from the health officer having jurisdiction, and all persons are forbidden to remove, obscure or mutilate this card or to interfere in any way with this quarantine without written orders from said health officer, under penalty of a fine or imprisonment as provided in section 4608 of the statutes." Sec. 1416—15, Stats., as amended by ch. 239, laws of 1917.

Disobedience or disregard of the notice subjects the violator to the punishment provided by that section.

By inference, the physician attending the person afflicted with any such diseases is permitted to pass and repass the quarantine bar for the purpose of treating the patient, by rule 6 of the rules of the state board of health, which said rule prescribes

precautions to be taken by such physician. All other persons must observe the bar, unless furnished with a written permit by the health officer. A chiropractor is permitted to treat patients according to his school of practice (sec. 1435e, Stats.), but so is a chiropodist, a masseur (sec. 1435d, Stats.), a Christian Science healer (sec. 1435i—1), and an optometrist (sec. 1435f—35), but they must one and all respect the quarantine, the same as must any ordinary, untitled citizen. The law does not presume that such practitioners as those named can diagnose diseases required to be quarantined, and they are exempted from being required to report such diseases. Licensed physicians are the only practitioners who are required to report the existence of contagious diseases, (Sec. 1412a, Stats.)

A chiropractor is not charged with that duty and is not subject to a penalty if he fails to report the existence of such a disease. The latter, in every way, is subject to the law of quarantine in the manner that the ordinary run of people are.

2. The house in question was not legally quarantined unless the town chairman was the health officer. Not every one can declare a quarantine. That power is vested locally in the health officer and in him alone.

*** * * The health officer having jurisdiction, upon being notified or having knowledge of the existence of any disease which has been designated by the state board of health in its rules and regulations to be quarantinable, shall immediately in person or by deputy quarantine the infected house, rooms or premises. * * *. Sec. 1416—15, Stats. (Ch. 239, laws of 1917.)

Attention is called to the fact that the quarantine must be declared by the health officer or his deputy. No provision of law has been found which prescribes the manner of quarantining by deputy or delegating this power. It may however, I think, be inferred from the language last quoted that the health officer may send or deputize any person to post the placard and notice. In the case you mention, the chairman gave the placard to a chiropractor to be posted, and it was by him in fact posted. If the chairman was the health officer, the law was complied with. If he was not such officer, then the premises were not quarantined by the health officer or his deputy.

3. The answer to your third question must be in the affirmative. All persons, excepting the attending physician and those

authorized in writing by the health officer, must observe the quarantine. If a physician has a member of his family afflicted with a communicable disease and his home has been quarantined, he may remain as a member of the family and is subject to the quarantine that other persons are, or he may live outside of the premises and simply visit it in the capacity of physician. The statute and your rules plainly contemplate that those who go and come must not be inmates of quarantined places. The inmates must remain there until the quarantine is raised. The privilege which a physician enjoys beyond that possessed by all persons is confined to his office of practitioner and physician to the afflicted person. He cannot, under the guise of a licensed physician, remain an inmate of the house and at the same time practice his profession generally. By remaining an inmate, he is exposed to the disease, and therefore the law requires that he be isolated from the public.

Automobiles—Municipal Corporations—A city must pay the required registration fee for all its automobiles, motor cycles and other similar motor vehicles, including police and fire department motor driven vehicles.

January 31, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of January 30 you ask whether or not municipal corporations are exempt from the payment of automobile license fees for cars owned and operated solely for the purposes of such municipalities.

In an opinion by my predecessor, Honorable Walter C. Owen, reported in Vol. V, Op. Atty. Gen., p. 77, being an opinion to Mark Catlin, the district attorney at Appleton, under date of January 28, 1916, I find the following:

"In the light of the provisions of these statutes [secs. 1636—47 to 1636—57, inclusive, Stats.], and of the considerations affecting the operation of fire and police department vehicles of cities, and motor ambulances, which are matters of common knowledge, and in view of the authorities herein cited, I am of the opinion that these statutes are inapplicable to vehicles of the classes mentioned and were not intended by the legislature to apply thereto." P. 92.

The opinion passed upon the law as it was in 1916, after the enactments of 1913 and 1915. Your attention is called to the fact that there has been a legislative expression upon this matter since that time, contained in ch. 249, laws of 1917. Prior to this legislative enactment there had been considerable discussion throughout the state as to whether or not the law was applicable to motor driven vehicles in the city service. Ch. 249, Laws 1917, contains the following:

"Any police officer of any city, county, town or village shall be exempt from the provisions of said sections 1636—47 to 1636—57, inclusive, while *actually in pursuit of a criminal or attempting to apprehend a person who is violating any of the provisions of these sections*, and all members of fire departments shall be exempt from such provisions *while going to a fire or answering a fire alarm*, but shall be subject to local municipal regulation."

It should be noted here that the exemption does not exempt any class of *vehicles* from registration or payment of license fee, but renders the law inapplicable only as to certain *persons* while in the performance of certain specified duties, leaving a clear inference that those portions of the statute which relate to the registration and license of vehicles were intended to have a general application, and only those provisions of the law which relate to traffic movements on the streets were inapplicable in certain specified cases.

The exceptions are few and carefully circumscribed. The only exceptions and exemptions are as follows:

First: A police officer while actually in pursuit of a criminal.

Second: A police officer while attempting to apprehend a person violating the motor vehicle law.

Third: Members of fire departments *while going to a fire or answering a fire alarm*.

It is apparent that the only exceptions that the legislature endeavored to extend relate to the matter of obeying traffic rules, not to the matter of registering and licensing motor vehicles of any character whatever.

The rule *expressio unius* is specially applicable here, in view of the fact that the legislature, in inserting these exceptions, was amending a general law that had been in operation and much criticized in the various municipalities of the state.

If there had been any legislative intent to exempt any kind of motor vehicle whatsoever from the payment of registration fee, presumably some words evincing such an intent would have been inserted. I find no such words in the statutes.

Sec. 1636—47 is broad enough to include the class of vehicles under consideration. It provides, in part:

"No automobile, motor cycle or other similar motor vehicle shall be operated, ridden or driven along or upon any public highway of the state, unless the same shall have been registered * * * in accordance with the provisions of sections 1636—47 to 1636—57."

"This language, taken literally, is broad enough, doubtless, to include automobile fire engines and trucks, automobile police patrol wagons and automobile ambulances, and the like. While these vehicles are not, perhaps, at once suggested by the term 'automobiles,' they are, doubtless, as much within the class of 'other similar motor vehicles' as are many of the various types of motor trucks used for private and commercial purposes and to which these statutes were undoubtedly intended to apply."

Vol. V, Op. Atty. Gen., pp. 77-78.

That the legislature has the power to impose a registration fee upon automobiles owned by cities is well established.

"The state has the power to license as a means of regulation all business and employments which impose a burden on the public or when the public interests or welfare require that the business or occupation should be regulated. Licensing automobiles is a valid exercise of the police power. That a reasonable fee may be imposed as an incident to the exercise of the police power of regulation is too well settled to require citation of authorities." Berry on Automobiles, 2d ed., sec. 80.

"While in the absence of constitutional prohibition a state may tax the property of its municipal corporations or a municipality having general powers of taxation may tax its own property, an intention to tax such property of a municipality as is devoted to public or governmental purposes will not be implied, but on the contrary such property will be held to be exempt unless intention to include it is clearly manifested." 37 Cyc. 874.

In *State v. Collins*, 162 P. 556 (Wash. 1917), an automobile was operated by an employee of the city in the light and power department without a license. The statute of Washington provided in substance that no motor vehicles shall be operated upon any public highway without a license first having been obtained therefor, except as hereinafter provided. The exception was:

"Motor vehicles owned by any city for the police and fire departments thereof and used exclusively in those departments shall be exempt from payment of license fees."

The court held the statute constitutional and held that the state had the right to require the registration and payment of fee for the operation of automobiles by any city. The court also held that it was a proper classification if the legislature saw fit to exempt fire and police automobiles from the payment of a license fee.

"A law is constitutional which exempts from registration fees vehicles used for municipal purposes." Sec. 112, Babbitt on Automobiles, 2d ed.; *Ruggles v. State*, 120 Md. 553.

"There is no unjust and unfair discrimination in exempting from the provisions of an act requiring the licensing and registering of motor vehicles, fire engines, fire trucks, and police patrol wagons, these being governmental agencies maintained by general taxation, and public ambulances including those owned by public authorities as well as those privately owned may be legitimately excepted from the provisions of such act because of the public welfare involved in their use." *Graves v. James*, 18 Ohio, C. C. N. S. 488, 52 L. N. S. 949, Note.

While it is a proper classification to exempt automobiles used in the performance of a governmental function from the operation of the registration and license features of the automobile law, it is very clear that there is nothing to prevent the legislature from including them within the act if they see fit. I have been unable to find that the courts have anywhere held that the legislature has not the power unless prohibited by constitutional provision to require a license fee from municipally owned automobiles used in the performance of governmental functions.

I am of the opinion that secs. 1636—47 to 1636—57 apply in all respects to all municipally owned automobiles and other similar motor vehicles, except as to certain persons while in the use of said vehicles for certain purposes specifically mentioned in the statute; that the language "automobile, motor cycle or other similar motor vehicle," used in sec. 1636—47, Stats., is broad enough to include all automobiles, motor cycles and other similar motor vehicles owned by cities, whether used entirely within the city and for governmental functions only or for other purposes; and that a city must pay the required license fee for all automobiles, motor cycles and other similar motor vehicles used by said city.

Public Officers—District Attorney—Charitable and Penal Institutions—The district attorney should file a claim against the estate of an inmate of the home for the feeble-minded for unpaid maintenance in case of a proceeding under sec. 3995b.

February 2, 1918.

E. S. JEDNEY,

District Attorney,

Black River Falls, Wisconsin.

It appears from your letter of recent date that Emma Friedl, of the town of Cleveland, in your county, was committed to the state home for the feeble-minded and is still an inmate; that she is the owner of a small tract of land worth about \$500.00. That you have secured the appointment of a guardian of her estate and that he is ready to petition the court, under sec. 3995b, Stats., for an order giving notice to creditors and for filing of claims; that you plan to file a claim against her estate for support and maintenance at said home and that the guardian raises the question whether such claim could be legally filed by you or allowed by the court, in view of the fact that no action to that end has been taken by the county board, and you refer to sec. 600, Stats., in that connection. You ask to be advised whether or not you are lawfully authorized to file a claim on behalf of the county and whether it would be proper for the court to allow the claim if filed by you.

It is my opinion that you are authorized and directed to present such claim in the event that the county court proceeds under said sec. 3995b. From that conclusion I think there is no escape. The section last named first provides for a petition by the guardian to the court for adjustment of all claims against the ward, and upon such petition, for an order fixing the time and place when claims will be received, examined and adjusted, and for barring all claims not then presented. It also provides

for the manner of giving notice by publication. It further provides:

"* * * All proceedings relating to the presentation, allowance and payment of claims and demands against any ward shall be substantially like those provided by law *in relation to the estates of decedents*, so far as applicable, unless otherwise provided herein, * * *."

Now, your duty in relation to the estates of decedents who were inmates of a state or county asylum for the insane is laid down in sec. 600, Stats., in these words:

"* * * In case of the decease of any such patient, before payment for such maintenance, such district attorney shall, in the name of the county file against the estate of such deceased person as a claim and may have allowed proper charges for the maintenance of such patient pursuant to law. * * *."

You will observe that the first part of sec. 600 relates to claims against living patients and with reference to those it is said that the district attorney is to act under the direction of the county board. The legislature evidently took into account the fact that there might be no time for such action by the county court in the cases of deceased patients whose estates were being settled and that the county's claim might become barred unless the district attorney was clothed with authority and charged with the duty of filing claims against the estates of decedents within the time permitted by law. To me it seems very plain that district attorneys should not wait for action upon the part of county boards in the matter of estates of deceased persons who were patients and whose maintenance has not been paid for. And, by referring back to sec. 3995b, it is noticed that the practice to be followed in cases of decedents is applicable to the adjustment and the barring of claims against persons under guardianship.

This duty on the part of district attorneys is by statute extended to the matter of inmates of the state home for the feeble-minded. The maintenance of this patient is charged by the state to your county, pursuant to sec. 561e, and sec. 573w provides:

"Any county which is lawfully charged with the expense, or any part thereof, of maintaining an inmate in the Wisconsin home for the feeble-minded, shall have all remedies to collect

the sums so charged out of the estate of such inmate or from individuals, which are conferred by law upon counties, to collect charges against them for maintenance in state hospitals and county asylums for the insane, of patients whose maintenance therein is chargeable to such counties respectively."

Statutes already referred to, it would seem, leave no doubt as to your authority to proceed in the matter. If doubt there be, it is dispelled by the provisions of sec. 604q. It is there provided that the property or estate of every insane person kept at a state or county asylum (and by force of other sections this one is extended to inmates of said home) shall be liable for the continuing and past maintenance of patients, and upon failure of the person having the custody of the property or estate of the person to pay therefrom for such maintenance,

"the district attorney of such county may apply to the proper county judge or court to compel such payment."

This section further provides that in case of the demise of a patient, the district attorney may institute proper proceedings to collect the amount due his county.

I have no hesitation in advising that you may lawfully proceed in this matter.

Public Officers—Deputy Sheriff—County Board—The county board may change the salary of the deputy sheriff at any time but can change the salary of the undersheriff only when it may change salaries of county officers.

February 2, 1918.

JOHN W. SODERBERG,
District Attorney,
Barron, Wisconsin.

It appears from your letter of January 31, 1918, that the sheriff resigned last December and the vacancy was filled; that at its last session the county board fixed the salaries of county officers to be elected next fall and also fixed the salaries of the undersheriff and deputy sheriffs, the last named salaries being increased; that thereupon the question arises whether the undersheriff and deputies appointed by the new sheriff are to receive

the salaries fixed by the last county board or the salaries theretofore fixed and being paid.

The answer to your question turns very much upon the exact phrascology of the resolution or ordinance of the last session, whereby the salaries were fixed.

As you point out, the county board has the power to change the salaries of the deputies at any time and increase or diminish the number of deputies.

"(b) The board may at any time fix or change the number of deputies, clerks and assistants that may be appointed by any county officer, and fix or change the annual salary of each such appointee. * * *." Subd. (4), sec. 694, Stats.

This unlimited power as to changing salaries, I think, does not extend to the office of undersheriff. His salary and the fixing of it are regulated by the same portion of said section, which regulates the time and manner of fixing the salaries of the sheriff and other county officers. The county board is required at its annual meeting to fix the salaries of the county officers to be elected during the ensuing year.

"* * * The salary so fixed shall not be increased or diminished during the officer's term. The salary of undersheriff * * *, if not otherwise fixed by law, shall be fixed by the county board at the same time." Subd. (1), sec. 694, Stats.

This fact may aid in determining the intention of the county board at the time it fixed the salaries of the undersheriff and deputies, and that intention is really the subject of inquiry. The intention of the county board with reference to the salaries of the deputy will control, and that intention is to be sought from the language used by the county board and the surrounding facts and circumstances, in case this language is ambiguous and therefore in need of construction.

In case there is nothing in the language or those facts and circumstances to indicate an intent with reference to the time when the increase of salaries of deputies should become effective, I am of the opinion that the increase would become effective from the time the resolution or ordinance was adopted, following the general rule as to the time when statutes become effective,

in the absence of any declaration on the part of the lawmaker with reference thereto.

"When no time is expressly fixed by a general constitutional or statutory provision or by a provision in the act itself, a statute takes effect from its passage." 36 Cyc. 1196.

While, for reasons before stated, I am not in position to express a decided opinion as to the time the increase of salaries of deputies should become effective, I am inclined to the belief that intention was to have the increase applied to the deputies at the same time the change applied to county officers, which would be at the time when the officers elected next fall take office.

Taxation—Inheritance Taxes—Widow's Exemption—Federal inheritance taxes are not deducted in determining the net or taxable estate under the state law.

The widow's allowances which arose or accrued after June 2, 1917, are not deducted in determining her inheritance tax.

February 4, 1918.

WISCONSIN TAX COMMISSION.

In re estate of Lamar Olmstead:

You have asked for my opinion upon the following questions in connection with said estate:

First: Is the amount of the federal inheritance tax to be deducted in determining the net estate or basis for Wisconsin inheritance taxes due from said estate?

The great weight of authority is against allowing such deduction. The decisions upon the question are collected in the recent work of Gleason and Otis on Inheritance Taxation, p. 303. I think, too, that reason is against the deduction. If the federal tax is a property tax, that is, a tax upon the whole estate or on the right to transmit it, the federal law is possibly unconstitutional, as suggested by the above authority on pages 486 to 493, and then, of course, it would not be a proper deduction. If it is not a property tax, and it does not come from the estate, strictly speaking, then, in contemplation of law the estate

is not reduced by the tax. An inheritance tax is a tax upon the right or privilege of succeeding to or receiving property, and is paid by the beneficiary as a condition to the enjoyment of that right or privilege. The judgment of distribution and assignment takes no account of the tax. The property, as regards the amount distributed or assigned, is not diminished by the tax. The executor or administrator is by the judgment directed to pay a legacy or share as though no tax were assessed, and he may insist upon a receipt for the full amount thereof from the recipient, and he may either require the recipient to pay the amount of the tax or take it out of the legacy or share, and then pay over the residue. Sec. 1087—7, Wis. Stats.

Furthermore, if the succession tax imposed by one jurisdiction is to be deducted in determining the tax in another jurisdiction, the right of reduction ought to be reciprocal, and the result is that each jurisdiction must wait until the other has acted. Thus the matter is deadlocked.

I am therefore of the opinion that the amount of the federal tax should not be deducted in determining the net estate or basis for Wisconsin inheritance taxes due from said estate.

Second: Should the allowance made to the widow, pending the settlement of the estate, be added to her distributive share in determining the inheritance tax due from her?

Our supreme court in *Smith v. State*, 161 Wis. 588, held that such allowance was not taxable, hence should not be added to her distributive share. The law, however, was amended by ch. 319, laws of 1917, so as to provide that the ten thousand dollars exemption allowed to a widow "shall include all her statutory and other allowances." You have ruled that the widow was entitled to have deducted such part of an allowance as was paid, or had accrued prior to the enactment of ch. 319, and that so much of her allowance as accrued thereafter is not a proper deduction and should be added to her distributive share and subjected to taxation.

With that ruling I am in entire accord. The order of the county court fixing an allowance for the support of the widow pending the settlement of the estate is an interlocutory order. The widow has no vested interest in that allowance beyond what has been paid or has accrued and is payable. Beyond that the court may at any time change the allowance or deny it en-

tirely. It was held that such power remained with the court in *Ford v. Ford*, 80 Wis. 565, and *Baker v. Baker*, 57 Wis. 538. That, too, is the general rule. 18 Cyc. 404-405. It would seem to follow from this that the allowance which accrues after ch. 319 became effective is to be treated the same as though the order under which it was made had been entered subsequent to that date, and the result is that that portion of the allowance is to be added to her net estate in determining the proper basis for inheritance taxes.

Bridges and Highways—Towns and villages whose entire mileage of road on the county system of prospective state highways has been fully improved and constructed do not participate in the distribution of the second fifty per cent of state aid.

February 4, 1918.

M. W. TORKELSON,

Assistant Bridge Engineer,

Wisconsin Highway Commission.

In your letter of January 31 you ask for my opinion with reference to whether any town or village whose entire mileage of roads on county system of prospective state highways has been fully constructed and improved under the provisions of secs. 1317m—1 to 1317m—15, inclusive, is entitled to participate in the distribution of the second fifty per cent of state aid, as provided in subd. (b), sec. 2, ch. 556, laws of 1917. Said section provides:

“Except in counties having a population of one hundred thousand or more, the remaining fifty per cent allotted to the county under the provisions of section 1317m—8 *for construction in any calendar year* shall be available, together with the necessary county funds and the necessary town, village or city funds, *for the construction under the provisions of sections 1317m—1 to 1317m—15*, inclusive, of portions of the county system of prospective state highways lying in towns, villages and cities not directly benefited or served by any improvement made on the state trunk line system in the county in the same calendar year. The state aid available shall be divided between the said towns, villages and cities in the proportion of their valuation as equalized by the county board, except that not more than two thou-

sand dollars shall be allotted to any governmental unit in any one year. * * *

It is apparent from a reading of the entire law, and taking into account its purposes, and especially the purpose of state aid to towns and villages, that it was the intent of the legislature to have the state aid apportioned among those towns and villages that were performing actual road construction, and not to those towns and villages wherein the construction was completed. It should be noted that state aid is not available for maintenance in any instance and that the county must maintain that portion of the trunk line system lying within it when once constructed.

The statute above quoted contains the provision that this amount

"shall be available * * * for the construction under the provisions of sections 1317m—1 to 1317m—15, inclusive."

It is clear that the legislature did not intend to have those towns wherein no construction was to be performed participate in the distribution of the fifty per cent available as state aid for construction work.

You are, therefore, advised that towns and villages whose entire mileage of the county system of prospective state highways has all been improved do not participate in the distribution provided for in subd. (b), sec. 2, ch. 556, laws of 1917.

Public Officers—State Employe—Judgment—Duty of secretary of state when judgment is filed: first, when exemption is claimed; second, when exemption is not claimed.

February 5, 1918.

HONORABLE WILLIAM B. NAYLOR,

Assistant Secretary of State.

In your letter of February 1 you state:

"Assume that Mr. A. is a state employe, receiving \$100.00 per month, and being paid on the first day of each month for his services during the preceding month. Assume that he will be so paid on March 1, 1918, but that on February 15th a judgment against him is filed in this office for the sum of \$200.00 under the provisions of sec. 3716a.

"What action concerning this situation, and the salary of Mr. A. should this department take under the above cited law?"

Ch. 332, laws of 1917, repeals sec. 3716a, and reenacts it with slight changes. The chapter now, in substance, provides that when a judgment is obtained against a debtor who has money due from the state, the judgment debtor may file a certified copy of the judgment with the secretary of state; that it thereupon becomes the duty of the secretary of state, after the expiration of thirty days from the date of filing of the certified copy of judgment,

"to pay to the owner of such judgment such sum as at the time of said filing is due, and thereafter and until such judgment is fully paid to pay to the owner of such judgment such sum or sums as may at any time or times be due from the state, * * *."

Said chapter further provides:

"* * * If the sum or sums due as aforesaid is for salary or wages of any officer or employee of any state * * * the same shall be exempt from the provisions of this section to the same extent as salaries and wages are by law exempt from garnishment. * * *"

Subsec. 15, sec. 2982, Stats., exempts:

"The earnings of any person * * * having a family dependent upon him * * * including earnings of any minor child or children, * * * for three months next preceding the issue of any writ of attachment, execution, garnishment * * * to the amount of sixty dollars only for each month in which such earnings are made or earned. * * *"

It seems to have been the legislative intent to include among those persons against whom garnishment proceedings might have formerly been brought persons employed by the state and the various municipal corporations. In legislating upon the subject no provision has been made for the ascertainment of the amount of exemptions in any proceeding connected with the practice as prescribed in the section. The statute does not seem to cover the matter completely, but that is a matter which the legislature only can correct.

I am satisfied that you cannot safely pay the wages of an employee on such a judgment in disregard of the exemption statute. The only safe rule for you to pursue would be, immediately

upon such a judgment being filed, to notify the judgment debtor of its filing, inquire if he claims exemption, and give him a reasonable time to notify you of his claim. If he claims no exemption within the time, then you could undoubtedly safely pay or audit the claim to the amount of salary due, as he would undoubtedly be held to be estopped on such a notice from you to thereafter claim his exemption. But should he make claim of his exemption in time after such a notice, then you should not pay out or audit the claim so as to impair his right of exemption, but could audit the claim to the amount in excess thereof, withholding the amount of the exemption, and compel the parties—the judgment creditor and the defendant—to bring such action or proceeding as they may see fit to determine the question of the defendant's exemption.

Appropriations and Expenditures—State Council of Defense—The state council of defense, if it finds and determines that a serious scarcity of seed corn threatens the general public welfare as the same may affect or be affected by the common defense, is authorized under ch. 561, Laws 1917, to purchase seed corn and sell the same to farmers, the seed to be paid for out of the appropriation made by sec. 7 of that chapter.

February 5, 1918.

HONORABLE E. L. PHILIPP,
Governor.

In your letter of February 2 you state that Mr. Swenson, representing the council of defense, makes application for ten or fifteen thousand dollars to be used as a revolving fund in the purchase of seed corn; you ask if there is anything in the law which would prohibit such use of the state money and state that the situation, so far as the seed corn is concerned, is critical and that you feel that we must do what we can to aid our farmers; that it is impossible to accomplish anything unless we have the money to make purchases, as the corn must be picked up in small lots and concentrated at some central point.

I am assuming that the application of Mr. Swenson was made pursuant to sec. 18, ch. 82, laws of 1917. This is the chapter

creating the council of defense and defining its duties in general.

Sec. 18 provides:

"There are hereby appropriated such sums as may be necessary to carry out the purposes of this act, payable from moneys appropriated under subsection 2 of section 20.03. This fund shall be available in sums not greater than ten thousand dollars upon written approval by the governor. These funds shall be paid out and audited as all other moneys are paid out and audited. * * *."

However, the legislature later passed ch. 561, laws of 1917, the first section of which provides:

"Whenever the state council of defense shall find and determine that a serious scarcity of food, fuel, seeds, or any other personal property, necessary for common defense, or for the general public welfare as the same may affect or be affected by the common defense, exists or threatens while the nation is at war, or whenever while the nation is at war such council shall find and determine that the supply of any of said property is or threatens to be restricted or made unavailable for purposes of common defense or for such general public welfare by reason of excessive, extortionate, or prohibitive prices, then the council is authorized and empowered to take possession of such amounts of any of such property, as it may deem to be required for common defense or for such general public welfare, in the name of the state, and shall pay or offer to pay therefor just compensation to be determined by said council of defense."

This is followed by provisions for determination of the value of the property thus taken, and among other things provides for a review of the determination as to value in court.

Sec. 4 of the same chapter provides:

"The amount of just compensation for the property taken or for the storage facilities used, when finally determined upon, whether with or without an action in court, shall be certified by the chairman and secretary of the council and audited and paid out of the state treasury."

Sec. 7 provides:

"A sum sufficient to carry out the provisions of this act is hereby appropriated out of any funds in the state treasury not otherwise appropriated."

It will be noted that under this chapter no approval by the governor is necessary. The chapter very clearly contemplates

that when the state council of defense shall determine that the general public welfare as the same may affect or be affected by the common defense is threatened by reason of a serious scarcity of seeds, it is the duty of the council of defense to take possession of such seeds as may be found within this state, or sufficient thereof to answer the purposes of the public welfare, and to pay for the same either through agreement with the owner, determination of value by it as provided in said chapter, or as may be determined by the court upon a review of such proceedings in court, and the amount so paid shall be paid out of this blanket appropriation made by sec. 7 of the act.

The council, however, must first find and determine that there is a serious scarcity of such seed, and that such seeds are necessary for the common defense or for the general public welfare as the same may affect or be affected by the common defense. Of course it is a matter of common knowledge that the common defense is affected by scarcity of any needed article of food. It is also a matter of common knowledge that corn is very essential to the general public welfare as the same may affect or be affected by the common defense, as it forms an important article of food for human beings and is also very important in the production of meat for the use both of the civilian population and of the army in the field. This chapter is a war measure made necessary by reason of the unusual conditions which surround us. The chapter authorizes the purchase of the seed corn, when such a finding as herein indicated has been made, and of course the supplying of such seed to the farmers follows as a part of the necessary preparation for the common defense. The money would not form a revolving fund but would be paid into the general fund of the treasury, and, as the chapter itself makes an unlimited appropriation, that would seem to answer the same purposes as though a revolving fund were formed.

Public Printing—Printing the annual report of the state dairymen's association is discretionary with the printing board, and it may exclude advertising matter as a condition of printing it.

February 6, 1918.

STATE PRINTING BOARD.

After conferring with a member of the board upon an opinion of January 24, 1918,* I have thought it best to supplement that opinion upon two points, to avoid any misunderstanding with reference to them.

1. The printing of the report of the state dairymen's association is expressly left to your discretion:

"Upon receiving the necessary printer's copy the printing board is empowered, *in its discretion*, to order printed by the state printer" among other bulletins and transactions, "the annual transactions of the state dairymen's association." Subd. 3, sec. 35.30, Stats.

Should the board, in its judgment, deem it unwise to have printed such transactions with advertising connected, it could, I believe, in its discretion, refuse to have the report printed.

2. The opinion heretofore given on this matter contains some statements upon the question of the policy or propriety of accompanying reports like the one mentioned with advertising matter. Those expressions are withdrawn. The opinions of the attorney general's department should, as a rule, be confined strictly to questions of law and where they go beyond that, the officer or department to whom they are addressed may certainly disregard them. The statute, as before remarked, vests a discretion in your board. I am still of the opinion that it is lawful to accompany these reports with advertising matter so long as no public money is expended for printing the advertising. Whether or not such advertising matter should be included is then a question of policy or advisability and that question is wholly for the board, and I do not wish to be understood as expressing any opinion regarding it.

*Page 52 of this volume.

Appropriations and Expenditures—Emergency Appropriations—Normal Schools—An emergency appropriation for coal for the several normal schools may be made whenever the allowances therefor in the budget are insufficient for that purpose, owing to high prices.

February 8, 1918.

BOARD OF REGENTS OF NORMAL SCHOOLS.

You have requested my interpretation of subd. (16), sec. 20.38, Stats. (sec. 3, ch. 447, Laws 1917), which reads as follows:

"In case the allowances, as made in the budget of the joint committee on finance of the legislature of 1917, for coal, at the various normal schools, are exceeded on account of unusually high prices of coal, an amount sufficient, in the discretion of the officers authorized in section 20.74, to act in case of deficit or emergency, to meet such increased cost, to be credited to the respective appropriations for operation."

This is obviously a special or specific emergency provision whereby a shortage of fuel—or what is the same thing—of money with which to purchase fuel for the normal schools, could be supplied without recourse to the general emergency appropriation. The purpose is to make an emergency appropriation available in advance or in the absence of a deficit in the general appropriation to the several normal schools for operation. Otherwise, the provisions of said sec. 20.74 would be sufficient. The last named section appropriates

"such sums as may be necessary, * * * as an emergency appropriation to meet operation expenses of any state institution, department, board, commission or other body for which sufficient money has not been appropriated to carry on the ordinary regular work."

Thereby the moneys are made available for the usual work of the institution as soon as the regular appropriation for operation is exhausted.

I am persuaded that it was the intention of the legislature that the general appropriation for operation of each and all of the normal schools need not be drawn on for fuel, in excess of the sums named in the budget for that particular item, and that in the event of extraordinary cost of fuel the extra sum thereby required might come from an emergency appropriation under

said subd. (16), *in the discretion*, however, of the governor, secretary of state, and state treasurer.

The conditions upon which a coal emergency deficiency may arise are fixed, definite and ascertainable. I take it that the budget referred to in the statute names specific sums as the estimated cost of fuel for the several normal schools respectively. That fact makes the emergency appropriation for fuel as definite as the circumstances permit and more definite than the conditions specified in sec. 20.74.

I am of the opinion that under said subd. (16) it is lawful to make an emergency appropriation sufficient to supply coal to any one or all of the normal schools as soon as the sum or sums specified therefor in said budget have been expended.

But such action is not obligatory upon the emergency board. That board may refuse to act under subd. (16) and thereby compel the regents to fully exhaust the appropriation made "for operation." When that is exhausted the emergency board would then act under the authority granted by sec. 20.74, Stats. The alternative of choosing between these two plans rests with the emergency board. Both plans are lawful.

Criminal Law—Abusive Language—A person guilty of using abusive language may be prosecuted under sec. 4398, Wis. Stats., or a city or village ordinance.

February 8, 1918.

ALBERT W. GRADY,

District Attorney,

Port Washington, Wisconsin.

In your letter of January 30 you refer to sec. 1561, Stats., and you state that it seems a person cannot be convicted of disorderly conduct under that section unless he is also drunk. You state that in all parts of the state there are insults hurled at the government and public officials, especially in the cities and villages, and that these parties are prosecuted under city ordinances which are framed differently from sec. 1561 and refer particularly to disorderly conduct. You ask to be referred to a section of the statute covering disorderly cases, outside of the one mentioned.

Conduct consisting of abusive language is made an offense under sec. 4398, Wis. Stats., which reads thus:

"Any person who shall assault another, when not excusable or justifiable, or who shall use in reference to and in the presence of another, or in reference to and in the presence of any member of his family, abusive or obscene language, intended or naturally tending to provoke an assault or any breach of the peace, shall be punished by imprisonment in the county jail not more than three months or by fine not exceeding one hundred dollars. The provisions of this section shall not be applicable to any city or village which has enacted an ordinance under its charter for the punishment of the same or similar offense."

Sec. 1561 applies only to a person found in a public place in such a state of intoxication as to disturb others or unable by reason of his condition to care for his own safety or the safety of others.

Automobiles—Only owners whose motor vehicles operate exclusively in a single incorporated village or city can avail themselves of the provisions of sec. 1636—47.

February 8, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of February 4 you ask if, under subd. (d), subsec. 5, sec. 1636—47, Stats., the owners of motor trucks, motor delivery wagons, or passenger automobile busses operating in more than one municipality may come within said subd. (d) thereof.

Said section provides:

"If the owner of any motor truck, motor delivery wagon, or passenger automobile bus shall, at the time he makes application for registration, accompany such application with an affidavit that said vehicle will be used entirely for the transportation of persons or goods *within the limits of an incorporated city or village*, the fee for the registration of such vehicle shall be ten dollars and the registration number plates furnished such applicant shall be of the same number series and character as those furnished for automobiles. * * *."

The above quoted section provides that if the owner makes an affidavit that such vehicle will be used exclusively within the limits of an incorporated city or village, the fee for registration shall be ten dollars.

It is quite obvious from a reading of this portion of the statute that the legislature had in mind a single municipality. The word "an" preceding the words "incorporated city or village" is singular.

If there had been a legislative intent to permit the operation of the motor vehicles in more than one incorporation under this subdivision, some words indicating such an intent would no doubt have been used. I find no such words in the statute.

I am therefore of the opinion that only the owners whose motor vehicles enumerated in said section are operated exclusively within a single incorporated city or village may avail themselves of the provisions of said subd. (d).

Criminal Law—U. S. Flag—Sec. 4575h prohibits the printing of a flag as part of an advertisement including an advertisement of the flag itself.

February 8, 1918.

WINFRED C. ZABEL,

District Attorney,

Milwaukee, Wisconsin.

In your communication of February 5 you direct my attention to sec. 4575h, Stats., which prohibits the use of the United States flag for advertising, and you state that certain manufacturers of the United States flag desire to advertise their flags by inserting advertisements in newspapers and printing in the newspapers the facsimile of the United States flag, this facsimile itself containing no printed matter or other advertising matter on the face or body of the flag, but the flag to be printed in the body of the advertising in which the manufacturer advertises the flags and his prices for the same.

You inquire whether or not the printing of the picture of the American flag in an advertisement advertising the sale of flags would constitute a violation of said section.

Sec. 4575*h* provides:

"Any person who in any manner, for exhibition, or display, shall place, or cause to be placed, any words, or figures, or numbers, or marks, or inscriptions, or picture, or design, or device, or symbol, or token, or notice, or drawing, or any advertisement of any nature whatever, upon any flag, standard, color, or ensign, of the United States, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign of the United States, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any words, or figures, or numbers, or marks, or inscriptions, or pictures, or design, or device, or symbol, or token, or notice, or drawing, or any advertisement of any nature or kind whatever, or who shall expose to public view, or shall manufacture or sell, or expose for sale, or have in possession for sale, or for use, any article or thing, or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, or attached, or otherwise placed, a representation of any such flag, standard, color, or ensign, of the United States, to advertise, or call attention to, or to decorate, or to ornament, or to mark, or to distinguish the article, or thing, on which so placed, or shall publicly mutilate, trample upon, or publicly deface, or defy, or desecrate, or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, of the United States shall be deemed guilty of a misdemeanor."

You will note that under this section it is made unlawful to attach, append, affix or annex to the portion of a flag any advertisements of any nature or kind whatever. These words are broad enough to include the advertisement of the United States flag. The language used is all inclusive, and it is hardly possible to use general words that would make the meaning broader. There seems to be no indication in this statute that an exception should be made in case the advertisement is of the flag itself. Had it been the intention of the lawmakers not to include advertisements of the flag itself, it would have been an easy matter to have said so in clear and unequivocal language. I see no reason for holding that advertisements of the flag are not included under the general language here used.

Appropriations and Expenditures—Words and Phrases—The construction of a root cellar for use in connection with a barn does not constitute “general remodeling,” and the expense thereof cannot be paid from an appropriation for the latter purpose.

February 9, 1918.

HONORABLE MERLIN HULL,

Secretary of State.

In your letter of February 7 you call my attention to par. (e), subd. (8), sec. 20.38, Stats., which makes an appropriation for the normal school at River Falls:

“* * * On July 1, 1917, two thousand dollars, and on July 1, 1918, two thousand dollars for general remodeling.”

You state that the board of normal regents contemplates the construction of a root cellar in connection with a barn which now stands upon the grounds of the River Falls normal school, and which will cost approximately \$275.00; that the bill for the construction of this root cellar they desire to have charged against the above appropriation; and you ask for my opinion as to the propriety of such a charge.

The authorities upon this question seem very meager, and we are obliged to fall back upon the definitions found in the regular dictionaries.

The Century Dictionary defines “remodel”:

“To model, shape, or fashion anew; reconstruct.”

Webster’s New International Dictionary gives substantially the same definition.

To reconstruct is “To construct again; rebuild.” Century Dictionary.

That is, as I understand it and as I believe the term is understood in the common usage of language, this term “remodel” means the alteration of an existing structure. When we speak of remodeling a building, we ordinarily mean changes in the interior arrangement of that building rather than an addition to the building.

In the case of *City of Mayville v. Rosing*, (N. D.) 123 N. W. 393, in considering an ordinance prohibiting the construction of

wooden buildings within certain limits, the court among other things said:

"Is repairing or remodeling or enlarging a building always to be regarded, under this ordinance, the same as building it in the first instance? Clearly not, or the most insignificant change in a structure would subject one to a penalty."

In that particular case a building was raised in height, except at the front, and an addition was added to the upper part of the rear of the building. Thus it will be seen that there the only change made was in adding to the height of the building. In other words, there was an alteration of the interior structure of the building but not an addition to it such as is made when a wing is added. The court did not determine whether this would be a remodeling or repairing or enlarging of the building. It merely determined that it was not the construction of a building.

In Hudson on Building Contracts I find the following definitions:

"'Rebuild' means rebuild the whole, and not merely part of a house. Pulling down joint and back walls of a house is not 'rebuilding.' [Citing cases.]

"'Repair' may have either of two meanings, either that of patching or that of renewing, according to circumstances.' [Citing case.]

"'Repair' a roof or the slating means to replace missing slates.'" 1 Hudson on Building Contracts (4th ed.) 188.

Changing an old building by enlarging it is not constructing a new building, but adding wings or a kitchen to a house is "the erection of a building," within an ordinance forbidding the erection of buildings within certain limits, unless constructed of certain materials. *State v. Long Branch Commrs.*, 25 Atl. 274, 55 N. J. L. 108.

What is the erection of a building and what an alteration is sometimes hard to decide. Where the roof was taken off and the whole building except three walls torn down and a new front wall with new foundations put in and the side walls lengthened, the question whether this was the erection of a building within a mechanics' lien law was a question of fact to be determined by the jury. *Armstrong v. Ware*, 20 Pa. St. 519.

Where the roof of a house was removed and part of the

weatherboards taken off and sixteen feet by twenty-six feet removed from the middle of a "mansion," a new roof put on and the middle built up, this was an alteration of the building and not the erection of a building so as to entitle the builder to a lien. *Combs v. Lippincott*, 35 N. J. L. 481.

While this root house is to be used in connection with the barn, yet it is in the nature of an addition to the building rather than a remodeling of the building. As generally construed, this would be considered a new construction and not an alteration, repairing or remodeling of the existing structure. It is not materially different in its essential aspects than would be the building of a corn crib at a distance of twenty feet or more from the barn, such crib being intended for the storage of food to be used for the animals kept in such barn. Clearly the latter would be new construction.

For these reasons, I am constrained to hold that the cost of construction of this root cellar cannot be paid for out of the appropriation to which you refer.

Intoxicating Liquors—Licenses—A city may grant as many liquor licenses as were issued and in force prior to its incorporation within the territory now comprising the city.

February 13, 1918.

MARION F. REID,

District Attorney,

Hurley, Wisconsin.

In your letter of February 9 you ask for my opinion as to how many licenses can be legally granted in Hurley after it becomes incorporated as a city. You state that Hurley has fifty-five saloons, being in the town of Vaughn, and that all of these saloons will be within the proposed limits of the city; that the number is far in excess of one for every five hundred inhabitants, considering the population of the town, and also considering the population of the proposed city.

Hurley, after incorporation, may grant as many licenses as were issued and in force on the 30th day of June, 1907, within the proposed limits of the said city, provided that the right to a license has not been forfeited by any location or a tenant en-

titled to a license under sec. 1565d. This department, as early as September 3, 1907, ruled that a village incorporated may grant as many licenses after the incorporation as there were licenses issued and in force in the territory comprising the same. See opinion by my predecessor, Mr. Gilbert, in Opinions of Attorney General for 1908, p. 563. See also opinions to the same effect, Vol. I, Op. Atty. Gen., p. 340; Vol. II, ibid., p. 446.

The same principle will, of course, apply to a city.

Criminal Law—Worthless Check—Under facts stated a *prima facie* case for issuing a worthless check is made out under sec. 4438a.

February 15, 1918.

C. T. EDGAR,

District Attorney,

Wausau, Wisconsin.

In your recent communication you ask to be informed whether under the statement of facts given by you an offense has been committed in Marathon county, under sec. 4438a, Wis. Stats. This relates to the issuing of worthless checks. Your statement of facts is as follows:

“The check was dated and issued October 12th, 1917, for the amount of \$60.75, and drawn to the order of M. B. and signed by J. M. and drawn on the Marshfield State Bank, Marshfield, Wood county, Wisconsin. The check was made and delivered to M. B. at his home in Marathon county, Wisconsin. The check was not presented for payment until Mr. B. went to Marshfield about a week later and at that time was informed by the cashier of said bank that no money was then on deposit in the bank in favor of J. M., and that the money that M. had on deposit had been checked out of the bank by M. on the day before Mr. B. presented his check for payment. It appears therefore that at the time the check was issued and delivered to B. and up to the day before it was presented for payment at the bank, there was sufficient funds on deposit in said bank in favor of the maker of this check to pay the same, but that at the time it was presented for payment it was refused because no funds were on deposit in favor of the maker and no funds were thereafter placed on deposit within five days thereafter and in fact none since that time.”

Sec. 4438a, as amended by ch. 164, laws of 1917, reads thus:

"1. Any person who, with intent to defraud, shall make or draw, or utter or deliver, any checks, drafts, or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or credit with, such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of a misdemeanor, and punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both fine and imprisonment.

"2. As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be *prima facie* evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee.

"3. The word 'credit' as used herein, shall be construed to mean an arrangement or understanding with the bank or depository, for the payment of such check, draft or order."

Under this statute you will make out a *prima facie* case against the defendant if you show that he made and delivered a check for the amount of \$60.75 on October 12, 1917; that the check was made and delivered to M. B., in whose favor it was drawn; that when the check was presented, a week later, the bank refused to pay it on the grounds that there were no funds in the bank or that the defendant had no funds in the bank with which the same could be paid; that notice was given to the defendant of such refusal of payment, and that five days have elapsed and the check has not been paid.

If the defendant does not introduce any evidence you have produced sufficient evidence to sustain a verdict finding him guilty. If the defendant then shows that he had sufficient funds in the bank at the time of the issuing of the check but withdrew the same before the check was paid, this may or may not be sufficient to rebut the *prima facie* proof of intent to defraud and of knowledge of insufficient funds or credit with such bank. This will depend upon all the circumstances.

Those facts may all be true and the defendant may still be guilty of intent to defraud and of knowledge of insufficient

funds or credit in said bank. If the defendant practically knew when he made the check that it would not be presented for payment for about a week and intended to withdraw the money before it was presented, he certainly would be guilty under this statute.

You do not state whether notice was given to the party in question that payment of the check was refused. This is a necessary element and must be shown. If it has not yet been done, it should be done, and five days should elapse before criminal prosecution be brought. But if it is a fact that notice has been given to him, then a *prima facie* case may be made out before a jury. I may add that under this statute it seems clear that the intent to defraud must be present at the time when the check is made and delivered, and that the knowledge that he has no funds or credit with such bank for the payment of such check must also be had by the defendant at that time.

But a *prima facie* case of this can easily be made out under the provisions of subsec. 2 of this section. The party in question here has issued and delivered his check in Marathon county. The offense would, therefore, be committed in Marathon county. If he had no intent at that time to defraud and did not have knowledge that he would not have funds or credit at the bank at the time when it would be presented, but afterwards and before the check was presented he formed the intent to defraud, he cannot be found guilty under this section of the statute. So, it must be said that either he is guilty of this offense in Marathon county, or he will not be guilty of the offense, within the purview of this section.

Public Officers — State Employe — Judgment — A judgment debtor claiming exemption, where he has been paid all but the salary for the current month, is entitled to an exemption of only \$60.00.

February 15, 1918.

HONORABLE WILLIAM B. NAYLOR,
Assistant Secretary of State.

In your letter of February 11 you refer to sec. 3716a and subd. (15), sec. 2982, Stats., and state that a claim has been

made in your department that the last phrase you quoted, which is,

"provided they shall not exceed one hundred and eighty dollars in all for said time, including such part or share thereof had, by or paid to the debtor during such three months,"

should be construed as at all times permitting such employe to have a total exemption for a three months' period, or not exceeding one hundred and eighty dollars; in other words, that this construction would mean that such party could not be garnisheed unless he permitted his wages to accumulate so as to exceed one hundred and eighty dollars and that this amount or more was due him at the time of garnishment. You ask for my opinion with reference to the above construction,

Subd. (15), sec. 2982, which refers to the exemption of earnings, provides, in substance, that there may be exempt to the amount of sixty dollars for each month in which such earnings are *made or earned*, providing that they shall not exceed one hundred and eighty dollars in all for said three months' period.

Sec. 3716a provides, in part, that if the sum due is for salary or wages,

"the same shall be exempt from the provisions of this section to the same extent as salaries and wages are by law exempt from garnishment."

In garnishment proceedings the amount that is paid to the debtor is to be included in the amount of exemptions, and if the debtor has been paid for two months of the thrce, and his earnings not yet paid to him are confined to those made or earned during the single month, then he is entitled to exemption of only sixty dollars. By sec. 3716a the exemptions are "to the same extent" as in garnishment.

You are therefore advised that a judgment debtor claiming exemption under sec. 3716a, where he has been paid all but the salary for the current month, is under the circumstances stated entitled to an exemption of only sixty dollars.

Automobiles—Car in question held to be a delivery wagon.

February 18, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of February 15 you enclose a letter from the Anger Engineering Company, of Milwaukee, upon the matter of classification of motor vehicles. The letter is as follows:

"We are attaching a cut of a commercial car with panel delivery body. Will you kindly advise if this type of car should be classed as a truck when securing license for same?"

Par. (a), subsec. 5, sec. 1636—47, Stats., provides, in part:

"* * * And for the registration of each motor truck, motor delivery wagon or passenger automobile bus as follows: If the advertised load carrying capacity is less than twenty-one hundred pounds, a fee of fifteen dollars; if twenty-one hundred pounds or more and less than fifty-one hundred pounds, a fee of twenty dollars; if fifty-one hundred pounds or more a fee of twenty-five dollars."

The legislature of 1917 took out of the general class of automobiles certain classes in the above quoted section: (1) motor trucks; (2) motor delivery wagons; (3) passenger automobile busses.

In an opinion given to you on December 20, 1917, Vol. VI, Op. Atty. Gen., p. 811, I stated that the graduating of the fee to be paid for operating different classes of automobiles

"was to make that fee somewhat commensurate with the injury done to highways by that class of traffic." P. 814.

The car in question is built for delivery purposes. In fact the company's letter uses the words "commercial car with panel delivery body."

From the purpose of the legislative act it is apparent that such cars were contemplated when the exceptions were made and a larger license fee attached.

The cut you enclose shows the most commonly used type of delivery wagon used by retail houses. It seems to me that it is very clearly a delivery wagon and falls squarely within the provision above quoted.

Agriculture—Counties—Fair Grounds—County boards may condemn lands for agricultural fairgrounds.

February 19, 1918.

W. B. SURPLICE,

Assistant District Attorney,

Green Bay, Wisconsin.

In your letter of recent date you submit this question:

Has Brown county, the population being less than three hundred thousand, the power to purchase, receive or condemn lands for the purpose of holding agricultural fairs thereon, within the limitations prescribed by subds. (9) and (9m), sec. 669, Stats.

In my opinion the question must be answered in the affirmative. Said subd. (9) authorizes the county board:

"To purchase land not exceeding in value the sum of eight thousand dollars for the purpose of holding thereon fairs and exhibitions of an agricultural character and to grant the use thereof from time to time to agricultural and other societies of similar nature," etc.

Subd. (9m) authorizes the county to expend more than eight thousand dollars for said purpose when authorized thereto by a vote of the electors of the county. This express power to purchase fairgrounds has long been a part of the statute and frequently acted upon.

The power to purchase includes the power to receive. The greater includes the less. *Hathaway v. Milwaukee*, 132 Wis. 249.

But the right to purchase and the right to take by eminent domain are separate and distinct, and the grant of one does not include the other. *Trestor v. Sheboygan*, 87 Wis. 496; *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 521.

Hence we must seek elsewhere for the power to condemn. I believe it is found in sec. 694c, Stats., referred to by you. That section was created by ch. 306, laws of 1891, and provided:

"Whenever, in the opinion of the county board of supervisors of any county in this state, the county shall require any lands for the use of a courthouse, jail, house of correction, poorhouse, hospital or county asylum for the chronic insane, and the county board shall be unable to agree with the owner upon the amount of compensation to be paid therefor,"

it may proceed in the same manner there provided to condemn said lands for any of said purposes.

Later the law was amended to extend the right of eminent domain to sites for workhouses. Up to 1913 no express grant of right to exercise this power for acquiring fairgrounds was given, but by ch. 276, laws of 1913, effective May 20, 1913, the right was extended to lands "for any other public purpose authorized by law." I assume that lands acquired for the purpose in question are for a public purpose. Counties have no authority to levy taxes or appropriate public funds for other than public purposes. It, therefore, follows that Brown county can, in case it cannot agree with the owner of lands which are desired by the county for fairgrounds, take the same by eminent domain, provided the cost thereof is kept within the limitations of said subds. (9) and (9m).

Subd. (9t), sec. 669, does not stand in the way of such a conclusion. This subsection was created by ch. 619, laws of 1913, published July 12, 1913. You will observe that the last named chapter was not in existence when the law was amended to extend the power of eminent domain to county boards to reach lands for fairgrounds. Furthermore, ch. 619 is a grant of power and not a withdrawal of it. It gives to counties with a population of three hundred thousand authority in addition to that possessed by counties in general. There is nothing in ch. 619 which is in derogation of the power theretofore existing with reference to this matter. Milwaukee county is really made a class by itself and other counties are left as they were before this classification took place.

Public Officers—Counties—County Board—County orders must be countersigned by the chairman of the county board.

Where the office is vacant and no vice chairman was elected a special meeting of the county board should be called to fill the vacancy.

February 20, 1918.

T. W. ANDRESEN,

District Attorney,

Medford, Wisconsin.

Your letter of February 12 reads, in part, as follows:

"Pursuant to sec. 667 our county board last spring elected a chairman but failed to elect a vice chairman. The chairman has lately died, which leaves the county without a chairman or vice chairman. Sec. 667 provides that the chairman, or the vice chairman in his absence, shall countersign all county orders. Failing to elect a vice chairman is there any way that county orders can be signed and issued without calling a special session of the entire county board and electing a new chairman? It is my opinion that an election is required but I would like your opinion on this matter.

Sec. 667 provides, among other things, that the chairman of the county board "shall countersign all county orders."

Sec. 715, subd. (2), relating to the duties of the county treasurer, reads, in part, as follows:

"To pay out all moneys belonging to the county only on the order of the county board, signed by the county clerk and countersigned by the chairman, except when special provision for the payment thereof is or shall be otherwise made by law," etc.

The above quotations from the statutes make it clear that no county order for which payment is not otherwise provided by law may be legally issued and paid, unless the same is countersigned by the chairman of the county board. Your county board is at present without a chairman or vice chairman. There is no other officer appointed by law who can perform the duties imposed by the sections referred to, and I am unable to suggest any way by which these duties or requirements may be waived.

I agree with you in your conclusion that it will be necessary to call a special session of the county board of Taylor county in order to elect a chairman of the county board.

Indigent, Insane, etc.—Public Health—Quarantine and Disinfection—The expense of maintaining quarantine is a charge against the municipality.

The expense of nurses, medical attention, etc., considered.

February 20, 1918.

S. G. DUNWIDDIE,

District Attorney,

Janesville, Wisconsin.

I have your letter of February 14, which reads as follows:

"During the recent smallpox scare in this county a question has arisen as to whether or not the county is liable under the poor laws for certain expenses.

"There have been several cases where working men who were able to take care of their families while working, were quarantined by the city authorities. This, of course, made an extra expense to them (in some cases a nurse being needed) and shut off all income, leaving them in need. The superintendent of the poor has usually furnished needed fuel and food in such cases, but the further question has arisen as to whether the county must also pay doctors', nurses' and medicine bills. See see. 1416—17, Stats."

The section referred to in your letter reads, in part, as follows:

"The expenses for necessary nurses, medical attention, food and other articles needed for the comfort of the afflicted person, or persons, shall be a charge to the person so taken care of, or against any other person who may be liable for his support. Indigent cases shall be cared for at public expense upon the order of the local board of health. The expense of maintaining quarantine and disinfection of persons and premises after death or recovery, shall be paid by the city, incorporated village, or town, upon the order of the local board of health."

The above quotation is, in my opinion, a complete answer to your question.

The expense of maintaining quarantine and disinfection of persons and premises after death or recovery is a charge against the city. The expenses for necessary nurses, medical attention, food and other articles needed for the comfort of the afflicted person is a charge against the person so taken care of or against any other person who may be liable for his support, but where such person is indigent then he must be cared for at the public expense, upon the order of the board of health.

While your letter does not so state, I assume that Rock county has adopted the county system of providing for its poor. If so, indigent cases must be cared for by the county. The county must in such cases pay

"the expense for necessary nurses, medical attention, food and other articles needed for the comfort of the afflicted person."

This ruling is in harmony with opinions rendered by my predecessors in office, and found in Vol. V, Op. Atty. Gen., p. 780, and in Opinions of Attorney General for 1912, p. 736.

It would seem, however, that a county may not be held liable, except "upon the order of the local board of health," and that the order of the health officer is not sufficient to bind the county in such cases. See *Collier v. Town of Scott*, 124 Wis. 400; *Martin v. Fond du Lac Co.*, 127 Wis. 586, 590.

Public Officers—Education—School Principal—The position of school principal is not a public office.

The position of principal and office of alderman are not incompatible.

February 21, 1918.

ORRIN H. LARRABEE,

District Attorney,

Chippewa Falls, Wisconsin.

I have your letter of February 18, in which you submit for my consideration and for an opinion the following statement of facts:

A certain individual has been hired by the school board of your city as principal of the high school; subsequent to entering into a contract between himself and the school board, he was elected and qualified as an alderman of the city of Chippewa Falls and is now acting as such alderman. There is at present pending before the council the proposition of building a new school house. The question has been raised whether or not he can hold both offices, or whether the fact that he is the principal of the high school disqualifies him as a member of the common council.

It has been decisively held in the case of *Board of Education of South Milwaukee v. State ex rel. Reed*, 100 Wis. 455, 462, that

a teacher appointed by a school board and serving under a contract is not an officer but a mere employe of the district. So it has been held that a professor who is under contract with the board of regents is not a public officer. *Butler v. Regents of University*, 32 Wis. 124.

While your letter does not so state, I am informed that your city is incorporated under the General Charter Law but I am not advised as to the school system in force in your city. I have examined the General Charter Law as well as the statutes relating to public officers, and am unable to find any provision from which it may be inferred that a person may not hold both the position as principal of your public schools and the office of alderman in your city. Neither can I find any law which disqualifies a man who is a principal or teacher in a public school from holding a public office, such as that of alderman.

Not being a public office, the position of principal cannot be incompatible with the office of alderman.

Secs. 17.19, 17.20, 17.21 and 925—249 relate to the eligibility of municipal officers, but none of said sections are applicable to the facts presented in your letter.

Aliens—Naturalization—Citizenship Papers—An alien who declared his intention to become a citizen before the act of 1906 had seven years from date of said act in which to petition for final papers. With the expiration of said period said declaration became void.

February 21, 1918.

HONORABLE E. L. PHILIPP,
Governor.

I have yours of February 12, referring to me communication of James Madison, of Kenosha, Wisconsin, and requesting that I answer his inquiries as to his citizenship.

Mr. Madison in his letter to you states that he was born in Denmark on the 12th day of May, 1869; that he landed in New York in April, in the year 1889; that two or three years later he took out what he supposed to be papers in Langlade county; that he has been a resident of Kenosha for about twenty years; that on October 8, 1900, he understood he was taking out his

citizenship papers; that it now appears that the papers sworn to by him on said day were a declaration of an intention to become a citizen of the United States; that he has been informed by the clerk of the court of said county that under the ruling of the courts he is not now a citizen of the United States and that, to become such, he must begin all over again and take out his first papers and thereafter, in not less than two years and not more than seven years, take out his second papers; that he supposed he was a full citizen of the United States and has been exercising all the rights of citizenship during the years mentioned. Mr. Madison also encloses a copy of the declaration of his intention to become a citizen, numbered 3037, and dated October 8, 1900. To his letter is attached a clipping from a paper which purports to contain a decision of the United States supreme court, relating to the naturalization of aliens who made declaration more than seven years after the passage of the naturalization law of 1906.

Upon investigation, I find that on January 17, 1918, the supreme court of the United States handed down a decision in the case of *United States v. Morena*, which is reported in the advance sheets of the Supreme Court Reporter, Vol. 38, No. 7, p. 151, which greatly affects the rights of certain aliens who have declared their intention to become citizens. This decision settled the construction to be given to the naturalization act of June 29, 1906, ch. 3592, sec. 4, 34 Stats. at Large 596 (Comp. Stats. 1916, sec. 4352), as to the right of an alien to be admitted to citizenship who had declared his intention to become a citizen under the old law, but had failed to file a petition for citizenship (his second papers) within seven years after such declaration of intention, or within seven years after the date of the act of 1906.

Prior to said decision a number of federal courts had held that an alien who had made a declaration of his intention to become a citizen under the old law (the law as it existed prior to June 1906) must file his petition for citizenship, his second papers, not later than seven years from the enactment of the present law, viz., within seven years after June 29, 1906 (See *In re Goldstein, et al.*, (D. C.) 211 Fed. 163; *In re Junghauss v. U. S.*, (C. C. A. 2d Cir.) 218 Fed. 168; *In re Lee*, (D. C.) 236 Fed. 287), while many other federal courts had held the oppo-

site view and announced, in effect, that the petition for citizenship could be based on such prior declarations of intention at any time; that the declaration of intention to become a citizen, once made, did not have to be renewed, and that the seven year limitation above referred to did not apply to such aliens. See *Eichhorst v. Lindsey*, (D. C.) 209 Fed. 708; *In re Anderson*, (D. C.) 214 Fed. 662; *In re Valhoff*, (D. C.) 405.

In the *Morena* case, above cited, the supreme court of the United States answered the three questions which had been certified up for its decision as follows:

1st Question: "Is a declaration of intention made before the naturalization act of 1906 saved by the proviso of the first paragraph from the seven-year limitation of the second paragraph of section 4 of the act?"

Answer: "No."

2d Question: "Is an alien who has made a declaration of intention before the act of 1906 required to file his petition for citizenship at a time not more than seven years after the date of such declaration of intention?"

Answer: "No."

3d Question: "Is an alien who has made a declaration of intention before the act of 1906 required to file his petition for citizenship at a time not more than seven years after the date of the act?"

Answer: "Yes."

These answers are decisive of the right of Mr. James Madison to petition for final citizenship if based upon the declaration of intention, his first papers, dated October 8, 1900.

According to said decision, his said declaration of intention has become null and void. Unless he can show himself to be within the amendment of June 25, 1910, he will be obliged to make a new declaration of intention to become a citizen and must "in not less than two years nor more than seven years" thereafter petition for citizenship, his second and final certificate or his second papers, as known in ordinary parlance.

The proviso above referred to reads as follows:

"Provided further, That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten, who, because of misinformation in regard to his citizenship or the requirements of the law

governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States, and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief, may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens." 36 Stats. at Large 830.

The federal courts are not in harmony as to the construction to be given to some of the phrases contained in this proviso and until the supreme court has settled the law there will be differences of opinion as to the rights of certain aliens thereunder. In my judgment, if Mr. Madison can make satisfactory showing of all the facts required to be alleged in his petition and can prove the same, he may

"receive from the court a final certificate of naturalization * * * without requiring proof of former declaration of his intention to become a citizen of the United States."

In the case *In re Fleury*, (D. C., E. D., N. Y.) 223 Fed. 803, the facts were not unlike those existing in Mr. Madison's case. The petitioner had resided in the United States for a great many years. He had taken out his first papers in 1897. Because of misinformation, he had the impression that he was or could become a citizen by filing the first papers. He was a man of good moral character, was intelligent, was a believer in the constitution and laws of the United States and in every other way was qualified for citizenship. Under the rulings of the courts his first papers were not valid and could not be presented in evidence. The court admitted him to citizenship upon his petition under the act of 1910.

There are other cases which may be referred to in determining whether Mr. Madison can make the allegations and proofs which will entitle him to citizenship under said act. See *In re*

Mondelli, 228 Fed. 920; *In re Horecsny*, (D. C., Idaho, S. D.) 238 Fed. 446.

The federal courts differ upon the question whether the "period of more than five years" mentioned in the proviso means during the period of five years immediately preceding the date of the petition or the "period of more than five years" immediately preceding the first day of May, 1910, the date from which the act of June 25, 1910, is said to speak. As Mr. Madison can undoubtedly make the necessary proofs for both of said periods this particular question cannot be raised in his application.

Public Officers—Deputy State Treasury Agent—Citizenship—
The appointment of a person who is not a full citizen to the position of deputy treasury agent is not invalid.

February 21, 1918.

MARION F. REID,

District Attorney,

Hurley, Wisconsin.

That portion of your letter of February 2, 1918, addressed to Honorable Michael Laffey, state treasury agent, in which you state that there seems to be some question about the validity of the appointment of Ad. Laveque, the deputy treasury agent residing in your city, for the reason that he is not a full citizen of the United States, has been referred to me for my consideration and for an opinion. Your letter further states that said deputy has declared his intention to become a citizen but has not the final citizenship papers.

I have made a thorough examination of the statutes and do not find that the legislature has prescribed any particular qualifications for the position of deputy treasury agent. His legal status, therefore, must be determined by the common law. The appointment of a deputy treasury agent is authorized by sec. 20.73 and his compensation is determined by sec. 20.07, subd. (2). The duties of the state treasury agent are prescribed by sec. 1580, and the duties of said officer and the tenure of the office of deputy state treasury agent were considered in an opinion rendered by my predecessor, in Vol. V, Op. Atty. Gen., p. 890.

Under sec. 20.73 the state treasury agent is authorized to prescribe the duties of such deputies as he may appoint. I am not advised whether the state treasury agent has prescribed any particular duties for the deputies appointed by him.

"Where there is no statute prescribing the qualifications of a deputy the principal is authorized as a general rule to appoint whomsoever he pleases, provided the duties of the deputy are purely ministerial." 9 Am. & Eng. Enc. of Law (2d ed.) 374.

It is said in *Wilkerson v. Dennison*, 113 Tenn. 237, 80 S. W. 765, 767:

"The deputy is but the officer's shadow and doeth all things in the name of the officer himself and nothing in his own name."

In another case it is said:

"A deputy is one who by appointment exercises an office in another's right, having no interest therein, and doing all things in his principal's name, for whose misconduct the principal is answerable." *Halter v. Leonard*, 223 Mo. 286, 122 S. W. 706, 708.

The question propounded in your letter has heretofore had the consideration of this department in connection with the office of undersheriff. The appointment of an undersheriff is provided for by sec. 722, and by said section he is made a general deputy. It seems, as here, that the undersheriff in question had declared his intention to become a citizen of the United States but had not been fully naturalized. His right to hold his office was questioned, and in an exhaustive opinion which you will find in Vol. II, Op. Atty. Gen., p. 658, my predecessor came to the conclusion that an undersheriff may legally serve as such officer, although he is not a full citizen of the United States, or of the state of Wisconsin. I know of no decision of this department or of the supreme court of this state which in any way alters or modifies this ruling. In harmony therewith, I must hold that there can be no question about the validity of the appointment of Ad. Laveque as a deputy of the state treasury agent, on the ground that he is not a full citizen of the United States.

Fish and Game—Public Officers—Conservation commission has no power to issue an order requiring all resident clammers to take out licenses.

February 22, 1918.

STATE CONSERVATION COMMISSION.

In your letter of February 16 you ask to be advised if your commission has authority under sec. 29.21, Stats., to issue an order compelling the resident clammers in the state of Wisconsin to secure clamming licenses. You state that the clamming industry in the state of Wisconsin is of great importance; that the proceeds from the sale of shells runs into many thousands of dollars; that sec. 29.38 provides for the payment of a nonresident clamming license fee of fifty dollars; that from investigation you find that approximately four or five hundred persons are clamming in the inland waters of Wisconsin every year; that the state has absolutely no control over the situation, and that the clammers as a rule claim that they are residents of the state; that without a license it is practically impossible for this department to systematically handle the situation; that it is your idea to issue an order that all persons clamming in the state and who have resided in the state for a period of one year must purchase a clamming license and charge a nominal fee, say of one or two dollars, and also that such clammers must send in regular reports of their catch of clams, state to whom they sell, and the prices received; that in this manner every person who clams would necessarily have in his possession either a resident or nonresident license, and would place your department in a position where it would have absolute supervision of the clamming industry.

Sec. 29.21, in subd. (1), provides, in part:

"The state conservation commission shall have power to issue orders determining in what manner, in what numbers, in what places and at what times the taking, catching, or killing of wild animals shall be inconsistent with the proper protection, propagation and conservation of fish, birds or mammals protected by law in this state, and the perpetuation of wild life."

The term "wild animal," as used in this statute, is defined in sec. 29.01 as follows:

"(1) * * * 'Wild animal' means any mammal, bird, fish or other creature of a wild nature endowed with sensation and the power of voluntary motion."

While I believe that these provisions are broad enough to include clams, I do not believe that these are broad enough to give the commission the power described in your inquiry. The commission is there authorized to issue orders

"determining in what manner, in what number, in what places, and at what time the taking, catching or killing of wild animals shall be inconsistent with," etc.

The legislature has been very careful to enumerate here as to what may be covered in the orders issued by the commission. The power to regulate the taking, catching and killing of wild animals is limited under this statute. The regulation can only be made as here specified.

Requiring a person to take out a license could not be said to be a determination of the manner in which claims could be taken, caught or killed. Neither would it be a determination of the number, the places or time of taking the same. It seems to me that the power asked for is not expressly given nor is it implied from the language used. The power to make an order requiring licenses for all resident clambers is one that must be given by unequivocal language.

I believe the legislature intended to give the commission power to require licenses only in such cases as are specifically provided for in the statute. I am confirmed in my conclusion by the fact that no order of the commission can be granted unless the procedural steps described in subds. (2) and (3) of said sec. 29.21 are strictly followed. The initial steps required to be taken by ten or more persons of any township, or twenty-five or more persons of any county, by filing a petition with the commission signed with their names and addresses, requesting the granting of protection or additional protection within such county, is in every case limited to one county, and each order could cover no more territory than is comprised in one county. In order to cover the whole state it would be necessary to have a petition signed by the required number of citizens in each county and a separate order would have to be made for each county under each separate petition.

In the practical working of this statute, if interpreted as broad enough to give the commission power to require a license, it would be possible to require licenses in certain counties, while in other counties it would not be necessary. No such condition

of things was contemplated by our lawmakers, in my opinion. Under no other provisions of our statutes except the one above quoted could the power to issue licenses be argued to be given.

You are therefore advised that it is my opinion that the commission has no power to issue an order requiring licenses to be secured by resident clammers in this state.

Banks and Banking—County Depository—Public Officers—
The fact that the president of a bank is poor commissioner and acting public administrator does not disqualify the bank from becoming a county depository.

February 22, 1918.

C. C. MURPHY,

District Attorney,

Friendship, Wisconsin.

In your communication of February 18 you state that the county board of your county last November, appointed the Friendship State Bank, the Adams State Bank, and the Grand Marsh State Bank as county depositories for your county, over your objection to the Friendship State Bank; that your objection is based upon the ground that the president holds two offices—one as poor commissioner with authority to expend large sums of county money and to make large purchases for said county and that he is also the acting public administrator for said county, wherefore you conclude that as he has authority to purchase articles with county money and to contract debts for said county, such acts are sufficient to disqualify the Friendship Bank from being a depository of the county money. You desire my opinion as to whether you are correct in your conclusion.

Sec. 692, which prohibits county officers from being interested in contracts for the purchase of articles required by the county, is not violated, and does not apply to a county depository.

Sec. 4549, covering malfeasance in office, is not applicable for it contains the following proviso:

“* * * But the provisions of this section shall not apply to the designation of public depositories for public funds.
* * *”

I see no objection, therefore, to designating the Friendship State Bank as a county depository in your county. No statute is being violated and the fact that the legislature has expressly exempted county depositories from the provisions of the malfeasance statute shows conclusively that it was not the intention to make it unlawful for a county officer to be interested in the bank which is made the depository.

You also inquire whether all bonds running to the county should be delivered to the district attorney of the county to be approved of as to their legal effect before said bonds are approved by the various committees appointed for that purpose.

Sec. 702 provides for the approval of bonds of the county and a sufficiency of the sureties thereto by a committee consisting of the chairman of the county board of supervisors and not less than two additional members of the board, who are to report their action upon all bonds, in writing, to the board. I find no provision of the statute which provides that the approval of the district attorney is required before a bond becomes effective. It is the duty of the district attorney to give advice to the county board and all other county officers of his county, when requested, in matters in which the county or state is interested, or anything that relates to the discharge of official duties of such board or officers.

If the county board or a committee of the county board should request your approval of a bond or your opinion on the legality thereof, it would be your duty to give such opinion. But where no such request is made and the committee or the county board approves the bond, or any other officer does an act which it is his duty to do, without requesting your opinion, this does not vitiate the official act of such committee, board or officer.

Public Officers—Legislature—No compensation other than mileage can be paid for services at extra sessions of the legislature; this applies to members elected since final adjournment of the regular session.

February 22, 1918.

C. E. SHAFFER,

Chief Clerk,

Assembly Chamber.

Under date of February 20, 1918, you say:

"Will you kindly give me your opinion as to whether or not a member of the legislature, elected to fill a vacancy since the adjournment of the last regular session, is entitled to receive any compensation for services (except mileage) as a member?"

The following constitutional and statutory provisions must be considered in answering your question:

"Compensation of members. Section 21. [As amended November, 1881.] Each member of the legislature shall receive for his services for and during a regular session the sum of five hundred dollars, and ten cents for every mile he shall travel in going to and returning from the place of meeting of the legislature on the most usual route. In case of an extra session of the legislature, no additional compensation shall be allowed to any member thereof, either directly or indirectly, except for mileage, to be computed at the same rate as for a regular session. No stationery, newspapers, postage or other perquisites, except the salary and mileage above provided, shall be received from the state by any member of the legislature for his services or in any other manner as such member." See. 21, art. IV, Const.

"There is appropriated from the general fund to the legislature, annually, * * * such sum as may be necessary to carry out its functions. Of this there is allotted:

"(1) MEMBERS. Compensation and mileage to each member of the legislature, as prescribed by section 21 of article IV of the constitution, payable at the beginning of the regular session." See. 20.01, Stats.

"The presiding officer of each house, immediately after the commencement of each regular or extra session of the legislature, shall certify to the secretary of state the names of all qualified members of the house over which he presides. * * *." See. 13.04.

I believe that the provisions of the constitution and the statutes above quoted present three insuperable obstacles to the pay-

ment of salaries to the members of the legislature for services rendered at a special session; and this applies equally to the members who serve during the regular session and to those who were elected since the final adjournment of that session.

First: The compensation, aside from mileage, provided by the constitution is for services rendered "during a regular session." The present is a "special session" (sec. 11, art. IV). Or an "extra session" (sec. 21, art. IV) convened by the governor on an extraordinary occasion (art. V, sec. 4, Const.) Such a specific provision as is found in said sec. 21 as to the services which are to be compensated, by legal implication denies payment for other or additional services. The possibility of being called upon to perform extra services is one of the burdens assumed in accepting membership in the legislature.

Second: But the framers of the constitution did not leave the matter of compensation to be disposed of by implication or legal inference. Pay for services at an extra session is limited to mileage. Every other compensation is forbidden.

"In case of an extra session of the legislature no additional compensation shall be allowed any member thereof either directly or indirectly except for mileage."

This language is in my opinion not open to construction and its meaning is free from doubt.

Third: No appropriation to pay for services which are necessitated by an extra session has been made by statute if, indeed, such a provision were constitutionally possible. Said sec. 20.01 provides for "compensation * * * payable at the beginning of the regular session." This plainly recognizes that the compensation for services at extra sessions is prohibited. Money can be drawn from the state treasury only pursuant to an appropriation made by law. In this connection it is hardly necessary to add to the many recent reminders that the legislature is confined strictly to matters covered by the call for the extra session (art. IV, sec. 11, Const.)

In addition to all this we have the practice which has always obtained. Upon inquiry at the office of the secretary of state I am informed that there is no record of any payment for services rendered at an extra session of the legislature. The special session of 1912 was attended by two senators who took office after the final adjournment of the preceding regular ses-

sion. These newly elected senators received no compensation other than mileage. The salary, you will observe, is for services during the regular session. The settled rule is that no salary or compensation other than mileage is received or payable, unless services were rendered during some part of a regular session. Full salaries have been paid for services during a part of such a session, and this department has held that payment to be constitutional, and that the salary is not apportionable. Vol. I, Op. Atty. Gen., p. 532; Vol. VI, Op. Atty. Gen., p. 75. But that is a matter quite separate and distinct from salaries for services at extra sessions.

While it is aside from the strictly constitutional question presented, still it may not be amiss to remark that from a practical viewpoint the constitution works no injustice to new members as compared with the other members. The latter, who served more than one-half year in the regular session of 1917, feel, I have no doubt, that they fully earned their five hundred dollars for salary then, and that during this extra session they too are serving without money compensation. Most men who serve in the legislature do so at a financial sacrifice, and the extent of that sacrifice is proportionate to the length and number of sessions at which they serve.

Municipal Corporations—Words and Phrases—The petition for the incorporation of an unincorporated village and adjacent territory lying in two or more towns, as a city, should be presented to the board of the town in which the unincorporated village is located.

“Unincorporated village” defined.

HONORABLE L. C. WHITTET,

Private Secretary to the Governor.

I have examined and return herewith the papers in connection with the incorporation of the city of Hurley. I note that according to the certificate filed with the secretary of state the petition to have the question of incorporating said city of Hurley, to be composed of the unincorporated village of Hurley, in the town of Vaughn, and adjacent territory thereto, situated in the

February 22, 1918.

said town of Vaughn, and in the town of Carey, was presented to the town clerk of the town of Vaughn, and no such petition appears to have been submitted to the town clerk of the town of Carey. The first question that suggests itself to me is whether there should not have been such a petition presented to the town clerks of both towns containing the territory proposed to be incorporated.

Sec. 925—7, Stats., provides:

"Any district containing a population of fifteen hundred or over, and not heretofore incorporated as a city may become incorporated under this chapter in the manner hereinafter specified."

Then it will be noted that the territory to become incorporated need not, so far as the provisions of this section are concerned, include a village either incorporated or unincorporated, and there is no limitation that it must be all situated within any one town.

Sec. 925—8, Stats., provides:

"One hundred or more electors and taxpayers of any village, incorporated or unincorporated, may apply by petition to the trustees of such village or to the proper town board to have the question of incorporating said village, or the same and adjacent territory, containing together a population of not less than fifteen hundred, as a city, submitted to a vote of the electors of the territory described in said petition; provided, that in case it is proposed to include territory adjacent to such village the consent in writing of a majority of the electors residing therein, and the owners of at least one-third of the taxable property in such territory according to the last assessment roll, shall be presented with said petition."

The question then presents itself as to what is the proper town board, in a case such as this, where the territory proposed to be incorporated lies in two towns, and part of such territory consists of an unincorporated village lying in one of said towns. The succeeding sections provide the necessary machinery for carrying out the scheme of incorporation and all seem to contemplate action by but a single municipality, through its board. Said board may adopt a resolution for the submission of the question of such incorporation to the vote of the electors residing within the limits of the proposed city, and such resolution shall determine the number and boundaries of the wards in

which the city shall be divided, fix the time of voting on such proposition, and provide for the taking of the census, unless it is proposed to have the city classified according to the last census taken under the laws of the United States or of this state. Notice of such election has to be given by publication in some newspaper published in the village, if there be one, and otherwise in some newspaper designated in the resolution. The election is to be conducted under the same rules and in the same manner as elections for village trustees, and the result canvassed by the inspectors is to be returned to the clerk of the village, if it be incorporated, and otherwise to the clerk of the town. No provision is made for joint action by the boards of two or more towns, nor by the board of a town and the board of a village where such village is incorporated.

I do not believe that the term "village" is defined in our statutes. Sec. 819, however, provides that the town board shall have power, among other things:

"(6) To designate and cause to be recorded by the town clerk the boundaries of any unincorporated village, located within the town;

"(7) To appoint, upon the petition of ten or more resident freeholders of any such village one or more fire wardens and, when the public good requires it, not exceeding three policemen, one superintendent of police and a night watchman for service in the village."

By sec. 819f, the town board is required, upon the presentation to it of a proper petition, to direct the construction of sidewalks in such incorporated villages.

It thus appears that the only unincorporated villages that are recognized as such by the provisions of the statutes, are those the boundaries of which have been designated by the town board of the town in which such village is located; that the town board is the proper legislative body of such unincorporated village and that necessarily such an unincorporated village must all be located within the boundaries of the one town. If we so construe the term "village" as used in sec. 925—8, it brings the whole scheme for incorporation into harmony. If it is proposed to incorporate as a city an unincorporated village together with adjacent territory, the petition is presented to the village board alone, and if it be proposed to incorporate as a city an unin-

corporated village together with adjacent territory then whether such adjacent territory be in the same town as the unincorporated village, or in an adjacent town, the petition is presented to the town board of the town in which the unincorporated village is located only. That board takes the necessary steps to secure the incorporation of such territory as a city, if a favorable vote results at the ensuing election.

I am therefore constrained to hold that in that respect the proceedings had in this case were proper.

Agriculture—Live stock sanitary board has power to issue order in question, to prevent the spread of rabies.

February 23, 1918.

DR. O. H. ELIASON,
State Veterinarian.

You inquire whether there is authority under the state statutes for the issuing of the following proclamation and order by the Wisconsin department of agriculture, to wit:

“WISCONSIN DEPARTMENT OF AGRICULTURE PROCLAMATION.

“WHEREAS, information shows that Rabies, a communicable disease, common to man and animals, is known to exist in various sections of counties in this state, and

“WHEREAS, the dog is the chief medium of carrying and distributing this disease, and

“WHEREAS, this disease is causing death to human beings and heavy losses of live stock within the described area:

“BE IT THEREFORE ORDERED, according to authority vested in the Commission of Agriculture, under ch. 548, 1917,

“I, _____ Commissioner of Agriculture, do declare that all dogs within the quarantined area shall be confined at leash or enclosure and shall not be permitted upon any highway, street or other public place unless such dog or dogs are *muzzled and on leash*.

“During the period of this quarantine, no dog shall be accepted for transportation by any common carrier and shall in no way be transferred from one premises to another, within the quarantined territory. (Except when a family is moving from one farm to another within the quarantined area, and then only on written permit of the state veterinarian.)

“City and village councils and town boards, within the quar-

anted area are hereby asked to coöperate and instruct their officers, police constables, and if necessary deputize others to assist in enforcing this order.

"It is the duty of every citizen to assist officers in the enforcement of this order. Lives have been lost, thousands of dollars worth of live stock have been lost as a consequence and a number of people have been bitten and have had to submit to preventative treatment, causing loss of time, money and also suffering.

"QUARANTINED AREA.

"Counties of Milwaukee, Racine, Kenosha, Ozaukee, Waukesha, Jefferson, Walworth, Rock and Dane.

"We call upon the people for their coöperation in exterminating this disease.

"DURATION OF QUARANTINE.

"This order shall take effect upon publication and continue until revoked."

Under sec. 1492ab there is created in the department of agriculture a state live stock sanitary board, to consist of five members. Concerning their power and duties, we find the following, in subsec. 5:

"It shall be the duty of the state live stock sanitary board to protect the health of domestic animals of the state; to determine and employ the most efficient and practical means for the prevention, suppression, control or eradication of dangerous, contagious or infectious diseases among domestic animals, and for these purposes it is hereby authorized to establish, maintain, enforce and regulate such quarantine and other measures relating to the movement and care of animals and their products, the disinfection of suspected localities and articles, and the disposition of animals, as it may deem necessary, and to adopt from time to time all such regulations as may be necessary and proper for carrying out the duties imposed upon said department by law; provided, however, in the case of solely contagious diseases only suspected or diseased animals shall be quarantined. * * *."

Subsec. 5r, as enacted by ch. 548, laws of 1917, provides as follows:

"Any person, firm, or corporation, who shall knowingly bring into this state, or transport or remove from one part of the state to another, or receive in charge, or exhibit at any fair, any

animal afflicted with or that has been exposed to any contagious or infectious disease, except as authorized by the rules, regulations, or orders of the department of agriculture, commissioner of agriculture, or state live stock sanitary board; or who, knowing or having reason to suspect that there is any such animal upon his premises or upon any premises of which he has control, shall fail to report such fact as required by law, or who shall attempt to conceal the existence of such disease upon such premises, or who shall permit such animal to run at large or come in contact with other animals susceptible to such disease; or who shall violate any provision of this section or any rule, regulation or order issued pursuant thereto by the department of agriculture, commissioner of agriculture, or state live stock sanitary board, shall be liable to any person injured thereby for the damages by him sustained, and shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than one year, or by both such fine and imprisonment, and the criminal penalty herein prescribed shall be cumulative for each animal involved in such violation."

The term "contagious and infectious diseases" includes rabies, under subsec. 5m, and by subsec. 5h animals in transit in this state are made subject to all the provisions of law relating to contagious and infectious diseases of animals, and the rules, regulations and orders of the state live stock sanitary board issued pursuant to law. Under these provisions of our statute I am persuaded that the state live stock sanitary board has the power to issue the proclamation and order above quoted.

The language of the statute is broad and sufficiently explicit to clearly indicate that the order made in the above proclamation is thereby authorized. And it seems to me, under the facts stated in the proclamation, no court would set them aside as unreasonable, in view of the seriousness of the communicable disease known as rabies.

Bridges and Highways—Counties—A county is liable only where the injury complained of occurred on a highway maintained at county expense.

February 25, 1918.

WILLIAM COOK,

District Attorney,

Green Bay, Wisconsin.

You state that an action was begun against Brown county to recover damages resulting from an injury due to a defect in a public highway, and you submit for my opinion this question:

Is the county liable under sec. 1339 for damages resulting from defects in a highway which has been included in the system of prospective county highways under ch. 487, laws of 1907, or ch. 552, laws of 1907 (both repealed by ch. 337, laws of 1911), and which highway became part of the county system of prospective state highways under sec. 1317m—3, subsec. 1, said highway not being improved or adopted as a state highway?

You express the opinion that the county is not liable upon the facts stated, and in that opinion I concur. The answer to your question turns upon the liability of the county to keep this highway in repair at the time the accident occurred. If the county was then liable to maintain this highway, it is liable for injuries resulting from actionable defects therein.

Sec. 1339, Stats., first provides for the recovery of damages from towns, cities and villages resulting from defects in highways therein, and further provides:

“* * * If such damages shall happen by reason of the insufficiency or want of repairs of a bridge, sluiceway or road which any county shall have adopted as a county road and is by law bound to keep in repair, such county shall be liable therefor and the claim for damages shall be against the county * * *.”

Ch. 487 provided for a permanent highway system under county supervision. Sec. 1311—10, being part of said chapter, directed the county board “to designate a system of prospective county highways.” But the designation of a highway as part of such a system did not constitute an adoption of the same as a county highway or make the county liable for its maintenance.

Under the act of 1907 a highway could be adopted as a county highway only when it had been improved as provided in secs. 911—1 and 911—2, and those sections provided for the permanent improvement of highways with gravel, crushed rock or other road material to a specified depth and width. See. 1311—20, Stats. 1898 (ch. 487, Laws 1907).

"When a road has been adopted as a county highway the town chairman in which such road shall be situated shall under the general direction of the county highway commissioner make the necessary repairs thereon, and all expenses thus incurred shall be paid by the county from the county highway repair fund." Sec. 1311—24, Stats. 1898 (ch. 487, Laws 1907).

According to the statement of facts above given this highway was not so improved and therefore was not and could not be adopted as a county road. As before stated, the highway acts of 1907 were repealed and the laws upon this subject revised in 1911. These statutes are secs. 1317m—1 to 1317m—15 and have been amended at each session of the legislature, but not so as to change their effect upon the question under consideration.

Sec. 1317m—3, subsec. 1 (created by ch. 337, laws of 1911) provides:

"The systems of prospective county highways which have been selected by the various county boards pursuant to section 1311—10 [ch. 487, laws of 1907], or section 1311p [ch. 552, laws of 1907] of the statutes shall be known as the county systems of prospective state highways. * * *

"3. The county board may adopt any part of the prospective system together with all bridges and culverts thereon as a state highway; provided (1) that such part has heretofore been improved with stone or gravel, (2) that it is in good repair; and (3) that all bridges and culverts on such part are well constructed and in good repair." Sec. 1317m—3, Stats.

The only other method by which highways on that system may become state highways is by being improved under the State Aid Highway Act. Only those which are improved thereunder or have been adopted according to the subsection just quoted are state highways. Subsec. 8, sec. 1317m—7.

The counties are obligated to keep state highways only in repair, except the parts thereof lying within incorporated villages. Subsec. 9, sec. 1317m—7.

Taxation—Boxing Exhibitions—The state receives 5% of gross receipts at all boxing exhibitions; gross receipts include war tax.

February 26, 1918.

WALTER H. LIGGINGER, *Chairman,*
State Athletic Commission.

In your communication of February 23 you state that the Cream City Athletic Club held a boxing show in Milwaukee on February 18; that the prices of admission were one dollar, one dollar and fifty cents and two dollars, including the war tax; that the club in making its report on sale of tickets and remittance for the state tax to the commission first deducted the war tax from the gross receipts for the face value of the tickets. You state that you have advised Mr. Thomas Andrews, secretary of the club, that you were of the opinion that the commission was entitled to the state tax for the face value of the admission tickets; that the report of your inspectors, of which you enclose a copy, is computed on the basis of the face value of the price printed on the tickets, as required by your rules. You inquire whether you are correct in the position which you have taken.

The provision of the statute which is controlling in this matter is found in subsec. 3, sec. 1636—241, Stats. It provides:

“Every club, corporation or association which may hold or exercise any of the privileges conferred by this section shall, within twenty-four hours after the determination of every contest, furnish to the said commission a written report, duly verified by one of its officers, showing the number of tickets sold for such contest, and the amount of gross proceeds thereof, and such other matters as the commission may prescribe; and shall also within said time, pay to the said commission a tax of five per cent of its total gross receipts from the sale of tickets of admission to such boxing or sparring match or exhibition.”

The gross receipts can only be, in this case, the price received for the tickets and includes the war tax.

“Gross receipts” is defined by Anderson’s Law Dictionary:

“All receipts due, undiminished by expenses or other deductions.”

The rules and regulations which you have adopted and of which you have furnished me a copy clearly provide that the

tickets shall have the price and date of show printed plainly thereon, and that the clubs are prohibited to sell any ticket for any price other than the price printed thereon or to change the prices of tickets at any time after tickets for the exhibition have been placed on sale or to sell any tickets at any time during the exhibition at less price than tickets for the same seats were sold or offered for the exhibition. You are advised, therefore, that the position that you have taken is the correct one.

Constitutional Law—Bonds—Taxation—War bonds under sec. 7, art. VIII, Wis. Const., should have the tax provision as in sec. 6, art. VIII. An income tax not a proper basis for such bonds.

An income surtax cannot be levied on a few to meet a war bond issue.

February 27, 1918.

HONORABLE E. L. PHILIPP,
Governor.

Upon your request I have examined Bill No. 12, S., providing for the borrowing of money and issuing bonds therefor for the purposes specified in sec. 7, art. VIII, Const., and herewith submit my opinion as to whether it is a legal and constitutional act.

I am satisfied that the state has authority under sec. 7, art. VIII of our constitution to borrow money for the purposes specified in this act, and to that extent the bill would be constitutional. This disposes of secs. 1 and 2 of the proposed bill.

Sec. 3 of the bill, however, presents a very novel situation, and, to say the least, enters a field of speculation untraveled in the past, and thus calling for closer scrutiny and the application of fundamental principles, perhaps, to guide us in its study.

Probably no bond issue was ever before attempted to be based upon an income tax provision for its repayment such as is outlined in this proposed bill. This fact challenges one's attention at the outset. By the provisions of this bill the entire burden is attempted to be placed upon that part of our people solely who have taxable incomes, under ch. 48a of our statutes, in excess of fifteen thousand dollars. The taxation policy of our state, as shown by the whole body of our tax laws, is to place the bur-

dens of taxation on both tangible property and income. Never before has it been attempted to place the burden of any particular project or financial scheme wholly upon incomes; while this proposed bill goes even farther than that, and places the whole burden of this proposed war fund upon a very small number of those paying income taxes under our income tax laws.

While it may be said that a graduated and progressive income tax law may not be said to violate the rule of uniformity required under sec. 1, art. VIII, it certainly is going a long way to say that an income tax law such as the one proposed, which places the whole burden upon only a few of those taxable under the income tax system of the state, is a valid enactment. This proposed bill is designed to become a part of and be engrafted upon the income tax laws of this state under ch. 48a of our statutes, and for the purposes of the thought we are considering now, it may be discussed as though our original income tax laws had contained this additional feature and had attempted to place the entire burden of the revenues necessary to defray the entire expenses of certain projects upon this same few of the whole income tax paying body, that is, requiring those few who have incomes bringing them within the terms of this proposed act to bear the entire burden of such financial project. In other words, the burden of this war fund, under this bill, will not fall upon the taxable property of the state at all, and will not fall in any graduated or progressive way, as those terms are used in sec. 1, art. VIII, upon the whole income tax paying body or individuals of the state; but this whole burden falls, under this proposed bill, upon a few only of those designated under our present income tax laws to bear the burdens of taxation. *Hale v. City of Kenosha*, 29 Wis. 599, 603-604.

The only feature of present taxing laws analogous to this feature of the proposed bill is the special assessment laws sustained against a special class of people on the ground that that class are the only ones specially benefited by the improvement for which the special assessment is made. It cannot be said in support of this proposed act that these few people who sustain this special tax burden receive the sole benefit. The benefit goes to all alike; the burden under this proposed bill falls upon the few. In this respect it would seem that this proposed bill would be said to be in violation of the rule of uniformity prescribed by sec. 1, art. VIII of our constitution,

The question also arises with reference to these war bonds, whether it is necessary to make any provision by taxation for the payment of the interest and the repayment of the principal as it falls due.

See. 3, art. XI makes such provision with regard to all municipalities within the state. In Gray's Limitations of Taxing Power and Public Indebtedness, sec. 2133, we find this language:

"Commonly it is provided that where a state or municipal debt is created the means to pay the interest or principal, or both, shall be provided by law at the time of the creation of the debt. * * *."

"The wisdom of regulations of this sort is apparent and they are so common that it may be stated as a prevailing rule of the state constitutions that provision for the payment of public debts must be made at the time such debts are created."

The above section cites the constitutions of a great many of the states of the Union, and the question is whether there is anything in the constitution of this state that requires the levying of a tax to meet the principal and interest on these bonds as they fall due.

Sec. 4, art. VIII of our constitution would seem to have some bearing on this question, and reads as follows:

"Section 4. The state shall never contract any public debt except in the cases and *manner* herein provided."

Then, after sec. 5 come secs. 6 and 7, being the only two sections of the constitution authorizing state debts.

Sec. 6 provides:

"* * *. Every such law shall provide for levying an annual tax sufficient to pay the annual interest of such debt and the principal within five years from the passage of such law, and shall specially appropriate the proceeds of such taxes to the payment of such principal and interest; and such appropriation shall not be repealed, nor the taxes be postponed or diminished, until the principal and interest of such debt shall have been wholly paid."

Then follows sec. 7 of said article, which reads as follows:

"Section 7. The legislature may also borrow money to repel invasion, suppress insurrection, or defend the state in time of war; but the money thus raised shall be applied exclusively to

the object for which the loan was authorized, or to the repayment of the debt thereby created."

Further on, in sec. 9 of the same article, we find this language:

"Section 9. No scrip, certificate, or other evidence of state debt whatsoever, shall be issued except for such debts as are authorized by the sixth and seventh sections of this article."

It will readily be seen that secs. 6 and 7, art. VIII, are in reality subdivisions of sec. 4, and said sec. 4 requires the debt to be created only in the "manner herein provided," but there is no manner provided in sec. 4. The manner is evidently pointed out in sec. 6, which is really a subsection of said sec. 4. The cases in which a public debt may be created, referred to in said sec. 4, are the cases nominated in secs. 6 and 7, and the language of sec. 9 of said article again ties secs. 6 and 7 of said article of the constitution together. It would seem clear, therefore, from this reasoning that the repayment of money borrowed under said sec. 7, that is, in the case or cases provided for in said sec. 7, must be provided for in the manner outlined in sec. 6. Otherwise there would be no manner provided in the constitution for creating a debt authorized by said sec. 7. But sec. 4 requires the debt to be created "in the manner herein provided," evidently intending thereby to specify the manner outlined in sec. 6.

By thus reading said secs. 4, 6, 7 and 9 together, and making or thinking of the three last sections as in reality subdivisions of said sec. 4, we have a complete, workable scheme clearly outlined. It can hardly be presumed that the framers of the constitution intended to provide for a state debt by the issue of bonds in unlimited amounts without requiring any provision for their repayment. Such bonds would hardly commend themselves to the investing public, and might prove of little or no value in raising funds to meet the extraordinary contingencies of a state in time of war. In the case of *In re Board of Equalization*, 24 Colo. 446, the constitution of Colorado is construed in a manner similar to that suggested here, and on page 450 of the opinion we find this language:

"It is a familiar principle that, if consistent with rational rules of construction, effect must be given to all the provisions and all the words of a constitution, and that construction is to be avoided which destroys or nullifies any portion thereof."

On page 451 of the opinion we find this language:

"To make effective the power to contract a loan it was, *of course, necessary* that some provision should be made for its payment; and so, in section 4 of article 11 there is conferred upon the general assembly a power, correlative to the power to contract a debt, to levy a tax sufficient to pay the interest and principal thereof, as the same fall due."

I am satisfied, therefore, that any bonds issued under said sec. 7 of our constitution must be accompanied by a provision as prescribed in said sec. 6, to wit,

"every such law shall provide for levying an annual tax sufficient to pay the annual interest on such debt and the principal."

Thus only will the debt be created in the manner required by said sec. 4.

It is obvious that the tax provision made in Bill No. 12, S., under consideration, is not a compliance with these constitutional provisions.

A further question for consideration is whether sec. 3 of the proposed bill is within the call for this special session of the legislature. The only provision in the call of the governor under which this proposed bill can come is the first in the call, to wit,

"To pass an act authorizing the state to borrow money to repel invasion, suppress insurrection and defend the state in time of war as provided by section 7 of article VIII of the constitution of the state of Wisconsin."

If this proposed bill does not come within the purposes outlined in the language of the call above quoted, it would, of course, invalidate the bill. It will be noted that the call says nothing about a tax. If a tax is not required under the constitutional provision for the payment of the principal and interest on the bonds as they fall due, that is, if a bond issue could be made under sec. 7, art. VIII of the constitution, without any tax provision for their payment, then no tax provision or levy can be said to be included within the call, and the proposed bill would be void because of containing a taxation law not authorized under the call. But if the constitutional provision for issuing these bonds requires a tax levy to accompany such a bond measure, then the only tax provision that would be authorized would be one that raised enough, but no more than enough,

funds to meet the interest and principal on the bonds as they fall due; and it cannot be said that the tax provision of the proposed bill does this. It does not purport to raise funds sufficient, and only sufficient, to meet the principal and interest of the bond issue as they fall due, but it proposes to levy a certain percentage of tax on certain incomes which may raise sufficient, and perhaps more, funds than is necessary to meet this bond issue, or may raise not enough. At most it can be said to be a mere estimate as to the amount of funds that will be thus raised. It cannot be presumed that the estimate will be so exact as to raise exactly enough, and no more. If it does not raise enough, it would not answer the calls of the constitutional requirements. If it raises too much, it is without the terms of the call. So that in either case the bill would be void. It would be impossible by such an income tax law, or any income tax that might be levied, to raise exactly enough and no more. So that no income tax provision would answer the constitutional requirements of a tax to pay the interest and principal as they fall due. It is certain, therefore, that in either case the proposed bill would be unconstitutional.

Without attempting to enumerate other defects that suggest themselves regarding the proposed bill, it is believed that the above are sufficient to warrant the conclusion that the bill, if enacted, would be unconstitutional and void.

Taxation—Gross Income—Life Insurance—Interest whether paid in cash or by being charged against the reserve value of a life insurance policy is gross income of the company.

February 28, 1918.

HONORABLE M. J. CLEARY,

Commissioner of Insurance.

In your favor of February 25 you call my attention to subd. (1), sec. 51.32, Stats., and suggest that the Northwestern Mutual Life Insurance Company, of Milwaukee, contends that the item of "interest on policy loans" is not an item of income subject to taxation under said section; that this interest income item is purely a matter of bookkeeping and is not an income subject to taxation within the contemplation of the statutes.

Under subd. (1) of said sec. 51.32 the Northwestern Mutual Life Insurance Company is required to pay

"three per centum of its gross income from all sources for the year ending December thirty-first, next prior to the said first day of March excepting therefrom income from rents of real estate upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected on policies of insurance and contracts for annuities."

The only question, therefore, to be considered is whether the item of interest on policy loans should be included in or as a part of the company's "gross income" under the provisions of this law.

Ordinarily, of course, interest items are a part of gross income. This question arises, however, because of certain peculiarities pertaining to and connected with the business of policy loans as conducted by this and other insurance companies.

After an insurance policy has run for some considerable length of time and the premiums thereon have been paid there is accumulated in the hands of the company what is known as a reserve to the credit of the policy, and the practice is—and it is provided for in the policy—for the company to loan or advance upon request to the assured a certain part of this reserve value at a rate of interest, five per cent or otherwise, as the case may be. This advance or loan is secured to the company by the policy and the assured signs a note or contract evidencing the same. The note or contract, however, does not require, in specified terms, that the assured actually pay in cash either the principal or interest, but goes upon the theory that they may be paid or not by the assured in cash. If not so paid, they are paid by the company charging up against the reserve value of the policy the amount of the interest, and when the interest and principal accumulations equal the cash surrender value of the policy, the policy is canceled, and the reserve value of the policy offsets the principal and interest of the so-called note.

Apparently the company's claim is that even when this interest is paid in cash by the assured, it is not a part of the gross income under this statute. I am satisfied that the company's claim in this regard is invalid. Where the interest is paid in cash, it increases to that extent the assets of the company. It increases the surplus of the company, and it certainly increases

the gross income of the company by the amount of such interest payment.

I therefore pass to the consideration of the interest item on such policy loans that is not paid in cash. Here we have a somewhat different proposition. It is said that here the company receives nothing from the assured, but merely charges up against the reserve value on the policy of the assured the amount of the interest, the interest item due to the company canceling an equal amount of reserve value of the policy due the assured, and that therefore the company has received no income by this transaction; that it is in reality only a part payment of its obligation to the assured, and that the payment of a debt of the company to the assured cannot work the item into one of gross income.

The company relies for its contention upon the authority of *Orleans Parish v. New York Life Insurance Company*, 216 U. S. 517. This was the case of the New York Life Insurance Company doing business in the state of New York being taxed in the state of Louisiana under a tax law taxing credits, and it was sought to hold the company liable under a tax against credits because of such policy loans made by that company to the policy holders in the state of Louisiana, and while certain language is used in the opinion in that case that might be said to be applicable here the case in no way involves the identical question, but rather involves a question of whether the New York Life Insurance Company was liable under such credit tax in the state of Louisiana. The case does not determine whether the item of interest under such circumstances would be a part of the gross income of the company, and therefore it does not necessarily pass on the question here involved.

The company also relies upon a decision handed down by Judge Geiger, of the federal court for the eastern district of Wisconsin, on November 7, 1917, in the case of *Northwestern Mutual Life Insurance Company v. Henry Fink, Collector, etc.* This case involved the question whether these interest items would increase the income of the company by that amount under the federal income tax law; and it holds that they would not, basing its decision upon the United States case above cited.

I cannot see that these two cases involved necessarily the same question as the one raised here. In the income tax case decided by Judge Geiger, last above referred to, was involved the

net income under the United States income tax law, while the Louisiana case, first above referred to, did not involve the question of income at all. Here we have the question of what should be included in the term "gross income" under sec. 51.32. We must, therefore, approach the question at least unprejudiced by those two decisions.

It is asserted and claimed on behalf of the company that on these policy loans to the assured, where the interest is not paid in cash, the company actually receives nothing by the transaction by which it pays the interest on the loan due from the assured to the company by a charge against the reserve policy value of the assured. But the company in fact does receive something. The interest is actually paid by deduction automatically made by the company of its reserve liability on the policy to the amount of the interest. The interest item decreases the amount of the company's indebtedness by the amount thereof. If the company loaned all of the reserve value of its policies to third persons, and not to policy holders, it would certainly receive the interest items therefrom as a part of its gross income, and the fact that it might pay the whole amount of these items out to its policy holders on the reserve value of their policies, thus decreasing the liabilities by that amount, would not have a tendency to in any way decrease its gross income. The interest items then would certainly be a part of the gross income, because the same thing results when loans are made to policy holders, and interest is not paid in cash, but charged up to each policy against its reserve value, thereby decreasing the liabilities of the company to that extent. How can it be said that the company has received nothing? It has received in value the same that it would have received had the loans been made not to the policy holders but to third persons who paid interest in cash.

Assuming that the insurance company has a surplus account, that surplus account is increased each year because of these interest items by the amount of the interest items whether such interest items are paid in cash or by a deduction of the reserve value of the policies.

It is not necessary that income items must be received in cash. If anything of value, the equivalent of cash, is received, it is sufficient to include the item in the income. Our court in the

Income Tax Cases, 148 Wis. 456, on page 512 of the opinion, in discussing what, in fact, is income says:

"In this connection, though not perhaps in its logical order, may be considered the objection to that provision of the act which directs that the estimated rental of residence property occupied by the owner shall be considered as income. It is said that this is not income, and that calling it income does not make it income. It may be conceded that things which are not in fact income cannot be made such by mere legislative fiat, yet it must also be conceded, we think, that income in its general sense need not necessarily be money. Clearly it must be money or that which is convertible into money. The Century Dictionary defines it as that which 'comes in to a person as payment for labor or services rendered in some office, or as gain from lands, business, the investment of capital, etc.' "

The court holds that the estimated rental of residence property under our income tax law is income, so here it would seem that the company receives in value from the assured the amount of the interest item whether paid in cash or not. If not paid in cash, it receives it in value by deduction of the company's liabilities on its policies in the same amount as though paid in cash. Its surplus is increased by the interest items in the same amount as though paid in cash. See *Northwestern Mutual L. Ins. Co. v. State*, 163 Wis. 484, 502.

Furthermore, this company has been taxed under this law ever since 1911. Each year it has rendered its reports in compliance with the provisions of the law and has itself included in such reports these interest items, both those paid in cash and those charged against the reserve value of the policies. In other words, it has itself ever since 1911 considered that these interest items on policy loans, whether paid in cash or not, were, in fact, items of gross income. This fact, even if not considered as a practical construction of the meaning of "gross income," within the provisions of this act, is at least persuasive in dissolving any doubt that may exist upon the question against the company and in favor of its long continued attitude and own interpretation of the question.

I therefore advise you that in my opinion the interest items on policy loans, whether paid in cash or not, should be included as a part of the company's gross income under the provisions of the law above referred to.

Taxation—Sec. 1164, relating to the time when settlement for taxes illegally assessed must be made between the county treasurer and the state treasurer is not a statute of limitation but merely fixes the time when right accrues.

February 28, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of February 25 you ask:

"If a town, city or village shall have paid a claim for taxes, illegally assessed, and shall have made settlement with the county treasurer, as provided by law, and if the county treasurer shall not have made settlement of such taxes in his settlement of state taxes with the state treasurer the ensuing year, then can such county require a settlement from the state of the state's portion of such illegally assessed taxes?"

Sec. 1164, Stats., in part, provides:

"2. In case any such town, city or village shall have paid such claim or any judgment recovered thereon after having paid over to the county treasurer the state and county tax levied and collected as part of such unlawful tax, such town, city, or village shall be credited by the county treasurer, on the settlement with the proper treasurer for the taxes of the ensuing year, the whole amount of such state and county tax so paid into the county treasury with the county's and state's proportionate share of the taxable costs and expenses of suit; and the county treasurer shall also be allowed by the state treasurer the amount of state tax so illegally collected with the state's proportionate share of the taxable costs and expenses of suit and paid in his settlement with the state treasurer next after the payment of such claim or the collection of such judgment."

The question is whether or not the latter portion of the above quoted statute is a statute of limitation or merely a statute fixing the time when the right to payment accrues. A reading of all of the statutes upon the subject of settlement between the respective treasurers of the taxing districts discloses that they must make settlement as follows:

First: By sec. 1081 the town treasurer must pay the state tax to the county treasurer not later than the first Monday in March.

Second: By sec. 1121 the county treasurer must pay to the state treasurer not later than the second Monday in March.

Third: By sec. 1081 a settlement must be made between the town and county treasurers not later than the 22d day of March.

Fourth: By sec. 1121 the several county treasurers shall pay to the state treasurer the amount of state taxes charged to their respective counties on or before the second Monday in March of each year, and the amount of income taxes charged to their respective counties on or before the first day of May in each year.

Reading all of the sections of the statutes together it seems that it is the intent of the legislature to fix a reasonable time for the payment and settlement between the respective treasurers of the taxing districts, and that the statute in question seeks only to fix a reasonable time in which the tax should be paid.

Sec. 1164 provides that the amount of taxes unlawfully collected shall be paid in the settlement of the ensuing year. It would be absurd to say that if it were not paid upon the exact date provided by statute the claim would become null and void. It might be that some dispute would arise, either in turning over the money or rendering a proper receipt therefor which would cause an action to be brought by one or the other of the treasurers involved. This must have been in the legislative mind when this subject was legislated upon, and it would be unreasonable and unfair to hold that the statute meant to limit the time so specifically and to shut off the right to sue to recover what might be a just claim of one or the other of the taxing districts.

It is, therefore, my opinion that sec. 1164, above quoted, merely fixes the time at which the right to compel action accrues, and that it is not a statute of limitation..

Bridges and Highways—The highway commission may allow counties fair pay for use of their unusual, labor-saving road machinery, to be charged to joint construction fund and credited to county road fund.

March 2, 1918.

W. T. DOAN,

District Attorney,

New Richmond, Wisconsin.

I have your letter stating that the county highway commissioner desires to be advised

"as to whether the county can purchase a gravel loader and motor truck for loading and hauling gravel in work done upon the prospective system of state highways and upon the federal trunk line system, and as the work is being done charge against the highway fund of the particular town in which the work is being done, a certain rate or interest on the value of the machinery used, * * * to be credited back to the county on its investment."

and you ask for my opinion thereon.

The question involves one of law and another of fact. The statute which controls in this matter is part of subsec. 5, sec. 1317m—5, and reads thus:

"* * * The state highway commission shall make fair allowance to a county out of the construction funds for the use of any labor-saving machinery provided by a county over and above the machinery commonly furnished by counties for work of like character. All moneys received by a county under this subsection shall be credited to the county road and bridge fund."

This statute, it seems to me, contains an express grant of power to counties which carries with it an implied limitation. The legislature having stated what a county may do in this particular field, thereby limited by inference the county to the power expressly granted. The county, I believe, must keep within this statute in this matter. It cannot make a charge

against a town or a town fund or determine the allowance to be made to the county for the use of labor-saving machinery.

"The state highway commission shall make a fair allowance to a county out of the joint construction funds."

No other statute bearing directly on the question has come to my attention, and I feel reasonably certain that this is the one under which your county must proceed.

Whether the equipment which you mention is

"labor-saving machinery * * * over and above the machinery commonly furnished by counties for work of like character"

is a question of fact primarily for determination by the commission. The commission undoubtedly has a wide discretion in this matter which can be interfered with only when abused, and then only by recourse to the courts.

Furthermore, machinery which stood the statutory test a few years ago may not do so now and that which stands it at present may fail in a year or two. That phase of the matter should be taken up with the commission. In fact, the entire question is one that is very much within the jurisdiction of the state highway commission and has likely been well considered there, and prompt response could be had by any county that should go to the commission with this matter.

Elections—Primary Party Ticket—A political party is entitled to a party ticket at a primary election if any of its candidates received one per cent of the total vote at the last preceding general election, even though no nomination papers are filed for that party.

March 2, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In answer to your inquiry of March 2, as to whether the prohibition party is entitled to a ticket at the special primary for nomination for United States senator on March 19, 1918, there having been no nomination papers filed by a prohibition candidate for such primary, I would say that sec. 5.13 requires:

"At all primaries there shall be an Australian ballot made up of the several party tickets herein provided for, all of which shall be securely fastened together at the top and folded; provided, that there shall be as many separate tickets as there are parties entitled to participate in said primary election."

Sec. 5.05, subsec. 6, subd. (d), provides:

"* * * But any political organization which at the last preceding general election was represented on the official ballot by either regular party candidates or by individual nominees only, may, upon complying with the provisions of this act, have a separate primary election ticket as a political party, if any of its candidates or individual nominees received one per cent of the total vote cast at the last preceding general election in the state. * * *"

This subd. (d) seems to govern the question as to what parties are entitled to a ticket, and also the question of what candidates are entitled to have their names put upon that ticket, and these requirements seem to be separate.

I am inclined to the opinion, therefore, that the party may be entitled to a separate ticket when it comes within the provisions of the law, even though it has no nomination papers on file. I therefore advise you that if the prohibition candidates or individual nominees received one per cent of the total vote cast at the last preceding general election in the state, then the party is entitled to a separate ticket.

Trade Names—Recording—A trade-mark cannot be used to designate the person or corporation transacting business.

March 5, 1918.

HONORABLE W. B. NAYLOR,

Assistant Secretary of State.

I have your inquiry concerning the construction to be placed upon sec. 1747a, Wis. Stats. It appears from the correspondence which you had and which you enclose with your letter that The Huber Brothers, a Wisconsin corporation located in the city of Fond du Lac, made application for registration under ch. 84a, Wis. Stats., of a trade name or form of advertising used by said corporation. Two catalogs, showing the manner

in which this trade name and form of advertising is used, are also enclosed.

Sec. 1747a provides, in part, as follows:

"Any person, firm, copartnership, corporation, association, or union of workingmen, which has heretofore adopted or used or shall hereafter adopt or use any label, trade-mark, trade name, term, design, pattern, model, device, shop mark, drawing, specification, designation, or form of advertisement, for the purpose of designating, making known, or distinguishing any goods, wares, merchandise, or other product of labor or manufacture as having been made, manufactured, produced, prepared, packed, or put on sale by such person, firm, copartnership, corporation, association, or union of workingmen, or by a member or members thereof, he or they, if residents of this or any other state of the United States, and such foreign corporations as may have been duly licensed to transact business in the state of Wisconsin, may file an original, a copy, or photographs, or cuts with specifications of the same for record in the office of the secretary of state, * * *."

The question before us resolves itself into this: whether under the laws of this state a simple business name may be recorded as a trade-mark or trade name, as a form of advertising. The company in question desires to record the name "Fond du Lac School Supply Company" as a trade name or form of advertising. In your correspondence you advised them that the ruling of this department was to the effect that this could not be done, and you have referred them to the opinion of Honorable L. M. Sturdevant, one of my predecessors, who, on June 8, 1906, rendered an opinion to your department on this question. Opinions of Attorney General for 1906, p. 756. In that opinion it was held that trade-marks cannot be used to designate the person or corporation transacting business. It is true, as is suggested by the attorney for The Huber Brothers, that this law was amended since that opinion was rendered.

After a careful examination of said statute I am still of the opinion that the law is not broad enough to cover a case such as you have before you. It is well said in the opinion above referred to that the trade-mark is not generally used to designate the firm or the person who is transacting the business but that it is generally applied to the goods sold by the firm or the business conducted by the firm, or the place where such business is carried on. Examining this statute carefully, you will note that

under it it is possible to adopt a form of trade name or form of advertisement for the purpose of designating, making known or distinguishing any goods, wares, merchandise, etc., but it does not entitle the person to record a corporate name and claim the exclusive use of such name thereafter, under this section. Mr. Sturdevant, in said opinion, referred to ch. 446, laws of 1901, now sec. 4470b, where a penalty is provided for the unlawful use of a corporate name.

If Huber Brothers desire to be known and transact business as the Fond du Lac School Supply Company, it would be an easy matter for them to do so by amending their articles of incorporation and designating their corporation by that name.

After a careful consideration of this matter I have come to the conclusion that the opinion of my predecessor is correct. The amendment to the law has not materially changed its meaning. It would be an easy matter for the legislature to change this statute so as to cover the present case but they have not done so; and until they do so by clear and unequivocal language, the ruling of this department should not be changed. You are advised, therefore, that you are correct in your ruling that the term "Fond du Lac School Supply Company" cannot be recorded as a trade-mark, trade name or form of advertisement, under sec. 1747a.

Abandonment—Criminal Law—Bastardy—There can be no extradition for bastardy but there can be for abandonment of wife or child.

March 6, 1918.

O. L. OLEN,

District Attorney,

Clintonville, Wisconsin.

I have your communication of March 4, in which you say that at the last November term of the circuit court one, A., was sentenced in a bastardy case to pay three dollars per week and the costs; that he was in open court when the judgment was entered and defended the case; that while he was in the custody of the officer he requested the opportunity of going to get the usual bonds; that instead of getting the bonds he fled into the state of Michigan, where he has been working ever since and has

paid nothing towards the support of the child or on the judgment. You inquire:

"1. Is there any way I can get him back under the judgment without starting an action of abandonment?

"2. Would it be advisable for me to issue a certificate under 731b of Wisconsin statutes and send the sheriff over there with the hope that he would voluntarily come with the sheriff?

"3. What would be my proper procedure in this matter?"

In order to have the party extradited from the state of Michigan it is necessary to charge him with a crime. See sec. 5278, U. S. R. S.

Rule 18 of the rules of the executive office, relating to the applications for requisitions for fugitives from justice, provides:

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

Abandonment of course is a crime, and A. could be returned to this state on a requisition after a complaint has been made charging him with said crime. Your first question must, therefore, be answered in the negative.

I do not believe that you should issue a certificate under sec. 731b, Wis. Stats., unless you have some assurance from the defendant that he will return without a formal requisition being made for his return. It would seem to me that it would be an unnecessary expense for the sheriff to take the trip for the purpose of returning A. when he would have no assurance that A. would return voluntarily. In fact, if the defendant desires to come back voluntarily, he could do so without a sheriff being sent after him.

I believe the proper procedure in the case in question is to charge the man with abandonment of his child and apply for the requisition for his return.

Criminal Law—Informations—Admission of forgery before a justice may be introduced in evidence at the trial, also admission of other forgeries.

March 6, 1918.

C. J. STRANG,

District Attorney,

Grantsburg, Wisconsin.

In your letter of February 25 you state that you have charged a man in your county with the crime of forgery and that he is now in jail to be tried at the next term of court; that he forged the name of his father without signing his own name to the note; that you have drawn up the charge in the same language used in charging the offense at the preliminary hearing, and you are doubtful if you have the correct wording, that is, whether it should not contain the allegation that he forged the signature of his father to the note. You enclose a copy of the information and if it is shown that his father did not sign his name, J. C., to said note, you ask whether the defendant can be convicted under said information; and if not, whether you could change the information when the complaint and warrant against the defendant in the preliminary hearing were in the same wording as this information.

The wording of the information is as follows:

"I, C. J. Strang, district attorney for said county, hereby inform the Court that on the 12th day of February, A. D. 1917, at said county, W— C— did have in his possession a certain, false, forged and counterfeit promissory note, he the said W— C—, then and there well knowing the same to be false, forged and counterfeit, which said false, forged and counterfeit note is of the tenor following, to wit:

"(Here follows a copy of the note with signatures of W— C— and J— C—) and that said W— C— did then and there feloniously utter and publish the said note as true, with intent thereby to injure and defraud, against the peace and dignity of the State of Wisconsin."

"Dated October 1st, 1917.

C. J. Strang,

District Attorney of Burnett County, Wisconsin."

In answer to this inquiry, I will say that you are authorized to file an information setting forth the crime committed, according to the facts ascertained on the preliminary examination, whether the offense be the offense charged in the complaint or not. See sec. 4653, Wis. Stats.

The section of the statute under which your complaint is evidently drawn is sec. 4455, which provides as follows:

"Any person who shall utter, publish, pass or tender in payment as true, or who shall have in his possession with intent to utter, publish, pass or tender in payment, sell or barter, as true or false, any false, forged, counterfeit or spurious record, deed, instrument, or other writing, or any note, certificate, bill of credit, bank bill, treasury note, draft, bond, or other evidence of debt, or any public security mentioned in the next preceding section, knowing the same to be false, forged, counterfeit or spurious, with intent to injure or defraud, shall be punished by imprisonment in the state prison not more than seven years nor less than one year."

I believe your complaint is sufficient to charge the offense under this section. It of course will be necessary at the trial to prove that the father did not sign said note nor did he authorize any one to subscribe his signature thereto. It of course will be necessary, also, to prove that the defendant passed or tendered the same in payment.

You also state that this defendant admitted to and in the presence of the sheriff, yourself and another, at the time of the preliminary hearing, that he was guilty and pleaded guilty before the justice but that on account of the sickness of the justice the docket was not correctly written up, or, rather, was only written on a piece of paper, so that at the last term of your court the complaint was dismissed, and the defendant rearrested on the charge as set forth in your information. You inquire whether it is possible for you to get this plea of guilty by the defendant in evidence against him. You state that at a second preliminary hearing he of course pleaded not guilty and he has now an attorney to defend him.

I see no reason why this admission could not be testified to by those who heard it. I believe the sheriff, yourself and the others who heard the testimony may testify as to his admission.

You also state that the defendant has admitted other forgeries of checks recently made, being about seven months after the forgery with which he is charged in the information. You inquire whether his admission of these forgeries made to the sheriff would be admissible. It is an elementary rule that it is improper, on the trial of a defendant for a crime, to prove that he has committed other crimes having no connection with the

one under investigation. He is supposed to be tried for one crime at a time. Other acts of immorality or criminality are not legally relevant and should not be introduced to prejudice the defendant before the jury; but this rule has exceptions, and such evidence may often be admitted to prove motive or intention.

In Jones on Evidence, sec. 143, 2d ed., it is stated:

"In criminal cases the conduct of the prisoner on other occasions is sometimes relevant, where such conduct has no other connection with the charge under inquiry than that it tends to throw light on what were his *motives and intentions* in doing the act complained of. Thus on trials for *uttering counterfeit bills* or coin and forged instruments, it has long been the practice to admit evidence of the uttering of similar counterfeit money or forgeries to other persons about the same time, for while in a single case the uttering of counterfeit money might be perfectly consistent with innocence, the probabilities of guilty knowledge rapidly increase on proof of a continued dealing in the unlawful money." P. 163.

See also 11 Am. & Eng. Ency. of Law (2d ed.) 506; *Zoldoske v. State*, 82 Wis. 580, 599.

It would seem, therefore, that the evidence of the passing of other papers would be admissible as bearing upon the question of motive or intent.

Bridges and Highways—Villages—A special tax valid under sec. 1317m—4, subsec. 1, must be paid to the county treasurer even when a village was created pending the collection.

Sec. 925i is not applicable.

March 11, 1918.

J. H. HILL,

District Attorney,

Baraboo, Wisconsin.

In your recent letter you say that in September, 1917, the village of Loganville was incorporated out of territory wholly within the town of Westfield; that at the annual town meeting preceding the incorporation the town voted a special tax of twenty-five hundred dollars for highway construction, and twelve hundred dollars for bridge construction under the State Aid Highway Law; that if this thirty-seven hundred dollars is

divided according to the provisions of sec. 925*i*, Stats., there will be a deficiency in the highway fund. And you ask if it is not the duty of the town treasurer to deposit this thirty-seven hundred dollars in the county treasury before division is made of the moneys collected on the last tax roll, as provided by said section of the statutes.

It is my opinion that said thirty-seven hundred dollars is not a "tax levied for town purposes," as these words are used in said section, but that it is a special tax for bridge and highway construction and must be paid into the county treasury the same as would have been done had no village been incorporated out of the town's territory.

Towns are authorized by par. (a), subsec. 1, sec. 1317*m-4* to vote

"a special tax * * * for building bridges on * * * or * * * improving a portion of the system of prospective state highways * * *."

Par. (b) of said subsection directs:

"Said special tax or taxes shall be collected in money and paid into the county treasury at the same time that the town's share of the county taxes are paid, in case the petition of the town for the improvement of the road or bridge specified has been granted by the county board in accordance with subsection 2 or 3 of section 1317*m-5*."

Other portions of the State Aid Highway Law provide for the expenditure of these moneys and for the control of the road improvement operations. That expenditure and those operations are under the direction of the county board and state highway commission. The fund is not expended as a town fund but as a joint state aid highway fund to which the state, the county and the town contribute. The incorporation of the village should not, and as you say, has not made any difference in the scheme of highway improvement. The expenditures have been or will be made precisely in accordance with the plan in view when the special tax was voted. It seems to me very clear that the special tax when collected must go as this statute directs. It is a special and a specific direction, and if there was conflict between this statute and the general statute providing for division of taxes between the town and the newly incorporated vil-

lage, the special provision would be construed as an amendment to and would prevail over the terms of the general statute under a familiar rule of statutory construction. But I do not see any conflict. There is none, unless this special tax is construed to be a tax for town purposes. I do not think it is such a tax. It is not paid out for the town; it is not under the control of the town officers; it is to be expended in the sovereign or public work of highway construction. No part of that tax would belong to the town in its corporate capacity had no village been incorporated, and the incorporation of a village cannot operate to vest such title in part or in whole in the town or in the village. The division, as you have noted, which is provided by sec. 925*i*, goes merely "to the moneys collected from the taxes levied for town purposes." If this special tax is not of that character, then the last named section has no application to the thirty-seven hundred dollars.

Elections—Absent Voting—Sec. 11.69, Wis. Stats. 1917, as amended at the special session of the legislature of 1918, applies to the special election to fill vacancy in office of United States senator to be held April 2, 1918.

March 11, 1918.

HONORABLE MERLIN HULL,

Secretary of State.

Your favor of March 8, enclosing copy of Bill No. 9, A., together with Substitute Amendment No. 1, S., passed by the special session just closed, and asking whether you are required under the wording of this bill at lines 15, 16 and 17 to send messengers to the various cantonments within the boundaries of the United States for the special election to be held April 2, 1918, to fill the vacancy in the office of United States senator caused by the death of Honorable Paul O. Husting, is at hand.

The language to which you refer is as follows:

"Whenever * * * such electors are absent from their places of residence on the day prescribed by law for holding a general election, or for holding a special election to fill any vacancy in any office required to be filled in the first instance at a general election, each such elector and each special messenger * * * may, on such day, exercise his right of suffrage," etc.

That part of the language above quoted, to wit, "in the first instance" is not very specific, and might be said to be somewhat uncertain, and yet I am satisfied that it was intended to cover the special election to be held April 2, 1918, to fill the vacancy in the United States senate. The language of this bill regarding special elections undoubtedly contemplates the case of a special election to fill the vacancy in any office that ordinarily is filled at a full term for that office at the general fall election.

Intoxicating Liquors—A transfer of license in question to a new location is void and license is still in force in old location; a new license may be granted the new location July 1st, next.

March 11, 1918.

MARION F. REID,

District Attorney,

Hurley, Wisconsin.

I have your letter of March 7, in which you answer some of the questions submitted to you by me under date of January 26. They relate to the statement of facts upon which was based the official opinion to you under date of January 21, 1918.* It now appears that the owner of the building which was destroyed by fire did not have the license in his own name but the license was in the name of a tenant and the tenant had been licensed at the same location since the 30th day of June, 1907; that the building was destroyed on the 27th day of December, 1917; that the license to the tenant was granted on the first day of July, 1917; that a new license was not granted to the tenant in the new location, neither did the tenant pay another license fee but he was given permission to transfer his saloon business from the old location to the new location, on January 10, 1918, which clearly appears from a copy of the board proceedings enclosed in your letter.

From the facts in your letter, it appears that the license granted to the old location was a valid license. The transfer to the new location was absolutely void. See Opinions of Attorney General for 1912, p. 497, in which it was held that a

* Page 31 of this volume.

liquor license cannot be legally transferred to a new location; and if it is transferred there is no protection to the holder of the license for the new location. See also Opinions of Attorney General for 1908, p. 547.

The attempted transfer was, therefore, absolutely void, and the license is still in force in the location for which it was granted. There is nothing to prevent the granting of a new license in said location beginning the first day of July, at the expiration of the former license. The tenant who has sold liquor in the location to which it was attempted to transfer his license has violated our excise law in selling liquor in the new location and may be prosecuted therefor.

Intoxicating Liquors—Liquor taken from an intoxicated man riding on train can be disposed of only as provided in sec. 1565—3.

March 11, 1918.

C. J. SMITH,

District Attorney,

Viroqua, Wisconsin.

In your communication of March 6 you state that you have had some trouble in your city, which is dry, with some fellows who go to La Crosse or Chasburg and come home in an intoxicated condition with a suitcase full of intoxicating liquor. You state that you have had them arrested and that they have pleaded guilty of having ridden on a railway train while intoxicated, and have been punished, but you desire to know what disposition can be made of the liquor. You inquire whether there is any law that will permit you to permanently dispose of the liquor and not return it to them.

Sec. 1565—3, Wis. Stats., is the only one applicable to the situation and provides as follows:

"The conductor of any railway train may take from any person found violating any of the provisions of section 1565—1, any intoxicating liquor then in the possession of such person, and deliver the same to the nearest station agent, giving the person from whom it is taken a receipt therefor. Upon the presentation and surrender of such receipt, within ten days thereafter, such liquor shall be delivered to the person present."

ing same, and if not so delivered within such time shall be destroyed by such agent."

I find no authority in any other statute authorizing a confiscation and destruction of the liquor. In view of that fact, the above section of the statutes must be followed where the liquor is taken away from the parties in question.

Intoxicating Liquors—If a license is surrendered for a location which may be legally licensed a new license may be granted therein within a reasonable time.

March 11, 1918.

A. L. STENGEL,

District Attorney,

Fort Atkinson, Wisconsin.

In your communication of March 7 you inquire whether the common council of a city which grants more licenses than one for every five hundred or fraction of the inhabitants, as authorized by the Baker Law, has the power to grant a saloon license to another party upon a location in which a license was granted on July first of the preceding year, but which said license has been surrendered by the one to whom it was given. This question must be answered in the affirmative, provided it is done without any unreasonable delay after the surrender of the license.

What will be an unreasonable delay will depend upon all the circumstances in each case. In New York it was held that two months' delay was unreasonable where a license could have been taken out immediately after the surrender of the former license. In the case of *Koch v. State*, 157 Wis. 437, our court intimated that under the Baker Law it was necessary to keep the premises under license continuously, for it italicized the word "continued" twice in its opinion. A reasonable time would undoubtedly be permitted to get out a new license after the former license is surrendered. It may be that our court would hold that a reasonable time would be a sufficient time to make the necessary application and publication of said application for a license, unless there is some reason in the circumstances that would necessitate a longer delay without fault or neglect on the part of the party interested.

Municipal Corporations—Ordinances—Criminal Law—Fines
—Fines in criminal cases go to the state but local ordinances may cover criminal acts; fines collected upon such ordinances belong to the municipality.

Offenders may be prosecuted under both the statute and the ordinance in such cases.

March 12, 1918.

HONORABLE HENRY JOHNSON,
State Treasurer.

You have transmitted with your letter of March 11, 1918, report of the Kenosha county treasurer upon fines received by him during the year 1917.

It appears from said report that fines aggregating \$1,676 were imposed by the municipal court of Kenosha county for violations of the speed limit. You say, as the fact is, that these fines seem to have been paid into the county treasury, and you inquire whether the state is entitled to such fines, or

"Is there a special state ordinance whereby we can prosecute that class of offenders and retain these fines for state purposes?"

"* * * The clear proceeds of all fines collected in the several counties for any breach of the penal laws, * * * shall be exclusively applied to the following objects, to wit:

"1. To the support and maintenance of common schools.
* * *." Sec. 2, art. X, Const.

This same direction is given by statute, and our supreme court has repeatedly held that the legislature has no power to divert these funds or use them for any other purpose. However, this provision of the constitution and the statutes made pursuant thereto applies only to penalties or fines for breaches of penal statutes and does not apply to penalties imposed for violations of a municipal ordinance and which are made payable to the municipal treasury. *Platteville v. Bell*, 43 Wis. 488.

But the common council of a city may enact ordinances for the government and good order of the city and for the prevention of crime, which ordinances impose penalties for acts which are also crimes or misdemeanors. In that situation the offender is open to prosecution under both the ordinance and the statute, and the satisfaction of a judgment under one prosecution is not a bar to the prosecution under the other law. For the offense against this ordinance the city recovers the penalty

provided by the ordinance. For violation of the state statute which results from the same act, the state may also recover a fine if the statute imposes one. *Ogden v. City of Madison*, 111 Wis. 413.

The affidavit attached to the report of the Kenosha county treasurer, and also his letter of transmittal, indicate that all of such moneys were received by him. Yet I doubt that such is the fact. If it is a fact, then the fines imposed for violating the statutes regulating the use of motor driven vehicles were collected in prosecutions under the state statute and belong to the state. It is possible, if not probable, that the fines imposed for violating the speed limit were imposed in prosecutions under a city ordinance. That is a question of fact which should be investigated by you before closing this settlement with the county treasurer.

In addition to the general power of cities to pass ordinances of the character above mentioned there is specific statutory authority for city councils to pass such ordinances regulating automobile traffic.

"* * * The provisions of sections 1636—47 to 1636—57, inclusive [which regulate the use of motor driven vehicles], * * * shall not prohibit any city, village, county, town, park board or other local authorities from passing any ordinance, resolution, rule or regulation in strict conformity with the provisions of sections 1636—47 to 1636—57, inclusive, imposing the same penalty for a violation of the provisions of said sections, where such violation occurs within such city, county, town or village," etc. Sec. 1636—55, Stats.

If an ordinance of that character relative to the speed limit is in force in Kenosha, the fines imposed thereby may be recovered by it for violations thereof. But, as before stated, the same act is also a misdemeanor and may be prosecuted in behalf of the state, and a recovery therefor would go to the school fund.

There is a reason why the county treasurer in his report showed fines recovered under such an ordinance. The municipal court of Kenosha county, which was created by ch. 18, laws of 1909, sec. 22, requires:

"All fines and costs collected by the clerk of said court in all actions for violation of the charter or any ordinance of the city of Kenosha, or any other action in which the city of Kenosha shall be a party, shall be accounted for and paid by such clerk

unto the city treasurer of the city of Kenosha. All fines and costs in every civil action and in all criminal prosecutions and proceedings under the general statutes of this state, shall be accounted for and paid over quarterly by said clerk unto the county treasurer of the county of Kenosha."

And there is a further provision to be found in sec. 13:

"* * * He shall render an account to the county treasurer quarterly, which shall be so itemized as to show the fines, penalties and officers' fees in each case. * * *"

Under this last quoted provision the report of the municipal clerk made to the county treasurer shows the fines collected under city ordinances as well as other fines. It may well be that the county treasurer merely copied that report as his own to you. That would be misleading, in that it shows fines imposed under a city ordinance to have been paid to the county treasurer, whereas they are by direction of the statute to be paid to the city treasurer. I am inclined to the belief that this is the explanation of the appearance of fines for violations of speed limit in the county treasurer's report. If such be the fact, however, and the state desires to recover for such violations of law, prosecutions therefor would have to be instituted.

Criminal Law—Sunday Closing—While a restaurant may lawfully keep open for the purpose of serving meals on Sunday it is a violation of sec. 4595 to sell cigars, candy or fruits on Sunday.

March 12, 1918.

O. L. OLEN,

District Attorney,

Clintonville, Wisconsin.

Your favor of March 9, asking whether or not a person who keeps a restaurant or delicatessen store open on Sunday and sells fruit, candies, cigars, etc., in a city of the fourth class is violating sec. 4595, Wis. Stats., is at hand.

In reply thereto I would say that it is lawful for a restaurant or boarding house or hotel to keep open and run on Sunday, so far as the furnishing of meals is concerned; but I am satisfied that it is a violation of the law for a restaurant, while keeping

open as such restaurant on Sunday for the furnishing of meals, to sell fruits, candies, cigars, etc., over the counter the same as they are sold week days, in large or small lots. Of course, a restaurant could serve fruit or candies on the table with meals or in connection with meals. But when such a restaurant departs from the necessary occupation of running a restaurant and sells cigars or candy or other things of that kind, it is undoubtedly a violation of the law.

Railroads—Passenger Fares—In computing mileage of a railroad under sec. 1798a industrial spur tracks and sidings on the company's own lands should be included.

March 12, 1918.

RAILROAD COMMISSION OF WISCONSIN.

Your favor of March 11, regarding the rate for passenger transportation charged by the Kewaunee, Green Bay and Western Railroad Company and the Ahnapee and Western Railway Company, is at hand.

From the information you give it appears that the mileage of the main line of this company is 32.529; that the mileage, including all yard tracks, sidings, industry spurs, except spurs which are on privately owned land, amounts to 38.655; that the gross receipts of the company appear to be \$132,039.78; that it appears that they are now charging 2.4 cents per mile for passenger service, and you ask whether they are permitted to make this charge under sec. 1798a, Stats.

Sec. 1798a reads as follows:

"No corporation operating a railroad in this state, the gross receipts of which are or exceed three thousand five hundred dollars per mile per annum, shall demand, collect or receive a greater compensation for the transportation of persons than two cents per mile," etc.

From the computation it appears that if the total mileage to be considered under this statute is to include the yard tracks, sidings and the industry spurs and sidings on the company's own lands, then they are earning less than three thousand five hundred dollars per mile, and would be entitled to charge in excess of two cents per mile for passenger transportation.

I am satisfied that the yard tracks, sidings and the industry spur tracks and sidings that are wholly on the company's own land should at least be included in the computation of the number of miles of road operated by the company. These sidings and spurs contribute to the total earnings of the company and constitute undoubtedly a part of the mileage of their road.

I think this idea is in line with the rule in the case of *State ex rel. Abbot v. McFetridge, State Treasurer*, 64 Wis. 130, 144. In that case the court was considering the mileage of the railroad with reference to the taxation proposition and said:

"We are clearly of the opinion that the length of these spur tracks should be included in the mileage of the relators' road."

I am therefore of the opinion that this company can legally charge in excess of two cents per mile for passenger service.

Elections—Public Officers—It is necessary to hold a special election April 2, 1918, for the purpose of electing a judge for the municipal court of the western district of Waukesha county.

March 12, 1918.

HONORABLE L. C. WHITTET,

Private Secretary to the Governor.

I have your letter of March 11, together with letter from Judge J. E. Thomas of Waukesha, relative to the holding of a special election for the election of a judge for the municipal court for the western district of Waukesha county. You ask to be advised whether it is necessary to hold an election this spring or not. I understand that recently an appointment has been made in said court to fill the vacancy, and the question arises whether the appointment will be for the unexpired term or until a special election is held this spring.

Ch. 23, laws of 1895, is the act which created the municipal court for the western district of Waukesha county. Sec. 6 thereof provides for the election of municipal judge. This was amended by sec. 7, ch. 225, laws of 1897, as follows:

"Section 7. Section 6, of chapter 23, of the laws of 1895, is hereby amended so as to read as follows: Section 6. The qualified electors of all the territory embraced in the said west-

ern municipal district of the county of Waukesha, shall, on the first Tuesday of April, A. D. 1895, and on the first Tuesday of April each six years thereafter, elect a suitable person, who shall have been admitted to practice in courts of record in said county, and be a resident of the district for which he is elected, to the office of judge of said municipal court, to be called 'The Municipal Judge,' who shall hold his office for the term of six years from the first Monday in May next succeeding such election, and until his successor is elected and qualified, and who may be removed from office in the manner provided in the constitution for the removal of supreme and circuit judges. If a vacancy shall happen in the office of judge of said court, the governor shall appoint a judge to fill the vacancy until a successor is elected. Elections to fill such vacancies shall be held as provided in section 88, revised statutes, and notice thereof shall be given by the sheriff of Waukesha county, in the same manner as for the election of county officers. All vacancies so filled shall be for the residue of the term only. All such elections shall be held and conducted and the votes cast thereat shall be returned and canvassed, and a certificate shall be given, in all respects as is provided by law in the case of the election of county judges."

Sec. 88 of the revised statutes therein referred to (Rev. Stats. 1878) provides as follows:

"Section 88. In all cases of vacancy in the office of justice of the supreme court, or circuit judge, the election to fill such vacancy shall be held on the first Tuesday of April next after the vacancy shall happen, in case such vacancy shall happen twenty days before such first Tuesday of April; and if no election shall then be held for such purpose, or if the vacancy shall happen within twenty days next before the first Tuesday of April next after such vacancy, then the election shall be held on the first Tuesday of April next thereafter."

It is a general rule that where a statute is referred to in another statute the effect is the same as if the statute referred to, or a part thereof, had been written into the adopting statute. 36 Cyc. 1152; 48 Wis. 567.

Sec. 2523—3, Wis. Stats., refers only to the judges of special municipal courts created under ch. 115, and is not applicable to the municipal court of the western district of Waukesha county.

You are therefore advised that it is necessary to hold a special election at the coming spring election.

Public Officers—Health Officer—Board of Health—The local health officer must be a licensed physician when practicable.

March 14, 1918.

DR. C. A. HARPER,

State Health Officer.

You ask to be advised whether or not a full time health officer or physician of a city must be a physician licensed to practice in Wisconsin. You state that part of his duties consist in diagnosing communicable diseases and vaccinating against smallpox and giving diphtheria antitoxin and antityphoid serum.

As no particular city was named this answer is based upon the general statutes and may not be applicable to cities operating under a special charter.

All cities, except those of the first class, are required by sec. 1411, Stats., to organize a board of health, and said board is commanded to appoint a health officer, who shall be *ex officio* a member of the board and its executive officer.

"Every health officer so appointed shall be, whenever practicable, a reputable physician."

Whether or not it is practicable to appoint a physician as health officer is in every instance a question of fact and depends upon the conditions in the particular locality in question. Presumably, in most cities of any size it is entirely feasible to have a physician for health officer.

Who answers to the name physician, as used in the above quotation? It is my opinion that only those who are licensed to practice in this state are physicians within the meaning of that section.

Sec. 1435*h* reads, in part, as follows:

"It shall be unlawful for any person not possessing a license to practice medicine, surgery or osteopathy to use or to assume the title 'doctor' or to append to his name the words or letters 'doctor,' 'Dr.,' 'specialist,' 'M. D.,' 'D. O.,' or any other title, letters, combination of letters or designation which in any way represents or may tend to represent him as engaged in the practice of medicine, surgery or osteopathy in any of its branches. * * *"

I think that one who is forbidden by law to call himself physician is not one within the meaning of the statute. The

word "physician" is used repeatedly in our statutes, and as a rule the context conveys the idea that the person thereby designated is one licensed to practice medicine. The word is repeatedly used in sec. 1412m—2, which relates to the form of reports of dangerous diseases. An unlicensed person may not testify as an expert in medicine or surgery. Sec. 1435i. The word is so used in sec. 4075, which protects a patient against disclosures made by a physician of knowledge obtained for the purpose of enabling a physician to treat the patient. Of course, only licensed physicians can treat a person for physical ailments and no one else can claim to have obtained the information for that purpose. In that section there can be no doubt that the word physician is limited to a licensed practitioner. Other illustrations might be given, but I deem these sufficient. The history and acknowledged purpose of statutes requiring the practice of medicine and surgery and requiring that the practitioner be licensed all tend to the conclusion that the word "physician" as used in the statutes means one who may practice medicine, in other words, one who may pursue the calling or the profession indicated by the title. There can be no doubt that the administering of smallpox vaccine, diphtheria antitoxin and anti-typhoid serum constitutes the practice of medicine or surgery. Only licensed practitioners should be permitted to perform those acts. The fact that the physician is paid by the city does not dispense him from having a license to practice medicine or surgery. The purpose of the law is to protect the health of the public and requires the same skill in the public physician that it does in private practice.

This, I think, accords with the popular significance of the word physician. Everybody, I believe, understands that one who is rightfully called a physician or who may claim that title is one who may practice medicine.

My conclusions may be summarized thus:

1. A "physician," where that word is used in sec. 1411, means a person licensed to practice medicine or surgery or osteopathy in Wisconsin; and the same is true of the phrase "city physician," when it occurs in a city charter.

2. The local board of health is legally bound to appoint a licensed practitioner as health officer when one can be obtained, but the board has a wide discretion in determining whether or not it is practicable to obtain a physician for the place.

3. Where it is not practicable, then it is lawful to appoint an unlicensed person. It goes without saying that the board should take the best qualified available person. One who has an M. D. degree and has practiced medicine, other things being equal, would be greatly preferred to those who are not skilled in medicine.

Elections—Primaries—Filing Expense Accounts—A candidate for office at the spring election who is not a candidate for nomination at the spring primary need file financial statements with reference to the election only and not with reference to the primary.

March 14, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

Subd. (1); sec. 12.09, Wis. Stats., reads as follows:

"Every candidate, the secretary of every personal campaign committee and the secretary of every party committee shall within four days ending on the Saturday preceding any primary or election and on the Saturday following any election or primary, file a financial statement verified upon the oath of such candidate or upon the oath of the secretary of such committee, as the case may be, which statement shall cover all transactions not accounted for and reported upon any statements theretofore filed," etc.

The question arises under this law whether a candidate at the spring election who is not a candidate at the primaries is required to file financial statements under this law within four days ending on the Saturday preceding the primary and on the Saturday following the primary, or whether he is required to file with reference to the election only.

I am satisfied that it was not the intention of this statute to require a person who is not a candidate for office to be voted for or nominated at the primary to file any expense account with reference to said primary; that the only statement that he is required to file is the statement before and following the holding of the election at which he is a candidate.

Intoxicating Liquors—Baker Law—A village after being dry for one year cannot issue more licenses than the ratio in the Baker Law permits.

March 14, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

You have asked me for an opinion on the question submitted to you by W. S. Orvine, of Loyal, Wisconsin, which may be stated as follows:

"The village of Loyal voted dry last spring and prior to that time there were seven saloons duly licensed. If the village should vote wet at this coming spring election the question is: How many licenses can be issued by the village board? Will said board be authorized to grant seven licenses or may they only issue as many licenses as the ratio in the Baker Law permits?"

The answer to your question is given by our supreme court in the decision handed down in the case of *State ex rel. Owen v. Schotten*, 165 Wis. 88. Under this decision no more licenses can be granted in Loyal after the same has been dry for one year than one for every five hundred or a fraction of the inhabitants. Loyal had a population of 677 in the 1910 census. This will authorize the board to grant only two licenses and they may grant the same to such persons as they deem suitable and to such places as they consider proper locations for a saloon. They are not limited to any person or place, but they cannot issue more than two licenses.

Public Officers—Council of Defense—State council of defense has the absolute power of removing any member of a county council.

March 14, 1918.

HONORABLE A. H. MELVILLE, *Executive Secretary,*
State Council of Defense.

You ask to be advised as to whether the state council of defense has power to remove officers of the county councils of defense who prove inefficient or inactive, and you state that this department has heretofore rendered an opinion to the effect that the county councils are creatures of the state council of defense, and have no powers other than those delegated by the parent organization.

That relationship, I believe, is decisive of the question. As to the fact of the relationship, there can be little doubt. The only statutory authority found for the creation or existence of the county councils is contained in ch. 82, laws of 1917, entitled, "An Act to establish a state council of defense," etc. Sec. 1 of said chapter determines the personnel of the state council, and sec. 2 gives the governor, who is *ex officio* a member, power to remove any other member. Sec. 8 declares that the state council

"shall have the right to form advisory or other committees from outside of its membership, and may organize subordinate bodies for its assistance in special investigations, either by the employment of experts or the creation of committees of specially qualified persons, and may form such committees from among its own members as may be necessary and convenient."

Sec. 9 declares:

"All such committees and bodies or combination thereof shall act together or separately in such manner as the council shall direct."

It is obvious from the provisions quoted that the county councils are created by the state council and exist by sufferance during the pleasure of their creator. The members of the county councils, hence, are mere appointees or committees of the state council of defense and are appointed or created for no particular period of time.

"* * * It is the universal rule where the duration of office is not prescribed by law, the power to remove is an incident of the power to appoint." 29 Cyc. 1371.

"* * * The power of removal is by common law regarded as an incident to the power of appointment. The executive power of removal is either an arbitrary or conditional one. In case the power is an arbitrary one—and it is arbitrary when incidental to the power of appointment—no formalities such as the presentment of charges or the granting of a hearing to the person removed are necessary to its lawful exercise. The appointment of a successor even is regarded as a removal of the prior incumbent." 29 Cyc. 1408—1409; *State ex rel. Kennedy v. McGarry*, 21 Wis. 496—499.

I am of the opinion that the arbitrary power of removal of members of the county councils of defense rests in the state council.

Taxation—Inheritance Taxes—Determination by county court of inheritance taxes is an order, not a judgment.

Such tax is a lien and also a personal liability.

Lien may be enforced by an equity action.

M. R. MUNSON,

March 14, 1918.

District Attorney,

Prairie du Chien, Wisconsin.

Under date of March 4, 1918, you say:

"Am writing you relative to the procedure to be followed in the following matter, in which the state is fully as much interested as Crawford county, viz: John C. Horgan, died intestate in the town of Clayton, this county on the 5th day of November, 1913. He left surviving eight children who are all still living; he left real estate of the value of \$27,500; no debts; that no administration was had upon his estate; that in 1917, the public administrator of this county instituted special administration proceedings to have the inheritance tax, if any due, adjudged and collected; no appearance on the part of the heirs; after going through the regular proceedings the county court of this county found that a tax of \$115.04 was due in said estate; that a penalty was to be added for the nonpayment within the 18 months provided by law; and an order was signed on the 9th day of October, 1917; that a copy of said order was sent to the state treasurer and Wisconsin tax commission on that day; that the heirs have refused and still refuse to pay the tax so ordered paid by the county court. What proceeding for the collection of the same would you advise? Is the order signed by the county court in such a proceeding of the nature of a monetary judgment, or merely a lien against the real estate upon which further proceedings must be had? Can the county and state now take the position that they are creditors of said decedent and make the necessary petition for a general administration of the estate?"

"Kindly give this matter your early and careful consideration for I find that our statutes are rather indefinite upon the procedure in such matters. Some of the heirs in this matter are anxious to have the estate probated but hesitate to do so on account of the attitude of the son and sisters who have possession, and who are operating the farm as their own. From what I know of the parties, I feel that it will be necessary to sell part of the land in order to collect the tax as there seems to be no personality belonging to the estate."

I am of the opinion that the determination by the county court of the inheritance tax is an order, not a judgment, and that the execution cannot issue upon that order.

"Upon the determination by the county court of the value of any estate * * * and of the tax to which it is liable, an order shall be entered by the county court determining the same * * *. A copy of the same shall be delivered or mailed to the county treasurer, the state treasurer, and the tax commission, and *no final judgment* shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed." Subsec. 10, sec. 1087—15, Stats.

But the inheritance tax, independently of the order determining it, is a lien upon the property transferred and a personal liability against the transferee. All inheritance taxes

"shall be * * * a lien on the property * * * until paid, and the person to whom the property is transferred * * * shall be personally liable for such tax until its payment." Subsec. 1, sec. 1087—5, Stats.

There is some provision for the enforcement of this lien and liability, although it is not entirely complete. Sec. 1087—16 provides that the county treasurer, the public administrator, or the tax commission, in case such tax is due and unpaid, and after refusal or neglect of the person liable therefor to pay the same, shall notify the district attorney thereof and he

"shall apply to the county court for a citation citing the person liable to pay such tax to appear before the court on the day specified, not more than three months from the date of such citation, and show cause why the tax should not be paid; or such citation may be granted on the application of the public administrator or tax commission. The judge of the county court upon such application and whenever it shall appear to him that any such tax, accruing under sections 1087—1 to 1087—24, inclusive, has not been paid as required by law, shall issue such citation, and the service of such citation and the time, manner and proof thereof, and the hearing and determination thereof, shall conform as near as may be to the provisions of the laws governing probate practice of this state, and whenever it shall appear that any such tax is due and payable, and the payment thereof cannot be enforced under the provisions of sections 1087—1 to 1087—24, inclusive, in said county court, the person or corporation from whom the same is due is hereby made liable to the county * * * for the amount of such tax, and it shall be the duty of the district attorney of said county, in the name of such county, to sue for and enforce the collection of such tax." Sec. 1087—16, Stats.

While it may not be absolutely necessary in this instance to resort to the issuance of a citation under the section last cited, it seems to me advisable so to do, and for two reasons: first, it may result in the tax being paid; and secondly, it would remove all grounds for quibble and for delay based upon a claim that such a procedure was a necessary preliminary to a suit.

Failing to obtain the tax through the procedure provided by the last cited section, an action in equity to foreclose the statutory lien should be instituted. No statutory proceeding has been discovered, but the power of a court of equity is ample without such a statute.

"2. One who has a lien on property, real or personal, may maintain an action in equity to have the amount of such lien determined and to enforce payment thereof by a sale of the property or otherwise." Syllabus, *Boorman v. The Wisconsin Rotary Engine Co.*, 36 Wis. 207.

It seems to me there is no occasion for general administration, and I am inclined to the opinion that no such administration would be legal or effective.

Criminal Law—Worthless Checks—Sec. 4438a, making it unlawful to issue a worthless check, applies to a person who issues such check on behalf of a corporation.

March 16, 1918.

MARK CATLIN,

District Attorney,

Appleton, Wisconsin.

In your recent letter relative to the interpretation to be given to sec. 4438a, Wis. Stats., you inquire whether a criminal prosecution for issuing worthless checks will lie against an individual where he issues the same for and on behalf of a corporation, knowing at the time the checks are given that there is no fund in the bank to meet the same.

Subsec. 1, sec. 4438a provides:

"Any person who, with intent to defraud, shall make or draw, or utter or deliver, any checks, drafts, or order, for the payment of money, upon any bank or other depository, knowing

at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or credit with, such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of a misdemeanor, and punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both fine and imprisonment."

This statute is applicable to any person who with intent to defraud shall make or draw or utter or deliver any checks, knowing at the time of such making, drawing, uttering or delivering the maker, or drawer, has not sufficient funds in or credit with such bank. It is applicable even to a person who does nothing more than deliver the check with such intent and knowledge. Note that the statute does not require that the person who delivers the check be also the maker or drawer of the same. The language is thus clearly broad enough to include a case where the person makes the check on behalf of a corporation.

This is a criminal statute, and, of course, must be construed strictly against the state but, nevertheless, I believe the language is such that the person who issues a check on behalf of a corporation comes within the purview of it, if all the other elements are present. See also subsecs. 2 and 3 of said section.

Public Officers—State Employe—Expenses of persons called by regents of university and regents of normal schools to Madison for conference looking toward future employment may be paid out of the public funds created for such institutions.

March 16, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of recent date you refer to two official opinions of my predecessor in which he held that the expenses of persons summoned to Madison for interviews prior to their employment could not be paid, and you state that it is the practice of the university when seeking some one to fill a vacancy to have him come to Madison for an interview and reimburse him for any expenses incurred, whether he is eventually employed or not. You also state that by doing this they avoid sending three or

four members of the board of regents out of Madison and considerable is saved on expenses. You believe, also, that the normal schools follow the same practice. You state that under the opinions above referred to you cannot audit these claims, and you inquire if in my opinion the ruling would apply to the university and the normal schools.

In one of the opinions referred to, given to your department under date of January 10, 1916 (Vol. V, Op. Atty. Gen., p. 20), it was held that a bill for the expense of Frank L. Glynn, in moving his household furniture to Wisconsin, in connection with his coming to this state to take the position of assistant to the state board of industrial education, was not a proper charge and could not be properly allowed, for the reason that there was no statutory authority for such allowance.

In the second opinion, that of February 25, 1916 (Vol. V, Op. Atty. Gen., p. 173), it was held that a claim for expenses submitted by B. R. Buckingham, an employe of the state board of education, could not be allowed. The expenses were incurred on a trip from New York to Madison and return, for the purpose of having an interview with the board of education before he became an employe thereof. The question was answered in the negative, for the same reason that there was no statutory authority for its allowance. It was said that the expenses incurred by him in making this trip were not necessarily incurred in performing a public duty, and it was held that sec. 145, Stats. 1915, which provides,

"No item shall be audited * * * for personal expenses not necessarily incurred by public duties,"

inhibits the payment thereof. It was there held that unless authority was found in the statute authorizing the said board to incur expense of that character, it could not be allowed.

The regents of the university of Wisconsin is a body corporate, and sec. 36.03 expressly provides that it

"shall possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law."

Sec. 36.06 provides:

"The board of regents shall enact laws for the government of the university in all its branches."

The board is also authorized to

"elect a president and the requisite number of professors, instructors, officers and employes, and fix the salaries and the term of office of each."

Sec. 36.02 provides that the government of the university shall be vested in the board of regents.

There is no expressed provision authorizing expenses to be paid such as you refer to in your inquiry. You are confronted with the question whether there is implied authority in the powers and duties delegated to the governing body of the university to pay such expenses. The duties prescribed and the powers given to the board of regents of the university are given in general language and are necessarily very broad. It would be practically impossible to enumerate all the powers given in express language.

In determining the question before us, we receive aid from the case of *State ex rel. Priest v. Regents of the University of Wisconsin*, 54 Wis. 159. The court had under consideration in said opinion whether the regents were authorized to exact from each student in attendance a fractional share of the expenses of the heating and lighting as a part of incidental expenses. The court held that the board had no powers except such as are conferred upon it by statute, either by express language or by fair implication. On page 170 the court said:

"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.' 5 Wis. 173; *Clark v. Farrington*, 11 Wis. 306; *Blunt v. Walker*, id. 334. 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 objects sought by the charter and within the scope of the general powers granted, and not in conflict with the statute."

If the board of regents determines that it is necessary to have an interview with an applicant before hiring him for a position, and in order to effect a meeting between the applicant and the regents it is necessary that such applicant incur expenses, I believe it can be said that this is calculated to accomplish the objects sought by the charter of the university and is, therefore, within the scope of the general powers granted. The same reasoning applies to the board of regents of normal schools.

Under sec. 37.03 the board of regents of normal schools is also made a body corporate and it is provided that it

"shall possess all other powers necessary or convenient to accomplish the objects and perform the duties prescribed by law."

They are also authorized to govern and control all the normal schools, under sec. 37.11; and in subd. (1) they are given the power:

"To make rules, regulations and by-laws for the good government and management of the same and each department thereof" and in subd. (2)

"To appoint a principal and assistants and such other teachers and officers and to employ such persons as may be required for each of said schools; and to prescribe their several duties."

These powers granted to the board of regents of normal schools are equally as broad as those granted to the regents of the university.

You are advised, therefore, that it is my opinion that they are empowered to incur the expenses referred to in your inquiry and that you are authorized to audit the same.

Elections—Judges—An election held to elect judges of the supreme and circuit courts, at the spring election, does not come within the term "general election" as used in secs. 11.69 to 11.82, Stats.

March 16, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your inquiry of March 15 you ask whether the fact that there will be elected at the coming spring election, April 2,

a justice of the supreme court and other judges of various circuit courts makes such election a general election within the meaning of the law and therefore requires your department to send proper ballots covering such elections to the various cantonments in order to secure the soldier vote.

Secs. 11.69 to 11.82 of the statutes as amended at the special session of the legislature just closed (ch. 16, Laws 1918, Special Session), provides a method for permitting soldiers to vote, in certain cases, who are absent.

"from their places of residence on the day prescribed by law for holding a general election, or for holding a special election to fill any vacancy in any office required to be filled in the first instance at a general election."

It is clear that this statute refers only to the time of holding general elections, or to the time of holding special elections to fill vacancies in offices that are filled for a full term, at a general election. The office of justice of the supreme court and the offices of judges of circuit courts are not filled for the full term at the general election, but at the spring election.

I am satisfied that the spring election, so-called, is not the general election within the meaning of said sec. 11.69.

Sec. 1, art. XIII of the constitution provides:

"The general election shall be holden on the Tuesday next succeeding the first Monday in November,"

and sec. 6.03, Stats., uses substantially the same language.

I therefore advise you that it is my opinion that secs. 11.69 to 11.82 do not require your department to prepare ballots to be sent to the various cantonments in order to secure the soldiers' vote for the offices of justice of the supreme court or judges of the various circuit courts.

Public Lands—Swamp Lands—Indian Reservations—State has no title to swamp lands within the boundaries of the Bad River reservation or the Menominee reservation.

March 18, 1918.

HONORABLE E. L. PHILIPP,
Governor.

Your favor of February 27 is at hand, in which you refer to me a communication from the department of the interior at

Washington, dated February 26, 1918, wherein the department calls your attention to the recent decisions of the supreme court of the United States rendered January 7, 1918, in the case of *The State of Wisconsin v. Franklin K. Lane*, and the case of *United States, Appellant, v. J. S. Stearns Lumber Company*, in which the court holds that the Indians of the Bad River reservation and the Menominee Indian reservation obtained from the government prior title to the title of the state under the school land grant, and the department of the interior suggests that these two cases and other cases that might have been referred to are also decisive as to the title of these Indians as to swamp lands claimed by the state.

For your information I would say that it is my opinion that the same rule applied in these cases to the school land grant would apply to the swamp land grant, and that the Indians on these two reservations acquired prior title from the United States government, and that the state's title under the swamp land grant to the swamp lands in these two Indian reservations is not good.

I therefore see no reason why the state of Wisconsin should continue to assert any claim to these swamp lands within the boundaries of these two Indian reservations nor any claim to the timber proposed to be cut on such lands.

These two Indian reservations were granted to the Indians by the United States government prior to their survey, and the rule is that neither the school land grant nor the swamp land grant took effect as to any particular lands so as to pass title to the state until the survey was made and approved by the United States land department; and as to the swamp land grant the title to the state did not inure until a designation or determination by the federal government was made designating the lands that were swamp, and this, of course, could not be done until after the survey was made, as the designation was made by determining that those subdivisions of the government survey were swamp within the meaning of the act, when the major portion of the subdivision was shown to be swamp by the government survey.

Education — Counties — Joint County Training Schools —
Neither the joint county training school board nor two counties acting jointly have the power to condemn land for a building to be used for a joint county training school.

March 19, 1918.

VILAS H. WHALEY,
District Attorney,

Racine, Wisconsin.

In your communication of March 8 you state that the county boards of Racine and Kenosha counties have united in establishing and maintaining a training school for teachers, under sec. 41.42, Stats., and are now preparing plans for the erection of a new school building to be located at the village of Union Grove, in Racine county; that at the time of establishing this joint district the county boards had not procured a site, neither had they erected a school building for such purposes, and the joint county training school board now proposes to go ahead and procure a site; that the school board has experienced some difficulty in this matter, and it may become necessary for condemnation proceedings to be commenced in securing a site.

You refer me to sec. 605, Stats., which provides for the condemnation of land by the state board of control, board of regents of the university and other boards and officials, but does not make provision for condemnation by county boards of supervisors or county training school boards.

You ask for an opinion on the question of whether condemnation proceedings can be instituted under the provisions set forth in secs. 694c, 694d and 694e by the county board of supervisors, or whether the joint county training school board may institute such proceedings under sec. 41.42.

There is no express provision made permitting the condemnation proceedings to be commenced by the county training school board. The question presents itself whether such power may be implied from the wording of sec. 41.42, subd. (2). Said subdivision contains the following:

"If, at the time of establishing such school, the counties so uniting shall neglect to procure a site or to erect a school building therefor, such joint county training school board shall have power, subject to the approval of the state superintendent, to procure such site and to erect a suitable school building thereon.
* * *"

We are confronted with the question whether the authority here given to procure a site is broad enough to include the acquisition of the same by condemnation proceedings, as well as by gift or contract. The exercise of the sovereign power of eminent domain—the taking of a man's property without his consent—is against common law right and as a general rule cannot be implied from a grant of authority to construct a public work. All acts relating to the taking of private property are to be strictly construed and not extended by implication. 10 Am. & Eng. Ency. of Law 1054.

The right of eminent domain is a very high and arbitrary one and arises only *ex necessitate rei* and will not be presumed to exist in a corporation unless by express legislative grant. *Phillips v. Dunkirk, Warren & Pittsburg Railroad Co.*, 78 Pa. St. R. 177, 180.

From the case of *Allen v. Jones*, 47 Ind. 438, we quote the following from the syllabus:

"The right of eminent domain lies dormant in the State until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise; and it should never be exercised except when the public interest clearly demands it, and then cautiously and in accordance with law."

In the case of *Butler v. Mayor, etc., of Thomasville*, 74 Ga. 570, it was held:

"There is no power or authority vested in the city of Thomasville authorizing it to enter upon or take the land of plaintiff for the purpose of digging or laying a sewer thereon, by its charter or other acts of the legislature. * * *. Nor is there any mode prescribed for the condemnation of such property for public use. Without express grant of such power, a municipal corporation cannot exercise it."

"Even if it seems that the act confers the power to condemn land, but there is not a clear and explicit grant, and no compensation is provided for, the presumption is that the legislature intended that the land needed should be gotten by contract." 10 Am. & Eng. Ency. of Law (2d ed.) 1055.

See also 15 Cyc. 567.

While the cases are not unanimous on this proposition and some may be found which hold that the right to take property

by the power of eminent domain is sometimes delegated by implication, under peculiar circumstances, I am persuaded that sec. 41.42, subd. (2), as above quoted, does not delegate that right to the joint county training school.

On the question whether the county boards of supervisors of the two counties have the right to procure the site by condemnation, you have referred me to secs. 694c, 694d and 694e, Wis. Stats.

Sec. 694c provides, in part, as follows:

"Whenever in the opinion of any county board the county requires any lands for the use of a courthouse, jail, house of correction, poorhouse, hospital, asylum or workhouse, or for any other public purpose authorized by law, and such board cannot agree with the owner of such lands upon the amount of compensation to be paid therefor, or when, by reason of the legal incapacity or absence of any such owner or other cause, no such agreement can be made or such lands cannot be purchased without unreasonable delay, the judge of the circuit court of the county in which such lands or any part thereof are situated may, upon application in writing by such board, which application shall contain a description of the lands so required, appoint three disinterested residents of such county commissioners to appraise said lands. * * *."

Then the procedural steps are further set forth. Here we find express authority given in the statute for the acquisition of property for the public building by the county board. But this statute does not purport to give authority to the two counties jointly to condemn, and it is clear that the joint county training school board is given no authority under this statute to condemn.

I am forced, therefore, to the conclusion that neither the joint county training school board nor the county board of the two counties acting jointly would have authority to acquire the site by condemnation under any of the statutes above referred to.

Public Officers—District Attorney—Intoxicating Liquors—
Duty of district attorney to make complaints, prosecute and make orders that certain specific laws heretofore not strictly enforced must be obeyed.

March 20, 1918.

RALPH E. SMITH,

District Attorney,

Merrill, Wisconsin.

In your recent communication you state that the mayor of your city of Merrill issued an order to its chief of police to close the saloons on Sunday; that at the time of the issuing of the order the mayor announced that this action was taken in view of the drastic action of the fuel administration of closing institutions as a measure to conserve fuel; and that it is not the excise law that is sought to be enforced but a plain Sunday closing statute, which covers all classes of business and all persons.

You state that a controversy has arisen between the mayor and yourself as to the closing of the saloons on Sunday in your county, outside of the city of Merrill; that you took the position that it is not the duty of the district attorney to issue an order but that it is his duty to prosecute when complaint is made in good faith; that you have always been ready and willing to perform that duty; and that the mayor takes the position that sec. 1553 has been a dead letter statute since the time it was enacted. You ask whether sec. 1553 is a dead letter or whether it is still in force.

No statute of this state can be considered a dead letter until it has been superseded by another statute or has been repealed, either expressly or impliedly. Sec. 1553 provides:

"Every sheriff, undersheriff and deputy sheriff, police officer, marshal, deputy marshal or constable of any town, village or city who shall know or be credibly informed that any offense has been committed against the provisions of any law of this state relating to excise or the sale of intoxicating liquors shall make complaint against the person so offending within their respective towns, villages or cities to a proper justice of the peace therein, and for every neglect or refusal so to do, every such officer shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars and the costs of prosecution."

This law is clear and explicit, and it is beyond controversy that it makes it the official duties of the officers therein named to make complaint against any violation of our excise law. This would include the sale of liquor on Sunday as prohibited by sec. 1564, and also sec. 4595, prohibiting the running of a shop on Sunday, when such shop is a saloon in which intoxicating liquors are sold.

You also inquire whether it is the duty of the district attorney to issue orders closing places of business on Sunday pursuant to the provisions of sec. 4595, and whether it is the duty of the district attorney to make complaint for violations of sec. 4595, also whether it is his duty to prosecute when complaint is made and to exercise his discretion as to whether or not the complaint is made in good faith or for the purposes of spite, revenge or for any other purpose than an honest desire to secure the enforcement of this law.

It is true that there is not in our statutes an expressed provision making it the duty of the district attorney to make a complaint when a criminal law has been violated, while there is a provision which makes it the duty of mayors to enforce the laws of the state and see to it that they are observed, and that all officers of the city discharge their respective duties. See secs. 925—37 and 925—38.

The office of district attorney is a constitutional office (sec. 4, art. VI, Wis. Const.), and the prosecuting officer elected by the people in each county in the state. Most of the criminal prosecutions in this state are brought by complaints being made by parties who are conversant with the facts connected with the crimes committed. In a broad sense, it may be said that it is the duty of every good citizen who, from his own knowledge, knows that the law is violated, to make complaint to the proper officers. This duty devolves upon the district attorney in his capacity as a private citizen, and, it being his official duty to prosecute the criminal offenders in his county, it is required of him to exert all the ability and power which he possesses to convict the guilty parties and see to it that they are punished. I believe it is part of the district attorney's duty to make a complaint for the violation of those crimes which come to his knowledge when no one else is willing to make the same. If it were not, some persons guilty of serious offenses might escape punishment.

Suppose a murder were committed in your county, and it came to your knowledge that the guilty party was well known to have committed the same, but no one was willing to make the complaint. Would it be contended that the district attorney could excuse his failure to prosecute by the fact that no one had made complaint? I believe not. Under the statutes of Wisconsin, as interpreted by the supreme court of this state, a criminal complaint may be made on information and belief, and there is no reason why the district attorney should not make the complaint in such cases, where otherwise the offenders would go unpunished. The fact that other officers whose duty it may also be to make the complaint do not do so is no excuse for the district attorney. He has been elected as the prosecuting attorney of the county. He should see to it that offenders are brought to justice. While he has a discretion to exercise and need not bring prosecution when it is clear that there is not sufficient evidence to convict the party accused, he cannot excuse his own failure to prosecute by accusing others of misfeasance in office.

It has been the practice in this state for district attorneys to make the complaint in a great many of the prosecutions, and the district attorneys are generally looked to by the people to bring the prosecutions where the criminal law has been clearly violated. The question of malice or bad motive in those swearing out a criminal complaint cannot, standing alone, be a valid reason for not bringing a criminal prosecution, but the district attorney may consider it as bearing upon the question whether sufficient evidence may be produced at the trial to convict the criminal. If there is sufficient evidence to convict the violator of the law, the malice or bad motive of the one who makes the complaint should not defeat the prosecution.

On the question of issuing orders or notifying the saloon keepers or other offenders of the law that the law will be enforced, I will say that in view of the fact that so many of our laws have not been enforced, I believe it would be only fair of the district attorney who has neglected his duty in the past to give orders and notice that the law will be strictly enforced and that its violators will be punished. This is especially applicable to the closing of saloons on Sundays. The saloon keepers have been led to believe in some places that they may violate the law with impunity, and juries are reluctant to convict if they believe

that the defendants have not been treated fairly. If notice has been given to them or if they have been ordered to close, a conviction may be more readily secured. I believe, therefore, that while it is not strictly the duty of the district attorney, it would be a good practice if notice were given to such parties that the law would hereafter be enforced. It may have the effect, in future, of having the law complied with.

I believe that the American people feel that the criminal laws which we have upon our statute books should be impartially and honestly enforced. The district attorney was elected as the prosecuting attorney of the county and he is expected to exert himself to the utmost to bring guilty offenders to justice.

Bridges and Highways—State Trunk Highway System—Main traveled highways extending beyond a county seat or city, to or toward the state line, may be included in the state trunk line system.

March 22, 1918.

WISCONSIN HIGHWAY COMMISSION.

It appears from your letter of March 19, 1918, that the United States officers charged with the disbursement of federal aid for the construction of highways question the legality of placing on the state trunk highway system that part of any road which extends beyond the last county seat or city of five thousand population and toward or to the state line.

Must a state trunk highway terminate in every instance at a county seat or a city above the fourth class, notwithstanding the highway is, in fact, part of an interstate trunk line but with no such city or county seat situate thereon at the state line? Is it forbidden by sec. 1313, Stats., that the state trunk highway system shall touch the state boundary, except at points which are within such a city or county seat, and does it command that the system must extend to the state boundary whenever a city or county seat is located at the boundary?

An affirmative answer to this question would be tantamount to saying that the legislature intended a highway system for the isolation of state highway traffic rather than to bring that state into closer union with other states, whereas the manifest purpose of these laws is to facilitate traffic and intercourse without

reference to the state lines. The purpose is to develop national routes of travel, not sectional routes.

The federal act is an exercise of the constitutional power to build post roads. Beyond doubt the postal roads of the United States are not limited by state lines. These roads and lines bear no relation to each other. The national aid is to be used in co-operation with the states

"in the construction of rural post roads," and that "shall be construed to mean any public road over which the United States mails now are or may hereafter be transported." Act of Congress, approved July 11, 1916, 39 U. S. Stats. at Large, 355.

Hence, I imagine it would be very strange, indeed, to find that the trunk line system of this state cannot link up with those of adjoining states, except it be upon the nonessential condition that the points where they do connect must be within a county seat or a city above the fourth class.

The federal aid, as before stated, can be obtained only by co-operation between the state and the United States. The legislature by ch. 175, laws of 1917, decided to co-operate and accepted the terms thereof prescribed by the act of congress above cited.

"1. The legislature of the state of Wisconsin hereby assents to the provisions of the act of congress approved July eleventh, nineteen hundred and sixteen, entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' thirty-ninth U. S. Statutes at Large, page three hundred and fifty-five. The Wisconsin highway commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the construction and maintenance of rural post roads under the provisions of the said act of congress, to submit such scheme or program of construction and maintenance as may be required by the secretary of agriculture and to do all other things necessary fully to carry out the co-operation contemplated and provided for by said act." Sec. 1312, Stats.

That is a complete and unqualified acceptance of the federal offer of aid, and is full authority to the Wisconsin highway commission to carry the plan of the construction of rural post roads into execution. The first section of said act of congress provides:

"* * * The Secretary of Agriculture is authorized to co-operate with the States, through their respective State highway

departments, in the construction of rural post roads; * * *. The Secretary of Agriculture and the State highway department of each State shall agree upon the roads to be constructed therein and the character and method of construction."

These two statutes above quoted from constitute a complete working plan. Nothing is wanting. However, the legislature went farther and provided for a state trunk highway system and imposed duties upon the commission in that connection.

"1. The commission shall * * * 'lay out a system of main traveled roads, interconnecting every county seat and every city with a population of five thousand and over, which system of roads * * * shall be known as the 'State Trunk Highway System.' The total mileage of all roads and streets included in the state trunk highway system shall be not more than five thousand miles.' Sec. 1313, Stats. (ch. 175, laws of 1917.)

There is in this a general command always operative and always controlling upon the acts of the commission. The general order is to "lay out a *system* of *main traveled roads*." The roads must constitute a system, and they must be main traveled highways or certain to become such when improved. This general order has two qualifiers or limitations which are to be observed in the selection of main traveled roads which are to comprise the system:

1. The system must interconnect every county seat and city of five thousand population. The system adopted by you, I understand, complies with that limitation and no question is made on that point.

2. The total length of the selected roads must not exceed five thousand miles. The system adopted is within this second limitation. There is no limitation in the statute regarding the point or points at which the selected roads shall touch the state line. Of course, there are many rural post roads which extend from such a city or county seat toward the state line, and the inclusion of those roads in the system does not violate either of the limitations above mentioned. A different interpretation of the statute would render the second limitation in conflict with the first limitation—a limitation upon a limitation. These limitations are distinct and independent of each other. They are not in conflict.

What the legislature did, in effect, was to direct the com-

mission to lay out a *system* of main traveled roads, not over five thousand miles in length, and so selected that every county seat and city above the fourth class should be reached by such system. Nothing beyond that is required by the statute. The system selected by you conforms to this requirement. Having selected

"main traveled roads interconnecting every county seat and every city with a population of five thousand and over,"

the commission was in its discretion authorized to select any other and additional main traveled roads so long as all the roads selected form a system and the total mileage thereof does not exceed five thousand miles. These cautions, I understand, were complied with.

I am firmly of the opinion that the system selected by you is legal and that the inclusion of main traveled roads extending beyond county seats and cities toward the state boundary are legally included in the state trunk line highway system.

Public Officers—County Highway Commissioner—Salary—A county board cannot change the salary of the county highway commissioner after having fixed such salary at the time of electing him.

March 28, 1918.

CARL O. NEUMAN,

District Attorney,

Oconto, Wisconsin.

I understand from your letter of March 25, 1918, that your county board at its last annual meeting elected a county highway commissioner at a salary of nine hundred dollars a year. Subsequently, the county board passed a resolution increasing his salary to fifteen hundred dollars a year. You wish to be advised as to the legality of said resolution.

"(a) Upon his first election, the county highway commissioner shall serve until the first Monday in January of the second year succeeding the year of his election. The county board shall fix his salary upon such first election, at not less than six hundred dollars per annum, make arrangements as to his bond," etc. Subsec. 2, sec. 1817m—6.

The succeeding paragraph of the subsection just cited makes provision for the salary of a highway commissioner who shall be reelected and also for the length of the term upon such reelection. With that paragraph we are not now concerned.

It is plain that the county board in November did precisely what the statute commands. They elected a commissioner at a specified salary and that salary was above six hundred dollars per annum. I can find no statute that gives the county board any authority to rescind its said action or to subsequently change the salary thus fixed for the term of the newly elected commissioner. The exercise of that authority as it was exercised by your county board exhausted its power in the premises.

You call my attention to sec. 694, Stats. It seems to me that section has no application, but if it has, it does not authorize an increase in the salary of the highway commissioner. Subd. (1), sec. 694 directs the county board at its annual meeting to fix the salary of every county officer to be elected during the ensuing year:

"* * * The salary so fixed shall not be increased or diminished during the officer's term."

You will notice first, that the highway commissioner was not to be elected "during the ensuing year," but was elected during the current year; in the next place, the term of the newly elected commissioner, if to fill a vacancy, began as soon as he qualified, and if for a regular term, began in January following the election. While your statement of facts does not show when the resolution to increase the salary was passed, I take it that it was passed since the newly elected highway commissioner assumed the duties of his office. This opinion is, in part, based upon that assumption.

Again, it is expressly provided by subd. (4) of said sec. 694 that the county board shall make no changes in the compensation of any officer contemplated by that section during the term for which the officer was elected or appointed, except as provided in that subsection. There is no provision there which would authorize a change in the salary of the highway commissioner, even if he be a county officer within the meaning of that section.

Under the circumstances stated I am of the opinion that the resolution attempting to increase the present county highway commissioner's salary is illegal. This is in accordance with former rulings of this department. Vol. VI, Op. Atty. Gen., p. 808.

Intoxicating Liquors—Public Officers—Town supervisors should consider it their duty to bring complaint against licensees who violate the excise law.

March 28, 1918.

RALPH E. SMITH,

District Attorney,

Merrill, Wisconsin.

In your communication of March 22 you desire to know whether town officers have the power and duty for the enforcement of secs. 1564 and 4595, the former relating to the sale of liquor on Sunday and the latter relating to the closing of shops and places of amusement, etc.

Sec. 1553 provides:

"Every sheriff, undersheriff and deputy sheriff, police officer, marshal, deputy marshal or constable of any town, village or city who shall know or be credibly informed that any offense has been committed against the provisions of any law of this state relating to excise or the sale of intoxicating liquors shall make complaint against the person so offending within their respective towns, villages or cities to a proper justice of the peace therein, and for every neglect or refusal so to do, every such officer shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars and the costs of prosecution."

This statute was amended by ch. 371, Laws 1909, in which the words, "sheriff, undersheriff and deputy sheriff" were inserted and the words "supervisor, trustee, alderman, justice of the peace" were eliminated. As this statute now reads, the only town officer affected is the constable whose clear duty it is to make complaint against violators of the excise law. You will note that mayors of cities are given the power and duty to

"take care that the laws of the state and the ordinances of the city are observed and enforced and that all officers of the city discharge their respective duties." Secs. 925—37, 925—38.

I find no provision in our statutes which prescribes a similar duty to town officers other than constables. It is true that town boards of supervisors have the right to revoke the licenses of saloon keepers but it is also true that the procedural steps to be taken to bring the matter before the said board is prescribed by statute, and, under the decision of our supreme court, in the case of *State ex rel. Getchell v. Bradish*, 95 Wis. 205, a supervisor may disqualify himself from sitting in such matter by taking active part in the prosecution before the board.

While no supervisor of a town is required, by expressed provision of law as a part of his official duties, to bring complaint against the saloon keeper for violating the excise law, yet, in view of the fact that he has the power to do so as a private citizen and is in a way required to take care of the affairs of the town, I believe it would be perfectly proper for such officer to become active in the enforcement of such laws. The board of supervisors is supposed to grant licenses to proper persons only and if any member of the board is informed of a criminal offense which a licensee commits, especially when it relates to the violation of the excise law, I believe such officer should consider it his duty to bring the violator to the bar of justice.

Public Officers—State Council of Defense—The state council of defense has no power to compel persons to work when such persons are not violating the law.

March 29, 1918.

A. H. MELVILLE, *Executive Secretary,*
State Council of Defense.

In your letter of March 27 you state:

"There are in the state of Wisconsin along the banks of the rivers and lakes clubs of men called 'Sunshine Clubs' who do nothing but fish a little and spend the rest of their time doing nothing but loafing and idling. * * * They fish enough to just live and no more.

"Does the state council of defense have the power, under ch. 82, laws of 1917, or through the enforcement of the Huber Law, to compel these men to go to work? * * *."

Art. I, sec. 2 of the constitution provides:

"There shall be neither slavery, nor involuntary servitude in

this state, otherwise than for the punishment of crime, whereof the party shall have been duly convicted."

Unless a crime or other offense recognized by law is committed by the acts of the persons in question, then they cannot be compelled to work in violation of their constitutional privilege.

The Huber Law provides for the employment of persons convicted as a part of the punishment after they have been duly convicted of an offense recognized in law. I have been unable to find any law that is being violated under the facts stated by you and for that reason I know of no way that these men can be legally compelled to work. Ch. 82, laws of 1917, does not provide a remedy for the situation you present.

Public Officers—Supervisor—Village Assessor—The offices of supervisor and village assessor are incompatible.

March 29, 1918.

O. L. OLEN,

District Attorney,

Clintonville, Wisconsin.

Your favor of March 29, asking whether or not the office of village assessor and that of supervisor are incompatible, so that one person cannot hold the two offices at the same time, is at hand.

In reply thereto I would say I am satisfied that these two offices are incompatible. The supervisor in performing his duties on the county board, as a part of his duties, makes the apportionment of the taxable property of the county among the several towns, villages and cities. This would include the passing upon the assessed value of the village of which he is assessor. He also might be on the special tax committee that investigates this matter of apportionment and reports to the county board, and there are special statutory duties and liabilities upon supervisors and assessors to assess at the full valuation. The supervisor, in a sense, has a power of revision or review of his own acts as assessor which renders the two offices incompatible.

Intoxicating Liquors—An administrator may continue the saloon of the deceased without paying the \$25.00 fee and filing a bond.

March 29, 1918.

A. J. O'MELIA,

District Attorney,

Rhineland, Wisconsin.

In your communication of March 27, 1918, you refer me to the provisions of subsec. 3, sec. 1548, and you inquire whether the administrator of an estate who desires to continue the business of liquor selling for said estate need furnish a new bond, receive the consent of the licensing authorities and pay the twenty-five dollar fee, or whether it was intended this need only be done by a person buying or receiving the license from the administrator.

Said subsec. 3 contains the following:

“* * * If any licensee shall die during any license year, the administrator of such deceased licensee may continue or sell said business and if he sells the same, may assign or transfer such license and all rights and privileges of the licensee thereunder, if the transferee or assignee is acceptable to the licensing authorities and secures their consent thereto and fully complies with the requirements of law applicable to original applicants and executes and delivers a satisfactory bond. No such assignment or transfer shall be permitted unless a fee of twenty-five dollars is paid therefor to the town, city or village, as the case may be.”

This statute expressly provides that the administrator may continue or sell said business, and, if he sells the same, that he may assign and transfer the license. It is only the transferee or assignee that must be acceptable to the licensing authorities, and he must comply with all the requirements of law applicable to original applicants and execute a bond. The administrator is not required to furnish a bond nor is there any necessity for requiring the assent of the licensing authorities. The administrator will conduct the business under the original license as a part of the estate. This is often done in other states. See sec. 422 of Woollen & Thornton on The Law of Intoxicating Liquors.

Prior to the enactment of this statute, the administrator was authorized under the decision of *Williams v. Troop*, 17 Wis. 463, to sell the liquor without a license but it required this statutory

enactment to authorize him to transfer the license or to continue the business for the estate of the deceased. You are advised, therefore, that the administrator may continue the business without paying the twenty-five dollar fee or filing a bond.

Public Officers—State Council of Defense—Ch. 82, Laws 1917, does not give the state council of defense power to control the price of ice.

March 30, 1918.

A. H. MELVILLE, *Executive Secretary,*
State Council of Defense.

In your letter of March 27 you submit the following:

The state council of defense wishes to know whether it has the power under ch. 82, laws of 1917, to control the price of ice.

The portion of ch. 82, laws of 1917, relative to the duties of the council of defense in the matter of scarcity of food, fuel or other articles of common necessity is as follows:

“When in the opinion of the council a serious scarcity of food, fuel, or other articles of common necessity exists or threatens by reason of actual war in which the country is engaged, or when in the opinion of the council unreasonable or excessive profits are being made through the manufacture or supply of necessities for common defense or public welfare, in time of actual war, the council shall advise the governor and he shall call a special session of the legislature to make provision for necessary supplies of food, fuel, and other articles of common necessity to be controlled by the state in quantities sufficient to prevent distress among the people, and to prevent and prohibit unreasonable or excessive profits through the manufacture or supply of necessities for common defense or public welfare.”
Sec. 14.

It will be noted that nowhere in ch. 82, laws of 1917, is the council given any authority to fix the price of food or necessities of life, but it has authority merely to make recommendations to the governor. This is also in keeping with the purpose of the act as expressed in sec. 1, where the following language is used:

“There is established a state council of defense, to be known hereafter in this act as the ‘council,’ to assist the governor in doing all things necessary to bring about the highest effectiveness within our state in the crisis now existing and to coördinate

all our efforts with those of the federal government and with those of other states. * * *,

You are advised that ch. 82, laws of 1917, does not give the council power to control the price of ice.

Criminal Law—Bastardy—Arrest of Drafted Men—The liability enforced in a bastardy proceeding is essentially civil.

The custody of a defendant under arrest in a bastardy proceeding must yield to a mobilization order addressed to such defendant under the Selective Service Law.

March 30, 1918.

H. B. ROGERS,

District Attorney,

Portage, Wisconsin.

In your telephone inquiry of yesterday you stated that a citizen of your county, who is in the custody of the sheriff on a bastardy charge, has been ordered to report forthwith for military service, pursuant to the act of congress approved May 18, 1917 (Public, No. 12, 65th Congress), and you ask whether it is the duty of the sheriff to retain custody of the defendant in the bastardy proceedings or to permit him to depart for military service pursuant to the orders which he has received.

A similar question was submitted to this office by District Attorney Roberts of Grand Rapids, Wisconsin, and answered by an opinion dated August 8, 1917 (Vol. VI, Op. Atty. Gen., p. 568). The situation there was somewhat different than the situation in this case, and besides, there has been some legislation since, notably Public Act No. 103 of the 65th Congress, entitled

"An Act To extend protection to the civil rights of members of the Military and Naval Establishments of the United States engaged in the present war,"

which was approved March 8, 1918, and which will be later referred to. For these reasons, the present inquiry cannot be deemed to be sufficiently answered by the prior opinion.

Manifestly, the solution of the situation which you present will depend largely on the nature of a bastardy proceeding.

This matter has been the subject of a great many decisions of our supreme court; some of which are not at all definite in determining whether this proceeding should be classed as essentially civil or essentially criminal. Among those cases are *State v. Mushied*, 12 Wis. 561; *State v. Jager*, 19 Wis. 235; *Rindskopf v. State*, 34 Wis. 217, 225; *Baker v. State*, 56 Wis. 568, 575-576; *Van Tassel v. State*, 59 Wis. 351; *Baker v. State*, 65 Wis. 50, 52-53; *Barry v. Neissen*, 114 Wis. 256, 259-260; *Goyke v. State*, 136 Wis. 557, 559; *Smith v. State*, 146 Wis. 111, 112; *State ex rel. Volkman v. Walthermath*, 162 Wis. 602, 603.

Without reviewing in detail this long list of decisions, the ultimate position of the court can be sufficiently determined by quoting briefly from the last two cases cited.

In the case of *Smith v. State*, *supra*, the court determined that a bastardy proceeding might be prosecuted by private counsel. In reaching this conclusion, the court said:

"If the proceeding be one in which the defendant is sought to be punished for a wrong done society or the state, then there is great force in the argument that the state alone should prosecute (citing cases). A bastardy proceeding has been held to be neither a civil nor a criminal action, but one depending wholly upon the terms of the statute authorizing it for the relief that may be afforded thereby (citing cases). The latter case (*Meyer v. Meyer*, 123 Wis. 538) held that it was designed primarily to enable the injured female to recover compensation from the person who has, in the eye of the law, inflicted an injury upon her with subsequent damages. It has also been held that when instituted by the mother it is a proceeding for her benefit and protection and to enforce the father's natural obligation to support his child (citing cases). So we see that whether the defendant's liability is founded upon a tort, or upon a natural obligation, irrespective of the blame, *it is a liability primarily to the mother and the remedy is given for her benefit*. True, the state is remotely interested, for if the father does not furnish support, it may be called upon to do so. *But its contingent claim upon the defendant is purely a pecuniary one and has naught to do with the violation of any criminal statute*. A defendant may be adjudged guilty in a bastardy proceeding and also in a prosecution for fornication or whatever statutory offense he may have been guilty of when the child was begotten, but they are two separate and distinct actions founded upon distinct grounds of liability. In the one the mother is primarily interested, and the state only remotely, and both interests are wholly pecuniary. In the other the state alone is interested, but not in a pecuniary sense. It is enforcing its criminal laws on the ground of public policy."

respect to other matters, and the city clerk must in turn perform duties as such affecting the school district.

I think, therefore, it appears very clearly that the two offices are incompatible, and occasions may arise where a conflict of interest might occur, and when that is true, the same person cannot hold two offices when one of such offices holds certain legal responsibility to the other office.

Public Officers—County Superintendent of Schools—Elections—Nominations—Under sec. 5.28 nomination may be made by county board where independent candidate having no personal campaign committee declines.

March 20, 1919.

C. M. DAVISON,
District Attorney,
Beaver Dam, Wisconsin.

In a telephone request this morning you ask my opinion with respect to the filling of a vacancy in the nomination of a candidate for the office of superintendent of schools under sec. 5.28.

It appears that a certain candidate filed his nomination papers nominating him for the office of superintendent of schools for your county as a nonpartisan candidate under the provisions of sec. 5.26, Stats., and that on the 19th day of March said candidate so nominated regularly filed his declination under sec. 5.28.

It also appears that the county clerk for your county has caused the ballots to be printed.

The question, therefore, arises whether or not under sec. 5.28 another candidate can be nominated upon the certificate under sec. 5.28 made and filed by the personal campaign committee of such person so seeking the nomination, and if not, how can a nomination be made to take the place of the person nominated, who has filed his declination?

What is now sec. 5.28 is an old statute and was formerly designated as sec. 34 (Stats. 1913). Under such statutes there was no provision made for filling a vacancy in the case of a declination of a nominee, except by a committee representing a party, and said sec. 34 did not recognize nonpartisan or independent nominations, so far as filling a vacancy with respect thereto was concerned.

By ch. 175, laws of 1915, an amendment was made to said

sec. 34, which chapter is now sec. 5.28, Stats., under the renumbering scheme.

This section takes cognizance of nonpartisan or independent nominations made under secs. 5.26 and 5.27.

So far as material to the matter under investigation the law now provides as follows:

"* * * 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 in case the candidate is the nominee of a political party, by the committee representing the party, the chairman and secretary of which in such case shall make and deliver to the proper officer for filing a certificate, duly signed, certified and sworn to, as required in case of original certificates, setting forth the cause of the vacancy, name of new nominee, office for which nominated, and such other information as is required in case of original certificates. This certificate must be filed six days before election in case of town, village or city offices, and eight days in other cases, and when so filed shall have the effect of an original certificate. In case the candidate is a nonpartisan nominee, the vacancy shall be filled by the personal campaign committee of the candidate, who shall make and file a certificate in the manner above prescribed. If the candidate had no personal campaign committee, such vacancy shall be filled by the supervisors of the town, trustees of the village, council of the city, or board of supervisors of the county, as the case may be, and such board shall make and file a certificate as herein provided. If such declination, death or the permanent removal of a nominee take place after the ballots are printed and before election, the proper chairman of the committee above authorized to fill vacancies may make a nomination to fill the vacancy and provide the election boards with pasters containing the name of such nominee only, which shall be pasted upon each of the official ballots by the ballot clerks, before signing their initials thereon and delivering them to the voters," etc.

The personal campaign committee referred to above is the personal campaign committee provided for in sec. 12.04, known as the corrupt practices act.

The amendment contained in ch. 175, laws of 1915, was enacted subsequent to sec. 12.04.

It will be observed that sec. 5.28 provides for filling vacancies in nominations generally, not only under the primary election law but also with respect to other nominations provided for

in sec. 5.26, and the certificate filling the vacancy in the case of a candidate to be voted for in a county must be filed not less than eight days before the election with the county clerk, and when it is so filed it shall have the effect of an original certificate.

Under this section in case the candidate is a nonpartisan nominee, which is the case here, the vacancy shall be filled by the personal campaign committee of the candidate, by making and filing the certificate to which I have referred.

I understand that the candidate who declined the nomination had no personal campaign committee. The section to which I have referred provides that if the candidate had no personal campaign committee, such vacancy shall be filled by the board of supervisors of the county and the board shall make and file a certificate as provided in this section.

It is very clear to me that the personal campaign committee referred to must be the personal campaign committee of the candidate who declined, and I think the statute is so clear that this point needs but little explanation.

If this were not the law, then any one seeking to be placed on the ballot in place of the candidate who declined might constitute a personal campaign committee and therefore would defeat the purpose of the statute in providing for filling a vacancy by the board of supervisors of the county. Besides, the language is in the past tense with reference to some one who was a candidate and who had no personal campaign committee.

Therefore, under the facts in this case, it remains with the board of supervisors of the county to fill the vacancy upon a certificate to be made and filed as provided under sec. 5.28, and such certificate must be made and filed eight days before the election, and I believe next Monday is the eighth day before the election and the last day upon which the certificate can be filed, if the vacancy is filled by the board of supervisors of the county.

However, this section also provides that if the declination takes place after the ballots are printed and before the election, the proper chairman of the committee above authorized to fill vacancies may make a nomination to fill a vacancy and, of course, such chairman would make and file the certificate prescribed, in which case there must be provided for the election boards pasters containing the name of such nominee only, which

shall be pasted upon each of the official ballots by the ballot clerks before signing their initials thereon and delivering them to the voters.

It is therefore my opinion that the board of supervisors of a county can fill the vacancy, and in this particular case it may be a question whether or not the chairman of the county board may not fill the vacancy. I will discuss this question last.

The question then arises: By what method must the board of supervisors of the county be convened? Under our statutes a special meeting of the county board can only be called after a request therefor has been signed by a majority of members of a county board, and such meeting cannot be called within less than seven days from the date of said call.

It will be observed that the candidate under this section may decline nine days before the election, and the county board may fill the vacancy, where there is no personal campaign committee, by filing a certificate at least eight days before the election.

It is therefore very evident that the legislature did not intend that the board of supervisors should be called in special meeting, because of the very fact that there would not be time within which to hold the meeting.

Therefore, must it not be concluded that the board of supervisors, through a majority—inasmuch as governing bodies act by majorities—may fill the vacancy by signing the certificate in the manner provided by said section without a special meeting of the board of supervisors of the county?

Where a situation of this kind arises proper construction of a statute must be made, and if a thing can be permitted to be done under a statute, then such statute should be construed so that the thing to be done can in practice be done.

It is therefore my conclusion that the board of supervisors can act without a special meeting, although it perhaps would be advisable to notify all of the supervisors that a meeting would be held, thereby giving them an opportunity to attend, if they choose, and if a majority of the supervisors made, and a majority of all the supervisors of the county joined in, the certificate, then it appears that the nomination to fill the vacancy would be properly made. In fact, if the vacancy can be filled by the board of supervisors, such is the only practical way of filling it, and I believe that the statute can be so construed without too great straining of the express provisions of the statutes.

which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war."

And, even if the proceeding went to judgment, the court would be empowered, under sec. 203 of the federal act Public, No. 103, *supra*, to "stay the execution of any judgment or order entered against such person."

In view of the provisions of these acts, state and federal, it seems to me that it would serve no useful purpose for those interested in the prosecution of this proceeding, to insist upon the retention of the defendant, because of any supposed advantage to be gained by procuring and enforcing against him any judgment therein.

I am not informed of the exact status of the proceeding at the present time. If it is at all possible to do so, I would advise that the matter be brought to the attention of the court, and appropriate proceedings taken to stay the same until the conclusion of defendant's military service.

I am informed, although I have no access to the regulations in question, that obligations on the part of enlisted men, under divorce decrees or orders in divorce actions, are recognized by the superior officers of the defendants in such proceedings, and such defendants compelled to make such adequate provision as they can for the support of their families. It occurs to me that it is very possible that by coöperation with the superior officers some arrangement could be made whereby mother and child (if a child be born alive) could be provided for from the salary of this defendant. I feel, however, that any relief must be by arrangement rather than by arbitrary insistence upon the continuance by the sheriff of his present custody of the defendant under the bastardy proceeding.

Automobiles—Trucks and automobiles owned by county used in road work must be licensed.

April 3, 1918.

ALVIN M. ANDREWS,
District Attorney,

Shawano, Wisconsin.

Your favor of April 2 is at hand. You inform me that Shawano county owns two trucks and one automobile which are used in the construction of the state highways in your county; that these cars are never used except by the county highway commissioner and his crew while employed in the construction of roads under highway law, and you ask whether or not the county is obliged to take out a license for these trucks and pay the state license fee.

This department has held that cities owning automobiles or trucks are required to take out the license and pay the fee. I am satisfied that the same rule will apply to counties and that the trucks and automobile owned by the county should be licensed the same as in other cases. Sec. 1636—47, subsec. 5, Stats.

Appropriations and Expenditures—State conservation commission has no power to appoint an attorney to defend a warden and pay him out of state funds.

April 4, 1918.
STATE CONSERVATION COMMISSION.

With your communication of April 1 you enclose a letter from F. P. Regner, dated March 30, in which it is argued that the commission has a right to pay for the services of an attorney who was employed in defending a warden in an assault and battery prosecution. You refer me to sec. 29.05, subd. (9), and you state that wardens are often sued for damages relative to the confiscation of boats, nets or any other hunting or fishing paraphernalia, and you inquire whether the commission is au-

thorized to pay for the services of an attorney in connection with such matters. Said sec. 29.05, subd. (9), provides:

"Each commissioner and each deputy conservation warden, in the performance of his official duties, shall be exempt from any and all liability to any person for acts done or permitted or property destroyed by authority of law; and in any action brought against any such commissioner or warden personally, arising from alleged excess of his authority, the taxable costs awarded to either party shall include a reasonable attorney's fee, to be fixed by the court, provided the party has appeared therein by an attorney of a court of record."

It is true that this subdivision primarily refers to civil actions, as there can be no taxation of costs in criminal cases against the state. It would therefore not give the attorney for the defendant the right to have a reasonable attorney's fee fixed and allowed by the court. It has been argued by Mr. Regner that under subd. (6), sec. 23.09, the commission has the authority to employ and pay for the services of an attorney in defending the warden concerning any matters that grow out of his official duties. He predicates his argument upon the following provision of said subdivision:

"* * * Said commission may employ the necessary clerks and stenographers to perform the clerical work of the office, and appoint and employ such foresters, wardens, experts, agents, superintendents, assistants and employes as may be necessary to carry out the provisions of this section, and shall fix the compensation for such clerks, stenographers, foresters, wardens, experts, agents, superintendents, assistants and employes, subject to the approval of the governor as to the number thereof and the amount of their respective salaries or compensation. All such employes shall receive their actual and necessary traveling expenses incurred in the performance of their duties, but no such expense account shall be audited unless the same is fully itemized and verified by the oath of such employes that such expenses were actually incurred in performance of their duties."

I am of the opinion that this provision of the statute is not broad enough to authorize the commission to appoint an attorney for the purpose of defending a warden who has been sued on matters growing out of the performance of his official duties. It is often the case that a state official is required to defend himself or his official acts in a lawsuit and thereby often incurring great expenses. But no general statute has been passed by

the legislature covering such cases. It has been the practice in the past for officials who have been unfortunate enough to have had expenses incurred in that manner to apply to the legislature for reimbursement and special appropriations have been made for such purposes.

You will note that this statute does not mention attorneys. While the words used in a broad sense might be considered as including attorneys, still, I believe in view of the past custom in such matters, it cannot be held that the legislature intended to include attorneys when they did not specifically mention the same. The warden will be required to pay his own attorney, and I suggest that he present his bill to the legislature.

Criminal Law—Requisitions—Abandonment—The failure of a husband to pay alimony to his former wife as required by a decree of divorce does not constitute an offense under sec. 4587c, Stats., and requisition for his return from another state will not lie.

April 9, 1918.

J. H. HILL,

District Attorney,

Baraboo, Wisconsin.

When you were here the other day you left with me a letter written to you by J. Wilfred Frenz, an attorney at Baraboo, in which he requests that you apply for a requisition upon the governor of Illinois for the apprehension and return to this state of a certain person under the following statement of facts:

This person's wife secured a divorce from him something like two years ago, and the judgment provided for periodical payments by him of alimony to his wife. These payments were made for a time, and then he ceased making them. He is now in Illinois and refuses to make further payments. He was in this state at the time the decree was granted and such decree was served upon him personally within this state. While Mr. Frenz does not so state, I assume that he ceased making such payments while he was still within the state. You request an opinion as to whether, under these circumstances, extradition proceedings would lie.

Under date of September 25, 1913, an opinion was rendered by this department to Honorable Francis E. McGovern, then governor of this state, to the effect that the willful failure to make payments for the support of a minor child, which payments had been ordered to be made in a divorce decree, constitutes an offense under the provisions of sec. 4587c, Stats. (Vol. II, Op. Atty. Gen., p. 326.)

Under date of February 9, 1916, an opinion was rendered to governor Philipp to the effect that a divorced husband, not required by the decree of divorce to support his minor children, who were committed to the care of the divorced wife, cannot be convicted of willful failure to support such children under the provisions of that section. Vol. V, Op. Atty. Gen., p. 119.

Neither of these opinions is directly in point, although each has some bearing upon the question submitted by you. I do not find that this department has ever passed upon the exact question you have submitted.

In an early case in this state in which a judgment of divorce *a vinculo* was granted at the suit of the wife, giving the custody of the surviving child to the wife and providing for periodical payments by the husband for the support of such child, and after default on the part of the husband in making such payments, he presented his petition to the court for a vacation of that part of the judgment providing for these payments. Among other things, Chief Justice Ryan said:

"As a general rule of our law, divorce does not discharge the husband from the duty of supporting the wife and their infant children. But it may make new provision for the support of the wife necessary; and it may modify, suspend or supersede the husband's right to the custody of the infant children of the marriage, and make new provision for their support necessary."

Campbell v. Campbell, 37 Wis. 206, 210.

"We should be very unwilling to adopt a construction of the statute which would exclude the wife, upon divorce, from all right to support from the income of the husband at the time of divorce or from his estate subsequently acquired. * * * During coverture, the wife would be entitled to support out of these; and we do not understand that, upon divorce, she should lose her right. The statute clearly recognizes the continued claim of the wife to support from her husband, notwithstanding the divorce, except in case of her adultery. * * *

"* * * Judgment of divorce can sever the legal bond of marriage, but it cannot undo the natural relation which husband

and wife bear to each other and to their children, cannot help but bear, and must bear always. Statutes and judgments may control the future, but cannot cancel the past; may solve social, but cannot annul natural relations. Marriage was before human law, and exists by higher and holier authority—the Divine Order, which we call the law of nature. The law and the judgment of the law of the land may separate husband and wife and set them legally free; but law or judgment cannot obliterate their cohabitation in marriage, or the natural and indelible relation which cohabitation in marriage fixes on them forever.

* * *

"Our statute of divorce recognizes the natural tie and consequent obligation, and proceeds upon them, in providing for the claim of the wife, founded in marriage, to support from the husband, after divorce. We cannot regard it as a hard provision, but as a remedial and beneficent statute, for protection of natural claim founded on natural relation. And we shall not confine it to the narrow application contended for, against its spirit and intent, if the language used be fairly susceptible of larger and more liberal construction." *Campbell v. Campbell, supra*, 213-215.

In a later case, upon an appeal from a judgment revising a former judgment of divorce *a vinculo*, in respect to alimony, Mr. Justice Lyon, among other things, said:

"The primary duty to support both mother and child remains with the defendant, notwithstanding the divorce." *Thomas v. Thomas*, 41 Wis. 229, 233.

This language is referred to with approval in the later case of *Crugom v. Crugom*, 64 Wis. 253.

In a more recent case, in which a divorced wife filed a claim against the estate of her former husband, for expenses incurred in the care of their children, no provision for the support of such children having been made in the decree of divorce but the care and custody having been awarded to the wife, among other things the court said:

"After the parents were divorced all duties and obligations to each other ceased, and they became as strangers to each other." *Zilley v. Dunwiddie*, 98 Wis. 428, 433.

It will be noted that all of these cases were civil actions, and that in none of them was it necessary to pass upon the question

of the liability of the husband for the support of his divorced wife.

Sec. 4587c provides in part:

"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; * * * shall be guilty of a crime, * * *."

This is a criminal statute and must be strictly construed in favor of the accused person. It is only for willful failure to support one who is his wife that a person can be convicted under that portion of the statute quoted.

Thus it has been held that one cannot be convicted under a similar statute for willful failure to support one with whom the defendant went through a ceremony of marriage at a time when he was not legally capable of contracting marriage. *People v. Steere*, (Mich.) 151 N. W. 617; *Commonwealth v. Isaacs*, 3 Pa. Dist. 517, 7 Kulp 304.

And it devolves on the state to prove that the marital relations existed at the time of the commission of the alleged crime. *State v. Maher*, 77 Mo. App. 401.

Upon an application for a writ of prohibition to prevent the enforcement of an order for temporary alimony made in an action brought to set aside a decree of divorce from bed and board the court said:

"Maintenance of the wife by the husband is alone incident to the marriage relation. There is no duty to furnish maintenance when that relation does not exist." *Chapman v. Parsons*, 66 S. E. 461, 463, 66 W. Va. 307.

In New York it has been held that a husband may be guilty of abandonment and failure to support after an interlocutory judgment of divorce ordering him to make certain payments to the wife for her support. The court, however, expressly calls attention to the rule that

"An interlocutory judgment, however, does not terminate the marriage relation, and the parties remain husband and wife until the entry of the final decree." *Kingsbury v. Sternberg*, 165 N. Y. S. 493, 494, 178 App. Div. 435.

But where there has been a divorce from bed and board, with no provision for alimony, he cannot be convicted of failure to

support. *People v. Cullen*, 47 N. E. 894, 153 N. Y. S. 629, 44 L. R. A. 420.

Where, in an action for separate maintenance, the trial court, against the protest of the wife, granted an absolute divorce, the supreme court of Michigan reversed the lower court, and, among other things, said:

"By the decree he is given immunity from pressure by criminal proceedings for deserting and abandoning his wife and child. *People v. Dunston*, 173 Mich. 368, 138 N. W. 1047, 42 L. R. A. (N. S.) 1065. Punitory proceedings for contempt of the chancery court in disobeying its order requiring him to pay petitioner alimony are contingent upon his being found within the jurisdiction of the court." *Lacey v. Lacey*, 155 N. W. 489, 491, 189 Mich. 271.

While that question was not directly before the court, we believe the court has stated the rule correctly, and that in a case like that referred to by Mr. Frenz the only remedy is by contempt proceedings for failure to comply with the order of the court, unless possibly the wife might have a civil right of action for the recovery of such payments as are due and unpaid. We have not considered this latter question as it is not a part of our duties to determine what the rights of the wife may be in civil proceedings. We recognize, of course, that the case of *People v. Dunston*, which is referred to in the quotation, is not necessarily an authority for the reasons given in the opinion given to Governor McGovern in 1913 and referred to in the beginning of this opinion.

In a Georgia case the syllabus reads:

"A judgment for alimony is not necessarily a bar to a prosecution for abandonment.

"Without reference to the effect generally of a judgment for alimony upon a prosecution for abandonment, a judgment for alimony against the accused and in favor of his wife and children would constitute no defense, where it appeared that after the rendition of such judgment he abandoned his children, leaving them in a dependent condition, and failed to comply with the judgment. While it appears in the present case that the accused partially satisfied the judgment for alimony, there was evidence that he had not paid the judgment in full, and that he had abandoned his children, leaving them at that time in a dependent condition." *King v. State*, 77 S. E. 651, 12 Ga. A. 482.

There is no statement of facts and no opinion given in the report. Our understanding, however, is that the judgment for alimony was rendered in a civil proceeding for separate maintenance, and that no divorce was granted. That would make a very material difference.

Where a husband, upon a prosecution for nonsupport, was ordered to pay certain sums weekly for the support of his wife and minor children and entered into a recognizance to make such payments, and later the wife brought an action in assumpsit for the amount remaining unpaid at the date upon which she secured a decree of divorce, it was held that the divorce was no defense to the action, the court, among other things, saying:

"The recognizance was a valid one and voluntarily entered into. The payments thereon provided for the support and maintenance of the wife and children; not as alimony or expenses pendente lite. The payments provided for were clearly defined and the amount could be litigated at any time. The only defense to such a recognizance is payment in compliance with its conditions. These were never modified * * *, and the decree of divorce by the court of common pleas of Lawrence county did not in the least manner affect the integrity or value of the recognizance. * * * The duties, rights and claims accruing to him in pursuance of his marriage which ceased and determined with the decree of divorce, did not apply to his existing financial obligations that were legally fixed prior thereto."

Commonwealth v. Foltz, 50 Pa. Super. 576, 578-579.

It will be noted that none of the cases involved the same question that is present here. We are convinced, however, that the person mentioned in Mr. Frenz' letter could not be convicted under the provisions of sec. 4587c. It is only the failure to support *a wife* that constitutes the offense and in this case there was no such person at the time the failure to make the payments occurred. When the marital relation was severed by the divorce decree, the obligation of the husband to support the wife was dependent entirely upon such decree, and upon any modification of it that might thereafter be made, and not upon the natural duty of a husband to support his wife.

We therefore conclude that you ought not to apply for a requisition in this case.

Labor—Criminal Law—Fraudulent Advertising—It is not the intent of sec. 1729p—1 to reach the advertising medium in which a labor advertisement is published.

April 10, 1918.

D. K. ALLEN,

District Attorney,

Oshkosh, Wisconsin.

In your letter of April 6 you submit the following:

"Given the following facts, does sec. 1729p—1 apply?

"About February 9, 1918, the Aluminum Goods Mfg. Co. of Manitowoc, Wisconsin, wrote to the Daily Northwestern instructing it to insert the enclosed ad for six days and to send bill for the same.

"The Daily Northwestern ran the ad from February 9 to March 26, 1918, inclusive.

"There was at that time a strike pending at the Aluminum plant at Manitowoc. The ad was run for the six days and on until March 26. * * *

"Question: Does the section above mentioned apply so that the Daily Northwestern of Oshkosh, which published the ad in Oshkosh, and which resulted in an Oshkosh union man going to Manitowoc to apply for work at the Aluminum Company is liable criminally?"

You enclose a copy of the ad as run by the Daily Northwestern:

"Machinists Wanted.

Steady; Permanent Employment;
Good Working Conditions; Growing,
Substantial Concern.

ALUMINUM GOODS MFG. CO.,
Manitowoc, Wis."

Sec. 1729p—1 provides, in part:

"It shall be unlawful to influence, * * * or engage workmen to change from one place of employment to another in this state, * * * through or by means of any false or deceptive representations, false advertising * * * or failure to state in any advertisement, * * * that there is a strike or lockout at the place of the proposed employment, when in fact such strike or lockout then actually exists in such employment at such place. * * *"

It should be borne in mind that this is a penal statute and under familiar rules of construction it is to be strictly construed.

In order to secure a conviction under it, it is without doubt necessary to prove not only false representations and false advertising on the part of the Daily Northwestern, but that they were known to be false when so published. It would seem quite unfair to put a newspaper upon its guard and charge it with the knowledge of labor conditions throughout the country so that it would be acting at its peril when publishing labor advertisements submitted to it by a reputable concern in another part of the state or outside of the state.

The false representations were made in this case by the Aluminum Goods Mfg. Co. at Manitowoc, Wisconsin. They violated the statute above quoted, and it would seem that the plain intent of the act is to punish employers and their representatives who, knowingly, advertise and misrepresent actual working conditions. It does not seem to have been the intent of the law to reach the advertising medium, especially in the absence of a knowledge on their part that such advertising is, in fact, false. You are advised, therefore, that under the facts stated the above quoted section does not reach the Daily Northwestern of Oshkosh.

Counties—Chairman of County Board—Bonds—Highway bonds voted by a county board should be signed by its chairman. It is immaterial whether signed by the chairman in office or the chairman soon to be elected.

April 10, 1918.

S. G. DUNWIDDIE,

District Attorney,

Janesville, Wisconsin.

I have your letter of March 30 to the effect that the county board of Rock county recently passed a resolution directing the issue of bonds for highway purposes and that the question has arisen as to whether or not the present chairman of the county board should sign all of said bonds and coupons attached. You state further that there is a possibility that some of the bonds may never be issued and that none of them will be issued before the middle or latter part of the summer, and that the chairman of the county board has asked you to obtain my opinion as to whether or not he is authorized to sign all of the bonds before going out of office as chairman of the county board.

I assume that the bonds were issued pursuant to sec. 1317m—12, Stats. Said section provides, among other things, the following:

"The bonds shall be signed by the chairman of the county board and the county clerk in their official capacities and be sealed with the county seal."

This is also the language used under sec. 658, subd. (2), relating to the issuance of general county bonds.

As I view the statute, I attach no importance as to who signs the bonds—whether it be the present chairman of the county board or the one to be elected at its first meeting. If, according to the resolution authorizing said issue of bonds they are to be dated at a date prior to the expiration of the term of office of the present chairman, then perhaps he should sign the same as chairman. If, however, the bonds are to bear a date subsequent to his term of office, then I would suggest that they be signed by the new chairman. The important thing is that the bonds be signed according to the terms of the section, namely, by the chairman of the county board.

According to my view of the statute, it is not necessary that any of the proposed issue of bonds be signed by the present chairman. If he chooses, however, he may sign all of them, or, he may sign only a part of said bonds, leaving the rest to be signed by his successor in office at such times as the funds are needed for the purposes for which said bonds are authorized.

Public Officers—Clerk of Circuit Court—Fees—The clerk of circuit court is entitled to fee per folio for making certified copies of records in his office, though the copy is furnished by the applicant.

April 11, 1918.

J. C. DAVIS,

District Attorney,

Hayward, Wisconsin.

In your favor of April 10 you ask if the clerk of the court for your county, in making certified copies of the records of his office, can charge the ten cents per folio therefor when the copy is furnished by the party who makes the request.

Sec. 747, Wis. Stats., so far as it affects this question, reads as follows:

"For making copies of any judgment, order, report, or other paper or record, ten cents per folio."

This is the provision of the clerk's fee bill under which the charge is made, if any. I find that a similar provision of the sheriff's fee bill has been decided by our court.

Subd. (4), sec. 731, governing the sheriff's fee bill in this regard, reads as follows:

"Making a copy of any bond or undertaking, summons, writ, complaint or other paper served or taken, when required by law or demanded by a party, ten cents per folio."

In the case of *Bound v. Beach*, 44 Wis. 600, the opinion by Chief Justice Lyon, after quoting this provision of the sheriff's fee bill, uses the following language:

"We think this provision extends to every case in which delivery of a copy is a necessary part of the service. The sheriff is responsible for the accuracy of the copy served, and must necessarily verify it by comparison with the original before he can safely serve it; and the fee given by the statute is, doubtless, in part to indemnify him for such responsibility. It is quite immaterial where or how he obtains the copy which he serves. If he writes it himself, he *makes* it. So also if he employs a clerk to write it, or a printer to print it. And if some other person writes or prints it for him voluntarily (as in this case), if the sheriff uses the copy thus furnished, we think he makes the copy within the meaning of the statute, and may lawfully demand and receive the prescribed statutory fees therefor." (Pp. 600-601.)

In this case the court holds that the sheriff was entitled to his fee, regardless of the fact that copies of the summons and complaint in the case were furnished, voluntarily by the plaintiff.

I think this case rules the construction of the clerk's fee bill. The language is almost identical, and as to the part construed, is identical. The sheriff's bill is "making a copy;" the clerk's bill "for making copies."

I am therefore of the opinion that the clerk is entitled to the ten cents per folio, whether the copy he serves is furnished by the applicant or made by the clerk himself.

Loans from Trust Funds—Schoolhouse Site—After a school district has obtained a loan from the state trust funds the electors may request a special meeting of the district to decide on a new site.

A change of site does not affect the validity of the loan.

April 11, 1918.

W. T. DOAR,

District Attorney,

New Richmond, Wisconsin.

I have your letter of April 9, to the effect that at an annual meeting of a school district held in the year 1917 the district board was duly authorized by the electors to borrow from the state trust funds the sum of \$2,500 for the purpose of erecting a new schoolhouse in said district; that at said meeting the electors duly decided upon a new schoolhouse site; that thereafter the loan was duly applied for and was duly granted by the commissioners of public lands and the funds so borrowed are still in the hands of the school district treasurer; that in the meantime some sentiment has gained ground favoring the old location for the new schoolhouse and the electors of the district desire to hold a special meeting for the purpose of reconsidering the action of the meeting which adopted the new site, and for the purpose of designating the old site as the place where the new schoolhouse should be located; that it is claimed by some that because of the fact that the commissioners of public lands have granted a loan to the district the district may not now decide upon the old site as a proper location, and it is mandatory upon the school board to erect a new schoolhouse on the new site, as designated by the electors at the 1917 meeting of the school district; that you have advised the school district officers that the location of the schoolhouse site has nothing whatever to do with the borrowing of the money and that the power to fix the site lies wholly with the electors, and that the electors may change the site as often as a majority of the electors of the school district decide thereon, so long as they do not hold more special meetings in one school year for that purpose than is authorized by law.

You submit the following questions:

1. Whether the electors of the district can now hold a special meeting and change the location of the schoolhouse site since

the district board has already procured the funds for the building of the schoolhouse from the state trust funds.

2. Whether the changing of the schoolhouse site would in any way affect the validity of the loan made to the school district from the state trust funds.

Sec. 40.09 empowers the inhabitants of any school district:

"(4) To designate a site for a district schoolhouse.

"* * *

"(11) To authorize the district board to borrow money as provided elsewhere in these statutes."

Sec. 40.11 empowers the electors of a school district to borrow money for the purpose of erecting a schoolhouse, and in subd.

(5) of said section provides as follows:

"The money borrowed under authority of subsections (1) to (4) shall be paid into the district treasury and be expended only for the purposes for which it was voted or borrowed. * * *"

I think the above citations from the statutes include all the provisions which are relevant to the consideration of your questions. The commissioners of public lands are not concerned as to the location of the site. They hold no mortgage upon the real estate or the school building of the district on account of said loan. The state depends entirely upon the tax levy for the repayment of the loan it has made to the district. The officers of the district are charged by law with expending the money obtained from the state for the purpose for which it was borrowed, viz., the building of the schoolhouse, and the state is not concerned as to where the schoolhouse is located or whether the title to the schoolhouse site is good or bad, or has been legally obtained.

I concur entirely in the opinion you have given to the officers of the district. Your first question should be answered in the affirmative and your second question should be answered in the negative.

Weights and Measures—Bonds—Sec. 1666a, Stats., authorizes the state superintendent of weights and measures to adopt a rule that the bonds given by manufacturers of milk bottles under the terms of that section run for three years.

Neither that section nor secs. 1494ab and 1659 authorize the making of a similar rule as to the bonds given pursuant to sec. 1494ab.

April 11, 1918.

HONORABLE GEORGE J. WEIGLE,

Dairy and Food Commissioner.

In your letter of this date you ask if the authority contained in sec. 1666a, subsec. 1 of the statutes of Wisconsin is broad enough to permit the issuance of a regulation such as that submitted by you, and whether it is desirable to have such a regulation as to the bonds filed by manufacturers under the provisions of secs. 1666a and 1494ab, Wis. Stats.

The proposed regulation, of which you enclose a copy, reads as follows:

"Under the authority granted the State Superintendent of Weights and Measures by section 1666a of the Statutes of Wisconsin, the following regulation is promulgated to take effect from and after May 1, 1918:

"All bonds filed by the manufacturers of bottles used for the sale of milk and cream as provided in section 1666a of the Wisconsin Statutes, and all bonds filed by the manufacturers of bottles and pipettes used in measuring milk or milk products for making determination of the per cent of fat in said milk or milk products as provided in section 1494ab of the Wisconsin Statutes shall be for a term of three years. All bonds as above, filed previous to the promulgation of this regulation, shall be renewed at the expiration of three years after the date on which they were executed."

Sec. 1666a, subsec. 1, provides for standard bottles to be used for the sale of milk and cream, and among other things contains this provision:

*** * * The state superintendent of weights and measures shall prescribe and adopt such rules and regulations as he may deem necessary to carry out the provisions of this section. Bottles or jars used for the sale of milk or cream 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," etc.

The provision herein contained authorizing the adoption of rules and regulations has reference purely to such as are designed to aid in carrying out the provisions of that particular section. In my opinion, these provisions authorize the promulgation of such a regulation as you have submitted so far as it relates to bonds filed under the provisions of sec. 1666a. It does not authorize the promulgation of such a regulation as to the bonds required to be filed under the provisions of sec. 1494ab.

Sec. 1494ab refers to bottles and pipettes used in measuring milk or milk products for making determination of the per cent of fat in said milk or milk products. It contains no provision for the promulgation of rules and regulations by the commissioner of weights and measures except the following:

"The state superintendent of weights and measures shall prescribe specifications with which the glassware mentioned in this section shall comply."

This, it will be noted, relates merely to specifications for the glassware itself and has no reference to any such rule or regulation as that here proposed.

Sec. 1659, Stats., provides, in part:

"* * * The superintendent of weights and measures shall issue from time to time, regulations for the guidance of all sealers, and the said regulations shall govern the procedure to be followed by the aforesaid officers in the discharge of their duties," etc.

I doubt very much if this provision authorizes the promulgation of such a rule or regulation as you have submitted as applied to the bonds required by sec. 1494ab.

I feel that this regulation is a desirable one as to the bonds under above sections, but would suggest in view of the provisions of the statutes that you limit its provisions to the bonds provided for in sec. 1666a. I think probably if you would sug-

gest to the manufacturers the desirability of having those bonds that are issued under sec. 1494ab issued for a definite length of time and for periodical renewal of the same that they would be glad to comply with your suggestion without having a formal rule or regulation made.

Mother's Pensions—Dependent children living with grandmother may, in discretion of court, receive aid while mother is living and working to support other children.

April 12, 1918.

J. H. HILL,

District Attorney,

Baraboo, Wisconsin.

In your letter of April 5 you submit the following:

"A woman, a resident of this county, is the mother of five children aged from four to seven years. The oldest one is blind and in the blind institution at Janesville. Last year the mother drew a pension of \$25.00 per month and kept the children together. This year, the little blind boy is in need of an operation again on his eyes and the mother is in need of an operation. She has an opportunity to secure employment in Milwaukee at good wages by doing the following:

"Out of her wages paying the keep of two of the children at a private institution and leaving two of the children with the grandmother, who should not be compelled to support them. She is working in Milwaukee for the purpose of saving enough money to pay for the operation upon the boy's eyes, and on herself.

"Is the grandmother entitled to aid under the Mother's Pension Act in caring for these two children?"

Sec. 573f, Stats., subsec. 4, provides:

"Upon such investigation the judge may, as the best interest of such child requires, grant aid to it, or to its parents, or to any person having the care or custody of such child, or commit such child to the state public school, or place such child in the home of a relative or friend of the family or in the home of a person interested in public welfare, or make such other disposition of such child as he may deem wise."

The intention of the law clearly is to render such aid as is necessary for the welfare of the children to be assisted by it. The purpose of the law is aid for the children rather than aid for any custodian or parent or guardian of the children.

Assuming that all of the other requirements necessary for a proper grant of aid are present, the fact that two of the children are in the care and custody of the grandmother would not operate to defeat the right of the children for such aid granted to the grandmother. In other words, the mere fact that the interests of the family require that two of the children be turned over to the care and custody of the grandmother does not defeat the right of such children to the aid provided in the law while in the care and custody of the grandmother.

The court may, if in his judgment the conditions warrant, grant such aid to the children so living with their grandmother.

Intoxicating Liquors—Licenses—Town board when granting but one liquor license is not limited to any particular place.

Town board has no right to accept more than the legal fee for a liquor license.

April 12, 1918.

GEORGE F. MERRILL,

District Attorney,

Ashland, Wisconsin.

In your communication of April 10 you state that a certain town in your county is contemplating licensing one saloon. You inquire whether it is necessary to give the license to the location that had a license several years ago in said town. This question must be answered in the negative.

When the town is entitled to at least one license under sec. 1565d, the so-called Baker Law, this may be granted to any location deemed suitable and to any person deemed a proper person in the discretion of the town board. Only when the ratio in the said statute is exceeded will it be necessary to grant licenses to premises that have been continuously under license since the enactment of the law.

You also state that the license was raised to \$250 in said town some years ago; that the town board is now contemplating

charging a thousand dollars to operate a saloon in said town. You inquire whether they have the right to charge more than the legal fee in said town.

An official opinion has been rendered by my predecessor on this question. See opinion under date of April 26, 1917, Vol. VI, Op. Atty. Gen., p. 258. It was there held that it is contrary to public policy to accept more than the legal rate as the town board is required to use its discretion as to what place is a suitable place and what person is a proper person, or whether a saloon should be licensed at all. The payment of more than the legal rate is considered in the nature of a bribe and is contrary to public policy, and therefore unlawful.

Appropriations and Expenditures—Capitol Light, Heat and Power Plant—Expenditures for repair and maintenance may not be charged to the appropriation for operation.

April 12, 1918.

JOHN C. WHITE,

State Power Plant Engineer.

Your letter of April 6 reads as follows:

"This department is charged with the operation, repair and maintenance of the permanent property, including operative equipment, of the Capitol, the Capitol Power and Heating Plant, and the Executive Residence. Separate appropriations have been made for this work which are classified as follows:

- "(a) Operation;
- "(b) Repair and maintenance;
- "(c) Capital expenditures.

"The first includes all expenses incident to the operation of the equipment such as labor, fuel, lubricants, packings, and such items as are used up, break or waste away in service. The second includes those expenditures necessary to maintain the property in good physical condition such as painting, repairs to machinery, and such replacements and work as are necessary to keep its capacity and efficiency up to the normal standard of performance, but without increase of capacity, or adding to the service. The third is intended to cover expenditures for new equipment either for a new purpose or for an increase in capacity.

"For several years we have been operating under the following method. The service is continuous, twenty-four hours daily,

To provide the flexibility in the organization necessary to cover regular days off, absence due to sickness or other causes and emergency conditions, a competent relief crew must be available at all times. To furnish this relief we have employed craftsmen, such as a steam fitter, plumber and machinist, whose duty it is to relieve the regular operators on their regular days off and at such other times as might be necessary.

"Under above schedule all men get an average of three days per month off duty. Also, a two weeks' vacation with pay has been given after one year of service. All are on monthly salaries paid from the appropriation for operation. Such time as the craftsmen are not required for relief work they are kept busy on repair work.

"Some of the craftsmen have objected to working under this arrangement and insist on having all of the Sundays and holidays off. To grant this it will be necessary to put on additional help for relief work, and to separate entirely the operating force from the repair and maintenance force.

"We have submitted and the men have accepted the proposition to put all craftsmen on an hourly wage scale at union rates, paying them only for such time as they work and with no vacation, sick leave, or other privileges or concessions that go with the salaried positions.

"The question is:

"Having separated the craftsmen from the operating force, and having no funds with which to pay them in the maintenance appropriation, can we continue to employ them on repair work only and pay them out of the operation fund?

"The new arrangement outlined above will not be put into effect until an opinion from your office assures me it is legal to do so."

Your question should be answered in the negative. The legislature has expressly made separate and distinct appropriations as to the several classes of work mentioned in your letter and no authority is given anywhere to exceed the amounts so appropriated for each class. According to sec. 20.12, subd. (3), the legislature has appropriated the sum of \$3,500

"for the repair and maintenance of all permanent property of the state at the light, heat and power plant and the heating plant for the executive residence, and for the repair and maintenance of the state capitol building and the machinery and equipment therein connected with the light, heating and power plant."

As I understand you, this fund has been exhausted.

I am unable to find any authority which permits you to make

a disbursement for repair and maintenance out of the operation fund provided for by sec. 20.12, subd. (2).

Sec. 2, art. VIII, Const., provides as follows:

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

Similar questions have had the consideration of this department, and I refer you to the opinions of my predecessor found in Vol. IV, Op. Atty. Gen., p. 387, and Vol. VI, Op. Atty. Gen., p. 700.

It may be that you have charged to repair and maintenance items which are properly apportionable and chargeable to operation, so that, under sec. 20.76, you are authorized to issue transfer vouchers, setting forth in each the reason therefor, and the secretary of state is authorized to credit the apportionment from which payment was originally made and debit the apportionment directed to be charged by the transfer voucher.

Appropriations and Expenditures—Board of Control—State Public School—Sec. 20.17, subd. (12), par. (e), construed to include expense necessary to filter and pipe deep well water to cisterns for laundry purposes at state public school at Sparta.

April 15, 1918.

STATE BOARD OF CONTROL.

In your letter of recent date you refer to sec. 20.17, Stats., and you state:

"Our sanitary engineer, Mr. W. G. Kirchoffer, has made an investigation of the matter and reported the result of such investigation to the Board. He finds that the water which can be produced at that institution is soft enough for laundry purposes, but that it contains so much iron, organic matter and manganese, that it is not satisfactory for that purpose. He reports that at the city water works during the past year they have been operating an experimental plant for the removal of iron from the city water and that inasmuch as the city was interested in what could be done with the deep well water, the city and the school jointly, at his suggestions, constructed a small experimental plant consisting of barrels and coke with sand filter for the removal of iron from the deep well water; that the results of such experiment have been satisfactory. He, therefore, recommends

that an apparatus be constructed for the purification of the water.

"The question now arises with the Board as to whether the appropriation made by the Legislature or any part of it can be used for expenses incurred in providing machinery or supplies for the treatment of the water at the State Public School."

I have been in consultation with your sanitary engineer and find that the only difference that will be occasioned by the use of the deep well water instead of the water gathered from the roofs of buildings will be that instead of using the gathering spouts for the rain water, water pipes and filter equipment will be used. The same cistern or container will be used under either system, and the water is to be used in either event for laundry purposes.

Sec. 20.17, subd. (12), par. (e), Stats., provides, in part, appropriations for the following:

"On July 1, 1917, * * * fifteen hundred dollars for the construction of cisterns and equipment necessary thereto."

It will be noticed here that there is no limitation put upon the source from which the water is to be taken, but it is understood that it is to be used for laundry purposes. The fact that the flowing deep wells furnish suitable water when the water is put through a simple filtering plant renders that plant quite as well within the meaning of the statute, which was to furnish water for laundry purposes, as the gathering of rain water. The words "for the construction of cisterns and equipment necessary thereto" are broad enough to include such piping, pumping and other necessary equipment. The fact that a simple filtering system is to be included is a mere incident to the equipment and not prohibited under a fair construction of the above quoted statute.

You are advised, therefore, that the appropriation therein contained can be used for equipment, including filter plant, necessary and incident to the use of the deep well water for laundry purposes at the state public school at Sparta.

Intoxicating Liquors—Licenses—A village board in a village which is dry but in which the election has resulted in favor of license cannot grant licenses to take effect prior to July 1 following such election.

April 16, 1918.

ARCHIBALD MCKAY,

District Attorney,

Superior, Wisconsin.

In your letter of April 12 you state that the village of Oliver, in your county, was a no-license territory and at the election held on the second day of April this year the voters decided in favor of license, and, as you understand it, the trustees are about to issue a license for the sale of intoxicating liquors, to take effect at once. You inquire whether, under the circumstances, a license can be issued to take effect earlier than July 1 of this year. You refer me to the opinion of my predecessor, Vol. I, Op. Atty. Gen., p. 360.

The question submitted by you is clearly passed upon by my predecessor in the opinion referred to. I have carefully considered the same and I am of the opinion that for the reasons given in said opinion the conclusion arrived at is the correct one. It would seem that this is the only reasonable conclusion to arrive at, considering the wording of our statute.

Under any other construction, if a municipality should alternate in being wet or dry, changing every year, there would always be a wet period of about fourteen months and a dry period of only ten months. This was certainly not the intention of the lawmakers. You are advised, therefore, that it will be unlawful for the trustees of the village of Oliver to grant licenses at the present time to take effect prior to July 1, 1918. Sec. 1565b, Stats.

Mother's Pensions—Words and Phrases—Term "emergency" as used in sec. 573f construed.

Emergency payments may be continued throughout the year if the emergency continues.

April 18, 1918.

STATE BOARD OF CONTROL.

In your letter of April 15 you submit the following:

"A mother with two children under the age of fourteen years is entirely incapacitated by disease. Aid was extended by

the county court in September, 1917, in the amount of thirty dollars for that month, and twenty-seven dollars per month thereafter for the period of one year. * * *

"The question here is what constitutes emergency payments. For what period can such payments be made before they lose their character of emergency payments as such and become common and to what extent can the state participate in this aid?

"Specifically, can the state contribute to the excess aid for September only or can the excess of all the remaining and subsequent payments be audited and allowed?"

Subsec. 6, sec. 573f, Stats., provides:

"The aid granted shall be sufficient to enable the mother, grandparent, or person having the custody of such children to properly care for the children and shall not exceed fifteen dollars per month for the first child excepting in emergency cases where the aid to such first child shall be left to the discretion of the court and ten dollars per month for each additional child and in no case shall any one family receive more than forty dollars per month excepting in counties containing a population of three hundred thousand or over where the maximum for any one family shall not exceed fifty dollars," etc.

Under the above quoted statute in the absence of an emergency the aid in this case should be limited to fifteen dollars for the first child and ten dollars for the second. The amount of aid in any event and under all circumstances is limited to forty dollars per month for any one family in a county containing less than three hundred thousand population. If more than three hundred thousand population, then the maximum to any one family is fifty dollars a month. This is true whether aid be given on an emergency basis or in the absence of emergency. If in the absence of an emergency, there must be at least four children under fourteen years of age in the family in order that the family receive forty dollars in counties with a population of less than three hundred thousand. In case of an emergency, however, aid may be given to the extent of forty dollars, if there be only one child. In other words, the discretion of the court is limited to payments not to exceed forty dollars per month to any one family.

What constitutes an emergency and the duration thereof must be determined largely by the legislative purpose of the act in question. The purpose of the act as disclosed in subsec. 6, above quoted, that

"the aid granted shall be sufficient to enable the mother to properly care for the children"

and limiting the amount of aid in ordinary cases to fifteen dollars for the first child and ten dollars for each additional child, indicates that any unusual, sudden or unexpected happening or occasion, or combination of circumstances of pressing necessity in the form of sickness, disease or incapacity of any kind which, in the judgment of the court rendered it impossible for the custodian of the children with the ordinary aid to properly care for them, would, in that individual case, constitute an emergency within the meaning of the statute. It is also difficult to lay down any general rule as to what shall constitute an emergency, as each case must be determined upon all the facts and circumstances surrounding it.

As to the duration of the emergency payments, it is quite obvious that an emergency may arise very suddenly and, once having arisen, the unusual need of aid occasioned thereby may extend over a considerable period of time, and inasmuch as the aid necessary to properly care for the children in the ordinary case is limited to fifteen dollars for the first and ten dollars for each other child as long as the necessity for aid in excess of that amount exists, then, within the meaning of the statute, the emergency is coëxcessive with such need, and if the emergency exists in the judgment of the court, it is proper to receive aid on the emergency basis.

You are advised, therefore, that if in the judgment of the court an emergency continues to exist throughout the year, he may, in his discretion, grant such aid as he sees fit, not to exceed forty dollars or fifty dollars, as the case may be (depending upon the population of the county), to any one family, and the voucher for the payment of the state's one-third of the same may properly be audited and allowed by the state.

Appropriations and Expenditures—Automobiles—The dairy and food commissioner may buy an automobile for use by his inspectors and pay for it out of his general appropriation.

April 18, 1918.

HONORABLE GEORGE J. WEIGLE,
Dairy and Food Commissioner.

In your communication of April 13 you refer me to sec. 20.59, Stats., appropriating money for your department, and you request my opinion as to whether you are permitted to purchase automobiles for the use of inspectors in the performance of their duties. Said sec. 20.59 provides:

"There is appropriated from the general fund to the dairy and food commissioner and ex officio state superintendent of weights and measures:

"(1) Annually, beginning July 1, 1917, sixty-three thousand thirty-two dollars, for the execution of his functions. Of this there is allotted to said commissioner and superintendent an annual salary of three thousand dollars. All license fees collected by the dairy and food commissioner under the provisions of sections 1410d—1 to 1410d—8, inclusive, of the statutes, shall be paid into the general fund and fifteen hundred dollars thereof is appropriated therefrom and added to this appropriation.

"(2) On July 1, 1913, five thousand dollars for the purchase of new apparatus to be used in the enforcement of the laws relating to weights and measures. On July 1, 1917, seven hundred twenty dollars, for the purpose of two Ford automobiles."

There are three more subsections in this section relating to appropriations but not here relevant.

An official opinion was rendered by my predecessor, Vol. VI, Op. Atty. Gen., p. 592, that the appropriations for Ford automobiles contained in subd. (2) can be used only for purchasing machines of that make.

Sec. 1410, referring to the dairy and food commissioner, contains the following:

*** * * Such commissioner may, with the advice and consent of the governor, appoint assistants, who shall be experts in dairy products, and chemists who shall be practical analytical chemists; he may also, with such advice and consent, appoint agents for the inspection of milk dairies, factories, cheese factories, foods and drugs, and creameries, and to assist in the

work of the dairy and food commission at such times and for such periods of time as may be required in the enforcement of the dairy and food laws or other laws required to be enforced by the said commissioner and ex officio superintendent of weights and measures. * * * The commissioner shall be furnished with a suitable office in the capitol, and with such supplies and printing as may be necessary. * * *."

Sec. 1410a provides, in part:

"It shall be the duty of the commissioner to enforce the laws regarding the production, manufacture and sale, offering or exposing for sale or having in possession with intent to sell, of any dairy, food or drug product, the adulteration or misbranding of any article of food or drink, or condiment or drug and personally or by his assistants, inspectors or agents, to inspect any milk, butter, cheese, lard, syrup, coffee, tea or other article of food, or drink, condiment or drug made or offered for sale within this state which he may suspect or have reason to believe to be impure, unhealthful, misbranded, adulterated or counterfeit, or in any way unlawful, and to prosecute or cause to be prosecuted any person, firm or corporation engaged in the manufacture or sale, offering or exposing for sale or having in possession with intent to sell, of any dairy product or of any adulterated, misbranded, counterfeit, or any unlawful article or articles of food or drink, or condiment or drug. * * *."

Under sec. 1410b the commissioner, his agent or assistant is given free access to any barn or stable where any cow is kept or milked, or to any factory, building, dairy or premises where any dairy product is manufactured, handled or stored, when the milk from such cow or such product is to be sold or shipped. He is given power to enforce such measures as are necessary to secure perfect cleanliness in and around the same and of any utensil used therein, and to prevent the sale of milk from cows diseased or fed upon unwholesome food.

An official opinion was rendered by this department on June 23, 1913, Vol. II, Op. Atty. Gen., p. 5, to the effect that the Wisconsin highway commission may purchase automobiles for use of its field men although there was no express provision in the statute authorizing the purchase of automobiles or appropriating money expressly therefor. It was said, on page 7:

"It is a familiar rule that, where express power or authority is granted for the accomplishment of a particular purpose, such other and further power and authority as may be necessary for the accomplishment of the main purpose is implied. The legis-

lature has charged the state highway commission with the performance of very important duties in very general terms. I can discover no legislative intent to define or limit the manner in which it shall prosecute the work delegated to it."

The same reasoning applies to your department. You have been charged with the performance of important duties in general terms, the same as the highway commissioner, and I believe that whenever in your judgment economic and efficient service by your appointees is promoted if you supply them with automobiles, you have the power to do so. It is necessary for your appointees, in order to discharge the duties imposed upon your department, to travel from place to place in visiting the different dairies, creameries and other places under your supervision. Undoubtedly, by the use of automobiles more places may be visited in a day and the efficiency of your department will thus be increased.

I do not believe that the appropriation for the purchase of two Ford automobiles is to be construed as the expression of a legislative intent that no more and no other automobiles can be purchased out of your general appropriation. Your question should therefore be answered in the affirmative.

Counties—Automobiles—County boards may enact ordinances providing the same penalties as the state law for highway speed violators.

April 19, 1918.

HONORABLE HENRY JOHNSON,
State Treasurer.

I have your favor of April 15 together with communication from J. W. Blair, county treasurer of Kenosha county, which communication I herewith return.

I note the county treasurer states that the fines referred to in his communication, amounting to \$1,676, were collected for violation of Kenosha county ordinance number one, and he claims the right to retain the same for that reason, and you inquire whether there is a statute whereby the county can pass an ordinance to prosecute speed violators and retain the fines.

In answer to your question I would say that sec. 1636—55,

among other things, provides that the statutes regarding highways and the use of vehicles thereon

"shall not prohibit any city, village, county, town, park board or other local authorities from passing any ordinance, resolution, rule or regulation in strict conformity with the provisions of section 1636—47 to section 1636—57, inclusive, imposing the same penalty for a violation of any of the provisions of said sections, where such violation occurs within said city, county, town or village," etc.

I find further that sec. 669, subd. (15a), provides that the county board of each county shall have power at any legal meeting

"To enact ordinances or by-laws regulating traffic of all kinds on any highway, except street or interurban railways, in the county which is maintained at the expense of the county and state, or either thereof; to declare and impose forfeitures, and enforce the same against any person for any violation of such ordinances or by-laws; to provide fully the manner in which forfeitures shall be collected; to provide for the policing of such highways and to provide for what purposes all forfeitures collected shall be used."

It would seem clear, therefore, that in the cases coming within the provisions of the statute last quoted counties would have authority to pass an ordinance under which speed violators could be prosecuted and the fines retained by the county to be disposed of as directed by the county board.

I think this answers your question.

Public Officers—City Treasurer—Constable—Offices of city treasurer and constable may be held at the same time by the same person in a city of the fourth class under the General City Charter Law.

April 19, 1918.

HONORABLE L. C. WHITTET,

Secretary to the Governor.

In response to your inquiry as to the legality of the offices of treasurer and constable of the city of Edgerton being occupied by one and the same person, you are advised that in my opinion there is no incompatability in the duties of the two offices, and that one person may legally hold both.

The only point which occurred to me at which the duties of the two offices might come in conflict is in the collection of personal property taxes. It is the duty of the city treasurer to collect such taxes by suit when necessary and the constable is commonly the officer who serves the summons in justice court.

I find, however, on turning to the statute (sec. 1100), that in such suit "the summons may be served by said treasurer or any constable." This quotation answers the objection mentioned.

Edgerton is a city of the fourth class operating under the General Charter Law, as I am advised. Under that law both positions are city offices. Sec. 925—23. The general duties of the city treasurer are enumerated in sec. 925—43, and those of the constable in sec. 843, Stats. I find no conflict in the duties of these two offices as laid down in those sections and I am of the opinion that the positions are compatible.

Constitutional Law—Public Officers—Special Messenger—A special messenger, under sec. 11.70, is not a civil officer, within the meaning of that term in sec. 12, art. IV, Const.

April 22, 1918.

HONORABLE MERLIN HULL,

Secretary of State.

I have your letter of April 11, which reads as follows:

"Assemblyman Arnold C. Otto of Milwaukee was appointed as a special messenger to secure the soldier vote at Charlotte, N. C. Mr. Otto has presented a bill for his expenses and also for \$60 to pay for twelve days' service at the rate of \$5 a day, as provided by law.

"The question has arisen as to whether Mr. Otto can draw the salary, as he is a member of the legislature. I would ask if, in your opinion, this is a proper charge and if the amount can be allowed."

The question whether Mr. Otto may be allowed his claim for his expenses and services as a special messenger depends upon the construction to be given to sec. 12, art. IV, state constitution, which reads as follows:

"No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the

state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected."

This constitutional provision was considered in an opinion by my predecessor and found in Vol. VI, Op. Atty. Gen., p. 498. It was there held that a state senator who was a member of the legislature at the time that an act was passed creating the Milwaukee civil service commission was eligible to hold the position of chief examiner of said commission on the theory that the position to which he was appointed did not constitute a civil office, as those words are used in the constitution.

It is unnecessary for me to go over the ground and the authorities cited in support of this conclusion. If the position of chief examiner of the civil service commission, which pays an annual salary of fifteen hundred dollars, and which is permanent in character, is not a civil office, then the position of special messenger to secure the soldier vote under ch. 16, laws of 1918, and which is only a temporary appointment, is certainly not a civil office under the constitutional provision above quoted.

Moreover, these messengers are appointed under the provisions of sec. 11.70, Wis. Stats. 1917, as amended by ch. 16 of the special session laws of 1918, which reads, in part, as follows:

"The secretary of state, not less than ten days before any election held under sections 11.69 to 11.82, inclusive, shall designate one or more employes in his department, or, if there are not sufficient employes in his department available for that purpose, he shall appoint one or more other persons, as special messengers," etc.

It will be noticed that these messengers are first to be *employes* from the department of the secretary of state, and if sufficient employes are not available, he shall appoint one or more other persons as special messengers. The appointment, of course, is temporary and for this special service. It would seem that to call such employment of such special messengers a civil office under the constitutional provision would be dignifying the language of the statute beyond its reasonable import.

The service rendered by Mr. Otto as special messenger was entirely foreign to his duties as member of the legislature and was certainly not performed by him as such member.

I am therefore of the opinion that the compensation for which

he has filed a claim does not constitute additional compensation, either directly or indirectly, as a member of the legislature and is, therefore, not in contravention of sec. 12, art. IV, state constitution.

It is therefore my opinion that the claim of Mr. Otto is a proper charge and is entitled to be allowed and audited by you.

Agriculture—Bounties—Crows are not protected by federal bird law.

April 22, 1918.

CARL O. NEUMAN,
District Attorney,
Oconto, Wisconsin.

In your letter of recent date you submit the following:

"The town board of this county are passing a resolution offering a bounty of 25¢ for crows. I have been informed that there is a federal law protecting crows. Kindly advise me if such is the fact."

In the act of congress dated March 4, 1913, 37 U. S. Stats. at Large, 847, relating to the protection of migratory birds, under the heading "definitions," subsec. f, appears a classification of birds that shall be considered migratory, insectivorous birds. Crows do not appear in such enumeration.

At the convention between the United States and Great Britain for the protection of migratory birds in the United States and Canada articles were adopted to protect migratory, insectivorous birds. Art. I, sec. 2, enumerates migratory, insectivorous birds, and crows do not appear in such enumeration. Subsec. 3 provides for other migratory, nongame birds, and crows do not appear in said subsection.

I conclude, therefore, that there is no federal protection for crows.

Appropriations and Expenditures—Normal Schools—Federal Aid—An emergency appropriation cannot be made simply on account of moneys from the federal government having been paid into the state normal school fund; but can be made only when the regular appropriation for operation is not sufficient to carry on the ordinary regular work of an institution.

April 24, 1918.

STATE EMERGENCY BOARD.

You informed me by letter of April 18, 1918, that the sum of \$3,546.74 has been certified by the state board of vocational education to the secretary of state for payment to the normal fund income out of moneys received from the United States under the Smith-Hughes Act (act of congress approved February 23, 1917, 39 U. S. Stats. at Large, 929), and that the emergency board has been asked to increase the appropriation "for operation" of the River Falls normal school by that sum, and you say:

"The emergency board desires an opinion, first, as to whether it is within their powers as given in sec. 20.74 of the statutes to act upon this request, and, second, as to whether there is any other provision in the statutes under which this board or any other board would have power to act upon the request before mentioned."

Taking up your first question we find that sec. 20.74 is very guarded in its grant of power. The legislature there makes provision whereby the schools and other institutions of the state shall be kept open and in operation and be enabled to carry on their accustomed courses and regular work, although the express appropriation therefor should prove insufficient from any cause. At the same time, the door is kept closed against inaugurating new courses or enlarging old ones, or taking up any new work which demands money in excess of the sum directly voted by the legislature for operation. It is not necessary to dwell upon the purpose of this statute. All concerned understand that fully. By the section under consideration

"There is annually appropriated such sums as may be necessary * * * as an emergency appropriation to meet operating expenses of any state institution, * * * for which sufficient money has not been appropriated to properly carry on the ordinary regular work. No moneys shall be paid out under

this appropriation except upon the certification * * * that such moneys are needed to carry on the ordinary regular work of the institution * * * and that no other appropriation is available for that purpose." Sec. 20.74.

"The ordinary regular work" here spoken of must be ascertained as of the time the appropriation is voted, or at least as early as the beginning of the fiscal year for which the appropriation is made. When so viewed there are at least two conditions to certify additional appropriations under this section that are wanting:

First, it does not appear from your letter or the correspondence which accompanies it that the regular appropriation "for operation" is or will be exhausted. The inference seems plain that the \$83,666 appropriated by sec. 20.38, subd. (a), for operation of the River Falls normal school for the current year is not exhausted, and, on the contrary, will be sufficient for the "ordinary regular work of the institution" for said year.

Second; the additional expense incurred during this calendar year as compared with former years of teaching agriculture and of fitting teachers of agriculture is rather an extraordinary than an ordinary work of the school and is new and special rather than the regular work of the school as it was conducted when the appropriation was made or at the beginning of the fiscal year. Evidently modifications and additions have been made in the course and to the teaching force.

I am unable to bring the situation presented within the terms of said sec. 20.74. Not every emergency warrants action thereunder, but only such unforeseen events as result in making the direct appropriation for "ordinary regular work" insufficient for carrying on that work. A practical illustration in connection with the normal schools resulted from the marked advance in the cost of fuel, regarding which an opinion was given to the board of normal school regents.*

Your first question is answered in the negative.

The same answer must be given to your other question. I know of no other statute which permits the "increase of the operating account" of a normal school, and there are some statutes which seem to me to forbid it.

The request to you asserts that "federal aid was not taken

* Page 88 of this volume.

into consideration by the legislature at the time of appropriating funds to the River Falls normal school." The courts will assume the contrary of that assertion. The appropriation to the River Falls normal school for this year is so made by ch. 447, laws of 1917 (approved June 14, and published June 21). The federal aid act was approved February 23, 1917, more than three months earlier.

Furthermore, No. 465, S. (which became ch. 494 and which accepted such federal aid), was introduced by the committee on public education and welfare on March 21. The legal presumption is that the legislature had this federal aid act in mind when it made the appropriation last mentioned.

Sec. 20.36 was revised by ch. 14, laws of 1917, approved March 16, and published March 21. In that revision, and now, the statute says:

"All * * * subventions from the United States for or in behalf of the normal schools * * * or any purpose connected therewith; * * * shall be paid into the state treasury and credited to the normal school fund income," etc. Sec. 20.36, subsec. (4), subd. (e).

The very next sentence of the statute provides:

"The normal school fund income shall be applied to the payment and support of the state normal schools and the purposes prescribed by law; *but the moneys from said fund shall be available only as expressly appropriated therefrom by the legislature.*"

The moneys received from the United States under said act of congress

"shall be paid out on the requisition of the State board as reimbursement for expenditures already incurred to such schools as are approved by said State board and are entitled to receive such moneys under the provisions of this Act." Sec. 14 of the act, 39. U. S. Stats. at Large, 929.

The request to you states that the state board of vocational education has certified the sum named for payment to the normal fund income. Presumably that sum has been passed to that fund and thus has reached a destination marked for it by the federal act. From there the moneys are subject to the state statutes. The provisions above quoted from, sec. 20.36, subsec. (5), stand in the way of doing what you are asked to do.

On the whole, I conclude that you are not authorized to grant the so-called emergency appropriation, but are under the conditions stated expressly forbidden to do so.

Bridges and Highways—State Trunk Highway System—Counties—The county is required to pay for services of an operator of a drawbridge necessary on the state trunk highway system.

April 24, 1918.

WISCONSIN HIGHWAY COMMISSION.

Your favor of April 18 is at hand. You state that sec. 1317, subsec. 1, subd. (a), provides that on and after May 1, 1918, each county shall adequately maintain the whole of the trunk system lying within the county in accordance with the directions, specifications and regulations made for such maintenance by the commission, and that the county highway commissioner of one of your counties calls attention to the fact that one of the bridges in his county, which is on the state trunk highway system, has a movable span which requires the constant presence of an operator whose duty it is to open the bridge to permit the passage of boats and to close the bridge after the boats have passed to permit the renewal of traffic. You ask whether the county is required to pay for the services of this operator, who has previously been paid by the town or municipality in which the bridge is located.

Sec. 1317, subsec. 1, subd. (a), provides, in part, as follows:

"On and after May 1, 1918, each county shall adequately maintain the whole of the trunk system lying within the county in accordance with the directions, specifications, and regulations made for such maintenance by the commission."

Subd. (b) of said subsection further provides:

"Said maintenance shall include the maintenance of the portion of the trunk system improved under the provisions of either the state aid or federal aid laws, as well as of those portions of said system as yet unimproved under either law."

Subsec. 5 of this same section makes the county liable for claims for damages due to the insufficiency or lack of repair of the trunk system.

Sec. 1312a, subsec. 1, subd. (b) provides:

"Wherever the word highway is used in sections 1312 to 1317, inclusive, of the statutes, it shall be construed to mean a public road, together with all culverts, bridges, overgrade and under-grade crossings with railways, and all other appurtenances necessary to make a road usable and safe for public travel, and nothing in said sections shall be construed to prohibit the construction of a bridge and its approaches and protection separate from any other construction."

It seems clear from these statutes that the county is required to take full charge of the trunk system, and if, as in the case you mention, it is necessary to maintain a drawbridge over a navigable stream used by boats, I am of the opinion that that burden would fall on the county, and it would be the duty of the county after May 1, 1918, to pay the operator of the drawbridge in question.

Education—Wisconsin School for the Blind—Counties—County Aid—The Wisconsin school for the blind is not a charitable, reformatory or penal institution.

Blind pupils attending such school may be entitled to aid in the discretion of the county board.

April 25, 1918.

STATE BOARD OF CONTROL.

In yours of April 16 you submit the following:

"Application is made at various times to the superintendent of the school for the blind by pupils of that institution showing that they are not inmates of a penal or charitable institution and are, therefore, entitled to the county pension or county aid provided by statute for blind persons.
***"

"This board desires your opinion as to whether inmates of the Wisconsin school for the blind would be entitled to aid under the provisions of that section and also desires your opinion as to whether the school for the blind is a charitable institution under the statutes."

Ch. 45f relates to the education of the blind. Under the scope note "Object and supervision of school for" sec. 568, Stats., provides, in part, as follows:

"The object of the school for the education of the blind, established in Janesville, shall be to afford to that unfortunate class, so far as possible, enlightened and practical education, which may aid them to obtain the means of subsistence, discharge the duties of citizens and secure all the happiness which they are capable of attaining. The general supervision and government of said school is vested in the state board of control. A summer school for adult blind persons shall be maintained in connection with such school for the blind."

Sec. 569 relates to the admission of persons and expense of pupils.

"All blind residents of this state who are of suitable age and capacity to receive instruction shall be received and taught and enjoy all the benefits and privileges of pupils, have the use of the library and books of tuition, and be furnished with board, lodging, washing and fuel free of charge. * * *."

Sec. 572*i* provides:

"Any male person over the age of twenty-one years, and any female person over the age of eighteen years, who is declared to be blind in the manner herein set forth, and who is not an inmate of any charitable, reformatory or penal institution in this state * * * may, in the discretion of the county board, receive from the county * * * a benefit of one hundred dollars per annum * * *."

The question, therefore, to be determined is whether pupils attending the school for the blind are, within the meaning of sec. 572*i*, inmates of a "charitable, reformatory or penal institution." There can be no contention that such pupils are inmates of a "reformatory or penal institution." The question is, therefore, reduced to whether or not a pupil of said school is an "inmate" of any "charitable" institution in this state and whether or not the school for the blind is a charitable institution within said section of the statutes.

The word "inmate" is defined in the Century Dictionary:

"One who is a mate or associate in the occupancy of a place; hence, an indweller; an associated lodger or inhabitant; as, the *inmates* of a dwelling-house, factory, hospital, or prison."

Webster's International Dictionary defines the word:

"One of a family or community occupying a single dwelling or home; as the *inmates* of a private house; an *inmate* of a con-

vent; also, one confined or kept in an institution such as an asylum, prison or poorhouse."

If pupils at the school for the blind are "inmates of a charitable institution," what are we to say of students who are attending the university of Wisconsin and boarding and rooming in one of the ladies' dormitories, either Chadbourne or Lathrop hall? It shocks our sense of word selection to call them inmates of a charitable institution. Yet if in the school for the blind they are inmates of a charitable institution, we cannot escape so classing them at the university. In both cases the student lives in that institution, and there is a financial loss to the state in furnishing the educational facilities in both cases. The difference, if any, as to the cost to the state is merely one of degree and not of principle. In both cases the dominant purpose of the state is education, not to furnish maintenance to the poor, correct incorrigibles, or penalize offenders.

The use of the term "inmate" in connection with charitable, reformatory and penal institutions in sec. 572*i* would indicate that the statute did not intend to reach pupils in a school where no correctional, reformatory or penal features were in vogue. This contention is further borne out by sec. 561*j*, subd. (12), where it is made the duty of the state board of control

"to * * * prescribe the school terms and confer upon meritorious *pupils* therein such academic and literary degrees as are usually conferred by similar institutions, and grant diplomas accordingly."

Note that the term "pupil" rather than "inmate" is applied.

I have given consideration to the fact that the school for the blind is an institution which by statute is under the supervision of the state board of control, and the further fact that the university and other educational institutions are not under this jurisdiction. This finds an explanation in the history of the school for the blind rather than in the classification of institutions on the basis of whether they are charitable, reformatory or penal, as distinguished from those strictly educational. No good reason is apparent, other than an historical one, why the school for the blind should not be considered a part of the school system of the state under the jurisdiction of the educational authorities of the state. I am forced to the conclusion that while the school for the blind has some charitable features, as has the state uni-

versity, and all other schools, it is predominantly an educational institution and that persons receiving an education there are not "inmates" of a charitable institution as contemplated in the statute.

The requisites for entrance to an institution shed some light upon its character. Sec. 569, Stats., provides that any blind resident of this state of suitable age and capacity to receive instruction shall be received. Charitable institutions as distinguished from educational institutions presuppose a condition of indigence, mental defectiveness, necessity for moral correction or a penalty, while the only requisite for admission to the school for the blind is that the person applying for admission be blind and capable of receiving instruction advantageously. It is open to rich and poor alike. Its purpose is solely to educate. When measured by the entrance requirements and the purpose of the school there is nothing in its attributes that in any way suggests the essential characteristics of a charitable institution.

Among the indicia which tend to give character to an institution is the purpose for which persons attend the institution. In the case of the school for the blind the sole purpose is to seek education. This is the statutory purpose set out in sec. 568, Stats., and from a practical viewpoint it is the impelling motive that brings students to school. They do not enter for maintenance because of indigence, nor are they placed there for correction, nor as a penalty. They attend to be educated, just as pupils attend a college or university. The only difference is that the equipment is peculiar, due to the peculiar needs occasioned by the unfortunate condition of blindness. It was not only not the purpose of the school as set out in sec. 568, *supra*, to administer to indigents, imbeciles, correct incorrigibles and punish offenders, but the institution is not fitted for such work and in fact is not called upon to do such work. Its work is solely to educate the blind.

I have also considered the fact that nearly all of the maintenance of pupils attending the school for the blind is furnished by the state. Pupils are furnished books, board, lodging, washing and fuel. This fact does not militate against the classification of the school as an educational institution. It is a mere matter of degree varying in various educational institutions. Some furnish textbooks only. Others furnish transportation to and from school, and others furnish boarding facilities. The

fact that blind people have peculiar and different needs, and the fact that their condition lends itself to an arrangement whereby all the necessities are furnished at the institution instead of at private homes, a greater or less distance from the institution, does not change the nature of the relation of the pupil to the school, and there is nothing in this relation that renders it different, except in the matter of degree, from other educational institutions.

There is a well recognized distinction between education and charity, which has been recognized both by the courts throughout the country and by our own legislature since the organization of the state. It is true that in a sense there is a broad definition of the word "charitable." This broad definition has grown up to meet the needs of emergencies, where a question of charitable use of property as distinguished from private use has been questioned, and where it was necessary to protect gifts and devises given in trust for charitable purposes to prevent such trust from being defeated by private parties.

In passing upon the question before us we cannot invoke this broad definition of the word "charitable" which was brought into being for an entirely different purpose than is contemplated in sec. 572*i*, Stats. It is true that some courts have gone so far as to hold for certain purposes that a state normal school is a charitable institution. *State v. Board of Control of State Institutions*, (Minn.) 88 N. W. 533. It will be noted, however, that this definition was used upon a constitutional question construing the scope of the title of a legislative act. The opinion is based upon the broad definition of charity and is not at all applicable to the matter now before us, as is suggested in the dissenting opinion therein on page 542.

Sec. 572*i* is merely a portion of a comprehensive system of statutory enactment to aid various classes of dependents in this state. In the same class is the so-called Mothers' Pension Act and the various indigent statutes, and statutes granting aid to poor and needy persons. It is the policy of the state not to permit these various statutes in the comprehensive system to overlap each other in application. The so-called Mothers' Pension Law provides that aid given under the act shall be the only form of public aid received. Yet it does not thereby prevent the children intended to be benefited thereby from attending school and thus receiving the charitable aid that flows from every pub-

lic school. The words "inmate of any charitable, reformatory, or penal institution in this state" must be taken to mean in the statute such institutions as care for indigents and mental defectives, correct incorrigibles, or penalize offenders. The statute provides that the payment to the blind shall be made out of the county treasury. The state is not directly responsible for the aid or any part of it. Doubtless the other county institutions, such as the county poorhouse, county jail, as well as other penal, reformatory and detention homes outside of the county, were dominant in the legislative mind when the act was passed, and it is reasonable to suppose that the legislature did not have in mind at all in enacting 572*i* the school for the blind at Janesville.

You are therefore advised that the Wisconsin school for the blind is not a charitable institution, as contemplated in sec. 572*i*, Stats., and that blind pupils attending such school may be entitled to aid under the provisions of said section in the discretion of the county board.

Marriage—First cousins by half or whole blood prohibited from marrying by sec. 2330.

April 25, 1918.

ALBERT W. GRADY,

District Attorney,

Port Washington, Wisconsin.

In your favor of April 24 you inquire whether the county clerk of your county can issue a marriage license to a person who has the following relationship to the young lady he intends to marry: the father of the young man and the mother of the young lady are brother and sister, but the father of the young man is a son of the young man's grandfather by a first marriage, and the mother of the young lady is a daughter of the young man's grandfather by a second marriage.

Sec. 2330, Wis. Stats., reads as follows:

"No marriage shall be contracted while either of the parties has a husband or wife living, nor between persons who are nearer of kin than second cousins, computing by the rule of the civil law, whether of the half or of whole blood," etc.

The young people in question are first cousins under our law, and it is my opinion that the license cannot properly issue.

Corporations—Amendment of Articles—Quorum.—An association of five hundred or more members can amend its articles under sec. 1786e—12a at a meeting properly called and noticed, attended by not less than 10% of its stockholders.

April 25, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your esteemed favor of April 25 you inquire if ten per cent of the total number of stockholders, as provided by sec. 1786e—12a, Stats., is sufficient to amend the articles of incorporation of a coöperative company.

Sec. 1786e—6, Stats., provides for the amendment of articles of coöperative companies and, in part, reads as follows:

"The association may amend its articles of incorporation by a majority vote of its stockholders at any regular stockholders' meeting, or at any special stockholders' meeting called for that purpose, on ten days' notice to the stockholders. * * *."

This provision has remained on the statute books unchanged since 1911.

At the 1917 session of the legislature a new section of the statutes was enacted by ch. 51, laws of 1917, which reads as follows:

"Section 1786e—12a. At any regular or special stockholders' meeting of any association with five hundred or more members, if not less than ten days' notice thereof was mailed to each stockholder of the association at his last known post-office address, and if the fact and date of mailing is established by the affidavit of the secretary of such association, the stockholders present at such meeting, if equal in number to ten per cent or more of the total number of stockholders in such association, shall constitute a quorum for the transaction of any business that a majority of all the stockholders could lawfully transact if present at such meeting."

In passing this latter act the legislature undoubtedly had in mind that it was practically impossible for the larger of these associations of coöperative companies to secure the attendance of a majority of their stockholders or members at their meetings for the transaction of business, and this latter statute was undoubtedly enacted to meet that difficulty.

I therefore advise you that it is my opinion that where such

coöperative company or association has five hundred or more members it can amend its articles by a meeting attended by not less than ten per cent of the total number of its members or stockholders under the provision of sec. 1786e—12a.

Intoxicating Liquors—Licenses—The right to a license is forfeited where the business has been discontinued for eleven months.

April 25, 1918.

J. R. PFIFFNER,

District Attorney,

Stevens Point, Wisconsin.

In your communication of April 23 you state that a person owns a building in which a saloon was conducted on June 30, 1907, and continuously from that date until some time in May, 1917, when the person holding the license disobeyed one of the excise laws and the council revoked his license; that since that time the saloon has been vacant and no license was applied for for the 1917 to 1918 period. You inquire whether the council of your city has the power to issue a license for a saloon in this building for the year 1918 to 1919.

This question must be answered in the negative. The fact that no license was taken out in that place prior to this time, for the period of one year, has the effect of being considered in law as an abandonment of said place for saloon purposes. The owner of the place has forfeited the right to have a license granted to it as a preferred place. See *Koch v. State*, 157 Wis. 437; *State ex rel. Owen v. Schotten*, 165 Wis. 88.

In the *Schotten* case the saloon business had been discontinued for one year. In New York, under a similar statute, a discontinuance of the business for two months has been held to work an abandonment of the same for saloon purposes. See *People ex rel. Bagley v. Hamilton*, 25 N. Y. App. Div. 428; *In re Lyman*, 54 N. Y. Supp. 294; *In re Lewis*, 26 N. Y. Misc. 532.

A granting of the licenses at this time for the year 1917 to 1918 will not reinstate this saloon. You are advised, therefore, that the city council has no power to grant a license for the location in question at the present time, so long as it exceeds the ratio of sec. 1565d, the so-called Baker Law, in granting licenses.

Public Officers—County Board—Compensation.—The per diem of members of the county board is three dollars a day unless increased to not exceeding four dollars a day by resolution of next preceding board.

April 25, 1918.

C. J. TESELL,
District Attorney,

Antigo, Wisconsin.

Your inquiry of April 24 is at hand. You state that the county board for your county in the year 1915, acting under sec. 695, fixed the compensation for all ensuing boards at four dollars per day, and you ask if that resolution will still hold for the board elected April 2, 1918.

Sec. 695 reads as follows:

"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; 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," etc.

You will notice that this language only permits the board at its annual meeting to fix the compensation of the members of the board to be elected at the next ensuing election. There is nothing in the statute that makes this apply to members elected at the second ensuing election. It is clearly limited to the board elected at the next ensuing election, that is, the next county board. In order to enable the members of the county board to be entitled to four dollars per day instead of three dollars, undoubtedly this statute requires each board to vote upon the matter covering the compensation for the next ensuing board.

I therefore advise you that it is my opinion that the resolution adopted by your county board in 1915 does not affect the compensation to be paid the members of your board in 1918; that it only affected the compensation to be paid the members of the board elected in April, 1916. Members for subsequent years would receive only three dollars per day, unless a separate resolution was passed fixing the amount at four dollars per day by the board next preceding.

Bridges and Highways—Under sec. 1325k the state's money should be deposited equally with the county treasurers. Orders for disbursement of funds had best be made pro rata upon the two treasurers.

April 27, 1918.

WISCONSIN HIGHWAY COMMISSION.

In the execution of the contract for the construction of a bridge across the Wisconsin River, between Adams and Juneau counties, under sec. 1325k, you say these two questions will arise:

1. Should the state's contribution be paid to the counties in moieties or in proportion to their equalized valuation?

2. Must each monthly installment of the cost which will come due as the work progresses be apportioned between the counties, or may such payments be made by orders drawn alternately upon the county treasurers so as to keep the amounts paid by each at all times approximately proportionate to the entire sums they are to contribute respectively?

1. Sec. 1325k is the last legislative addition to our statutory bridge law. What it says "goes." And it says that the state shall pay one-third of the cost of the bridge, and that

"all moneys available therefor from the state and said counties shall be deposited and paid out in accordance with the provisions of section 1321a."

There are no two ways about it. It is positive that the state moneys must be used as sec. 1321a commands, for the command is clear and easy to obey.

"* * * The amount to be paid by the state shall be paid upon the order of the state highway commission to the county treasurer of such county, and where two counties are contributing to the cost of constructing such bridge, one-half of the state share shall be paid to the respective treasurers of each of such counties." Subsec. 8.

It is true, as you say, that the

"counties shall pay two-thirds the cost of reconstructing such bridge each in proportion to the last preceding valuation equalized by the state tax commission. * * *." Subsec. 4, sec. 1325k.

This, however, does not control the place or places where the state money is deposited. Presumably the reason why the stat-

ute was not amended, so as to require the deposit of the state's contribution in proportion to the valuation of the respective counties, is to be found in the fact that the material interests of the counties are not at all affected thereby. It would be the same to them if the state's one-third was paid direct to the bridge contractor and never deposited with the county treasurers, or either of them. This thought leads me to state that neither county has such an interest in the matter as would enable it to test the question, and hence whatever way the deposit is made by the state will stand.

While I find no limitation upon this grant of power to you, no direction as to the manner in which the funds in the keeping of the county treasurers shall be drawn out, and while it is probable that you have a rather wide discretion, a reasonable exercise of which would not be interfered with by the courts, still, I advise you that the absolutely safe and the most prudent way would be to draw upon both county treasurers pro rata for each installment of the payments upon the bridge. By doing that, the money expended by each treasurer will at all times be in exactly the same ratio to the money still in the hands of each. Such a situation may save great embarrassment and trouble that might otherwise arise before the bridge is completed.

Marriage—Both parties must either appear in person or render a sworn statement before a marriage license can issue.

April 29, 1918.

JOHN W. SODERBERG,
District Attorney,
Barron, Wisconsin.

In your letter of April 26 you ask whether or not sec. 2339n—4 requires more than one of the parties to make application for a marriage license.

Under sec. 2339b, of the statutes, as they were prior to 1917, either party to a proposed marriage could secure the license. Said section was repealed by the legislature of 1917 and the whole subject of marriage licenses was legislated upon with the apparent purpose of getting a closer check upon the fitness and qualifications of the parties to a marriage contract.

Sec. 2339n—3, Wis. Stats. for 1917, provides for the application for license. It provides, in substance, that the application for the license shall be made at least five days before the license shall issue, except that in certain emergencies either of the parties may apply to a judge of a court of record, who may authorize the issue of a license before the expiration of the five days.

Sec. 2339n—4, Wis. Stats. for 1917, provides:

"No license shall be issued unless both of the contracting parties shall be identified to the satisfaction of the proper county clerk, who shall further require of the parties, either separately or together, a statement under oath relative to the legality of the contemplated marriage; * * *. Or, the parties intending marriage may, either separately or together, appear before any officer authorized by law to administer oaths * * *, who shall require of them a statement under oath as above provided; and such statement, having been duly subscribed and sworn to, and the parties having been duly identified, shall be forwarded to the proper county clerk," etc.

The above quoted section seems clearly to have contemplated a sworn statement by both of the parties to the proposed contract. There is nothing to indicate that it was intended that either of the parties applying was sufficient without the other so that from a reading of the section the only meaning one can gather is that it is necessary for both parties to make a sworn statement before receiving the license.

This construction is borne out by the obvious intent of the legislation upon the subject in 1917, which was to further safeguard the marriage contract by exercising greater care and supervision with reference to licensing persons to marry.

You are therefore advised that under sec. 2339n—4 both parties must either appear in person or render a sworn statement before license can issue.

Fish and Game—In the waters of Green Bay there is a close season on pike and pickerel from March 10 to May 15.

From April 1 to May 15 there is a close season in the waters of Green Bay on all varieties of fish except that nets with not less than 4-inch mesh may be used to catch lake trout and whitefish.

April 30, 1918.

STATE CONSERVATION COMMISSION.

In your letter of April 24 you ask for my interpretation of subsec. (6), subd. (a), and subsec. (7), subd. (a), sec. 29.33, Stats., as to the extent of the close season referred to therein.

Subsec. (6), subd. (a), sec. 29.33 provides:

"In Green Bay there shall be a close season on lake trout and whitefish from October 21 to November 21. A close season for pike and pickerel from March 10 to May 1. A close season for all varieties of fish, except lake trout and whitefish, from the first day of April to the fifteenth day of May, inclusive."

Subsec. (7), subd. (a), sec. 29.33 provides:

"In Green Bay nets with a mesh not less than four inches may be used for the taking of lake trout and whitefish. Gill nets with a mesh not less than two and three-eighths inches may be used for taking herring, chub, bluefin, or perch. Seines with a mesh of not less than three inches, and pound nets with a mesh of not more than two inches in the pound may be used. No nets of any kind shall be set for the purpose of catching any variety of fish during the close season for such fish and from the first day of April to the fifteenth day of May, inclusive, except gill nets with mesh of not less than four inches for the purpose of taking lake trout or whitefish, no nets of any kind shall be set in the waters of Green Bay. During the period from January 1 to March 10 gill nets with a mesh of two and one-eighth inches may be used under the ice for the purpose of catching herring."

As the law stood before the 1917 legislation on the subject, sec. 62.34, there was a close season for pike and pickerel from March 10 to May 1. The 1917 act, ch. 668, laws of 1917, is a codification and revision of the entire branch of the conservation of wild animals that was formerly covered in secs. 62.04 to 62.58, inclusive. By ch. 668, laws of 1917, these sections, from 62.04 to 62.58, were repealed, and there were created ch. 29, and sixty-four new sections thereof, numbered from 29.01 to

29.63, inclusive. In the enactment of this legislation the purpose seems to have been to codify and reenact, with slight changes, in substance, in the interest of brevity.

It seems to have been the legislative intent to create a close season for all varieties of fish, except lake trout and whitefish, from the first day of April to the fifteenth day of May, inclusive, and in the act of codifying, the former law with reference to pike and pickerel remained unchanged, to wit, from March 10 to May 1. The additional close season for all varieties of fish, extending from April 1 to May 15, in effect extends the close season of pike and pickerel from March 10 to May 15.

Further corroborating this legislative intent are the words found in subsec. (7), subd. (a), sec. 29.33:

"* * * No nets of any kind shall be set for the purpose of catching any variety of fish during the close season for such fish and from the first day of April to the fifteenth day of May, inclusive, except gill nets with mesh of not less than four inches for the purpose of taking lake trout or whitefish. No nets of any kind shall be set in the waters of Green Bay."

In other words, the legislature has prohibited the use of nets in Green Bay during the close season, except that not less than four-inch mesh nets may be used for catching lake trout and whitefish only, and that all other varieties of fish are protected, and the use of all other kinds of nets is prohibited from April 1 to May 15, inclusive.

Appropriations and Expenditures—Public Officers—Board of Medical Examiners—Expenses outside the State—Only one member of the state board of medical examiners is entitled to have his account audited and allowed for expenses in attending meetings outside the state.

April 30, 1918.

HONORABLE MERLIN HULL,

Secretary of State.

Your letter of April 11 reads as follows:

"Sec. 14.32, Stats., provides that but one officer or employee of the state may attend any convention or other meeting held outside of the state unless specific authority for such attendance exists. The same section provides that all travel outside of the

state, whether for attendance upon a convention or otherwise, must have the approval of the governor. Sec. 1436, subsec. 1, Stats., being one of the sections pertaining to the state board of medical examiners, provides in part as follows:

" * * * Said board shall hold regular meetings on the second Tuesday in each January at Madison, and on the last Tuesday of each June at Milwaukee, and such other meetings at such other times and places as it may from time to time determine."

"During the month of February a number of the members and employes of the state board of medical examiners attended the annual meeting of the federated state medical boards at Chicago, and at the same time held a meeting of the Wisconsin state board of medical examiners. I enclose herewith a letter received from Dr. Dodd, the secretary of the board, in which he quotes the minutes of their meeting in which the Chicago meeting was authorized. These accounts have all been approved by the governor, and I understand that the meeting in Chicago was also approved. I find nothing in their law, with the exception of the section quoted above, that would authorize them to hold a meeting outside of the state. Have I, in your opinion, the authority to audit these claims, or would they come under the provision of sec. 14:32, limiting the attendance to but one state officer or employe?"

To said letter is attached a letter signed by J. M. Dodd, the secretary of the Wisconsin state board of medical examiners, and from which I quote the following, which is material to the question submitted:

"The following is a copy of the minutes showing authority for the holding of said special meeting:

"Moved by Dr. Murphy, that the board, with the consent of the governor, attend in a body the meeting of the federation of state medical boards, in Chicago, in February, and that the privilege be obtained to transact such business as a Wisconsin board, in the state of Illinois, as is considered necessary at the time.

"Motion seconded and carried."

"The board, in a body called on the governor, who gave his consent to the holding of this meeting in Chicago, and who later O. K.'d the vouchers. This should, it seems, be ample authority for honoring these vouchers and should explain the reason for making the war tax charges."

Sec. 1436, Stats., reads, in part, as follows:

"The Wisconsin state board of medical examiners shall have the power and it shall be its duty:

"1. To elect annually, at its June meeting, from its members a president and a secretary and treasurer. The president and secretary may administer oaths. Said board shall hold regular meetings on the second Tuesday in each January at Madison and on the last Tuesday of each June at Milwaukee, and such other meetings at such other times and places as it may from time to time determine."

The Wisconsin state board of medical examiners consists of eight members who are appointed by the governor by authority of sec. 1435.

Sec. 14.32, referred to in your letter, reads as follows:

"The secretary of state shall not audit items of expenditure for tips, portage, parlor car seats other than sleeping car berths, or for expenses not necessarily incurred in the performance of duties required by the public service; nor shall he audit items of expenditure for expenses of any officer or employe of the state or of any department or institution thereof incurred while attending any convention or other meeting held outside the state or other traveling expenses incurred outside the state unless such expense is authorized by the governor, or specific statutory authority exists therefor; nor shall he audit items of expenditure for expenses of more than one officer or employe of the state or of any department or institution thereof in attending any convention or meeting held outside the state unless otherwise provided by law."

The foregoing section was the subject of an exhaustive opinion written by my predecessor and directed to you, under date of December 7, 1917, and found in Vol. VI, Op. Atty. Gen., p. 789. It was there decisively held that only one officer or employe of the state or of any department or institution thereof is entitled to have his items of expenditure in attending any convention or meeting held outside of the state audited by the secretary of state, and then only if such expenses were authorized by the governor, or if some specific statutory authority exists therefor.

From the minutes of a special meeting of the state board of medical examiners it appears that the federation of state medical boards was to hold a "meeting" in the city of Chicago in February, 1918. According to the facts, such a "meeting" was held and members of said board attended the meeting in a body, and have filed accounts covering their expenses in attending said meeting and in attending a meeting of the board in said city of Chicago, and such attendance had the consent and ap-

proval of the governor. From these facts the conclusion is inevitable that only one member of said board is entitled to have his expenditures for expenses or other traveling expenses audited by you. The fact that the governor authorized the members of the board as a body to attend the said meeting cannot suspend, set aside or abrogate a plain statutory provision defining your duties. Under this section the governor was empowered to authorize only one officer or employe of said department to attend said meeting at the expense of the state.

From the opinion above referred to I quote the following:

"Even though the governor should authorize more than one person to incur traveling expenses where the statute limits the number to one, you are none the less forbidden to audit the expenses of more than one."

I have searched diligently through the statutes to find a specific statute under which the Wisconsin state board of medical examiners was authorized to attend a convention or meeting outside of the state and have the expenses of the members thereof paid out of the state treasury. Sec. 1436, above quoted, prescribes that the state board of medical examiners shall hold one regular meeting in the city of Madison and one regular meeting in the city of Milwaukee in each year,

"and such other meetings at such other times and places as it may from time to time determine."

I think it would be a most violent construction of said section to say that the words "such other places" as used in said section amounts to a specific statutory authorization to hold "other meetings" in places outside of the state of Wisconsin.

It is my opinion, therefore, that under sec. 1432 your authority is limited to audit the account of only one of the members of said state board of medical examiners in attending the Chicago meeting of the federated state medical boards or in attending a meeting of the Wisconsin state board of medical examiners in said city.

Criminal Law—Constable's Fees—Witness Fees—In a criminal case where defendant is acquitted county is not liable for fees of a constable who subpoenaed defendant's witnesses nor for fees of witnesses when defendant has not complied with secs. 4060 and 4062, Stats.

April 30, 1918.

GEORGE E. O'CONNOR,

District Attorney,

Eagle River, Wisconsin.

In your letter of April 25 you submit the following:

"One of our citizens, a well-to-do man and *not an indigent*, was arrested on a criminal charge. On the trial he was discharged on motion of his attorney and with my consent for the reason the state had failed to prove him guilty, beyond a reasonable doubt.

"In preparing for his trial the defendant secured from the justice of the peace a subpoena for several witnesses. This subpoena was secured by a constable. The witnesses appeared and testified. The constable made his return on the subpoena showing services, mileage, etc.

"The defendant did not make proof that he was indigent, etc., under the provisions of section 4060 and ask that his witnesses be subpoenaed at the 'expense of the state.' The fact being that he could not make such proof or claim as he is in fact fairly well-to-do. He simply asked for and received a subpoena for his witnesses.

"On the above facts the defendant's attorney insists that the defendant's witnesses shall be paid by Vilas county and that the constable's fees for serving the subpoena for the defendant shall be paid by the county. He bases this claim on sec. 4633, Wisconsin statutes for 1917.

"I call your attention to sec. 4633 and also to sec. 4060.

"Question: Is Vilas county liable for the defendant's witnesses' fees?

"Question: Is Vilas county liable for the fees of the constable for serving the subpoena on defendant's witnesses?"

It is a well established rule of law that liability cannot attach to a county or other governmental subdivision unless it be pursuant to statute. And, in the absence of some statutes specifically authorizing the defendant to impose a charge against the county, the county cannot pay any expenses incurred in his behalf. The only sections of the statute by which a defendant

can charge the state, or any subdivision thereof, outside of life sentence homicide cases, are 4060 and 4062.

Sec. 4062 provides, in part:

"The judge * * * upon satisfactory proof of the inability of the defendant to procure the attendance of witnesses for his defense, may direct such witnesses to be summoned * * * whenever it shall be deemed proper and necessary. And all witnesses so ordered to appear * * * shall be paid their fees out of the county treasury * * *. The fees of no other witnesses for the defendant shall be a claim on the county or state."

The words

"in all criminal cases where the costs cannot be collected from the defendant on his or her conviction, or when the defendant shall be acquitted, *such costs* shall be paid by the county treasury"

as used in sec. 4633, Stats., do not authorize payment of any witness fees where sec. 4062 has not been complied with. The words "such costs" refer to the cost of prosecution and the cost incurred by the county at the request of the defendant, pursuant to sec. 4060, in other words, the taxable costs of the prosecution, or costs incurred at the request of the defendant, pursuant to statutory authority.

It was held in the case of *Philler v. Waukesha County*, 139 Wis. 211, syllabus 3:

"In criminal prosecutions an order of the court for compulsory attendance of the accused's witnesses is a necessary prerequisite to the existence of any liability of the county for witness fees therefor."

See also *Oneida County v. Tibbits*, 125 Wis. 9.

In answer to your first question, therefore, you are advised that Vilas county is not liable for defendant's witness fees.

In answer to your second question as to whether Vilas county is liable for the constable's fees, would say that it was held in the *Philler* case, *suprà*, syllabus 2:

"Liability cannot be imposed upon a county or other governmental subdivision of the state except in accordance with statute law."

The county is in no way liable for the expenses of the town constable. He is not a county officer and the county assumes

no responsibility for his pay when he is not serving the county. In the absence of any statute which authorizes the accused in a criminal case, or his attorney, to impose charges against the county, there can be no liability on the part of the county for work done by a constable at the request of an accused.

The only way the county could have assumed liability for the constable's services in serving subpoenas on witnesses at the request of the accused is by a compliance on the part of the accused with the provisions of secs. 4060 and 4062. This was not done. There is, therefore, no liability on the part of Vilas county for the fees of the constable in serving subpoenas on the accused's witnesses.

Appropriations and Expenditures—Public Officers—Highway Commission—Expenditures for personal expenses out of the state that may be made by the highway commission without being authorized by the governor considered.

May 1, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

By letter of April 26, 1918, you ask to be advised whether the members of the highway commission or its employes may incur expense in traveling outside the state, without such travel being first authorized by the governor.

This of course is a matter of statutory regulation and the statutes which are controlling in this matter are sec. 14.32 and subsec. 5, sec. 1317m—2, Stats., which I quote:

"The secretary of state shall not audit items of expenditure for tips, porterage, parlor car seats other than sleeping car berths, or for expenses not necessarily incurred in the performance of duties required by the public service; nor shall he audit items of expenditure for expenses of any officer or employe of the state or of any department or institution thereof incurred while attending any convention or other meeting held outside the state or other traveling expenses incurred outside the state unless such expense is authorized by the governor, or specific statutory authority exists therefor; nor shall he audit items of expenditure for expenses of more than one officer or employe of the state or of any department or institution thereof in attending any convention or meeting held outside the state unless otherwise provided by law." Sec. 14.32, Stats.

"5. The commission shall conduct such investigation and experiments, hold such public meetings, and attend or be represented at such meetings and conventions inside or outside of the state, as may in their judgment tend to the benefit of highway construction in the state. They may coöperate with the state or national organizations in experiments and work for the advancement of highway construction." Sec. 1317m—2, Stats.

It has heretofore been held by this department that "the matters covered by said subsec. 5, sec. 1317m—2 are excepted from the operation of said sec. 14.32." Vol. VI, Op. Atty. Gen., p. 826.

That opinion is adhered to. The question hence resolves itself into one to determine what matters are covered by said subsec. 5.

I am of the opinion that it covers all necessary expenses for travel by members and employes of the commission, in connection with reasonable investigations and experiments and attendance at meetings and conventions, both within and without this state. If there is any travel which is not necessary to or directly connected with the objects just mentioned, such travel is not expressly authorized by statute and is not within the exception created by said subsec. 5, and therefore is controlled, if the travel is without the state, by the provisions of sec. 14:32.

The real test, as you no doubt perceive, of whether or not any particular act must be authorized by the governor before expenses in connection therewith can be incurred outside the state, is to be found in the phrase "specific statutory authority exists therefor." If such authority does exist, then the act may be performed and expenses connected therewith incurred without being first authorized by the governor. Wanting such specific statutory authority, the expenditures outside the state must be authorized by the governor to entitle the person incurring the same to reimbursement from the state treasury..

Municipal Corporations—Prisons—Jails—The right of the city of Dodgeville to have offenders against its city ordinances imprisoned in the county jail of Iowa county considered.

May 2, 1918.

T. M. PRIESTLEY,

District Attorney,

Mineral Point, Wisconsin.

Your letter of April 17 reads as follows:

"By virtue of sec. 242, ch. 216, laws of 1889, it is provided that the city of Dodgeville may use the county jail of Iowa county until it provides a place of its own for taking care of offenders against the city ordinances, etc.

"The city of Dodgeville has taken advantage of this provision and has never gone to the expense of building a jail or place of detention for their various local offenders that are prosecuted in that city. In past years they have been lodged in the county jail against the protest of the state board of control and in most

cases without any warrant or commitment as contemplated by law.

"I have given an opinion to the effect that it was not contemplated by sec. 242, ch. 216, laws of 1889, that Iowa county was to furnish the city of Dodgeville with a perpetual jail and I would appreciate your views in regard to this matter."

Sec. 242, ch. 216 of the laws of 1889, the special charter of the city of Dodgeville, reads as follows:

"The use of the jail of Iowa county, until otherwise provided, shall be granted to the city of Dodgeville, for the confinement of offenders."

To fully understand the meaning of the above quoted section, it will be necessary to know something of the history of the city of Dodgeville and Iowa county, and to examine the laws of the state in force at the time that this special charter was granted. At this date I cannot see that it has any special meaning. The phrase "until otherwise provided" I would construe to mean "until otherwise provided by law." At the time the section was written the legislature perhaps intended to pass some act which would authorize cities to construct and maintain jails for the imprisonment of offenders against their ordinances. From the examination I have made of the charter of the city of Dodgeville, I am unable to find any expression therein from which it may be inferred that said city is authorized to build a jail or house of correction.

I do find that sec. 41 of said charter, which relates to the punishment of the violation of the ordinances, regulations or by-laws of said city, provides, among other things, the following:

"* * * And shall also enter a judgment that such defendant be imprisoned in the county jail or house of correction until such judgment be paid."

Again, under sec. 48, relating to the municipal court, I find the following language used:

"* * * Or be imprisoned in the county jail or house of correction."

A reference to secs. 925—56 and 925—67 of the General Charter Law, ch. 45*t*, Stats., shows that practically the same language is used in said sections as is used in secs. 41 and 48 of the charter of the city of Dodgeville. It is clear, therefore,

that the legislature intended that all offenders against the ordinances of a city, as well as against the general laws of the state, may be sentenced to imprisonment in the county jail or house of correction in the county where the city is located.

Sec. 4945, Stats., reads, in part, as follows:

"The county jails now erected or which shall hereafter be erected in the several counties in the charge of the respective sheriffs shall be used as prisons:

*** *

"(3) For the confinement of persons committed pursuant to a sentence upon and conviction for an offense, and of all other persons duly committed or held in custody by the sheriff for any cause authorized by law."

According to sec. 4947 all charges for maintaining persons charged with offenses and duly committed for trial and of those who are confined in the county jail

"who may be committed for the nonpayment of any fines and expenses for safe-keeping, shall be paid out of the county treasury, the accounts of the keeper of such jail having been first allowed by the county board. * * *."

See *Nickell v. Waukesha Co.*, 62 Wis. 469; *Waukesha Co. v. Village of Waukesha*, 78 Wis. 434; *Doty v. Sauk Co.*, 93 Wis. 102.

Sec. 725 prescribes the duty of the sheriff in the matter of having charge and custody of the county jail and of all persons therein, and prescribes that he shall keep a true and exact register of all prisoners committed to said jail, giving the names of all persons who shall have been committed, their residence, the time when, the cause of commitment and the authority by which they were committed. By subd. (4) of said section it is made his duty to

"serve or execute according to law all processes, writs, precepts and orders issued or made by lawful authority and to him delivered."

From said sec. 725 the inference is plain that the sheriff is not authorized to receive in the jail under his charge persons who are not lawfully committed thereto. In other words, he has no authority to detain or keep persons in said jail unless by some due process of law, and he cannot make claim against the county for the care and custody of persons detained in the county jail

who have not been committed in pursuance of some law. See *Nickell v. Waukesha Co., supra.*

Iowa county, under the law, is obliged to furnish the use of its jail to offenders against the ordinances of the city of Dodgeville. In this respect the county of Iowa stands in no different position than do all the other counties in the state of Wisconsin in taking care of offenders who have been convicted for the violation of some ordinance or regulation of a city organized under the General Charter Law. The city of Dodgeville and its officers have no right to abuse the privilege which has been granted under its charter and the sheriff of your county can do much toward limiting such abuse, if there be any, by insisting upon strict compliance with the laws relating to the commitment of offenders. He is not obliged to receive and keep prisoners who have not been legally committed by virtue of some law.

Public Officers—Justice of the Peace—Sec. 808a, Stats., provides for an additional justice of the peace for towns situated as therein prescribed. The term of office is the same as that of other justices.

May 2, 1918.

THOMAS M. PRIESTLEY,
District Attorney,

Mineral Point, Wisconsin.

Your favor of April 30, regarding ch. 437, laws of 1917, providing in certain cases for the election or appointment of an additional justice of the peace, is at hand.

In reply thereto I would say I think it is clear that this statute contemplates the election or appointment of a justice of the peace residing in the city or village in addition to the two justices provided for in the town by the general statute.

The question of the length of term that such a justice would hold is somewhat more difficult, but I am satisfied that his term would be the same as that of the other justices of the town, that is, a term of two years. His fees would undoubtedly be covered entirely by the general law, except as special enactments changed it.

Elections—Corrupt Practices Act—Public Officers—Justice of the Peace—Where one of two successful candidates for the office of justice of the peace was elected in violation of the Corrupt Practices Act and refused to qualify a vacancy is created. A third candidate who received the lowest vote has no right to the office.

Campaign literature must state name and address of author, of candidate, and of person causing it to be published, issued or circulated.

May 3, 1918.

FRANK W. BUCKLIN,
District Attorney,

West Bend, Wisconsin.

Your letter of April 12 reads as follows:

"At the election held on April 2, in the city of West Bend, there were on the ballots the names of two candidates for the office of justice of the peace, both having been regularly nominated by nomination papers. Nomination papers were circulated for a third candidate and these papers were filed with the city clerk together with a written refusal of the third candidate to accept the nomination. On the morning of election, April 2, certain persons took it upon themselves to circulate a card among the voters of the city upon which was printed the following words and no other, 'C. E. Robinson for Justice of the Peace.' At the time that these cards were presented to the voters they were requested to vote for the man whose name appeared upon the card, and were told to take the card into the election booth with them so that the name could be correctly written in upon the ballot. It does not appear that the cards were authorized by Mr. Robinson, the man named thereon, nor by anybody pretending to act as his campaign committee by virtue of any authority from him, as he was not in any sense a candidate.

"When the ballots were counted it was found that enough of the electors had scratched off the names of one of the regular candidates for justice of the peace and at the same time written in the name of 'C. E. Robinson' for that office, so that Mr. Robinson received the second largest number of votes cast for justice of the peace, and was duly notified of his election by the common council. When Mr. Robinson's attention was called to secs. 12.16 to 12.24, inclusive, of the statutes, he stated that he would not qualify, as he did not consider that his election had been legal. He therefore refuses to qualify absolutely.

"The result of the vote is as follows: 'A.' 430 votes, Robinson 404 votes, and 'B.' 180 votes.

"B." who is now one of the present justices of the peace claims that he has been re-elected as one of the justices of the peace. My construction of the sections referred to is that, even assuming that sec. 12.16 had been violated, the effect of it would be simply to create a vacancy, and that this would be so in the event of the candidate receiving the second largest number of votes refusing to qualify, as well as by having the fact determined in accordance with secs. 12.22, 12.23, 12.24.

"Will you kindly give me your opinion in regard to this case, stating whether or not you consider that a vacancy is created by Robinson's refusal to qualify, also whether or not you consider that sec. 12.16 has been violated by the circulation of the card as above stated."

The facts are undisputed that of the three candidates for justice of the peace Mr. Robinson stood second in the number of votes received. The number of votes received by him were duly canvassed by the canvassing board and he was declared elected one of the justices of the peace. He refused to qualify within the time prescribed by law.

No pretense is made that Mr. Robinson himself was guilty of any of the violations of sec. 12.16. It further appears that no special proceedings were instituted against Mr. Robinson under the provisions of 12.22, 12.23, 12.24.

The principle of law which is controlling in the consideration of your question was comparatively recently reaffirmed in the case of *State ex rel. Bancroft v. Frear*, 144 Wis. 79. I quote the following from p. 87:

"It is well settled that where electors vote for an ineligible candidate without knowledge of his disqualification, and such candidate receives a plurality of the votes cast, his disqualification does not result in electing the candidate receiving the next highest number of votes. In such a case the votes cast for the ineligible candidate must be counted, and there is a vacancy in the office instead of an election of the candidate receiving less than a plurality of the votes."

The following is quoted from p. 101 of said case:

"It has long been the law of this state that the fact that the candidate who receives the highest number of votes is ineligible does not render the votes cast for him void, nor is the person receiving the next highest number, though eligible, to be regarded as legally elected or entitled to the office."

As I understand the provisions of secs. 12.23 to 12.24, the result of a judgment rendered in a special proceeding to oust Mr. Robinson, by reason of the alleged violation of the Corrupt Practices Act, would result in nothing more than a vacancy, which vacancy would, according to the section last named, have to be filled in the manner provided by law. The fact that Mr. Robinson refused to qualify and no such special proceedings were brought under said section does not change the situation.

According to sec. 17.02,

"Every office shall become vacant on the happening of either of the following events:

"* * *

"(7) The neglect or refusal of any person elected or appointed or re-elected or re-appointed to any office to give or renew his official bond or to deposit the same in the manner and within the time prescribed by law."

My conclusion, therefore, is that a vacancy in the office of justice of the peace has been created by the refusal of Mr. Robinson to qualify and that such vacancy should be filled in the manner provided by law. In other words, the person designated as "B," who received 180 votes, is not entitled to the office of justice of the peace by reason of the failure of Mr. Robinson to qualify.

Sec. 12.16, Stats., reads 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 subsection (1), of section 12.14, 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."

The cards so circulated were not, according to your statement of facts, published, issued or circulated by Mr. C. E. Robinson, nor by his personal campaign committee. Some person or persons were authors thereof. The persons who circulated the same appear to be known to you. The card was obviously a "publication tending to influence voting at any election," and was used for that purpose. The card should have conformed to the requirement of the section above quoted. It failed to do so in the

following particulars: It failed to bear on its face the name and address of the author, the address of the candidate in whose behalf it was published, issued or circulated, and the name and address of the person causing the same to be published, issued or circulated. In my opinion the conclusion is inevitable that the circulation of said card was a violation of sec. 12.16.

Public Lands—State Parks—Conveyances to the state of lands for park purposes should not conflict with the terms of the statutes relating to state parks.

May 3, 1918.

STATE CONSERVATION COMMISSION.

I have your letter of April 22, addressed to me by Honorable F. B. Moody, and relating to the proposed acceptance of a conveyance from Mr. John A. Latsch, of Winona, Minnesota, of certain lands in the county of Trempealeau for state park purposes.

With his letter he enclosed originals and copies of correspondence had with Mr. Latsch. Attached thereto is a copy of the proposed conveyance to the state of Wisconsin, as suggested by said grantor. I note that you have requested Mr. Latsch to eliminate the certain paragraph in said deed providing for a forfeiture of title and a reversion to the grantor or his heirs in case the legislature of the state of Wisconsin should repeal or amend a certain law exempting from taxation certain lands in the state of Minnesota proposed to be maintained in Buffalo county, as a city park.

With his letter was also submitted an amended form of deed to be substituted for the one proposed by Mr. Latsch.

I have examined said proposed forms of deeds and the statutes applicable to state parks and to the authority of the state conservation commission and am of the opinion that nothing should be contained in the deed which is to be signed by the grantor which is not in harmony with the statutes of this state. It is my opinion that the state conservation commission has no right to agree to any condition, reservation or stipulation which is not conferred by law. Further, it has been held that any deed or contract made by the officers or agents of a state, without pre-

vious authority conferred by the constitution or laws of the state, is not binding upon the state. See 36 Cyc. 870, 872, 873.

Sec. 27.01 relates to state parks and the powers of the conservation commission in respect thereto. I quote the following from subsec. (1), subd. (b) :

"To accept in the name of the state grants, conveyances and devises of land, and bequests and donations of money, to be used for park purposes."

Subsec. (5) of said section reads as follows:

"The commission shall provide a suitable and durable set of maps of each state park, so arranged that additions thereto can be made whenever lands are added to them. Each parcel of land designated on any such map that was or shall be granted, conveyed or devised to the state as a gift for park purposes, shall have plainly written thereon the name of the donor; and in close proximity to each map shall be inscribed a schedule of all legislative acts affecting the park represented. Said maps and all deeds and all documents relating to the title of any of the state park lands shall be filed and kept in the office of the secretary of state. The commission may designate by an appropriate name any state park not expressly named by the legislature."

The above sections prescribe the powers of the state conservation commission in respect to parks. I question very much whether the commission has any authority to add to or enlarge upon its powers or to accept a conveyance which would impose reservations, restrictions or conditions which would conflict in any way with the terms of said statute.

Public Officers—County Abstractor—Corporations—A corporation cannot act as county abstractor.

May 4, 1918.

D. K. ALLEN,

District Attorney,

Oshkosh, Wisconsin.

In your telegram of yesterday you ask to be advised "whether a corporation can be elected county abstractor."

Sec. 762m, Stats., provides in part:

"* * * The county board may elect a competent person for a term of two years, who shall be known as the county ab-

stractor, * * *. Before entering upon the performance of the duties of his office, such county abstractor shall execute and deposit an official bond in the sum of five thousand dollars, with two or more sufficient sureties, according to the provisions of section 702, * * *.

"Before entering upon the duties of his office the county abstractor shall execute and file with the county clerk a bond in such sum as the county board shall prescribe, not less than five thousand dollars, * * *."

Sec. 702, above referred to in connection with the bond that must be given by the county abstractor, is a part of ch. 45n, containing general provisions as to county officers. It provides, in part:

"Every official bond required by law of any county officer shall be executed to the proper county by its corporate name, and after approval thereof shall be recorded at the cost of the officer in the office of the register of deeds of his county * * *."

It will be noted that the position of county abstractor is such that he becomes a county officer. He takes the official oath and has, by sec. 762m, a definite term of office, two years. He has an official seal and has a fixed salary authorized by subsec. 3, sec. 762m, to be fixed by the county board. The fact that he is not included as one of the officers named in ch. 45n does not argue against his being considered a county officer, for the reason that the position of county abstractor is comparatively new as compared with the creation of other county offices named in ch. 45n.

The fact that the county abstractor is to give an official bond, as provided in sec. 702, Stats., indicates that it was the legislative intent to consider this position with other county official positions where an official bond was required. I conclude, therefore, that the position of county abstractor is a county office.

Being a county office, it cannot be held by one who is not a citizen of the United States. *State ex rel. Off v. Smith*, 14 Wis. 497. As a corporation cannot be a citizen in the sense in which the term is there used, it cannot hold a county office.

From an entire reading of the statute I think it is fair to conclude that the legislature did not have in mind and did not intend to give the right to the county board to appoint a corporation as county abstractor, and that when they used the words "competent person," they had in mind a competent individual

whose official judgment and official integrity fitted him for the position of making abstracts of the property in the county, and that they did not refer to or have in mind corporations. Your question is, therefore, answered in the negative.

Corporations—Amendment of Articles—The articles of a corporation cannot be amended by the signers of the articles of organization.

May 6, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

I am in receipt of your esteemed favor of April 24, together with proposed amendment to the articles of organization of the Hercules Steel Casting Company.

It seems that this company filed its original articles of organization in your office February 1, 1917; that the original articles provided for a capital stock of four hundred thousand dollars; that said company has never had a meeting of its stockholders; that fifty per cent of the capital stock has not been subscribed. The proposed amendment is for the purpose of reducing the capital stock from four hundred thousand dollars to three hundred thousand dollars. The meeting at which the proposed amendment of the articles of organization was adopted was a meeting of the signers of the original articles of the corporation, commonly known as the promoters, held on April 22, 1918.

You desire to know whether the articles of organization of such a company can be amended at a meeting of the signers of the original articles of the corporation.

Sec. 1774, Stats., prescribes the method by which the articles of incorporation of such a company may be amended, where a different method is not prescribed in the articles of organization. This statute requires a vote of at least the owners of two-thirds of all the stock then outstanding to amend the articles.

Sec. 1773, Stats., provides as follows:

"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. In stock corporations the first meeting may be held at any time after one-half the capital stock shall have been subscribed; and may be called by any two signers of the articles, at such time and place as they shall appoint, by giving ten days' personal notice thereof in writing to each subscriber of stock or by publishing notice thereof for at least two weeks before such meeting in some newspaper published at or nearest to the designated place of location of the corporation; or such meeting may be held without previous notice if all the subscribers for stock be present in person or by duly authorized attorney, * * *."

Then follows in this same section a prohibition against the corporation transacting business with any other than its members until at least one-half of its capital stock shall have been duly subscribed and at least twenty per cent of its capital stock actually paid in.

It appears, therefore, that the only statutory method for amending the articles of organization of a corporation such as this is that prescribed by sec. 1774 at a meeting of the stockholders, and such a meeting can be held only after fifty per cent of capital stock has been subscribed.

In an opinion rendered by my predecessor, Mr. Owen, found in Vol. IV, Op. Atty. Gen., p. 747, it was held that an attempted amendment of the articles of organization of a corporation at a meeting of the stockholders before the fifty per cent of the capital stock had been subscribed, was illegal and that the secretary of state was not authorized to file the proposed amendment. A similar question was passed upon by Attorney General F. L. Gilbert in an opinion rendered by him as attorney general dated July 30, 1908, to the same effect, Opinions of Attorney General for 1910, p. 170.

It would seem, therefore, that there not being fifty per cent of the capital stock of the Hercules Steel Casting Company subscribed, they could not hold a valid stockholders' meeting, and therefore could not amend the articles of the corporation at a stockholders' meeting.

To obviate this difficulty the signers of the original articles of the corporation, pretending to act under authority of sec. 1773, giving the signers of the articles of organization "direction of the affairs of the company" until the directors are elected, have held a meeting of the signers and adopted a resolution purporting to amend the original articles of the corporation. I

am satisfied that they cannot amend the articles of organization of this company in that way. The only statutory method for amendment, as we have seen, is under sec. 1774, at a meeting of the stockholders. No authority is given by statute for the signers of the articles to meet and amend the articles, unless it is given under the language above quoted from sec. 1773. I am satisfied that that section gives no such authority. The phrase in that section

"until the directors or trustees shall be elected the signers of the articles of organization shall have direction of the affairs of the corporation"

I am satisfied relates only to the business of the corporation that they can properly conduct under the statute at that period. This power is possessed by the incorporators only until the board of directors has been elected. The board of directors, however, has no power to amend the articles. It has power to control the business affairs and interests of the corporation. Surely the promoters would have no more power than that vested in the directors after their election.

This idea is further borne out by the fact that sec. 1773 further provides for a case in which sufficient of the capital stock of the company has not been subscribed. I refer to that part of the section last cited which reads as follows:

"* * * The signers of the articles of organization may abandon the organization and revoke the articles at any time before fifty per centum of the stock has been subscribed and twenty per centum of its capital stock paid in by signing and acknowledging duplicate, written agreements revoking the original articles of organization," etc.

Here is provided a clear method of procedure by the promoters in case they are unable to secure the necessary subscribers.

I find, therefore, that the statute has prescribed a special method for amending the articles of organization and a special method for abandoning the corporation, but it has prescribed no method by which the promoters can amend its articles. In the present case to permit the promoters to amend the articles as proposed might work a grave injustice to those who have already subscribed for the capital stock. It would make them subscribers to a different institution, that is, one with a different capital stock than that for which they entered their subscription.

It would be changing their relations materially, which might do an injustice to them.

Furthermore, a corporation is a creature of the statute. Its franchise, both as to its existence and extent, and the manner in which it may be granted and modified, is statutory. All these things are covered by statute. The statute prescribes no method by which the incorporators may amend, no method by which the amendments may be made effective by certification to the secretary of state and recording. The method pursued in the present case of the promoters' meeting, adopting a resolution and certifying to it themselves, is novel indeed.

I therefore inform you that in my opinion the articles of organization of this corporation cannot be so amended, and this proposed amendment should not be filed.

Counties—Prisons—Jails—Sheriff may not receive into the county jail tramps or vagrants or persons held for violations of city ordinances without commitment or other due process of law.

May 6, 1918.

THOMAS M. PRIESTLEY,

District Attorney,

Mineral Point, Wisconsin.

Your letter of May 3 reads as follows:

"Your favor of May 2* regarding the use of the county jail by the city of Dodgeville is received. I find upon looking over my letter to you that I did not make myself as clear as I should.

"The only real controversy between the county and city of Dodgeville is as to whether the city officers have a right to lodge tramps and persons who have been arrested for the violation of certain ordinances in the county jail without any commitment or conviction. I enclose a letter from Mr. J. D. McGeever, city attorney of Dodgeville, which quite fully covers the real controversy. The concluding paragraph of your opinion of May 2 is:

"He is not obliged to keep and receive prisoners who have not been legally committed by virtue of some law."

"From this it seems clear to me that the city of Dodgeville has no right to use the jail except as a place of confinement for offenders who have been duly convicted and committed and that

*Page 253 of this volume,

they have not the right to use the jail for lodging tramps and as a place of confinement for alleged offenders against the city ordinances who have not been convicted or committed, and that the city of Dodgeville ought to provide a place of its own for lodging tramps and as a place of confinement for prisoners charged with offense against the city ordinances while awaiting trial.

"I should be very glad to hear from you further in the matter."

Attached to said letter is a letter signed by J. D. McGeever, city attorney of Dodgeville, which reads as follows:

"I am advised that the sheriff has refused to accept prisoners brought to the county jail by our local marshal, Mr. Olson, for the reason that he has been instructed by you that we are not to place people in the jail until they have been tried, convicted and properly committed. As you know, under the charter we have always had the use of the jail and hence have treated it as a lock-up for vagrants, drunkards and other offenders under the ordinance, pending their hearing, and if convicted they have from time to time been committed to the county jail. We have no other lock-up or jail and it appears to me that it is necessary when a person is arrested to have some place to put them pending their trial. I do not know whether the sheriff has given the local officer the proper construction of your orders or not and would be pleased to hear from you relative to any opinion you may have given in the matter. I will be frank with you in saying that I have written the attorney general for an opinion and he has advised that he cannot give an opinion on the matter as he anticipates a request from you. I would suggest that you take up the matter, if you have not already done so, and get an opinion of the attorney general relative to the use of the county jail."

In addition to what I stated in my opinion dated May 2 I call attention to a provision in sec. 4947, which reads as follows:

"* * * Provided, that no sheriff or jailer shall receive, and no county board shall allow, any compensation whatever for keeping or boarding any tramp or vagrant in the county jail unless such tramp or vagrant shall have been committed thereto pursuant to law."

This provision applies as well to the sheriff or jailer of Iowa county as to any sheriff or jailer in the state of Wisconsin. Sec. 242, ch. 216, laws of 1889, quoted in my letter of May 2, does not create an exception as to the provision of the statute above.

quoted. Unquestionably, the city of Dodgeville, as well as every other city in Iowa county, has the right to have offenders against its ordinances confined in the county jail but these offenders must be lawfully confined by virtue of some process or commitment duly issued. See secs. 725 and 4945. The sheriff or jailer of Iowa county is not obliged under the law to receive a prisoner unless by virtue of some commitment issued either during the pendency of the trial and before sentence or after sentence.

You understand, of course, that at any stage of the proceeding against a prisoner the justice or magistrate may issue a commitment for his detention and the law provides a fee therefor, and before the sheriff or jailer is obliged to receive said prisoner such commitment must be delivered to him. In case it is necessary to bring the prisoner before the court, the justice or magistrate should issue an order to bring up the prisoner. This order should be addressed to the officer in charge of the case and also to the sheriff or jailer. It constitutes the warrant by which the sheriff releases the prisoner from jail.

I trust I have made myself clear.

Public Health—Registered Nurses—The examination of applicants for nurses' licenses may be conducted after June 1, 1918, if application is properly made prior thereto.

May 7, 1918.

MISS ANNA J. HASWELL, *Secretary,*

Committee of Examiners of Registered Nurses.

Your favor of April 19 is at hand. You ask whether under sec. 1435c you can grant reciprocity only with those states where the law requires a three years' course of instruction. You state that in Pennsylvania and Michigan the law requires only a two years' course, but that on several occasions nurses that are registered from those states have asked to be granted registration under our laws without examination under this reciprocity statute, in cases where such nurses have graduated from schools giving a three years' course, and in other particulars meeting the requirements of our law.

The fifth subdivision of sec. 1435c reads as follows:

"Fifth. Without examination, provided the applicant shall have been registered as a registered nurse, under the laws of

another state having requirements determined by the Wisconsin state board of medical examiners of this state, to be equivalent to the requirements of this state."

This is a provision whereby nurses who have been registered under the laws of foreign states are permitted to be registered under our laws without examination. It will be noticed, therefore, that it is based upon the requirements required by the state law of the other state, and not upon the actual qualifications of the nurse who makes application. The particular qualifications of the nurse are not made the standard. The standard is rather the requirements for registration under the laws of the foreign state.

I think this answers your first question.

Your second question is whether applicants for registration can be examined by your committee who have not completed their three years' course of instruction.

It seems clear under the language of both the third and fourth subdivisions of sec. 1435c that the applicant, before applying for registration or for examination, "shall have graduated from a reputable training school." The law evidently contemplates this graduation to precede the examination.

For a third question you state that under sec. 1435c, third subdivision, the law permits senior nurses to have three months outside of the hospital, and you ask whether the nurses, should it seem necessary, could be released from that much of the course and serve their city where there is a shortage of outside nurses.

Under this third subdivision the law requires the applicant to graduate from a reputable training school with a three or more years' course, and it requires that the applicant must study at the training school or hospital the whole of the first two years and that not to exceed three months of the senior or third year may be devoted to outside nursing. It seems clear that this third subdivision requires three years' work or study at the training school or hospital, with the exception that not exceeding three months of the last or third year may be devoted to outside nursing. I therefore conclude that this outside nursing —this three months of the last year—might be devoted to any class of outside nursing that could properly come within the definition of outside nursing under this statute, whether in the service of the city or not; that the devotion of any part of such

three months to outside nursing is not a relieving of the applicant from any part of the course, the three months' outside nursing being substituted as a part of the course.

Criminal Law—Sec. 4802, providing for settlements of criminal cases, is applicable only to those involving misdemeanors, not to felonies.

May 7, 1918.

O. L. OLEN,

District Attorney,

Clintonville, Wisconsin.

In your communication of May 2 you state that on the 20th day of April one, A., took the automobile of B. without his consent, and drove it on the public streets of Waupaca contrary to sec. 1636—52m, Wis. Stats.; that the complaint was made and a warrant issued and he was arrested and brought before a justice of the peace and that the case was continued from April 30 to May 2; that on May 2 the complaining witness appeared in court and said that A. had paid him \$100 for the use and damage done to the automobile and that he was satisfied and wished the defendant released, under the provisions of sec. 4802. You submit the following question:

"If the complaining witness presents a certificate under sec. 4802 and the costs are paid would the justice have a right to release the defendant, or should he be bound over to the circuit court of Waupaca county and application for his release under sec. 4802 be made in the circuit court?"

Said sec. 4802 provides, as follows:

"When any person shall be committed to prison or shall be under recognizance to answer any charge of a misdemeanor for which the party injured may have a remedy by civil action, except when the offense was committed by or upon any sheriff or other officer of justice, or riotously, or with intent to commit a felony, if the party injured shall appear before the magistrate who made the commitment or took the recognizance and acknowledge in writing that he has received satisfaction for the injury the magistrate may, at his discretion, upon payment of all costs which have accrued, discharge the recognizance or supersede the commitment by an order under his hand and may also discharge all recognizances and supersede the commitment of all witnesses in the case."

You will note that sec. 1636—52*m* describes a felony. See definition of "felony" in sec. 4637. Said sec. 4802 is applicable only in cases where the defendant is charged with a misdemeanor and therefore is not applicable in this case.

Prisons—Convicts—Good time credits forfeited by convicts cannot be restored by board of control or warden.

May 8, 1918.

STATE BOARD OF CONTROL.

In your letter of May 8 you state:

"Section 4928 of the statutes provides that the deputy warden of the state prison shall keep a true record of the conduct of each convict, specifying each infraction of the rules of discipline; that at the end of each month the said deputy shall give a certificate of good conduct to each convict who shall require it, against whom is recorded no infraction of the rules of discipline. That section also provides for credit for good conduct and forfeiture for bad.

"The question has been raised as to whether this board or the warden of the state prison has power to restore to a convict any of the good time lost by reason of infraction of the rules of discipline."

You ask the opinion of this office as to whether your board or the warden of the state prison has power to restore to a convict any of the good time lost by reason of an infraction of the rules of discipline.

Sec. 4928, after providing for credits for good conduct, provides as follows:

"* * * In case any convict shall be guilty of the violation of any of the rules, laws or regulations of the prison or shall refuse or neglect faithfully to perform all the duties required of him, and has become entitled to any diminution of his sentence, he shall forfeit from his good time earned, for the first offense, five days; for the second offense, ten days; and for the third and each subsequent offense, twenty days; and in addition thereto, the warden may, with the consent of the [state board of control] directors, cancel and deprive him of all or any part of the good time theretofore earned," etc.

The above language of the statute just quoted is the only provision of the statute I find dealing with the cancellation of

credits for good conduct, and I find no provision of the statute anywhere permitting remittance of such cancellation or reinstating of the convict or of his good time credits when once canceled. The cancellation of credits for good conduct, when once properly made under the statute, is final.

It is my opinion, therefore, that neither your board, the warden of the state prison or his deputy have power to restore to the convict any of the good time lost by reason of the infraction of the rules of discipline.

Bridges and Highways—County board may appropriate money to construct or improve any bridge or highway.

May 8, 1918.

PETER FISHER, JR.,

District Attorney,

Kenosha, Wisconsin.

It appears from your letter of April 26, 1918, that the county board adopted a resolution appropriating the sum of \$9,000 out of its general fund, for the purpose of completing certain road improvements in the town of Pleasant Prairie; that the highway is part of the county system of prospective state highways, and that this appropriation is made to provide necessary funds to extend the concrete construction work now contracted for a distance of about half a mile; that otherwise the construction work would stop at one of the worst places in the highway and render a very considerable stretch of concrete road largely useless.

You ask if, in my opinion, there is any statutory authority for such action on the part of the county board. You are advised that this department has heretofore held that county boards have that power, under subsec. 1, sec. 1317m—5, Vol. IV, Op. Atty. Gen., pp. 484, 680. The statute, in most explicit terms, grants such power:

"(a) The county boards are given authority to construct or improve, or aid in constructing or improving any road or bridge within the county."

The county board may improve any road or bridge and it may aid in improving any road or bridge, and it may construct or

aid in constructing either. The tendency of recent highway legislation has been to greatly extend the power of county boards. I find nothing in the statute which in any way limits the power in question. The language is so plain that it does not admit of construction or interpretation. About all that can be done is to paraphrase its language. In this connection I quote with approval the language of my predecessor:

"* * * Sec. 1317m—5 authorizes county boards to construct or improve, or aid in constructing or improving, any road or bridge within the county. Under this section the county board can do just exactly what the section says. It can construct or improve, or aid in constructing or improving, any bridge or road within the county. * * * It can either do the work entirely by itself, or aid in doing it by joining in with the town or other proper authorities in such construction or improvement." P. 680.

Municipal Corporations—Local Board of Health—Special charter cities, except those of the first class, may organize and provide for boards of health. Caution in doing so advised.

May 8, 1918.

DR. C. A. HARPER,

State Health Officer.

In your favor of May 6 you ask whether under sec. 1411m certain cities existing under special charters may change their method of organization of the board of health without coming to the legislature for an amendment to the special charter.

Sec. 1411 provides for a board of health in all towns, villages and cities, except in cities of the first class and except that the provisions of that section do not apply to any village or city in which a board of health or a health officer is provided for by the charter.

Sec. 1411m, subsec. 1, provides as follows:

"The council of any city, excepting cities of the first class, existing under special charter or organized under the provisions of sections 925m—301 to 925m—319, inclusive, of the statutes, may by ordinance create a board of health of not less than three nor more members than the number of aldermen elected in such city, provide for the manner of their election or appointment and fix the terms of office of the members of such board," etc.

The legislature evidently intended to permit all cities organized under special charters, except cities of the first class, to organize boards of health under this section of the statutes, and I have no doubt that such cities have power and authority given them by this statute to organize boards of health in pursuance thereto. The question of the advisability of any city organized under a special charter acting under the provisions of this statute is one with which this office is not called upon to deal, but it seems proper to say that any city attempting to organize a board of health under this section should exercise great care in doing so, as it is probable that having once acted, the power of the city ceases, so that it should make its organization under this section as perfect and complete as possible in the first instance. The ordinance by which the board of health is organized in such a city should be complete and full, should provide for the manner of the election or appointment of the members of such board, and should fix the term of office and should provide for the continuation of the board, from year to year, as there is no method provided by the statute of altering those things. In other words, any city acting under this section should do so with care and precision and after due consideration.

Taxation—Inheritance tax is due upon transfer of mortgage bonds of a Wisconsin railroad corporation owned by a nonresident decedent.

May 8, 1918.

WISCONSIN TAX COMMISSION.

In re estate of Ira Smith:

By letter of May 2, 1918, you transmitted correspondence in the above entitled matter relative to inheritance taxes. It appears therefrom that Ira Smith at the time of his death was a resident of New York and owned and had in his possession consolidated mortgage bonds of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, a Wisconsin corporation; that approximately one-half of the property of said railway company is located in this state; that you have ruled that a like proportion of the value of said bonds upon the transfer by the will of said deceased is subject to inheritance taxes under the laws

of this state, and that the railway company takes issue with you upon said ruling.

The following provisions of our inheritance tax laws are involved in the question submitted:

"A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person * * * in the following cases, except as hereinafter provided:

"(1) * * * .

"(2) When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death." Sec. 1087—1.

"3. Where stocks, bonds, mortgages, or other securities of corporations organized under the laws of this state or of foreign corporations owning property doing business in this state shall have been transferred by a nonresident decedent, the tax shall be upon such proportion of the value thereof as the property of such corporation in this state bears to the total property of the corporation issuing such stocks, bonds, mortgages or other securities." Sec. 1087—11.

The bonds transferred by the will of Ira Smith fall literally within the provisions of statute above quoted. It is evidently the legislative intent that an inheritance tax should be paid on the transfer of those bonds. As was said in *Kinney v. Stevens*, 93 N. E. 586, 207 Mass. 368:

"The statute is as broad as the jurisdiction of the commonwealth."

So the question is one of constitutional power on the part of the legislature to subject this transfer to such a tax.

I understand that your department has held from the first that such transfer is liable to a tax, and that the statute has been so administered, by you. In this connection I notice that the vice president of the railway company, in his letter to you of April 29, 1918, says:

"We have been furnished from time to time during the past eight years with various rulings from the office of the attorney general of Wisconsin to the effect that 'bonds represent an indebtedness and are not subject to taxation under the laws of this state when owned by a nonresident decedent.'"

The published decisions of this department upon the subject of inheritance taxes have been examined and none found which

sustain the statement just quoted, and no special reference to any was given in that letter.

But on the contrary, an opposite opinion was rendered by the attorney general June 10, 1907 (Opinions of Attorney General for 1908, p. 836). The properties therein involved were mortgages upon Wisconsin real estate, which mortgages were owned by a resident of Scotland, and were in her possession at the time of her death. It was there stated:

"* * * The *situs* of the mortgages described by you, for the purpose of taxation and for the collection of the inheritance tax, is in the state of Wisconsin," etc. P. 839.

It has been decided by the courts of Massachusetts, Michigan, New York and the United States that mortgages upon real estate, but owned by nonresident decedents at the time of their death are a legitimate subject of inheritance taxation by the state where the realty is situated. *Kinney v. Stevens*, 93 N. E. 586 (Mass.); *Estate of Merriman*, 111 N. W. 196 (Mich.); *Estate of Rogers*, 112 N. W. 931 (Mich.); *Estate of Romaine*, 127 N. Y. 80; *Blackstone v. Miller*, 188 U. S. 206.

It was held in *State ex rel. Graf v. Probate Court*, 150 N. W. 1094, that debts evidenced by the notes of a Minnesota corporation and owned by a nonresident decedent were subject to the inheritance tax act of Minnesota, even though the notes were outside the state.

In *Bliss v. Bliss*, 109 N. E. 148, it was held that registered municipal bonds of Massachusetts cities, when owned and held by nonresident decedents, were still subject to transfer tax.

In view of these decisions and of the language of our statutes, and the practice which has heretofore obtained, I am of the opinion that the bonds owned by Ira Smith are subject to inheritance taxes in this state, and advise that you rule to that effect. If any change is to be made in the practice, it ought to be made by the courts or the legislature and not by this department or yours, and besides, it seems to me entirely logical to hold that the bonds of Wisconsin corporations are to be placed in the same class and treated the same as the notes of natural persons resident in this state, and that the mortgages or trust deeds given by Wisconsin corporations upon Wisconsin property are to be placed in the same category as mortgages given by natural persons upon real estate situate here. There are, how-

ever, rulings to the contrary. Whether they are based upon a statute as broad and sweeping as the Wisconsin Inheritance Tax Law, I am not prepared to say. It was held by a divided court in *In the matter of Bronson*, 150 N. Y. 1, that bonds of a domestic corporation were not subject to a transfer tax when the decedent owner was a nonresident. The reasoning in the dissenting opinion by Justice Vann appears to me to be sound. Pp. 24-26.

In *In re Ward's Estate: Chadwick v. State*, 157 N. W. 1076, the supreme court of Minnesota distinguished the *Graf* case, *supra*, and held that under the facts there presented the bonds of the Great Northern Railway Company owned by a nonresident decedent at the time of his death were not subject to inheritance taxes in Minnesota. Two of the justices dissented.

Agriculture—Poultry Associations—A poultry association regularly established and holding annual shows, failing to hold its annual show for one year is entitled to state aid based upon such show held after resuming.

May 10, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of May 1 you state that the Manitowoc Feathered Stock Association has filed its claim for state aid together with its itemized list of entries as provided in the statute, and that because of the fact that the association received no aid last year, not having held a show, you ask if the association is entitled to receive aid at the present time for their show which was held last December.

You have directed my attention to the opinions rendered by this department to you under dates of April 20, 1912, Opinions of Attorney General for 1912, p. 651, and February 9, 1917, Vol. VI, Op. Atty. Gen., p. 88.

With reference to the opinion in 1917, *supra*, it appears that the association in question was holding shows biennially rather than annually, and for that reason it was held that said association was not entitled to state aid.

The opinion in 1912, *supra*, p. 652, held:

"* * * One meeting should be held by such association for which no money shall be paid and that the money is to be paid out on the premiums paid at the second meeting."

The facts upon which this opinion was rendered were as follows: the association was incorporated in December, 1910; the show was held November 28 to December 3, 1911; this was the first show held by the association.

There can be no doubt as to the purpose and intent of the legislature. They desired to encourage the holding of annual shows by poultry associations and, to encourage this, provision was made for state aid. They intended likewise to prevent an organization from organizing and holding one show, getting its money from the state and then disbanding. It was the intent to grant aid only to established associations that had some promise of permanency.

Sec. 20.61, subd. (10) provides, in part, that the state aid shall be distributed as follows:

"(a) To each incorporated poultry association, complying with the provisions of paragraph (b), *which has held at least one annual exhibition* and has paid out at least fifty dollars as premiums in such year, * * *."

The provisions of par. (b) referred to are, in substance, as follows:

"On or before the first day of April in each year the president and secretary of each such association claiming state aid shall file with the secretary of state, * * * a sworn itemized statement of the amount of cash actually received for poultry entries at its annual exhibition, * * *."

It will be noted that among the requirements for state aid are the following:

First: There must be held at least one annual exhibition.

Second: Such association must have paid out at least fifty dollars in premiums in such year.

Third: On or before the first day of April in each year the president and secretary must file with the secretary of state a sworn statement showing the amount of receipts for poultry entries *at its annual exhibition*.

There can be no doubt from the statute but that it was intended by the legislature that no aid should be received unless an annual exhibition was held.

I am assuming in reference to the association here in question that it is an established association that has held several annual shows, but merely failed to hold a show for the one year, and that

for that year no aid was granted. This association, therefore, satisfied the requirements of sec. 20.61, subd. (10), in that it "has held at least one annual exhibition" before holding the exhibition upon which its demand for aid is now based.

I can find nothing in the wording of the statute nor in the intent and purpose of the law that tends to defeat the claim of the association for aid based upon the show held last December. Your question, therefore, is answered in the affirmative.

Bridges and Highways—Repairs and maintenance on state trunk highway system to be made by counties.

May 10, 1918.

CARL O. NEUMAN,

District Attorney,

Oconto, Wisconsin.

You inform me that a bridge located on the state trunk highway system needs repairs and say:

"What I would like to know at this time is who is to repair this bridge and pay the expenses, whether it falls upon the town, county or state."

You are advised that the county must repair the bridge and if the work is done to the satisfaction of the state highway commission the expenses will be paid for out of the proceeds of automobile license fees.

"1. (a) On and after May 1, 1918, each county shall adequately maintain the whole of the trunk system lying within the county in accordance with the directions, specifications and regulations made for said maintenance by the commission." Sec. 1317, Stats.

This same section also covers the matter of the payment of the expenses.

Public Health—Registered Nurses—Different provisions of sec. 1435c, for registration of nurses discussed and considered.

May 11, 1918.

MRS. MARY P. MORGAN, *Chairman,*
Woman's Committee,

State Council of Defense.

Your favor of May 8, calling my attention to the sixth subdivision of sec. 1435c, Stats., which was a new paragraph enacted at the last (special) session of the legislature (ch. 4, Laws 1918, Special Session), is at hand.

You inquire:

"Can any one eligible to this examination who makes application on or before June 1, 1918, take the examination at any time she desires in the future, or must she take the first examination given after June 1, 1918?"

Under this subdivision the application must be made on or before June 1, 1918, and the applicant at the time of such application must have graduated from a reputable training school for nurses connected with a general or special hospital and must have received a course of at least two years' training in such training school, all of which must precede the application. The examination may be given by the committee after said application and after June 1, 1918. I find no provision of the statute requiring the examination to be made at the first examination held. Some reasonable latitude in that regard is undoubtedly left with the committee.

Taxation—Military Service—Real estate of person in military service may be sold for taxes with certain limitations provided in act of congress approved March 8, 1918.

May 11, 1918.

WISCONSIN TAX COMMISSION.

You have submitted to me for my opinion the question asked by the county treasurer of Monroe county as to whether he has a right to sell for unpaid taxes lands owned by Lieutenant J. C. Strachen, who is now serving in the United States army in France.

In ch. 409, Laws 1917, creating sec. 4232a, relating to the commencement and prosecution of civil actions against persons in the military service of the country, there is no inhibition making it unlawful for an administrative officer, such as a county treasurer, to sell the land of a soldier in the active service of the United States, for unpaid taxes. Neither do I find any other provision of the statute of the state of Wisconsin from which such inference could be drawn.

I find, however, that a federal statute has been enacted by congress and has been approved March 8, 1918, Public, No. 103, 65th Congress, being an act to extend protection to the civil rights of members of the military and naval establishments of the United States engaged in the present war. The provisions in said statute here relevant are as follows:

"Sec. 500. (1) That the provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"(2) When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the war.

"(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the termination of the war; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

"(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of six per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

The term "person in military service" is also defined in sec. 101 of said statute (Public, No. 103, 65th Congress) and is, of course, broad enough to include a lieutenant serving in the United States army in France, under the above provision. This is the only statutory provision which I find regulating the matter here under consideration. You are advised, therefore, that the county treasurer is authorized to sell the land of said Lieutenant Strachen, unless it comes within the purview of the above quoted federal statute. The language there used is clear and explicit and needs no further comment.

Building and Loan Associations—Bonds—The functions of a building and loan association must be carried on from a single office.

The commissioner of banking may refuse to file the bond of a local collector if he is in fact conducting a branch office.

May 15, 1918.

HONORABLE A. E. KUOLT,

Commissioner of Banking.

In your letter of April 23 you refer to the statutes covering building and loan association operations, and you state:

"One of the building and loan associations has had for sometime 'local boards' in various cities of the state, such boards constituted with president, secretary, treasurer, etc. Such boards act independently or in conjunction with the directors of the association in passing upon loans made in the local jurisdiction of such boards, and the secretary or treasurer of such boards acts as a local collector for the association, himself making the receipt entries in the pass books of members."

You state that the association now submits to the department for filing under the provisions of sec. 2014—11m a number of

bonds executed by and on behalf of a number of the local collectors of the association, and you ask:

"Whether such collectors are now legal officers or employes, and whether the banking department may receive such bonds and tacitly recognize their legality."

Sec. 2010d, which was passed in 1917, provides:

"No such association shall establish more than one office nor establish nor maintain branches."

From the method of operation of these associations prior to 1917 and the purpose of the legislature in enacting sec. 2010d, it is very clear that the legislature intended to prohibit the practice of an association conducting independent branches in offices away from the home office. The purpose of building and loan associations is primarily to aid the members in purchasing and building homes. The strength and security of the building and loan association depends upon the care of the directors in the placing of loans, and this in turn depends upon their personal knowledge of the loan value of property.

In a general sense the commissioner of banking is given jurisdiction of all building and loan association operations. Sec. 2014—11n provides that the bonds shall be sufficient in amount to protect the association.

"* * * The commissioner of banking may at any time require additional bond or security when, in his opinion, the bonds then executed and approved are insufficient."

This statute is replete with words that indicate an intent that the commissioner of banking shall approve the bond not only as to amount, but that he shall require a bond that will be a substantial and adequate protection. It therefore becomes the duty of the commissioner of banking to file only such bonds as in his judgment are good and sufficient under all the circumstances.

If the commissioner is satisfied that the principal upon any bond is operating in violation of law, or, in other words, is operating a branch of the association or keeping an office of the association in violation of sec. 2010d, Stats., it is his duty to refuse to file such bond.

Whether the local collectors are legal officers performing functions of the association in conformity with statute, or are operating branches or maintaining offices of the association in violation

of statute, is a question of fact that can be determined only upon all of the circumstances surrounding each individual case. A person collecting money for the association may or may not be doing so in compliance with law, depending upon the circumstances.

You are therefore advised that if, in your judgment, in any individual case a collector for the association is operating a branch of the business or maintaining an office in violation of the statute, you should not file the bond submitted by him.

Public Officers—County Superintendent of Schools—Vacancy
—Absenting himself from the county and engaging in other prolonged vocations is ground for vacating office of county superintendent of schools.

May 17, 1918.

J. R. PFIFTNER,

District Attorney,

Stevens Point, Wisconsin.

I quote the following from your statement of facts as contained in your letter of May 2:

"Mr. Lancelot Gordon of this county was superintendent of schools elected at the last regular election and continued to hold office until he was inducted into military service by the local exemption board of this county and departed from the county in the contingent which left here on the 29th day of April, 1918. He left without resigning his office and a clerk in his office is now handling the duties thereof and is sending requisitions for expenses in connection with the office to the county clerk signed Lancelot Gordon, County Superintendent of Schools per 'A. B. C.' or the initials of the clerk. The county clerk has asked me whether or not he should honor requisitions signed in the manner indicated and in fact whether or not there is a county superintendent of schools in this county and I would like your opinion in order to see whether it coincides with mine upon this question. In the meantime, I have instructed the clerk not to honor the orders. There is no provision so far as I know providing for a deputy county superintendent.

"Kindly give me your opinion as to whether or not there is a vacancy in the office in this county and also under any circumstances whether the requisitions signed as above indicated are regular and to be honored by the clerk."

I have examined the provisions of sec. 17.02, relating to vacancies, and am of the opinion that under the facts stated in your letter no event has happened which would cause the office of county superintendent of schools of Portage county to become vacant, under said section. As to this office, the legislature has provided certain special provisions. I call your attention to sec. 39.04, Stats., which relates to the election, powers, duties and removal of county superintendent of schools. I quote the whole of subd. (3) of said section:

"No county or district superintendent of schools except in counties where his salary is less than eight hundred dollars, shall engage in teaching during the term for which he was elected, or engage in any business, profession, occupation or pursuit during the term for which he was elected, which will in anywise interfere with the proper discharge of the duties of his office. He shall not absent himself from the county or district to engage in any business, occupation, profession, or pursuit, during the term for which he was elected. A violation of any of the provisions of this subsection shall subject the offender to removal from office and to a loss of salary during the entire time that any of the provisions of this subsection have been violated. It shall be the duty of the district attorney, upon complaint, to commence an appropriate action for the recovery of any sum due for violation of any of the provisions of this subsection. Any sum recoverable under the provisions of this subsection shall be placed in the general fund of the county."

In entering the military service of the United States Mr. Gordon is engaging in an "occupation or pursuit during the term for which he was elected," which does interfere with the proper discharge of the duties of his office. As you have discovered, there are no provisions in the statute which authorize a county superintendent of schools to appoint a deputy. While ordinarily a public officer, even in the absence of statutory authority, may appoint a deputy who may perform purely ministerial acts, this does not, in my opinion, hold true of the county superintendent of schools. By ch. 321, Laws 1901 (sec. 461r, Stats. 1913), the legislature specially authorized a county superintendent of schools to appoint a deputy. This section was, however, by ch. 531, laws of 1915, expressly repealed. The inference, therefore, is that the legislature decided upon a policy which negatives the authority of a county superintendent of schools to appoint a deputy.

Under subd. (5), sec. 39.04 a county superintendent is empowered to employ a clerk. While the statute nowhere prescribes the duties of said clerk, it may be fairly presumed that he is to perform such ministerial duties as the county superintendent of schools may direct. Duties which the legislature has specifically imposed upon the county superintendent of schools and, generally, such duties as involve discretion and the exercise of judgment may not be performed by the clerk. They can only be performed by the superintendent himself. Authorities supporting this conclusion are found in an opinion by my predecessor in Vol. V, Op. Atty. Gen., p. 299.

From your statement of facts I am unable to say whether the clerk in

"sending requisitions for expenses in connection with the office to the county clerk signed Lancelot Gordon, County Superintendent of Schools per 'A. B. C.' or the initials of the clerk,"

is performing duties other than ministerial. It occurs to me that if the clerk was duly authorized to make said requisitions and to sign the superintendent's name thereto in the manner indicated, he is performing purely ministerial duties. As long as Mr. Gordon has not been removed from office, in accordance with the provisions of subd. (3), above quoted, and of subd. (11) of said section, he is still the county superintendent of schools of said county and is authorized to perform his duties. The mere fact that he is absent from the county does not vacate the office. It may be that, after all, his absence is but temporary. He may contemplate obtaining a leave of absence or furlough and thus to continue in office for the remainder of his term. Not until he has resigned or the circuit court has duly rendered a judgment of removal or ouster is there a vacancy in said office, and until a vacancy has occurred the state superintendent is without authority to appoint a suitable person to fill such vacancy until another county superintendent shall be elected and have qualified.

It is therefore my opinion that there is no vacancy in said office, and if the requisitions signed by the clerk were actually passed upon by the superintendent and his name subscribed thereto by direct authority to the clerk so as to make it in substance and in fact the superintendent's signature, they probably should be honored by the county clerk.

The facts narrated in your letter regarding the absence of the superintendent require, in my judgment, additional consideration. If you are satisfied that the superintendent is to be absent more or less permanently, I think you should take the matter up with him and ask him to resign, and if he fails to do this, then it will probably be your duty to take proceedings for his removal as above outlined.

The office of county superintendent is a very important one. There are many duties to be performed by that officer that cannot be performed by a clerk and cannot be performed by the county superintendent while he is away under military duty. The county superintendent is required to examine and license teachers. This cannot be done by the clerk. Many reports and statements have to be made by him upon which are based the taxes for school purposes and the apportionment of school funds by state, county and town authorities. These duties are prescribed by secs. 39.04, 39.07 and other sections of the statute not necessary to mention and enumerate here. Sufficient is shown to make it apparent that it is practically impossible—and the law recognizes the fact that it is practically impossible—for the school matters of a county to be properly conducted or even to be conducted at all under our present system in the absence of a county superintendent of schools. So many features of the school organization, school government, school taxes and funds depend upon the official acts of the superintendent that grave consequences might result should an attempt be made to run the schools of a county without a superintendent. To avoid such grave consequences I feel that it is your duty to take this matter in hand and if it is a fact that the superintendent will be more or less permanently absent from the county and incapable of personally performing the duties that devolve upon him, then a new superintendent is imperative.

I realize fully that the people generally wish to do whatever they can and sometimes more to save the men who are drafted into army service from any financial or pecuniary loss, but our sentiment and feelings in this regard cannot be allowed to lead us to the disastrous results that necessarily would follow to schools of a whole county should this be carried to the extent of attempting to run the schools of your county without a superintendent present within the county capable of performing the necessary official acts.

University—Appropriations and Expenditures—The appropriation of \$50,000 by sec. 20.41, subsec. (1), subd. (jn), for the construction of an infirmary for the university may be used in part for one building and in part for another constituting the infirmary.

May 17, 1918.

HONORABLE H. J. THORKELSON,

Business Manager,

University of Wisconsin.

In your favor of May 10 you state that under the provisions of sec. 20.41, subsec. (1), subd. (jn) the legislature of 1917 made the following appropriation:

"Infirmary. On July 1, 1918, fifty thousand dollars for the construction of an infirmary."

The regents of the university have secured gifts aggregating one hundred thousand dollars which have been submitted to me in detail, and if found satisfactory will also be available for building purposes. You ask if the appropriation for fifty thousand dollars may be used, part for one building and part for another, the balance of the funds for each building coming from the gifts mentioned, the building so constructed to be used for and constitute the infirmary.

The word "infirmary" according to the Century Dictionary means

"A place for the treatment of the infirm or persons suffering from diseases or injury."

All dictionaries give the meaning of the term substantially as above, and I have no doubt that the legislature intended the term in the statute to be given the above meaning. An infirmary, like a hospital, is or may be an institution comprising or made up of more than one building. The language of the statute is general and broad. The appropriation is "for the construction of an infirmary." Just what building or buildings this infirmary shall consist of, the type of building or buildings, materials to be used, method of construction, etc., are all, together with all details, left to the discretion and judgment of the regents of the university.

I therefore advise you that this fifty thousand dollars so appropriated can be used in the discretion of the regents of the uni-

versity in the construction of one or more buildings to constitute an infirmary and to be used for infirmary purposes; that part of the amount of the appropriation can be used in one building and part in another; and said amounts may be supplemented by gifts of private individuals sufficient to complete either or both buildings, the whole or both buildings to constitute and to be used for an infirmary.

The subject of gifts in this connection is treated of in another opinion rendered you under this date,* making it unnecessary to go into that matter further here.

University—Gifts—The regents of the university of Wisconsin may accept gifts to assist in the construction of buildings for infirmary purposes.

May 17, 1918.

HONORABLE H. J. THORKELSON,

Business Manager,

University of Wisconsin.

In your favor of May 10 you enclose copies of documents tendering to the regents of the university gifts or funds as follows:

Exhibit A	-----	\$50,000
Exhibit B	-----	25,000
Exhibit C	-----	25,000

You state that, acting under sec. 20.39, subsec. (8), subds. (a), (b), (c), it has been the practice of the regents for many years to accept gifts under reasonable conditions, and you ask whether the regents of the university are authorized to accept the gifts designated and hereinafter referred to for the purpose of supplementing the appropriation made by the legislature for the construction of an infirmary, said appropriation being designated in the statute as sec. 20.41, subsec. (1), subd. (jn).

Sec. 36.02, Wis. Stats., in part reads as follows:

"The government of the university shall be vested in a board of regents, to consist of one member from each congressional

* Page 289 of this volume.

district and two-from the state at large, at least two of whom shall be women, to be appointed by the governor; the state superintendent and the president of the university shall be ex officio members of said board."

Sec. 36.03 in part provides as follows:

"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 all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law, and shall have the custody of the books, records, buildings and all other property of said university."

Sec. 36.08 provides as follows;

"For the erection of suitable buildings and the purchase of apparatus, a library, cabinets and additions thereto, the board of regents are authorized to expend such portion of the income of the university fund as is appropriated by the legislature for such purposes; * * *."

Toward the end of sec. 36.10 we find the following:

"* * * All gifts, bounties and moneys paid in and appropriations made by law for the university, its endowment, aid or support, when received by the state treasurer shall be at once credited to the proper fund, and if received as part of the general fund shall be forthwith transferred by warrant to the proper university account and shall all thenceforth be held solely for the respective uses to which the same is by law appropriated, and shall never be employed, diverted to, or paid out for any other use or purpose."

Sec. 20.39, subsec. (8), subd. (a), reads as follows:

"All gifts, grants, bequests and devises from individuals, partnerships, associations or corporations and all subventions from the federal government for or in behalf of the university or any department thereof or any purpose connected therewith, are appropriated to the board of regents of the university and shall be used according to the provisions of the instrument or act making the same and all such receipts shall be paid into the university fund income, agricultural college fund income or into such other fund of the state treasury as the board of regents of the university shall designate; unless the provisions of the instrument or act making the gift, grant, bequest, devise or subvention shall be inconsistent with or repugnant to the provisions of this subsection requiring such payments into the state treasury."

Subd. (b), said subsec. (8), said sec. 20.39 reads as follows:

"All gifts, grants, bequests and devises for the benefit or advantage of the university or any of its departments, colleges, schools, halls, observatories or institutions, or to provide any means of instruction, illustration or knowledge in connection therewith, whether made to trustees or otherwise, shall be legal and valid and shall be executed and enforced according to the provisions of the instrument making the same, including all provisions and directions in any such instrument for accumulation of the income of any fund or rents and profits of any real estate without being subject to the limitations and restrictions provided by law in other cases; but no such accumulation shall be allowed to produce a fund more than twenty times as great as that originally given."

Subd. (c), said subsec. (8), said sec. 20.39 provides as follows:

"All such gifts, grants, devises or bequests may be made to the regents of the university or to the president or any officer thereof, or to any person or persons as trustees, or may be charged upon any executor, trustee, heir, devisee or legatee, or made in any other manner indicating an intention to create a trust, and may be made as well for the benefit of the university or any of its chairs, faculty, departments, colleges, schools, halls, observatories, or institutions or to provide any means of instruction, illustration or knowledge in connection therewith, or for the benefit of any class of students at the university or in any of its departments, whether by way of scholarship, fellowship, or otherwise, or whether for the benefit of students in any course, subcourse, special course, postgraduate course, summer school or teachers' course, oratorical or debating course, laboratory, shop, lectureship, drill, gymnasium, or any other like division or department of study, experiment, research, observation, travel or mental or physical improvement in any manner connected with the university, or to provide for the voluntary retirement of any of its faculty."

The first gift, Exhibit A, reads as follows:

"Washington, D. C., May 8, 1918.

(Name of donor) promise to pay to the Regents of the University of Wisconsin or order fifty thousand and 00/100 Dollars for the construction of a memorial Hospital as agreed upon, and any such sums as will be required during construction.

(Name of donor.)"

The name of the donor is here omitted for obvious reasons.

You inform me that the conditions agreed upon for this gift are "that the money tendered is to be used with other money for

the construction of an infirmary and memorial hospital." I understand that it is proposed to use this gift of fifty thousand dollars, together with approximately twenty-five thousand of the fifty thousand dollars state appropriation, for the construction of one building to constitute a part of the infirmary, and that the regents intend possibly to name this building appropriately to carry out the idea of the memorial feature.

The third gift, evidenced by Exhibit C, reads as follows:

"Madison, Wis., May 6, 1918.

Regents of the University of Wisconsin,
City.

Gentlemen,—

I agree to contribute the sum of \$25,000 payable on or before one year from date, without interest, toward the construction of the proposed students' infirmary, for which plans have been made. This is upon condition that the construction of the infirmary and also of the Bradley Memorial be proceeded with within a reasonable time and upon the further condition that one of the three wings or parts of the infirmary shall, if I so desire, be considered and appropriately designated as the (name of person to be here inserted) Memorial.

If this is acceptable to you I will promptly deliver to you my note for the above sum and will make a deposit in my bank of \$25,000 of Liberty Bonds as collateral.

Yours very truly,
(Name of individual donor.)"

The second gift, evidenced by Exhibit B, reads as follows:

"Madison, Wis., April 30, 1918.

Dr. Charles R. Van Hise,
President, University of Wisconsin,
City.

Dear Mr. Van Hise:

With the expectation of benefiting others, and in consideration of an annual physical examination being given me by competent parties during the balance of my life, if I elect, I agree to pay to the Regents of the University of Wisconsin on or before one year the sum of Twenty-Five Thousand Dollars which is to be expended toward the construction of a Students Infirmary.

Yours truly,
(Name of donor.)"

As we have seen from the statutes quoted above the board of regents of the university is made a body corporate. The management of the institution is left entirely to this board of regents under authority and provisions of the statutes. The statutes contemplating the receiving of gifts of the nature here evidenced appropriates the money from such gifts immediately to the uses intended. I am satisfied that the mere naming of a building in *mémoriam* as a condition of the gift is not invalid so long as the name thus used is reasonably proper and appropriate.

I have no doubt, therefore, that the gift of fifty thousand dollars above referred to, and the gift of twenty-five thousand dollars evidenced by Exhibit C are valid and may properly be accepted by the board of regents.

The second gift, that of twenty-five thousand dollars evidenced by Exhibit B, is stated to be

"in consideration of an annual physical examination being given to me (donor) by competent parties during the balance of my life, if I elect."

This is a condition of which I have some doubt of the propriety and legality of the regents' accepting. I doubt very much whether the board of regents could accept such a gift and bind the university to give such physical examination contemplated. If they could do this, they could accept a gift based upon other similar conditions, such as medical treatment and services for the balance of a person's life, or hospital treatment and services, and so on. I am informed, however, that this donor inserted this clause merely for the purpose of making a valid consideration, and that the donor does not expect to receive such physical examination. I suggest, therefore, that this document be amended, or a new one substituted, stating as and for a consideration the expenditure of some part of the fifty thousand dollars appropriated by the state upon the building or buildings for which this twenty-five thousand dollars is given.

With this change in Exhibit B I advise you that it is my opinion that the regents of the university are authorized to accept these gifts, and are authorized to construct the two buildings contemplated, using the gift of fifty thousand dollars for one of the buildings, supplementing the said fifty thousand dollars by a part of the fifty thousand dollars appropriated by the legislature to complete the building, and using the other two gifts of

twenty-five thousand dollars each, supplementing the same by the remainder of the fifty thousand dollars appropriated to build and complete the second building, the two buildings to constitute the infirmary, and to be used for infirmary purposes, and that the buildings may be named by the board of regents, one as the (inserting the name) Memorial, and the other similarly with the other individual name inserted, or by suitable tablets therefor.

I think the above gives you the information desired.

Insurance—Fire Insurance—Lines 1-6 of standard fire policy, sec. 1941x, must be read with sec. 4202m, which construes it. The two sections to that extent modify each other.

May 18, 1918.

HONORABLE M. J. CLEARY,

Commissioner of Insurance.

In your letter of May 10 you submit the following:

"Sec. 1941—45, Wis. Stats., which was repealed by the session of 1917, had been a part of the standard fire insurance policy for many years. Subsequent to the passage of the law contained in this section, sec. 4202m was enacted. In 1917 the legislature amended sec. 4202m, which amendment became ch. 67, laws of 1917. Subsequent to this amendment, sec. 1941—45 was repealed by ch. 127, laws of 1917, and the provisions of this section were in substance reenacted as part of sec. 1941x, and are found in lines 1 to 6 of the body of the standard policy, on page 70 of the compilation of the insurance laws.

"Did the action of the 1917 legislature with reference to these two particular sections have the effect of nullifying the provisions of sec. 4202m in so far as that section previously related to sec. 1941—45? In other words, do the provisions of lines 1 to 6 of the standard fire policy prevail without modification by sec. 4202m?"

Sec. 1941x being, in part, the standard fire insurance policy, provides, in part:

"This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof; whether before or after a loss."

This, of course, relates only to fire insurance policies.

Sec. 4202m is found in ch. 176, Stats., which is entitled "Provisions Common to Actions and Proceedings in All Courts," and is a chapter covering the subject of evidence. This section provides, in part:

"No oral or written statement, representation, or warranty made by the insured or in his behalf in the negotiation of a contract of insurance shall be deemed material or defeat or avoid the policy, or prevent its attaching unless such statement, representation, or warranty was false and made with actual intent to deceive or unless the matter misrepresented or made a warranty, increased the risk or contributed to the loss."

The effect of the act of the 1917 legislature with reference to sec. 4202m merely extended the applicability of this section to fraternal and mutual benefit societies. It was not taken out of the chapter on evidence or changed in any other material respect.

The legislature of 1917 amended sec. 1941—45, which is a part of the standard policy law, by putting it under 1941x, Stats., and repealing the old number 1941—45, and by striking therefrom the underscored two clauses in the following quoted portion:

"This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

Bearing in mind the fact that sec. 1941—45 is a portion of the standard fire policy law, and that sec. 4202m is essentially a statute governing necessary proofs in actions and proceedings relating to all insurance contracts in all courts, the one may be considered as construing the other. The first six lines of the standard fire policy in effect states that if there has been concealment or misrepresentation of a material fact or circumstance concerning the subject of insurance, or if there has been fraud or false swearing, the policy is void.

Sec. 4202m provides, in substance, that no representation or warranty made by the insured in the negotiation of a contract of insurance shall be deemed material or defeat or avoid the policy, unless the statement or warranty was false and made

with actual intent to deceive, or unless it increased the risk or contributed to the loss.

The representation, it will be noted, to be available as a defense to defeat the policy must be false, the intent to deceive must be present, and the false representation must have increased the risk or contributed to the loss. The standard fire policy must be construed by the provisions of sec. 4202m, which is merely a construction statute which applies to all insurance contracts, including fire policies. It is quite apparent that the legislature was not legislating upon the same proposition in the two statutes. Neither one devitalizes the other, yet they must be read together, one construing the other, and to that extent they modify.

You are therefore advised that the provisions of the standard fire insurance policy are not devitalized by sec. 4202m; the two sections modify each other and must be read together.

Public Officers—Board of Examiners of Architects—General administration of ch. 73b—1.

May 20, 1918.

INDUSTRIAL COMMISSION.

In your esteemed favor of May 16 you request my opinion as to whether it is a part of your duties or that of the board of examiners of architects to enforce the provisions of ch. 644, laws of 1917, being ch. 73b—1, Wis. Stats., particularly as to the violations of these statutes.

The statute makes it the duty of your commission to appoint the board of examiners of architects, and upon their reporting the result of their examination to your commission you are to keep a record of such report and issue certificates of registration to the persons certified by the board of examiners as having passed such examination. Your commission is further required to revoke any certificate of registration upon the recommendation for such action by the board of examiners, after a hearing to be held before the board of examiners, etc.

It will be noticed that the above are substantially all of the duties that are specially made to devolve upon your commission. The rest of the duties prescribed by this act seem to devolve upon the board of examiners.

Subsec. 5, said sec. 1636—215, in part, provides as follows:

"* * * For the purpose of this section, the board of examiners shall have the same testimonial powers as are given to the industrial commission in section 2394—61. * * *."

Furthermore, fees received under this act are appropriated to the board of examiners for the purpose of carrying into effect the provisions of the act. This is provided for in sec. 20.565, which reads as follows:

"All moneys collected or received by each and every person for or in behalf of the board of examiners of architects shall be paid within one month of receipt into the general fund of the state treasury. All moneys so deposited are appropriated for said board to carry into effect the provisions of section 1636—215 of the statutes."

It seems clear that your commission has nothing more to do with this matter as a commission than the appointment of the members of the board and keeping the record prescribed, issuing certificates and revoking them, as above outlined. All of the rest of the provisions of this law seem to be under the direct supervision of the board of examiners of architects. All moneys collected from persons applying for registration and receiving certificates of registration are appropriated to the board of examiners to be used by them in carrying into effect the provisions of the act. I think, on the whole, that the general administration of this act was intended to be placed with the board of examiners of architects, and if any one has the special duty of seeing that persons offending against this law are brought to justice and prosecuted, it would be the duty of the board of examiners.

Of course, the offenses defined under this act are criminal offenses, and prosecutions may be had under the ordinary criminal procedure of the state.

Criminal Law—Fraudulent Advertising—The advertiser and the publisher may both be guilty under sec. 1747k, the latter only if he has knowledge of the unlawful or untruthful nature of the advertisement.

GEORGE J. WEIGLE,

May 21, 1918.

Dairy and Food Commissioner.

In your esteemed favor of May 14 you enclose letter complaining about an advertisement of a substitute for butter. The advertisement makes the following statements:

"Science solves the butter problem with butter made from the white meat of cocoanuts."

"It tastes exactly like the finest creamery butter and is even more wholesome and pure."

"[Name of product] has all the good qualities of fine creamery butter. The only difference you will notice is the cost."

"It is as nutritious as cream butter, and as easily digested. It possesses the fuel value needed for energy."

"Served on your table, without explanation, no one can tell the difference."

"[Name of product], used in cooking, gives the same results as butter, except that it goes farther."

"For [name of product] solves one of the biggest problems presented by our high food prices."

"The problem of serving appetizing, wholesome butter at a moderate cost."

You state that practically all of these statements are false, and you call my attention to sec. 1747k, Stats., particularly the reference in that statute to the liability of newspapers publishing such advertisements. You ask whether the dairy and food commissioner is warranted or authorized to serve notice on the parties responsible for the advertisement as well as on the newspaper to the effect that the advertisement contains assertions, representations or statements of fact which are untrue, deceptive and misleading, and after such notices are served whether the dairy and food commissioner is authorized to bring prosecutions, if the advertisements, or similar ones, are repeated.

Sec. 1747k reads as follows:

"Any person, firm, corporation or association who, with intent to sell or in any wise dispose of merchandise, live stock,

securities, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, for the purpose of defrauding the public, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, live stock, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor, and shall upon conviction thereof be punished by a fine of not less than ten dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than ten days nor more than ninety days, or by both such fine and imprisonment; providing that nothing herein shall apply to any proprietor or publisher of any newspaper or magazine who publishes, disseminates or circulates any such advertisement without knowledge of the unlawful or untruthful nature of such advertisement."

If you are correct that these representations are false and untrue, and are made "for the purpose of defrauding the public," then unquestionably the person causing the advertisement to be published in the newspaper or magazine is liable to prosecution under this statute. The proprietor or publisher of the newspaper or magazine, however, in which the advertisement appears does not violate the statute unless he has knowledge of the unlawful or untruthful nature of the advertisement. If this knowledge is brought home to him so that he can be said to know and have knowledge of the unlawful or untruthful nature of the advertisement, then he would be equally guilty.

I have no doubt that your department is authorized to serve such notice as you suggest upon the editor or publisher. No such notice, however, would be necessary upon the person causing the advertisement to be made, although it could do no harm, and your department would be authorized in bringing prosecutions against both the editor or publisher and the party placing the advertisement in the publication in case the practice was continued.

Corporations—Annual Report—Penalty for failure to make annual report in time specified applies even when the organization has not been perfected by election of officers.

May 23, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

Your favor of May 23, with reference to whether the Hercules Steel Casting Company is required to file an annual report in your department under sec. 1774a, Wis. Stats., is at hand.

It seems that this company was organized about February 1, 1917, that is, its articles were at that time filed in your office and properly recorded in the office of the register of deeds of the proper county, and as I understand it, the attorneys for the company now claim that the company is not required to file any report under sec. 1774a, Wis. Stats., for the reason that the company was not fully organized until May 11, 1918, when the stock subscribers first met and elected a board of directors, and that board elected officers, and prior to May 11, 1918, there were no officers of the company to make and file such report.

The section of the statute in question, 1774a, in part, reads as follows:

"Every corporation for profit, organized under the provisions of this chapter, shall annually, between the first day of January and the first day of March, file with the secretary of state, a report sworn to by the president, secretary, treasurer or general manager, or if the corporation is in the hands of assignee or receiver, by such assignee or receiver, as of the first day of January preceding, which shall state:

[Here follow seven different items of information.]

"In case such corporation fails to file its report, as above set forth, it shall be allowed to file such report prior to June first on payment to the secretary of state of a forfeit of ten dollars. In case said report is not filed June first, the secretary of state shall cause to be published once a week for three successive weeks a notice of such failure, in a newspaper published at or near the location of said corporation, as shown by the records of his department; and the register of deeds of each county shall post in his office a list of the corporations located in such county failing to so report. Such corporation shall be allowed to file its said annual report prior to January first on payment of the forfeit, as above set forth, and on payment of the costs of publication. In case said report is not filed by said January first, the corporate rights and privileges granted to such corporation

shall be forfeited and the secretary of state shall enter such forfeiture on the records of his department.

"* * *

"The failure to file such report in the time specified herein and proof of publication of the notice herein provided, shall be sufficient evidence on which the secretary of state is authorized to declare the forfeiture of corporate rights, and privileges herein provided. * * *."

Counsel for this corporation first contends that as this corporation had no president and secretary at the time it was required to file its report, being the first day of January and the first day of March, 1918, therefore it was required to file no report and could file none.

These reports are required to be filed for the purpose of the information of state officers and the public generally. The mere failure to file a report is made ground for the forfeiture of corporate rights and privileges. This, however, argues strongly in favor of requiring every corporation, even one in the condition this corporation found itself in, to file the report. Otherwise it becomes the positive duty of the secretary of state to forfeit its corporate rights and privileges. True, the statute seems to require such report to be sworn to by the president, secretary, treasurer or general manager, but if the corporation had no such officers, sec. 1773 provides:

"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 am persuaded that if no president and secretary have been elected, the signers of the articles of organization, who have the affairs of the corporation in their charge during the interim of its existence as a corporation until the first meeting of its stockholders, would be the proper officers to swear to such report. They are the only officers who have any of the affairs of the corporation in charge, who would have the right to make any such report at that time, and it is no great stretch of the term "general manager" as used in sec. 1774a to construe it to include the signers of the articles of incorporation under the authority vested in them by sec. 1773.

True, the statute has not provided in as clear language as was

possible for this report in the case of a corporation, which during the period from January first to March first has not perfected its organization by the election of officers, but the language of sec. 1774a is very clear that every corporation for profit organized under the provisions of that chapter is required to make the report, and as the signers of the articles are the only persons who could be said to be authorized to make the report, then I am satisfied that they are the ones upon whom the duty devolves. Otherwise such a corporation could not report and its corporate rights and privileges would be lost by forfeiture. Moreover, as I understand it, this company has filed its report since May 11, the date of the election of its officers, which report, I assume, is properly sworn to by its president and secretary. This report was not filed in time and, therefore, the penalty has been incurred. Their effort now is to seek to avoid the payment of the penalty based upon the ground that by their own failure they had failed or neglected to elect their officers in time to make the report in time.

I cannot believe that these facts would prevent the application of the penalty. I think the above gives you the information desired.

Indigent, Insane, etc.—Minors—Legal settlement of a minor who has been apprenticed from the state public school and liability for her care considered.

May 23, 1918.

E. S. JEDNEY,

District Attorney,

Black River Falls, Wisconsin.

You submit, in substance, these facts:

Lillian Semore was committed to the state public school at Sparta, from Burnett county, October 10, 1911, and thereafter was indentured by the state board of control to Carl Rhyme, a resident of the village of Melrose, in Jackson county, until she should become eighteen years of age, that is, to August 20, 1917; she still continues to live at his home; recently she was afflicted with acute appendicitis, and an immediate operation was necessary to save her life; and you informed the village president that Melrose must furnish her proper care and that theulti-

mate liability for the expense thereby incurred would be determined later.

You ask to be advised

"whether or not Lillian gained a residence in the village of Melrose * * * and whether or not such village would be responsible for the expenses incurred by reason of this operation, or whether she would be regarded as a transient, indigent person and the village of Melrose should therefore proceed under sec. 1512 by giving the proper notice to Jackson county and Jackson county in turn filing their claim against Burnett county."

You state further that the superintendent of the state public school has informed you that children committed to that institution do not gain a residence until they are twenty-one years of age and that therefore Burnett county will be ultimately responsible for the expenses.

You will notice that in the matter of ultimate liability for the public support of indigent persons the important fact is the place of legal settlement, rather than the place of residence. Residence is significant only in so far as it may determine or assist in determining the place of legal settlement. The real inquiry here, therefore, is as to the place of legal settlement of this girl.

"Every town shall relieve and support all poor and indigent persons *lawfully settled therein* * * *." Sec. 1499, Stats.

"Legal settlements may be acquired in any town, so as to oblige such town to relieve and support the persons acquiring the same in case they are poor and stand in need of relief, as follows:

"* * *

"(2) Legitimate children shall follow and have the settlement of their father if he have any within the state until they gain a settlement of their own; but if the father have no settlement they shall in like manner follow and have the settlement of their mother if she have any."

Illegitimate children have the settlement of their mother. Every adult person who resides in a town and receives no support as a pauper for one year thereby gains a settlement in such town.

"(5) Every minor whose parent * * * has no settlement in this state who shall have resided one whole year in any town in this state shall thereby gain a settlement in such town.

"(6) Every minor who shall be bound as an apprentice to any person shall, immediately upon such binding, if done in good faith, thereby gain a settlement where his or her master or mistress has a settlement.

"(7) Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost." Sec. 1500, Stats.

Assuming that this girl was "bound as an apprentice" to Mr. Rhyme, it follows from the provisions of the sixth subdivision of said sec. 1500 that she immediately acquired a settlement in Melrose, and that it certainly continued up to the 20th of August, 1917, the date she became eighteen years of age, and it follows from the next paragraph that she lost any former settlement she may have had. It is equally certain that this settlement in Melrose continues unless she has acquired a new legal settlement since the termination of her apprenticeship.

The facts stated are not sufficient to determine that question. If her parents or either of them has a settlement in this state, I am of the opinion that such settlement, upon the child's arriving at the age of eighteen years, again became the child's legal settlement, under the provisions of subds. (2) and (3) of said sec. 1500.

On the subject of the settlement of a parent, you have not given any information. That subject needs further investigation.

If neither of her parents has a settlement in this state, the fact of indenture is not important, for she has resided more than a whole year in Melrose and thereby gained a settlement in the village. The statute expressly so provides.

But if a parent has such settlement, it becomes important to determine whether or not the minor was "bound as an apprentice." It is my opinion, upon the facts stated, that she was so bound.

Supervisors are empowered by sec. 1511, Stats., to apprentice minors of a specified class by written indenture and the trustees of county homes for dependent children may

"bind out all minors, who are supported at the expense of the county, in the same manner and with like effect as town boards are authorized to do by section 1511." Sec. 697—6, Stats.

This child was bound out pursuant to the provisions of sec. 573d, Stats. The state board of control is thereby made the legal guardian of all inmates of the state public school and

"it shall be its duty to use special diligence in providing suitable homes for them. It may place them in families and make written contracts with responsible and suitable persons that the children shall be kept during their minority, or, in the discretion of the board, until they attain the age of eighteen years; provide therein for their education in the public schools where they may reside, for teaching them some useful occupation, for their kind and proper treatment as members of the families in which they are placed, and for the payment, on the termination of such contracts, to said board, for the use of the children, of such sum of money as may have been stipulated in the contracts."

The three sections last mentioned all relate to the same subject matter, and, if action under one creates any apprenticeship, action under another does the same.

Furthermore, I am of the opinion that the binding out in this case satisfies the requirements of the general provisions covering the subject of masters and apprentices as the law stood when this particular contract was made. Sec. 2377, *et seq.*, Stats. She might still be an apprentice and not satisfy the calls of those sections, for it has been held by our supreme court that the statute just referred to was not intended as an interference with or repeal of the common law but the grant of additional privileges in favor of children. *Davies v. Turton*, 13 Wis. 185.

Children who are bound out pursuant to and in accordance with the provisions of said sec. 573d, Stats., are apprenticed within the rules of the common law. 4 C. J. 1416, 1418, 1430.

It occurs to me that you should ascertain whether or not some person is not liable for the expense of the care and treatment of this minor. The parents, of course, are never exempted from caring for their minor children. It may be that Mr. Rhyme is liable. He would have been had the illness occurred during the apprenticeship, unless the contract provided otherwise. 4 C. J. 1437.

The master stands *in loco parentis* to his apprentice. That idea is emphasized by the statute which commands the boards to place such children in suitable homes. It seems this girl has remained in his household, a member of his family, and he has had the benefit of her services, and if he has not compensated her with wages he may be liable for suitable medical care dur-

ing illness. I express no opinion upon this point, not having investigated the law, but suggest the question for your consideration.

Public Officers—Justice of the Peace—Police Justice—Criminal Law—In a city located in two counties having a police justice no justice of the peace can exercise jurisdiction in a criminal case arising in said city; no change of venue can be taken from said police justice.

O. L. OLEN,

May 23, 1918.

District Attorney,

Clintonville, Wisconsin.

In your letter of May 16 you state that in New London, which is a city in two counties and to which sec. 925—269, Stats., is applicable, a crime was committed within the corporate limits and an action started before a police justice in said city. You inquire whether the defendant would be entitled to a change of venue under sec. 925—269, or whether he is prevented from taking a change of venue under the provisions of sec. 925—66.

Sec. 925—269 relates to the jurisdiction of justices of the peace and police justices in cities comprising territory in two or more counties, and gives such justices jurisdiction in both counties. In subd. (1) of said section, *inter alia*, we find the following:

... * * * Each of said justices of the peace and police justices shall have jurisdiction both civil and criminal co-extensive with the limits of each of the counties in which said city or any part of it is situated, and may issue process and do all things in either of said counties that any justice of the peace of such county may lawfully do. * * *; and provided further, in all cases, if a cause shall be removed from the justice before whom the same was commenced, the papers shall be transmitted to the nearest justice in said city, if he be competent to try the cause, but if there shall be no such justice, or if he be absent or sick, the papers shall, in civil cases, be transmitted to the nearest justice of the peace of the county in which the defendants or either of them was served with process, and in criminal cases they shall be transmitted to the nearest justice of the peace of the county in which the offense was charged to have been committed, and such nearest justice may hear, try and determine the same; and said justices of the peace and police justices shall perform the same duties, receive the same fees, and be liable to the same penalties as other justices of the peace."

Sec. 925—66 provides as follows:

"No justice of the peace in any city wherein there shall be a police court under this chapter shall have any criminal jurisdiction of offenses committed in such city, nor any authority to issue warrants for the apprehension of any alleged offender for an offense committed therein, nor to examine or commit or hold to bail any such offender charged with any crime or misdemeanor committed in said city. Civil actions, except actions under city ordinances, may be removed from a police court for trial before a justice of the peace for the same reasons and in the same manner provided by law for removing such actions from one justice of the peace to another. No criminal action and no action under any ordinance of the city shall be so removable; but in case of the absence, sickness, or disability of said police justice, he may, by an order in writing to be filed in said court, appoint a justice of the peace or a court commissioner in said city to discharge his duties during such absence, sickness, or disability, and the person so appointed shall have all the powers of said police justice while administering such office."

After a careful consideration of the question submitted by you I am of the opinion that the above quoted provisions of sec. 925—269 and the provisions of sec. 925—66 are *in pari materia*. While sec. 925—269 provides that the justices of the peace and police justices shall have jurisdiction coextensive with the limits of each of the counties in which said city or any part of it is located, nevertheless, I do not believe that it was intended to change the jurisdiction of justices of the peace and police justices in cities as provided in said sec. 925—66. I believe that justices of the peace in New London are not authorized to exercise jurisdiction in criminal offenses committed in such city, for the reason that there is a police justice and that no change of venue can be taken in such cases from the police justice.

You will note that the language in the above quoted provision of sec. 925—269 relative to the change of venue is

"if a cause shall be removed from the justice before whom the same was commenced," etc.

This, I take it, applies only to causes in which a removal can be made and not to causes where no removal can be made. It does not in terms give the right to removal.

It seems that my predecessor in answering one question in his opinion of December 18, 1917 (Vol. VI, Op. Atty. Gen., p. 805), overlooked the provision in sec. 925—66.

Education—Blind—A blind person receiving aid in one county on removing into another may receive aid on application.

May 23, 1918.

JOHN ROBERTS,

District Attorney,

Grand Rapids, Wisconsin.

In your communication of May 20 you submit the following as a basis for an opinion:

“Mr. D., as a blind person, was granted county aid, in the sum of \$150.00 per annum at the November, 1917, session of the county board of Wood county, under sections 572*i*, *et seq.*, of the Wisconsin statutes, and is drawing that aid now. He has a son residing in another county in this state with whom he desires to make his home, and the son is able and desirous of having Mr. D. make his home with them, and Mr. D. wishes to live with his son, and become an actual resident of the county in which the son lives, but wishes to retain the aid granted him by this county.”

You inquire whether the removal from this county will discontinue the aid granted by this county and, if receiving aid from this county, whether he could make application for aid in the new county immediately on removing thereto, and what would be the proper course of administration in this matter.

Sec. 572*i* provides, in part, as follows:

“Any male person over the age of twenty-one years, and any female person over the age of eighteen years, who is declared to be blind in the manner hereinafter set forth, and who is not an inmate of any charitable, reformatory or penal institution in this state, and who

“(a) * * *

“(b) Has no income and who has been a bona fide resident of this state for ten years and is a resident of the county wherein application is made at the time of making the application may be entitled to receive from said county a benefit of one hundred and fifty dollars annually, payable quarterly and such additional aid as the county board may determine.

“2. Payments made under paragraph (b) of subsection 1 by any county to any person within and for the first year after such person takes up residence therein, shall be and constitute a charge against the county in this state wherein such person resided for one full year or more next preceding removal into the county which paid such benefits. The clerk of the county wherein such benefits were paid shall certify to the clerk of such

other county the amount of the benefits so paid, and said clerk, upon receipt of such certificate, shall draw his warrant upon the county treasurer in favor of the county which paid such benefits for the amount named in such certificate."

The party here in question is receiving aid under par. (b), subsec. 1 of the above statute. Under the provisions in said paragraph it is not necessary that he reside in the new county a year before he can make application for aid. This is obvious not only from the language used in said par. (b) but also from the language used in said subsec. 2 of said section, wherein it is provided that payments made under par. (b), subsec. 1, by any county to any person within and for the first year after such person takes up residence therein shall be and constitute a charge against the county in this state wherein such person resided for one full year or more next preceding removal into the county which paid such benefits. Mr. D. can make application in the new county as soon as he has established his residence therein, and the county in which he then resides will have a charge against the county from which he moved for the payments made during the first year in the new county. I believe the payments in the old county must cease as soon as the party has removed therefrom, because he is required to be a resident in the county in which he receives the aid.

Taxation—Income Taxes—A resident who receives a commission as managing agent of his employer's business conducted outside this state is subject to income taxes on account of said commission.

May 24, 1918.

T. P. ABEL,

District Attorney,

Sparta, Wisconsin.

You call attention to subsec. 3, sec. 1087m—2, Stats., and ask to be advised whether or not "A." is required to pay an income tax upon the commission he receives upon business done outside of Wisconsin, under the following statement of facts submitted by you:

"'A.' resides in Monroe county, Wisconsin, with his family. He is employed by the Chicago Portrait Company of Chicago, a

corporation of Chicago, Illinois, and his only compensation is commissions. The duties of his employment are as follows: he is field manager in the states of Pennsylvania, Minnesota, Michigan and Wisconsin for the sale of enlarged portraits. He employs men in Pennsylvania to solicit for the sale of enlarged portraits in the state of Pennsylvania, and in addition thereto employs one man to supervise the work of the men who do the soliciting. This applies to his work in Minnesota and Michigan as well. 'A.' received a commission upon all sales of enlarged portraits sold through his soliciting agents in the states of Pennsylvania, Minnesota and Michigan. 'A.' does not engage in the selling of these enlarged portraits himself, and his business is entirely conducted in the respective states of Pennsylvania, Minnesota and Michigan. None of the business that brings him a revenue from the states of Pennsylvania, Minnesota and Michigan is done in the state of Wisconsin."

It is my opinion that your question must be answered in the affirmative and that all of the commissions earned and compensations received by "A." are for his services, and form a proper basis for income taxes.

The term "income," as used in the Wisconsin Income Tax Act, includes,

"(c) All wages, salaries or fees derived from services; * * *

"3. The tax shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, * * *. In determining taxable income, rentals, royalties, and gains or profit from the operation of any farm, mine, or quarry shall follow the situs of the property from which derived, and income from personal service and from land contracts, mortgages, stocks, bonds and securities shall follow the residence of the recipient. With respect to other income, persons engaged in business within and without the state shall be taxed only upon such income as is derived from business transacted and property located within the state, * * *. Sec. 1087m—2.

The net commissions received by "A.," that is, the part thereof over and above what he passes to his subagents or employes, constitute the salary or "fees derived from his services." He is the employe of the Chicago Portrait Company—its field manager. Were he employed at a fixed salary it would have to be conceded that the salary was for his services. The only distinction to be made between the supposed case and the actual one is that in the former his compensation would be certain and fixed.

while in the latter it is dependent upon the amount of business transacted by him for his employer. This distinction is immaterial in the eyes of the Income Tax Law, nor does it make any difference in principle that he does not do the work of actual personal solicitation. He resides in Wisconsin and he is receiving pay for his personal services.

"Income from personal service and * * * securities shall follow the residence of the recipient."

You refer to this portrait business as "his business." It seems to me perfectly plain that it is the business of the Chicago Portrait Company conducted by him as its manager, agent or servant, within the meaning of the statute. Were the Chicago Portrait Company a citizen of Wisconsin, unquestionably it could claim that the profit which it derived from this particular business conducted outside of Wisconsin would not be subject to income taxation. The right to such exemption from taxation, however, belongs to the Chicago Portrait Company and not to its employes.

The foregoing seems to me the obvious meaning of the statute. It certainly is a reasonable construction of the statute. Furthermore, it is the one which has been adopted by the tax commission from the beginning, as I am informed, and this department should be slow in adopting a contrary one. In case a statute of general application requires interpretation and there is doubt as to which of two possible constructions is correct, or the question is evenly balanced, then the interpretation or construction which the administrative officer or commission charged with its enforcement has placed upon the statute should be adhered to until changed by the courts or the legislature.

I may add that it is not at all probable that the legislature would now release from the burdens of government any present subject of taxation.

Taxation—Income Taxes—Legislature—The salary of an assemblyman is subject to income tax.

May 24, 1918.

HONORABLE J. A. CHINNOCK,
Member of Assembly,

Hudson, Wisconsin.

In your letter of May 22 you inquire whether you are required to pay an income tax on the \$500 salary received as assemblyman. This question must be answered in the affirmative.

While there was some doubt on the question shortly after the enactment of the Income Tax Law, all doubt has practically been removed by the decision of our supreme court in the case of *State ex rel. Wickham v. Nygaard*, 159 Wis. 396. In that case it was argued that the salary of a circuit judge was not subject to the income tax for the reason that it could not be increased or diminished during the term for which the judge was elected, under sec. 26, art. IV, state constitution, which contains this provision:

"* * * Nor shall the compensation of any public officer be increased or diminished during his term of office."

The court pointed out that in sec. 1, art. VIII, Const., as amended in 1908, we find the following:

"* * * Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

The court said further relative to this matter:

"It would not be contended that the constitution might not be amended so as to abrogate sec. 26 of art. IV entirely. Neither would it be contended, if the amendment of 1908 had in express terms stated that salaries of public officers should be subject to an income tax, that so much of sec. 26 of art. IV as prohibited the levy of such a tax would not be abrogated, assuming that it did prohibit the imposition of a tax on salaries of public officers. The real question is one of construction involving the comprehensiveness of the 1908 amendment. The language is broad and sweeping, making and containing no exception. Both constitutional provisions are somewhat general in their nature. As applied to the right to tax incomes of state officers, sec. 26 of art. IV is no more specific than is the amendment of 1908. Hardly as much so. The latter says taxes may be 'imposed on incomes.' We are not at liberty to rewrite this clause so as to read that

taxes may be 'imposed on incomes, except where the income consists of a salary received by a public officer.' We perceive very little room for construction, and if a doubtful question were involved it should not be resolved against the exercise of the taxing power by the state." Pp. 402-403.

The reasoning of the court is equally applicable to the provision in our constitution fixing the salary of assemblymen at \$500. This provision must be construed together with the provision authorizing the taxation of incomes, and such salaries have been taxed by the tax commission; and I believe it is authorized by the statute, as interpreted by our supreme court in the *Wickham* case.

Bridges and Highways—County State Road and Bridge Committee—The county state road and bridge committee elected at the annual meeting of a county board holds for one year and the board cannot elect a new committee prior to the succeeding annual meeting.

May 24, 1918.

WISCONSIN HIGHWAY COMMISSION.

I quote your letter of May 24, 1918:

"Sec. 1317m—5, subsec. 8, subd. (1), which provides for the election of the county state road and bridge committees contains the following sentence:

"'1317m—5, 8, (1). Each county board, at or before the annual meeting held next after the passage and publication of this act and at each succeeding annual meeting thereafter, shall by ballot elect, or by resolution instruct the chairman of said board to appoint, a committee of not less than three or more than five persons, of which said chairman may be one, who shall hold their offices for one year and until their successors are elected and have qualified.'

"Several county boards have held meetings since the spring elections for the purpose of organization and some of these have chosen county road and bridge committees. The question which we wish asked is this: Is the committee selected at the November, 1917, meeting the lawful committee or is the new committee the lawful committee?"

You are advised that it is my opinion that the county state road and bridge committees elected in November, 1917, are the lawful committees and the only lawful ones; that they hold for

one year from the time of their election or appointment and until their successors are elected or appointed.

The provision which you quote was enacted by ch. 533, laws of 1915, published August 13, 1915. The statute made but one exception to the rule that these committees are to be chosen at the annual meetings. That exception is for a special meeting held prior

"to the annual meeting held next after the passage and publication of this act."

County boards are in duty bound, at annual meetings, to elect such committee or to direct the chairman of the board to appoint a committee. Any action in that direction taken by a county board at any other than an annual meeting during this year is a legal nullity, if a committee was chosen at the last annual meeting.

Intoxicating Liquors—In a dry city a pharmacist who has no permit is not authorized to sell liquor except on a physician's prescription.

May 28, 1918.

D. K. ALLEN,

District Attorney,

Oshkosh, Wisconsin.

In your communication of May 24 you state that the city of Neenah voted dry for the year July 1, 1917, to July 1, 1918, and that no liquor licenses have been granted during said year; that there are five drug stores in said city and none of them have applied for or received from the city council a permit to sell liquor; that these druggists have worked out a form of certificate reciting the purpose for which the liquor is bought by the purchaser and they require the purchaser to sign it, his signature being witnessed by the druggist selling the liquor to him; that whisky is being sold in this way, not on the prescription of a physician, and no physician's prescription being presented or filed by the purchaser; that the city council has not refused permits to the druggists, for the reason that they have made no application for them. You inquire whether, under these facts, a druggist may legally sell whisky in quantities less than one gallon for medicinal, mechanical or scientific purposes on

such a certificate without a physician's prescription and without a permit or license from the city council.

Under sec. 1548a the common council is authorized, upon application therefor, to grant registered pharmacists permits to sell in their respective cities strong, spirituous and ardent liquors in quantities less than one gallon for medicinal, mechanical or scientific purposes only and not to be drunk on the premises. Said statute, however, contains the following proviso:

"* * *. Provided, however, that in any town, village or city where license for the sale of intoxicating liquors is not granted, no sale for either medicinal, mechanical or scientific purposes shall be made by any such pharmacist until the person purchasing the same shall for each sale make and file a certificate in writing dated and subscribed by him and witnessed by such registered pharmacist, stating for what purpose the liquor so desired is to be used and is not for a beverage; and also stating, in case of a sale for medicinal purposes on a physician's prescription its date and number and the name of the physician issuing the same. * * *. If any such board or council shall refuse to grant any such permit, any registered pharmacist may nevertheless sell such liquors for medicinal purposes only on such certificate and a written prescription for each sale of a practicing physician who is competent to testify in a professional capacity as provided in section 1436. * * *."

Under this provision of our statutes the registered pharmacist who has not a permit to sell such liquor is not authorized in a dry town to sell the same without the prescription of a physician, as required by this section of the statute. The language of this section of the statute is explicit, and any druggist who sells liquor except in compliance with its provisions should be prosecuted, as he has incurred the penalty provided for in the part of sec. 1548a not quoted.

Education—Counties—County Training Schools—Where a county training school is established by two or more counties state aid may be given to each county under sec. 41.36.

May 28, 1918.

HONORABLE C. P. CARY,

State Superintendent of Public Instruction.

In your letter of May 24 you state that some time last summer or fall an agreement was reached between the proper authorities

in the counties of Kenosha and Racine whereby a county training school is to be established and maintained jointly under the provisions of secs. 41.42 to 41.44, inclusive; that there is only one other joint county training school in the state, which is located in Algoma and supported by the counties of Door and Kewaunee. You direct my attention to the provisions of sec. 41.36, relative to the granting of state aid to a county erecting a county training school, and you inquire whether the statute authorizes you to grant the aid from the state to each of the two counties for building and equipment, the same as they would have received had a county training school been established in each county, instead of being established jointly.

Said sec. 41.36 provides as follows:

"(1) The county board of any county within which a state normal school is not located, is hereby authorized to appropriate money for the organization, equipment, and maintenance of a county training school for teachers of common schools, and for the erection of suitable school buildings therefor.

"(2) In case any county board of supervisors votes to appropriate money and erect a suitable school building for the use of the county training school for teachers, special state aid, partially to defray the cost of erecting such school building, shall be granted to counties maintaining county training schools, as follows:

"(a) All plans for the erection of such school buildings shall be submitted to the state superintendent for his approval before the construction of the building shall be commenced, and no state aid shall be granted unless he has approved the plans thus submitted.

"(b) Upon the completion of the building, the county board of supervisors, through the proper officers, shall notify the state superintendent that the school building is completed and shall submit to him a certified statement of the actual cost of the erection of the building.

"(c) If he shall be satisfied that the building has been erected substantially in accordance with the plans submitted, it shall be his duty to certify to the secretary of state aid in favor of the county erecting the building in an amount equal to one-fourth the cost of the erection of the building, provided that not more than three thousand dollars shall be paid as such aid to any one county, and provided, further, that he shall not certify aid for more than two counties in any one school year.

"(d) The secretary of state, on receipt of such certificate, shall draw his warrant on the state treasurer, in favor of the treasurer of the county, which shall be paid by the state treasurer."

Subd. (1), sec. 41.42 provides:

"(1) The county boards of two or more adjoining counties may unite in establishing and maintaining a training school for teachers for the purposes and on the same general plan as provided for in sections 41.36 to 41.40, and may appropriate money for its maintenance, and whenever two or more counties unite in establishing such a school, the county superintendents of the counties so uniting and two members in addition chosen from each such county, no member of any county board being eligible thereto, shall constitute the joint county training school board. The members of the board chosen by the county boards of supervisors shall choose one of the county superintendents of the counties uniting to maintain the school as secretary of the county training school board."

You will note, in par. (c), subd. (2), sec. 41.36, that the state aid may be granted in favor of the county erecting the building in an amount equal to one-fourth the cost of the erection of the building, provided that not more than three thousand dollars shall be paid as such aid to any one county. Both Racine and Kenosha counties have erected the building in question. Had the legislature intended to limit a certain amount for each building erected, it would have been an easy matter to have said so. The limitation is made on the payment to the county; no more than three thousand dollars shall be paid as such aid to any one county.

I am of the opinion that under this statute you are authorized to give the aid to each county, and that the aid granted to each county must not exceed the two limitations placed in the statute, i. e., must not be more than three thousand dollars to one county, neither may it be more than one-fourth of the money contributed by such county for the building.

Under sec. 4971, it is provided that in the construction of the statutes of this state every word importing singular number only may extend and be applied to several persons or things, as well as to one person or thing, unless such construction would be inconsistent with the manifest intent of the legislature; so we have no difficulty in construing this statute as here suggested, on the ground that the singular number is used in this statute instead of the plural.

Each county had it within its power to erect and maintain a separate school and in that case there would have been no ques-

tion but that each would have been entitled to the state aid. By joining in this work the school building can be made to answer for both counties under one faculty, and appropriations granted each year for maintaining the school, it seems, will be much diminished, and the state advantaged financially because of this joint arrangement. I believe a reasonable interpretation of this statute, under all the circumstances, permits state aid to each county as indicated above.

Public Officers—Bridges and Highways—County State Road and Bridge Committee—County Board Commissioners—Subsec. 8, sec. 1317m—5 and subsec. 6, sec. 1319 construed.

Jurisdiction of committee and commission named therein discussed.

May 29, 1918.

WILLIAM COOK,

District Attorney,

Green Bay, Wisconsin.

You ask for my opinion as to whether, in case aid is petitioned for under sec. 1319 for constructing a bridge costing over \$500.00, the provisions of said section prevail, or whether the county state road and bridge committee has full authority to let and approve the contract for the construction of the bridge.

Sec. 1319, Stats., provides for county aid for the construction of highway bridges upon proper petition from the town.

"6. The county board shall, at the time of acting upon such petition, designate two of its members, who shall act as its commissioners and who shall co-operate with the board of such town; and such board and the said commissioners shall have full charge and authority to act in the letting, inspecting and acceptance of the work, where the cost of the construction or repair of said bridge shall exceed eight hundred dollars, where the cost of said bridge is less than eight hundred dollars, the chairman of the county board shall appoint the chairman of an adjoining town who shall act as commissioner and who shall co-operate with the board of such town; and such board and the said commissioner shall have full charge and authority to act in the letting, inspecting and acceptance of the work."

The county state road and bridge committee was created and its powers and duties are prescribed by subsec. 8, sec. 1317m—5. This county committee is there directed and empowered

"(f) To assist in the letting of and to approve the contracts for all county aid bridges costing over five hundred dollars."

Sec. 1319, Stats., has not been amended since 1911. Said subsec. 8, sec. 1317m—5 was created by sec. 11, ch. 533, laws of 1915.

Under a familiar rule, if there is conflict between these statutes, the later statute must prevail. In my opinion there is a little conflict that is unavoidable by the canons of construction of statutes. Sec. 1319 gives the commissioners there provided for

"full * * * authority to act in the letting, inspecting and acceptance of the work." Subsec. 6.

So far as this authority must be construed to be exclusive in the letting of the contract, such authority must yield to the provisions of par. (f), subd. (2), subsec. 8, sec. 1317m—5 so that the assistance of the county state road and bridge committee may be had in letting the contract, and furthermore, so as to require the approval of the contract by the last named committee. The inspection and supervision of the work and the acceptance thereof remain with the commissioners, the committee provided for by sec. 1319 where the county aid is granted upon petition under said section. Really, the addition to the statute made in 1915 reduces itself in practice to requiring the approval by the committee then created or provided for all bridge contracts. The execution of the work in certain classes of bridges remains as before.

The foregoing interpretation of the statute gives force to the latest enactment and makes very little modification of the earlier one which is somewhat in conflict.

Bridges and Highways—Subsec. 7, sec. 1317m—4 is in force.
Its application considered.

May 29, 1918.

GAD JONES,

District Attorney,

Wautoma, Wisconsin.

You ask if subsec. 7, sec. 1317m—4, Stats., is still in force.

It appears from your letter of April 30, 1918, that the Waushara county board at its last annual session allowed all town petitions for state and county aid but took no further action in the premises and did not determine that the highway construction work should be done upon county initiative.

At its last annual meeting the town of Saxeville voted a special tax to improve the portion of the prospective state highway not on the trunk line system and which portion is

"continuous with a portion of the system of prospective state highways for the improvement of which a tax was voted * * * the preceding year," and authorized the town board "to borrow a sum equal to three times the sum voted by the electors of the town" at the last meeting.

This action is according to the terms of said subsec. 7. The concrete question which confronts you is this: Is the town of Saxeville entitled to receive county and state aid on account of the special taxes voted at the last town meeting?

I am of the opinion that it is entitled to such aid. The highway statutes are in considerable confusion, and said subsec. 7 is rendered partially inoperative by a repeal of certain other statutory provisions referred to in it. Par. (a), subsec. 7, sec. 1317m—4 has stood in its present form for some time and may be applied completely, but par. (b) thereof refers to

"(a) or (b) of subsection 3 of section 1317m—5 of the statutes."

The words last quoted were struck from said sec. 3 by the amendment made thereto by ch. 533, laws of 1915. That subsection as so amended contains no option. We are therefore forced to construe and apply par. (b), said subsec. 7 as being to that extent modified or amended. The words above quoted from par. (b), subsec. 7 now have nothing on which to operate and must be treated as though struck from the statutes. To that extent this paragraph was amended by implication when subsec. 3, sec. 1317m—5 was so amended.

I am of the opinion that the town board of Saxeville should file a petition with the county board as directed by subsec. 4, sec. 1317m—4, that such petition should be allowed by the county board; and the county board should allot to the town a proportionate share of the state aid and make provision by taxation for any deficit pursuant to the provisions of the last sentence of par. (b), said subsec. 7, sec. 1317m—4.

The legislature evidently intended by the amendments made in 1917 to pass to counties the initiative in the improvement of prospective state highways, but so long as the counties do not take the initiative and continue to grant petitions of towns for county and state aid, so long, I believe, will the towns be entitled to insist on the assistance provided for by said subsec. 7.

Criminal Law—Commitment—Beginning of Term—Prisons—
The term of sentence to the state prison begins at the time the prisoner is delivered at the prison.

May 31, 1918.

STATE BOARD OF CONTROL.

Your favor of May 28 is at hand, in which you state that Ewald Ramphun was sentenced to the state prison at Waupun on May 20, 1916, to serve a sentence of three years on a charge of arson; that after sentence was imposed a stay of execution was secured for a period of one month, but the defendant was not committed, due to a transfer, until October 13, 1916, that is, the commitment by the court was not made and signed until that time, and he was delivered by the sheriff of Milwaukee county to the state prison on October 16, 1916.

You call my attention to sec. 4733, Wis. Stats., and inquire when his term legally began in the state prison.

From your letter and the correspondence accompanying the same it appears that the defendant remained in the county jail at Milwaukee county from May 20 until October 13, or possibly October 16, after sentence.

Sec. 4733, Wis. Stats., reads as follows:

"The sentence of any convict to imprisonment in the state prison shall be for a certain term of time, to commence at twelve o'clock, noon, on the day of such sentence, but any time which

may elapse after such sentence, while such convict is confined in the county jail or is at large on bail, or while his case is pending in the supreme court upon writ of error or otherwise, shall not be computed as any part of the term of such sentence; * * *.”

Under this section of the statute it seems clear that the defendant's term of sentence did not begin until he was actually committed to the state prison, to wit, on October 16, 1916. This view of the matter is supported by the case of *State v. Grottkau*, 73 Wis. 589, 592, where the court says, in referring to this language of the statute:

“In most, if not all, cases the effect of this statute seems to be to make the term of imprisonment commence when the convict is committed to the state prison.”

I have no hesitancy, therefore, in advising you that the term of imprisonment of the defendant in this case began on the 16th day of October, 1916.

Taxation—Bonds—Manner of returning and collecting delinquent taxes entered on the roll to pay special assessment certificates and bonds discussed.

June 1, 1918.

D. K. ALLEN,

District Attorney,

Oshkosh, Wisconsin.

By letter of May 27, 1918, you ask for my opinion upon facts which you state as follows:

"The county of Winnebago and the cities of Neenah, Menasha and Oshkosh are having some difficulty in working out the correct manner of handling street improvement bonds issued under sec. 959—33 and other similar sections. It seems to have been the practice heretofore for any unpaid bonds or street improvement certificates to be turned in to the county treasurer and sold in the same manner that land is sold upon default in the general taxes. I take it that this procedure is correct in the case of street improvement certificates, but I interpret the law to mean that a bond given for a street improvement constitutes a lien against the property improved and the remedy of the bond holder is to foreclose against the property, and I take it that the county treasurer is not interested and that he does not have anything to do with collecting the unpaid bonds and cannot sell the property affected by the bonds and should not in any way handle any money received when the bonds are paid. Of course, sec. 959—34 seems to put the unpaid bonds on the tax roll and this eventually brings them into the office of the county treasurer, but I believe nevertheless that he is not concerned with the collection of any city street improvement bonds which is a matter for the city, the property owners and the contractor to work out."

In an opinion rendered by this department May 24, 1917, it was held that the provision for the enforcement of a lien created by special assessment certificates and improvement bonds is cumulative and does not exclude the remedies of the lien holder through delinquent tax returns and tax sales. Vol. VI, Op. Atty. Gen., p. 351.

The question has been reexamined with the result that the former opinion of this office is adhered to. It seems to me that there is such strong reason for providing the same method of enforcing certificates and bonds based upon special assessments that we must conclude the procedure is identical, unless the language of the statute forces a contrary holding. The statutes—and there are many upon this subject—all impress me with intending the same procedure shall be observed in their enforcement. They all provide a lien on particular property, for the issuance of special assessment certificates, unless the property owner asks to pay the assessment in annual installments; they all provide for entering upon the tax roll by the clerk at the request of the lien holder taxes sufficient to meet the payments as they fall due.

I am further of the opinion that it has been the practice to proceed with these special assessments, once they are entered on the tax roll, to a sale thereof by the county for delinquency unless paid before the tax sale date. In *Sheboygan County v. City of Sheboygan*, 54 Wis. 415, 420, it was held that sec. 1114, Stats., covers every form of tax which is in the tax roll, and that the local treasurer returns as delinquent the entire uncollected portion of the tax roll. That case involved a special assessment for street improvement made in the city of Sheboygan and charged against certain lots. Not being paid, it was returned delinquent with other taxes. That was held a proper procedure. The court said:

"No discrimination is made between different kinds of taxes, or the different purposes for which they are imposed. The return may include state, county, town or city, ward, school or road taxes, or any special assessment whatever, authorized by law," etc.

The court there further held that upon such delinquent return the county became the owner of the special assessment and that the city must answer to the lien holder for the amount thereof.

The same question was again in the supreme court in *State ex rel. Donnelly v. Hobe*; 106 Wis. 411. In the latter case the court affirmed the law as laid down in the Sheboygan case. In fact it was taken for granted that the special assessments, when inserted in the tax roll and unpaid, when the time came

must be returned as delinquent taxes. But the court, after a lengthy review of the special provisions of the city charter of Superior, distinguished between the procedure there provided and that of the general statutes relating to taxation, and held that although a special assessment must be returned as delinquent, if unpaid, such return did not make the county a debtor to the city but merely a collection agent for the lien holder.

It was also held that though there was no special statutory requirement therefor, by necessary implication the law required that the special assessments be kept separate and noted in the delinquent return and be sold separately thereafter, and if purchased by the county, the tax sale certificate was held in trust for the lien holder and should be delivered to him upon demand. The court said:

"The special assessment liens are required to be returned delinquent if not seasonably paid to the city treasurer, but to be kept separate by such return necessarily, and thereafter separately enforced, if not seasonably paid, by advertisement and sale of the property affected thereby.

"The provision to the effect that special assessments shall be treated as other taxes does not indicate that they are to be confused with other taxes and that the entire amount, composed of special assessments and general taxes, is to be treated in one sum as a lien against the property affected. Such assessment liens cannot be reasonably treated as solely the private property of the certificate holders except by a delinquent return, keeping special assessments separate from other taxes, and subsequent proceedings to enforce such liens, if such proceedings become necessary, including advertisement of the lands affected by the assessment liens for sale separately therefor and the issuance of certificates of sale which shall not include any tax liens that belong to the public. In case lands, sold for the purpose of enforcing special assessment liens, are bid in by the county, the certificates of sale, when issued, are not the property of the county, but of the holders of the special assessment certificates. The county, in such circumstances, becomes a trustee of the tax-sale certificates for the actual owners thereof." *State ex rel. Donnelly v. Hobe, supra, 422.*

To the suggested difficulties that would arise from the taxes being returned delinquent as a unit and the county treasurer's being unable to tell what part was special assessments and what part other taxes, the court replied that they

"all disappear when it is considered, as it must be, that the provision requiring special assessments to be returned delin-

quent and to be thereafter treated in the same manner as other delinquent taxes, but for the sole benefit of the owners of the special assessment liens, by necessary implication requires such assessments to be specifically noted in the delinquent return, and in the advertisement of the sale of the lands to enforce the assessment liens they shall be treated separate from other delinquent taxes," etc. *Ibid.* 424.

The result of the two decisions quoted was to make one procedure applicable where there was a special charter provision, like that of Superior, and a different procedure where the general statutes or different charters were in force. The effect of the general rule was to make cities and counties directly liable to lien holders. This seemed unwarranted when it was noted that the city and county had no property interest in the matter and were simply acting as a collection agent. The rule adopted in the Hobe case seemed much more equitable, and from a public standpoint much more desirable. The decision in that case was rendered in April, 1900. On March 26, 1901, the legislature, by ch. 71, laws of 1901, made the Superior plan for enforcing the lien created by special assessment the general plan. The purpose of the act, as stated in its title, was

"to provide against charging to counties the special assessment certificates issued by cities to contractors in payment upon contracts, and for the enforcement thereof."

Said chapter is now secs. 926—135 to 926—138, inclusive. Although its provisions are now found in ch. 45*u*, entitled "Cities under special charter" we must remember that said ch. 71 applies

"In all cities of this state having power to issue to contractors or others, in payment upon any contract, special assessment certificates * * * and whose charters contain no provision authorizing said city to enforce such special assessment certificate by separate sale of the lands," etc.

It is my opinion that the provisions therein contained as to delinquent returns, tax sales, and tax sale certificates apply to the situation stated in your letter, and generally to the collection of special assessments for city improvements, whether represented by special assessment certificates or improvement bonds. The only difference between certificates and bonds is that certificates, if not paid, are inserted in a single tax roll, whereas

the bonds are paid by installments through a series of from five to ten years. "Certificates or improvement bonds" is a phrase frequently used. See secs. 959—30g to 959—30i:

"Where any contract has been entered into by the city, as hereinbefore provided, certificates and improvement bonds may be issued in the manner provided by subchapter 18 of chapter 40a of the revised statutes." Sec. 959—30i.

Sec. 959—34 requires the city clerk to enter in the tax roll "the amount of the annual instalment assessment, together with the accrued interest, against the several pieces of property on said tax roll according to the assessment list * * * until the entire amount chargeable to said property * * * shall have been taxed and levied against such property; and such assessment shall be collected by the city treasurer as other taxes are collected by him. * * *."

This language applies to delinquent assessments. The only collection the local treasurer can make is to return the uncollected taxes to the county treasurer. It is true that this section and the one preceding it relate specifically to improvement bonds, but ch. 71, laws of 1901, mentioned only special assessment certificates. Possibly the legislative idea was that those two sections made express provision for what had been left, in ch. 71, to implication. Be that as it may, it seems to me that the two statutes cover certificates and bonds and make the procedure upon a delinquent return identical in the two cases.

The general charter provisions for city improvements before referred to cover the matter of collection of special assessments and provide for foreclosure of bonds and for treatment of the same, when entered in the tax roll, as other taxes. Secs. 925—196 to 925—197a. The general provisions for city improvements are repeated as to sidewalks, subch. XIX; sewers, subch. XX; and drainage districts, secs. 925—270 to 925—294, inclusive.

While the city is not interested in these liens as owner, the evidences of the indebtedness are issued by the city, and the city and county are required by statute to furnish the machinery for collecting the same. Nor does the city do so, or the county, without remuneration. The two per cent collection fee provided by sec. 1090 applies to items covering special assessments, and the percentage goes to the town treasury, and where the special

assessments are returned delinquent and handled by the county this two per cent penalty and other penalties and charges are retained by the county. When the land is finally redeemed from this lien

"the amount collected, exclusive of collection fees and charges shall be paid to the owner of the special assessment certificate." Sec. 926—137.

The same is undoubtedly true where the collection is to pay improvement bonds. The amount which the county must deliver to the bond holder when collection has been made is the amount stated in the bond. The collection fees, penalties and charges are in addition to the amount stated by the bond and are retained by the county.

Public Officers—Counties—County Board—When a county board has not granted or delegated the power to a standing committee to build a barn on the county farm no committee has such power and the county board must act in the matter.

June 1, 1918.

M. R. MUNSON,

District Attorney,

Prairie du Chien, Wisconsin.

In your letter of May 17 you state that your county board has been operating under the county system of caring for its poor; that it owns a county farm, has a county superintendent of poor, also a county committee on poor; that this county committee, elected by the county board at a regular session held in November, is a standing committee and serves for one year and audits all accounts or claims against the poor fund, supervises the operation of the farm and has general charge of all affairs pertaining to the farm and poor; that at the regular session of the county board a committee on public property is also appointed by the chairman of the board; that this committee looks after all repairing necessary for county buildings; that on the 10th day of this month the barn on the county farm burned and that it will be necessary to rebuild the same before another meeting of the county board.

You state that there has been no specific authority delegated to either of said committees on this matter, that the expenditure involved will probably amount to \$1,000; and you inquire which committee can enter into a valid contract for the erection of a barn on said farm, or whether the county board would be required to elect a special committee and delegate to it the authority to build said barn.

In answer to your inquiry I will say, in view of the fact that no power has been delegated to either committee to-erect a barn involving the expenditure of \$1,000, that neither of these committees will have the right to proceed with such building. The power to erect the barn is lodged in the county board and cannot be exercised by any of the committees under the powers granted to it at the present time.

Under sec. 668, it is provided that any county board may by resolution designate the purposes and prescribe the duties of committees to be appointed, and when appointed shall perform the duties as prescribed in such resolution.

I am of the opinion that it will be necessary to have a special meeting of your county board in order to pass upon the question whether a new barn is to be erected. The county board will then have the power to delegate either to a special committee appointed for that purpose or to any of the standing committees the right to carry out the erection of such barn.

Intoxicating Liquors—Licenses—Under facts stated no license can be granted for a new location.

June 3, 1918.

EDWARD W. MILLER,
District Attorney,
Marinette, Wisconsin.

In your letter of May 31 you state that on July 1, 1907, there were lawfully issued retail liquor licenses in the town of Niagara exceeding ten in number; that since that time the village of Niagara has been created out of the town of Niagara, and the population outside of the village of Niagara is less than 500; that there is one saloon duly licensed outside of the village of Niagara, which license was granted by the town board of the

town of Niagara; that the said village has five saloons duly licensed and that at the last spring election the village voted dry; that application is now being made by one of the saloon keepers of the village of Niagara for a license in the town; that he has operated a saloon in the village in its present location since 1907. You inquire whether or not the town board of the town of Niagara has authority to issue any further liquor licenses in said town, inasmuch as the population outside of the village, in the town of Niagara, does not exceed 500.

This question must be answered in the negative. The town of Niagara has not exceeded the ratio in the so-called Baker Law, and no more than one license can now be granted in said town. See *Koch v. State*, 157 Wis. 437; *State ex rel. Owen v. Scholten*, 165 Wis. 88.

This is not a case where the party has brought himself within the exception where a tenant is authorized to receive a license at a new location by reason of the fact that such license was "refused by operation of law." A license in that case can be granted only in the same municipality in which the license was refused for the old location.

Public Officers—Town Board—Village Board—A town board in a town containing an unincorporated village may be authorized to exercise the powers of a village board by a resolution duly passed at a town meeting.

June 5, 1918.

STATE BOARD OF HEALTH.

In your letter of June 4 you state that you have a communication from a citizen of Holcombe, in which the question is asked:

"Who are the legal owners of the sewer system for the unincorporated village of Holcombe?"

You state that it appears that a realty company, when platting the village, constructed the sewers; that at the present time they need cleaning and some repairing but the town board refuses to do anything, stating that there is no law authorizing them to expend money for the repair of sewers located in this unincorporated village; that the cellars are full of water and the sewers

are dammed up, and you inquire what can be done in a situation of this kind.

It is true that town boards have not the power to construct a sewerage system in a town having no unincorporated village, but see. 776, subd. (13), reads:

"All powers relating to villages and conferred upon village boards by the provisions of chapter 40 of the statutes, excepting those, the exercise of which would conflict with the statutes relating to towns and town boards, are conferred upon towns which contain a population of not less than five hundred and having therein one or more unincorporated villages, and may be exercised by the board of such town when directed by resolution of the electors thereof at an annual town meeting."

The village of Holcombe, being of considerable size, I presume that the town will have a population containing at least five hundred inhabitants, so that this provision is applicable. Village boards are given the power to open, lay out, widen or extend sewers, under subd. (11), sec. 893. The town board, if it has not been directed by resolution of the electors at the annual town meeting to exercise the powers of village boards, may be authorized to do so at a special town meeting, for at special town meetings any business may be transacted that could lawfully be transacted at the annual town meeting, under sec. 788.

Ch. 40, referred to in said sec. 776, subd. (13), was, at the time the law was enacted, the chapter pertaining to villages. The number of the chapter has been changed since but this will not affect in any way the true meaning of this provision.

Ch. 45q now contains the provision relating to villages.

In answer to the specific question asked by your correspondent I will say that the sewerage system in the unincorporated village of Holcombe is owned by the property owners in which the same is located.

You have also asked the question: What can be done in a situation of this kind? In answer to this I will say that I think a special town meeting should be called, at which the town board should be authorized by resolution duly passed to exercise the powers of the village board relative to sewerage systems and to repair the sewerage system in the unincorporated village of Holcombe,

Mother's Pensions—No period of residence is required as to a child.

Place of legal settlement is not material; poor aid is no bar to acquiring a residence.

June 5, 1918.

HONORABLE OSCAR W. SCHOENGARTH,

County Judge,

Neillsville, Wisconsin.

Under date of May 29 you submit the following:

"(1) Harry Jones is left an orphan in A. county and his uncle lives in B. county, and has lived in B. county over 6 months. Can Harry Jones move to B. county to live with his uncle and immediately apply for a pension to be paid by B. county? Subd. 5, sec. 573f, requires that 'the mother, grandparent or such other person must have resided in this state one year and in the court in which application is made for aid six months' but does not state that the child must be a resident of the county from which aid is asked.

"(2) Suppose James White is 10 years of age and his mother, being a widow and destitute, is receiving aid under sec. 1500, etc., as a town pauper from the town of Warner, Clark county, and the mother while receiving such aid moves to the town of Loyal, Clark county, where she still receives aid at times during the year from the town of Warner. After living in the town of Loyal two months James White, the son, through his mother applies for a mother's pension from the town of Loyal. What are his and the town's rights? The mother's 'legal settlement' while supported by town of Warner remains there no matter where she lives. Is her 'residence' sufficient in the town of Loyal to make that town liable for the minor's pension? Or is the aid given by the town of Warner to the mother also aid to the child so that both have a legal settlement in the town of Warner and as paupers of Warner can they gain a 'residence' in Loyal while being supported under sec. 1500 by Warner?"

(1) The place of residence of Harry Jones presents the real difficulty. Minors have little control over their place of residence. The general rule is that their residence is fixed by that of their parents. The law on the subject is not very well settled in Wisconsin. Under some circumstances the courts hold that an orphan takes the place of residence of those who stand in the relation of parent to the minor. I am inclined to think that should be the rule in the administration of sec. 573f. Vol. VI, Op. Atty. Gen., p. 767. (November 23, 1917.) I am of the opinion that the child must be a resident of the county granting

the aid. You will notice that subsec. 1, sec. 573f provides how the needs of a dependent child may be brought to the notice of the "county court of the county in which such child resides." By necessary implication it makes residence of the child in the county essential to the jurisdiction of the court. It is to be noted, however, that such residence need merely exist, and that there is no requirement for the time it must have existed, while as to the mother or grandparent or person having the care and custody of the child, the residence in the county must date back at least six months. Subsec. 5. Aid may be granted by B. county under circumstances named by you to Harry Jones, if the judge finds that Harry is a resident of said county.

(2) James White takes the residence of his mother and both reside in Clark county. Therefore all of the conditions as to the residence prescribed by sec. 573f, Stats., are satisfied. Residence, and not legal settlement in a town, is what determines the town's liability under this pension statute. Receiving aid as a pauper does not prevent the poor person from changing her place of residence, while it does prevent her from establishing a new legal settlement. Under the facts stated by you it seems plain that Mrs. White resides in the town of Loyal. Therefore that town is liable to the county for aid granted under the section in question. Vol. VI, Op. Atty. Gen., p. 767; Ibid., p. 115; Vol. V, Op. Atty. Gen., p. 124.

While you say nothing on the point, I think it well to call attention to the last sentence of subsec. 6, sec. 573f, wherein it is provided that "such aid shall be the only form of public assistance granted to the family," etc. To entitle James White or his mother to aid under sec. 573f she must discontinue receiving aid as a poor person under ch. 63, Stats.

Corporations—Building and Loan Associations—Plan of company transactions as submitted does not conflict with building and loan association and investment association laws.

June 6, 1918.

HONORABLE A. E. KUOLT,
Commissioner of Banking.

In your communication of May 15 you submit the articles of incorporation and amendments thereto of the Peters Home

Building Company, a corporation organized under the laws of the state of South Dakota, with a business office located at Minneapolis, Minnesota.

You submit also copies of advertising matter issued and sent out by said company and with it the following communication:

"I send you herewith copies of the advertising matter of the Peters Home Building Company of South Dakota, and ask you to render an opinion to this department as to whether or not this company would be prohibited from doing business in Wisconsin under the mutual building and loan association law, or under the investment company law."

In addition to the above data I have had a personal interview with Mr. H. T. Park, attorney for the company, and have before me a written communication from him with reference to the plan upon which the company transacts business, from which I quote the following:

"The proposed purchaser must first own his lot clear of encumbrances; he then enters into a contract with the Peters Home Building Company whereby it is agreed that the Peters Home Building Company shall construct a house according to the plans and specifications attached to the contract, and upon the completion of the building the purchaser of the lot secures a first mortgage of approximately 50% of the total value of the building constructed and the lot. If the purchaser is unable to secure the loan, which usually is the case, the Company is in touch with real estate firms and mortgage companies, who appraise the property and place a loan upon it of approximately 50% of the value to run for three years, and often for five years, at current rates of interest then in force, which is usually 6% per annum, payable semi-annually.

"The Company then accepts a second mortgage upon the property for the balance due it for the contract price of the building so constructed; this mortgage is payable in monthly installments upon the basis of 1% of the principal, to which is added the interest at 6% per annum, computed monthly upon the balance remaining unpaid from month to month; thus the monthly payments are reduced each month until finally the second mortgage is entirely wiped out by payment.

"The purchaser, of course, assumes the payment of the interest upon the first mortgage and taxes upon the property.

"There is no Certificate of Membership in the Company issued to any purchaser, nor has the purchaser any interest in the profits of the Company; nor does the purchaser pay or deliver to the Company any sum or sums whatsoever as advance-

ments or deposits; nor does the Company in any manner act as the Agent of the purchaser other than to the extent of constructing a house, and when the Company accepts the second mortgage referred to, its interest in the transaction is entirely closed. In fact very often the Company finds it to its advantage to sell the second mortgage and the payments are then made to the new owner and the transaction with the purchaser is entirely closed on the books of the Company."

The company has applied to the Wisconsin railroad commission under secs. 1753—48, *et seq.*, for a permit to sell securities in the state of Wisconsin, and the question before us is whether or not the company's plan of transacting business brings it within the provisions of the building and loan association law of this state or the investment association law as contained in ch. 93, Stats.

The articles of the company give it power to "loan money and funds both for itself and as agent for others," and the question is raised as to whether or not this does not render it a building and loan association under the Wisconsin law.

The essential powers of a building and loan association are given in sec. 2011, Stats., and include the power:

"To issue stock to members; to assess and collect from members fees, dues, fines, interest, premiums and other charges; * * * to permit or force members to withdraw all or part of their stock," etc.

Among the essential differences is the fact that the applicant company does not issue a membership, and the persons dealing with the company do not share in the profits of the company, nor are they liable to assessment for any deficit the company may have. Persons dealing with the company carry on merely a separate transaction in each instance, and when the transaction is finished the relations between the parties cease. The individual knows at all times just what his obligation is to the company, as he has a contract which is fixed and definite.

The investment association law, sec. 2014—27, provides, in part:

"No person and no copartnership, association or corporation [which person or company is a part of its plan of operation], whether local or foreign, * * * 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 anything of value at some future date, * * *."

By sec. 2014—28 these provisions of ch. 93 are applicable to other investment companies enumerated in sec. 2014—27, whether they be building and loan associations or not.

It will be noted that the class of companies in sec. 2014—27 is those that solicit payments and hold as a depositor funds of another with agreement to return to the holder at some future date.

From the representations made and filed with the railroad commission under sec. 1753—51, subsec. 2, it is very apparent that the applicant company does not hold any funds of the persons dealing with it with any agreement to pay back at any future time. Every payment of principal that is made on the installment plan or otherwise is indorsed upon the mortgage or other evidence of indebtedness and reduces the principal by that amount. The company at no time holds the funds belonging to the person with whom it is transacting business.

It is obvious from a reading of the entire building and loan association and investment association law that the practice sought to be prevented was that by which a company would accumulate funds belonging to another without making the depositor secure in every respect. The plan of transacting business submitted by the applicant company does not permit of the abuse that is sought to be corrected in the building and loan association and investment association laws.

You are therefore advised that the applicant company is not prohibited from doing business in Wisconsin under the building and loan association and investment association laws.

Taxation—Under sec. 1138m the county is the exclusive purchaser; no other bid is permitted.

June 7, 1918.

O. J. FALGE,

District Attorney,

Ladysmith, Wisconsin.

I quote from your letter of June 5, 1918:

"Acting under section 1138m of the Wisconsin statutes, the county board of Rusk county, authorized and directed the county

treasurer to bid in and become the purchaser of land sold for general taxes. We desire your interpretation of the above named section of the Wisconsin statutes, along the following lines.

"First. May the county treasurer refuse any and all bids by outside parties on land sold for taxes except where there are outstanding certificates of sale? That is, in case the land sold for taxes is mortgaged, can the county treasurer refuse a bid for the delinquent taxes by the mortgagee or his representative?

"Second. Does the county treasurer become merely a bidder with other bidders at the tax sale?

"Third. If he does become a bidder, that is enters into competition with other purchasers, may he stop bidding when he chooses or must he bid to the limit and become the purchaser of the certificate?"

Said sec. 1138m provides:

"The county board of any county may authorize and direct the county treasurer to bid in and become the purchaser of any or all such lands as are sold for general taxes only for the amount of such general taxes, interest and charges remaining unpaid thereon, excepting such lands against which there are outstanding certificates of sale," etc.

This statute in my opinion answers your first question in the affirmative, and your second question in the negative.

The answer to your third question is that there is no competitive bidding for the lands in the class created by said section.

The lands in the class named are taken by the county for delinquent taxes and the charges. That is the simple, plain effect of the statute and the act of the county board. No bidding in the real sense takes place. The county is the purchaser to the exclusion of all others. The lands are not offered for sale to the highest bidder. The proper practice requires that the county treasurer merely announce that the lands within said class are sold to the county. Bidding is confined to the lands which are sold for something other or in addition to the general taxes or against which there are outstanding tax sale certificates.

While it is aside from the question, I deem it proper, in view of what you said about mortgages, to call your attention to secs. 1158, *et seq.*, which protect lien holders as to taxes and enable them to recover moneys paid for taxes and interest at the rate of ten per cent per annum.

Corporations—Trade-Marks—The name "Lincoln," being a fanciful or historical name, may be registered as a trade-mark.

June 7, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

I have yours of June 4, submitting the application of Mr. John H. Kuenzli, Milwaukee, Wisconsin, for the registration of the word "Lincoln" as a trade-mark, together with his affidavit, stating, among other things, that "no other person, firm, association or corporation has the right to such use" of said word. A facsimile of the trade-mark or form of advertisement consisting of a metal plate and having impressed thereon the words "J. H. Kuenzli, Lincoln, Milwaukee, Wis." is attached thereto.

This metal plate is intended to be affixed to bicycles, which machines are being manufactured and sold by said J. H. Kuenzli.

You wish to know if you are authorized to register this trade-mark.

Trade-marks are authorized to be filed and recorded in the office of the secretary of state, under the provisions of sec. 1747a. The application and the affidavit seem to be in due form and contain the statement of facts required by said section. I take it that you are in doubt as to whether the word "Lincoln" may be used as a trade-mark.

In an opinion by my predecessor, found in Opinions of Attorney General for 1912, p. 997, it was held, among other things:

"The office of a trade-mark is to point out the true source, origin or ownership of goods to which that mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. * * *

"Words merely descriptive of the kind, nature, style, character or quality of the goods or articles sold cannot be exclusively appropriated and protected as a trade-mark. * * *

"Words of a generic or geographical character or merely descriptive of the article manufactured, which can be employed with truth by other manufacturers, are not entitled to legal protection as trade-marks. * * *

"Arbitrary or fanciful words or phrases may be registered as trade-marks."

voted to construct or repair any bridge wholly or partly within such town, designating as near as may be the location of such bridge, and further stating that such town has provided for the payment of such proportion of the cost of such construction or repairs as is required by this section, the said county board shall appropriate such sum as is required by this section to be paid by the county and shall cause such sum to be levied upon the taxable property of the county as will, with the amount provided by said town, be sufficient to defray the expense of erecting or repairing such bridge so petitioned for, and such money, when collected, shall be paid out on the order of the chairman of the county board and county clerk whenever the said town board and the commissioners hereinafter provided for shall notify them that the work has been completed and accepted."

The question presented in your letter has, in connection with the construction of highways, had the consideration of our state supreme court, in the case of *State ex rel. Cary v. Ballard*, 158 Wis. 251. This was a mandamus proceeding in which certain of the provisions of secs. 1317m—1 to 1317m—16, Stats. of 1913, known as the County Highway Law, were attacked on constitutional grounds. The general scheme of this act was to create a system of county highways and provided that the expense of the construction of such highways was to be paid, one-third by the town, one-third by the county and one-third by the state, under conditions therein imposed. Sec. 1317m—4 of said law provided that the electors of any town, village board of any village or the common council of cities of certain class and population could vote to raise a tax of not less than \$250 for building bridges on a prospective state highway or a tax of not less than \$400 for improving a portion of a prospective state highway, and thereby became entitled to a like amount from the county and state.

Subsec. 4 of the aforementioned section read as follows:

"Any sum of money bequeathed to a town, or collected and donated to a town, for the purpose of securing the improvement in any one of the manners specified in section 2 of this section, of any portion of the system of prospective state highways lying in the town, may be accepted by the town board, and the subsequent procedure shall be the same as if a tax of like amount had been voted under the provisions of subsection 1 of this section,"

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All of sec. 1817m—4 excepting subsec. 3 thereof was upheld by the decision of said court. In other words, the validity of subsec. 4, above quoted, was sustained by said decision.

Sec. 1347t, Stats., authorizes bequests and donations to towns, cities, and villages for the construction of highways.

I believe that the question submitted in your letter should be decided in harmony with the decision of our court in the case above cited. While it is undoubtedly true that the county board may, under the cases noted by you, investigate as to the truth of the facts alleged in any petition under sec. 1819, we are here presented with a fact. The money voted by the town is in its treasury, appropriated for the purpose of constructing the bridge. Whether this money is donated or whether a tax was levied by the town in order to raise the money is immaterial. The town has voted the money, and the money is in its treasury for the purposes set forth in sec. 1819. In my opinion there is nothing for the county board to do but to appropriate its share towards the construction of said bridge.

It has repeatedly been held that the county board has no discretion, and when a petition in due form is presented, making allegations of fact which are not subject to dispute, the county can be compelled by mandamus to aid the town in the construction of a proposed bridge. See Opinions of Attorney General for 1910, p. 77.

Indians—Taxation—The property of an Indian who is not a citizen is not taxable.

June 12, 1912.

HONORABLE J. B. BORDEN, *Executive Secretary,
State Council of Defense.*

In your letter of June 8 you state that you have received an inquiry from a citizen of Wisconsin asking if an Indian is exempt from paying taxes, buying liberty bonds, or working his own lands, and you submit the question to this department for an opinion.

Concerning the taxation of Indian property I will say that under subd. (6), sec. 1038, the property of Indians who are not citizens, except land held by them by purchase, is exempt from taxation. Indians who have received allotments under the

Dawes Act of 1887 (24 Stats. at Large 388) are full citizens and entitled to all the rights, privileges and immunities of citizens and they are subject to the criminal and civil state laws. See *Matter of Heff*, 197 U. S. 488; *U. S. v. Celestine*, 215 U. S. 278.

Concerning the purchase of liberty bonds, this, of course, is not compulsory on any one. It is a moral obligation rather than a legal obligation, and the same is true as to working of his own land. The Indian, of course, owes as great a patriotic duty to the United States as does any other resident of the country.

Appropriations and Expenditures—State Fair—Toilets may be constructed in and as part of the grand stand at the state fair.

June 12, 1918.

HONORABLE C. P. NORRIS,

Commissioner of Agriculture.

In your favor of June 10 you say that you are considering the erection of toilets and lavatories on the third floor of that part of the grand stand at the fair grounds already erected; that the purpose of this is to make this floor useful for a new educational department; that owing to the height it cannot be used for exhibition purposes; that you also wish to make these toilets available in connection with the seating capacity of the grand stand, and you ask whether or not such additional construction on this part of the grand stand already built is within the scope of sec. 20.60, subd. (6), par. (e), Stats., making the appropriation for the construction of the grand stand. You state that the purpose of the grand stand is primarily for seating capacity, but that a very large amount of floor space for exhibition purposes and other uses is provided, lighted, and otherwise prepared for use under the stand.

Sec. 20.60 is the statute making the appropriations for the department of agriculture, and sec. 20.60, subd. (6), par. (e), provides for the appropriation of the general fund to the department of agriculture as follows:

"Construction. On July 1, 1918, fifty thousand dollars, and on July 1, 1919, fifty thousand dollars, for construction of a grand stand," etc.

It will be noted that this language appropriates the money therein specified for the construction of a grand stand. It will be presumed and assumed that this grand stand is at the state fair grounds, from other parts of the section. It will be noticed that the language of this appropriation is broad and general. It leaves to the agricultural department and the officials having the administration of this fund a broad discretion as to details. The amount of the fund is specified and it must be expended for the construction of a grand stand. All of the other details are left to the discretion of the officers having the matter in charge. The term "grand stand" undoubtedly includes, as the term is now understood, more than merely providing seating capacity. Surely at this age of the world a grand stand for a state fair would include, when properly constructed, suitable toilet rooms. If the toilet rooms contemplated are made reasonably available in connection with the seating capacity of the grand stand, and it is deemed advisable to construct them primarily for that purpose and use, then I have no hesitancy in advising you that you have, under this section, authority to use part of the appropriation for that purpose. They must, however, to come within the terms of the appropriation, be made a part of the grand stand, and the primary purpose of their construction must be to make them available in connection with the seating capacity of the grand stand.

Public Officers—Industrial Commission—Architects—The industrial commission should not refuse to approve plans submitted under sec. 2394—52, subd. (13), merely because not signed or submitted by a registered architect.

June 12, 1918.

ARTHUR PEABODY, *Secretary,*
Board of Examiners of Architects.

In your favor of June 6 you state:

"The law requiring registration of architects in Wisconsin, chapter 73b—1, Wisconsin statutes, 1917, section 1, reads in part as follows:

"After January 1, 1918, no person doing business in this state shall use the term 'architect' as part of his business name

or title or in any way represent himself to be an architect, without a certificate of registration, as provided in this section."

You also call my attention to sec. 2394—52, subd. (13), which reads in part as follows:

"To require the submission of proper plans and specifications for places of employment and public buildings, also for elevators, toilets, and other permanent equipment of such buildings."

You inquire whether in the submission of plans from architects for inspection and approval of the industrial commission under the statute last quoted it would be proper for the industrial commission to approve plans submitted under said section signed and submitted by architects as such, when such architects are not registered in compliance with the statute as above cited.

Subd. (13), sec. 2394—52 concerns the powers and authority of the industrial commission and deals with plans and specifications for places of employment and public buildings, etc., and it is intended that the industrial commission shall supervise such buildings and structures with the sole view in mind of the public health and safety and the health and safety of employes. There is no requirement that such plans shall be submitted by licensed architects or even by persons skilled in architecture. The statute for the licensing of architects, in the main, is to be administered by the board of examiners of architects, with which the industrial commission has very little to do. I am inclined to the opinion that the industrial commission in passing upon plans and specifications under said subd. (13), sec. 2394—52, should not refuse to accept or approve plans and specifications because the same were submitted by an unlicensed architect. The industrial commission, I am satisfied, should look only to the sufficiency of such plans and specifications. I do not mean by this that they should not call the attention of the proper authorities to the fact that the persons submitting the plans are signing the same as architects, when they are not entitled to do so, but as far as the duties of the industrial commission go I think they are not properly concerned with whether the plans are submitted and signed by unlicensed architects or not, so long as the plans and specifications are sufficient to meet with their approval in all other respects.

Your other question is:

"Is such submission of plans by architects not registered an attempt to practice architecture unlawfully in this state?"

In reply to this question I would say that if the plans were signed by unlicensed persons as architects, undoubtedly it is a violation, otherwise it might or might not be, according to the circumstances.

Elections—Publication of Notices—Compensation for publication of special election and judicial election notices in one discussed.

June 12, 1918.

RALPH E. SMITH,

District Attorney,

Merrill, Wisconsin.

Your communication of June 16 received, in which you state that at the special session of the county board of Lincoln county held May 22, 1918, the Merrill Daily Herald filed a bill for the publication of the notice of judicial and special senatorial election in the sum of \$167.00, claiming compensation for 120 squares at the rate of \$1.00 per square for the first publication and 35¢ a square for each subsequent publication, but the committee of the county board having the matter under consideration allowed the sum of \$50.00, as the notice of the special senatorial election and the notice of the judicial election were made in one; and that the limitation of sec. 6.22, subd. (4), as to judicial notice would apply. You inquire whether or not this limitation will apply to the publication, or whether the Merrill Daily Herald is entitled to the compensation allowed for notices of special senatorial election in the same amount as it is allowed in general election.

Under said subd. (4), sec. 6.22 it is provided:

"The compensation to be paid for all publications pursuant to sections 6.21 and 6.22 shall be sixty cents per square for weekly papers, and one dollar per square for the first publication, and thirty-five cents per square for each subsequent publication in daily papers, but in cities of the third and fourth classes the total shall in no case exceed the sums hereafter speci-

fied, to wit: For a general election in weekly newspapers one hundred dollars, and in daily papers two hundred dollars; for a judicial election in weekly newspapers, twenty-five dollars and in daily newspapers, fifty dollars," etc.

There is no express limitation for notices in special elections, but the notices in a special election must be made in the manner of giving notice in general election. Sec. 7.05.

The publications are therefore made pursuant to secs. 6.21 and 6.22, and the compensation is one dollar per square for the first publication and thirty-five cents per square for each subsequent publication. It is contemplated by our statute that the publication of the notice is to be compensated for. I do not believe we would be justified in assuming that the notices in special elections should be given without compensation. The notices in the special election to fill the vacancy being made in the same manner as the notices in a general election, I am of the opinion that it necessarily carries with it the compensation that is paid for the notices of a general election. I am clearly of the opinion that the limitation in the compensation for the notices of the judicial election will not apply.

Public Officers—State Board of Dental Examiners—Dentists—
Fees paid by applicants for examination may be refunded under sec. 1410j in proper cases.

Board has no jurisdiction to relieve from operation of statute dentist who fails to register annually because in U. S. service.

June 12, 1918.

F. A. TATE, D. D. S., *Secretary,*
State Board of Dental Examiners,
Rice Lake, Wisconsin.

In your favor of May 27 you ask if the Wisconsin state board of dental examiners can return fees to applicants for examination who have failed to take the examination.

These fees are paid in under sec. 1410j, subsec. 1, which reads as follows:

"Said board may charge each person applying for a license to practice dentistry in this state, whether such applicant be ex-

aminated or not, a fee of twenty-five dollars, which, in no case, shall be returnable, unless from sickness or some other good cause such applicant was prevented from attending and completing such examination."

It seems very clear from the language of this statute that the legislature intended that the applicant who had paid the fee for this examination could have it returned, if he could bring himself within the provisions of this statute, that is, if he could show that from sickness or some other good cause he was prevented from attending and completing his examination. I understand the refunds you have under consideration are those of applicants who have, since paying in the fee, gone into the military service of the United States and thus have been unable to complete the examination. In such case the applicant should make out a bill against the state for the fee and show by affidavit the fact which prevented him from completing the examination. This should be verified as a claim against the state and approved by your board and then put through the regular channels of audit for payment by the state treasurer.

You also ask what action your board can take regarding dentists that have enlisted and are in active service to save them from becoming in arrears and thereby losing their license to practice in this state.

Sec. 1410g, Wis. Stats., requires each licensed dentist to annually cause his name and place of business to be registered by your board and to pay a fee of one dollar. Upon failure of a licensed dentist to register and to pay to the board annually the fee required he of course loses his right to practice dentistry in the state. The statute makes no provision for suspending the operation of this law to those registered dentists who have gone into the service of the United States. If anything is to be done to relieve those persons, it would have to be done by the legislature. There is no jurisdiction or authority given to your board to relieve them therefrom.

Labor—Child Labor—Agriculture—A child of permit age engaged in an agricultural pursuit needs no permit and is exempt from secs. 1728a to 1728j by subsec. 4, sec. 1728e.

June 13, 1918.

INDUSTRIAL COMMISSION.

In your favor of June 12 you state that subsec. 4, sec. 1728e provides:

"Nothing contained in sections 1728a to 1728j, inclusive, shall be construed to forbid any child from being employed in agricultural pursuits, nor to require a permit to be obtained for such child."

You state that the question has been presented to your commission whether this exception from the provisions of the Child Labor Law for children employed in agricultural pursuits is applicable to one or both of the following situations:

"1. A corporation operating an establishment for canning peas owns a farm on which it raises a part of the peas to be canned. On this farm it employs boys of permit age, who do no work in connection with the canning operations.

"2. A pea cannery contracts with farmers to harvest their crop. Boys of permit age are employed in these harvesting operations, but do not come in contact with the canning factory proper."

You ask whether the boys of permit age employed as indicated above are required to procure a child labor permit and are otherwise subject to the provisions of the Child Labor Law.

I have no doubt that said subsec. 4, sec. 1728e, exempts children of permit age from the provisions of secs. 1728a to 1728j, inclusive, so far as those sections require permits or prohibit them from being employed in agricultural pursuits. I think it is clear that in the two cases you mention the employment is an agricultural pursuit. Therefore, sec. 1728e applies, and such children so employed are not prohibited from such employment and are not required to secure a permit.

Public Officers—County State Road and Bridge Committee—
The term of office of the county state road and bridge committee is one year even though the county board attempt to elect for a different term.

June 14, 1918.

WISCONSIN HIGHWAY COMMISSION.

In your inquiry of June 7 you inquire as follows:

"If a county board electing a county state road and bridge committee at its November meeting provides for a term differing from that provided by law, does this action elect a committee for the term provided in the statute or is the election void?"

Subsec. 8, sec. 1317m—5 provides for the election at each annual meeting of the county board of the members of this committee, and provides that they

"shall hold their office for one year and until their successors are elected and have qualified."

The term of office, therefore, is fixed by the statute at one year, with the additional provision that they hold until their successors are elected and qualified.

The attempt by the county board to fix the term differently from that provided by statute is mere surplusage and ineffective. I am satisfied the committee should be considered as legally elected, but for the term provided by the statute only.

Indigent, Insane, etc.— The legal settlement of a person committed to a hospital for the insane continues while he is confined.

The settlement of a minor child of such parent is not affected by the detention of the parent at a hospital.

June 14, 1918.

E. S. JEDNEY,

District Attorney,

Black River Falls, Wisconsin.

You ask that I supplement my opinion to you of May 23, 1918,* relative to the place of legal settlement of Lillian Sa-

* Page 302 of this volume.

more. It appears from your letter and that of the county judge of Burnett county accompanying yours that Albert Semore—Lillian's father—resided in the town of Rusk, Burnett county, when she was sent to the state public school at Sparta; that the father on April 15, 1913, was committed from said county to the Wisconsin state hospital for the insane at Mendota and is still a patient at that institution. I infer that he resided and had a legal settlement in said town of Rusk when committed and has not voluntarily abandoned or lost either such settlement or residence.

His involuntary absence from the town of Rusk and as a patient under the commitment to the state hospital for the insane would not destroy such residence or settlement. Any doubt there may be as to the soundness of this statement must relate solely to the matter of residence. The statute leaves no room for doubt as to the continuance of Albert Semore's legal settlement where it was when he was committed.

"(7) Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost." Sec. 1500, Stats.

It follows therefrom and from what was said in the former opinion that Lillian has a legal settlement in the town of Rusk. That is the place of her father's legal settlement and minor legitimate children

"have the settlement of their father, if he have any within the state." Sec. 1500, Stats.

Agriculture—Criminal Law—Penalty for violation of quarantine order of state live stock sanitary board is prescribed by subsec. 5r, sec. 1492ab.

June 14, 1918.

HONORABLE C. P. NORGORD,

Commissioner of Agriculture.

I have your favor of June 11, regarding penalty that can be imposed upon one violating the quarantine ordered by the state live stock sanitary board under sec. 1492ab.

For the violation of such an order properly promulgated the penalties provided in subsec. 5r would apply. This statute provides that for such a violation the person

"shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than one year, or by both such fine and imprisonment, and the criminal penalty herein prescribed shall be cumulative for each animal involved in such violation."

I can give you no information regarding the penalty that could be inflicted in case of violation of an ordinance of the city of Burlington.

Taxation—Public Officers—County Board—A direction by the county board, under sec. 1138m, to the treasurer to purchase lands at tax sale is an implied order to him under sec. 1192 not to sell tax certificates held by the county.

June 18, 1918.

C. S. ROBERTS,

District Attorney,

Balsam Lake, Wisconsin.

I have been informed that your county board, exercising the authority vested in it by sec. 1138, Stats., ordered the county treasurer to purchase at the tax sale all lands authorized by said section to be purchased for the county and that your county treasurer complied with said direction.

By letter of June 14, 1918, you advise me that persons bid on every tract of land so purchased by your county treasury; that on the 13th inst. these same parties filed with the county treasurer lists of lands on which they had bid and demanded under the authority of sec. 1192, Stats., the surrender to them of the certificates for the lands purchased by the county; and that you advised the county treasurer not to comply with the demand, and the delivery and surrender was refused.

You state further that mandamus will shortly be asked to compel the delivery of these certificates, and you ask for my advice and assistance in the premises.

In my opinion the enactment of sec. 1138m means a decided change of policy in the law upon this subject, and what is said relative to the purpose of requiring the county to purchase in certain cases in the *Town of Iron River v. Bayfield County*, 106 Wis. 587, 593, must now be read in view of this change of policy on the part of the legislative branch of government. In reading that decision we must also bear in mind that the county board of Bayfield county had given no order to the county treasurer not to sell tax certificates. Authority to make such order is too plainly given to be misunderstood.

"(1) The several county treasurers, *when no order to the contrary shall have been made by the county board* shall sell and transfer, by assignment, any tax certificates held by the county to any person offering to purchase the same for the amount for which the land described therein was sold, with interest * * *; but every such sale shall include all certificates in the hands of such treasurer on the same lands." Sec. 1192, Stats.

The necessary implication is that the county may "order to the contrary." Prior to the enactment of sec. 1138m the evident policy and purpose of the proceedings subsequent to the return of the lands delinquent were the collection of the taxes. The change in policy enacted by the statute is plainly to give to counties the opportunity to reap the benefits or profits which individuals have heretofore obtained by investment in tax sale certificates.

The direction to the county treasurer to purchase in behalf of the county at the tax sale is also an implied order to him not to sell the tax certificates issued to the county. It is to be desired that this be not left to implication but that county boards which exercise the authority given by sec. 1138m should also expressly exercise that conferred by subd. (1), sec. 1192, and explicitly order the county treasurer not to sell these tax certificates; but as before stated, such order, I think, must be implied. To require the treasurer on the order of the county board to purchase the lands sold for taxes and to then immediately require the treasurer under sec. 1192 to surrender those certificates to any individual applying therefor would be ridiculous, would nullify the purpose of sec. 1138m, and might work an injury to the land owner without any corresponding compensation to anybody except speculators in tax certificates.

To my mind the only reasonable construction that can be placed upon the action of the county board and the provisions of these two sections of the statutes is to the effect that the direction of the county board to the treasurer to purchase certificates is also an order to him not to sell the certificates.

As to the validity of sec. 1138m, Stats., an opinion was given to the district attorney of Rusk county June 7, 1918.* I can think of no constitutional provision on which sec. 1138m impinges. It authorizes a general or very considerable extension of the provisions of statute, long existing, and which had never been so much as questioned on the score of constitutionality. By sec. 1138 the counties were required to take the leavings, to take what the tax certificate speculators did not want.

Sec. 1191 excluded all competitors and required the county to be the exclusive purchaser at the tax sale of all

"real property upon which the county holds any certificate of tax sale."

If the county may be the exclusive purchaser of lands which were forced upon it at a prior sale and can be required to take at any sale all lands for which there is no legal bid, it must be within the power of the legislature to give the county the preference and authority found in sec. 1138m.

I presume that in a mandamus proceeding, if one be instituted, there will be no dispute of fact, but that an issue of law merely would be raised. Should the petition for the writ allege all the material facts, the legal issue would naturally be raised by a motion to quash. On the other hand, should the petition fail to state the action of the county authorities, a return to the writ would have to be made wherein those facts were set up. A demurrer to the return would likely follow and thus present the legal issue. Of course, the case would really involve no more than the construction of a few sections of our statutes. A search for decisions or similar statutes in other jurisdictions should be made to aid the court to arrive at a correct decision. That work, I think, should be done by the district attorneys of the counties having the direct interest, at least for purposes of the trial in the circuit court.

* Page 336 of this volume.

Live Stock—Public Health—No compensation is due the owner of animals afflicted with rabies upon slaughter of said animals.

June 18, 1918.

H. B. ROGERS,

District Attorney,

Portage, Wisconsin.

You ask for my opinion upon the question of whether or not compensation can be made to the owner of cattle ordered slaughtered by the state live stock sanitary board because the animals are afflicted with rabies.

You state further that such board has ruled that no compensation can be made, whereas the parties claim they are entitled to compensation.

Practically the same question is answered in an opinion given to the secretary of state November 15, 1911, Opinions of Attorney General for 1912, p. 556, in these words:

"This is a question of fact, rather than one of law. It would seem to me that the State Veterinarian or the State Live Stock Sanitary Board could answer this question better than I can. The law provides for the appraisal of the animals and that the appraisers shall determine their value in the condition in which they are found at the time of such appraisement.

"The persons appointed as appraisers should be familiar with this provision of the law and if, as a matter of fact, the condition of the animal is such as to render it of no value, they should so report in making their appraisal and should not put a value upon it." P. 559.

By sec. 1492ab it is made the duty of this board to employ the most efficient and practical means for the control and eradication of dangerous diseases among domestic animals, and for these purposes it is hereby authorized to establish quarantine and regulate the movement, care and disposition of animals as it may deem necessary.

It is provided by sec. 1492b, Stats., among other things, that when the board shall deem the slaughter of a diseased animal necessary and it cannot agree with the owner of such animal as to its value, the animal shall be appraised by three disinterested citizens appointed by a justice of the peace.

"In making the appraisement of diseased animals the appraisers shall determine their value in the condition in which

they are found at the time of the appraisement; but the appraised value of no single animal shall exceed the actual market value thereof at the time of such appraisement; * * *."

The board and the state veterinarian claim that a rabid animal has no market value; that it is a menace to the life of man and beast, in other words, that it is a liability and not an asset. This is a position, I think, from which very few disinterested persons would dissent. Aside from being a menace, an animal afflicted with rabies is sure to die in a short time. It cannot possibly have any market value. It is safe to say that no one ever paid a dollar for such an animal, or ever will knowingly, unless it be for scientific and experimental purposes. So the question really resolves itself into one of fact. Conceding that an animal has the disease mentioned, it has no market value, and no person having the qualifications required of appraisers can conscientiously place any value thereon.

Peddlers—Fish venders are no exception to the rule that all peddlers must be licensed.

June 18, 1918.

C. J. SMITH,

District Attorney,

Viroqua, Wisconsin.

You have just now, by telephone, requested my opinion as to whether or not a person who peddles fish must have a peddlers' license. You are advised that the statute makes no exception in favor of fish venders.

"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 as provided in sections 1570 to 1584*i*, inclusive." Sec. 1570, Stats.

You will observe that the statute is perfectly general in its terms. I find no exceptions whatsoever. In that situation I must advise you that fish peddlers need a peddlers' license to make their business lawful. In this connection I inform you that the state treasury agent has so ruled, and that the licensing of fish peddlers is a common occurrence.

Weights and Measures—Subsec. 10, sec. 1668 governs as to berries named therein and other similar berries, while subsec. 11 of said section governs as to all other fresh fruits and vegetables.

June 22, 1918.

HONORABLE GEORGE J. WEIGLE,

Dairy and Food Commissioner.

In your favor of June 21, you inquire whether it is permissible to sell cherries by weight. You explain that the cherries are contained in eight pound boxes, and you desire to know whether from these eight pound boxes sales can be made of one pound, one-half pound, etc., and you refer to a seeming conflict in the provisions of subsec. 10 and subsec. 11 of sec. 1668, Stats.

Said subsec. 10, in part, reads as follows:

"All sales of blackberries, blueberries, currants, gooseberries, raspberries, cherries, strawberries, and similar berries in quantities of less than one bushel shall be by the quart, pint, or half-pint, dry measure, and all berry boxes or baskets sold, used, or offered for sale within the state shall be of the interior capacity of not less than one quart, pint, or half-pint, dry measure. * * * *."

Said subsec. 11 reads as follows:

"All sales of fresh fruits or vegetables in containers of less than one bushel dry capacity measure shall be in containers of the standard capacity of one quart, two quarts, three quarts, four quarts, five quarts, six quarts, eight quarts, sixteen quarts or twenty-four quarts standard dry measure, and such receptacles shall in fact contain the full capacity of such fresh fruits or vegetables, or if in other than standard containers such receptacles for fresh fruits or vegetables shall be plainly and conspicuously marked to indicate the true net weight, measure or numerical count of such fruits or vegetables."

True, said subsec. 11 was enacted in its present form after the enactment of said subsec. 10, and there is no question but what the term of "fresh fruits" would, in a general way, include all of the kinds of berries specified in subsec. 10. The legislature, however, in enacting subsec. 11 must be presumed to have known of the existence of subsec. 10, and it is quite evident that subsec. 11 was enacted to include and cover in addition to vegetables those fresh fruits not specifically covered by sub-

sec. 10. I am satisfied that the two statutes should be read together and each be given its field of operation, if this can be done consistently. The berries designated in subsec. 10 and "similar berries" deal with a special class of fruit, and I think the statutes should be construed with this idea in view and that said subsec. 10 should be given its full force as to said special fruits, that is, the berries particularly designated "and similar berries," and that subsec. 11 should be construed as dealing with all other fresh fruits. In this way both of the subsections are given a full and consistent meaning without any real conflict.

I am satisfied, therefore, that the berries dealt with in subsec. 10 should not be considered as coming within the provisions of subsec. 11, and that the other fruits dealt with in subsec. 11 should not be considered as covering the berries dealt with in subsec. 10.

This interpretation of the statutes, which I am satisfied is the correct one, makes the answer to your question clear. The cherries are included under the provisions of and covered by subsec. 10, which requires them to be sold in quantities less than a bushel in quart, pint or half-pint measures and prevents their being sold by the pound or half-pound.

Fish and Game—Commerce—Interstate Commerce—Regulation limiting possession of bullheads to 30 pounds a day applies to shipments in interstate commerce.

June 25, 1918.

CONSERVATION COMMISSION.

You ask to be informed whether it is lawful for a wholesale dealer to ship bullheads, perch, sunfish, strawberry bass, calico bass or silver bass from another state, where such fish are legally caught, into Wisconsin during the open season for such fish in Wisconsin, to be shipped and sold to different retail dealers throughout the state and to be retailed to consumers.

Sec. 29.44 *inter alia* provides:

"No person shall transport or cause to be transported, or deliver or receive or offer to deliver or receive for transportation, into or through this state, * * * any game or game fish or car-

cass or part thereof lawfully transported from any other state, nor have the same in his possession or under his control, during the close season or in excess of the limitations prescribed for such animal in this chapter, unless a permit therefor has been duly issued to such person by the state conservation commission,
* * *."

Under sec. 29.19 the open season for bullheads in Wisconsin is during the whole year. The bag limit is thirty pounds each day, and there is no minimum length limit. Perch in all counties bordering on the Mississippi River and in Lakes Winnebago, Butte des Morts and Poygan, Fox River and Wolf River and tributary streams within Winnebago county have an open season from May 29 to March 1, while in all other waters the open season is during the whole year, with no limitations as to bag limit or minimum length. Sunfish in counties bordering on the Mississippi River have an open season from May 29 to March 1, and in all other waters an open season during the whole year. There are no limitations as to bag limit nor minimum length. Strawberry bass, calico bass and silver bass have an open season throughout the year, with no limitations as to bag limit or minimum length.

It thus appears that the only limitations for bullheads during the open season is as to quantity—thirty pounds each day. The question arises whether this limitation is applicable to shipments made from another state where said fish are legally caught. Under sec. 29.44, as above quoted, this limitation will apply to interstate shipments. The question confronting us is whether this provision is authorized in view of the delegation to the federal government of the exclusive regulation of interstate commerce.

The so-called Lacey Act was passed May 25, 1900, ch. 553, 31 Stats. at Large, 188. Sec. 5 of said chapter, as contained now in sec. 8708, 8 U. S. Comp. Stats. 1916, provides:

"All dead bodies, or parts therof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts therof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent

and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Secs. 2, 3 and 4 of the Lacey Law have been repealed by sec. 341 of the Criminal Code. See sec. 10515, 10 U. S. Comp. Stats. 1916. Sec. 5 of said Lacey Act has not been repealed and is still in force, as above quoted.

Under its provisions the laws of the state of Wisconsin are applicable to interstate shipments of fish and game as soon as they arrive in the state of Wisconsin. In 12 C. J. 61-62 we find the following rule laid down:

"* * * The states * * * to prevent the evasion of the state fish and game laws may restrict or prohibit the free importation and sale of fish and game from outside the state, and may make it crime to have in possession such fish or game, or to sell or offer it for sale. Indeed, the passage by congress of the so-called 'Lacey Act' which provides in substance that foreign game, when transported into any state, shall be subject to the laws of that state, enacted in the exercise of its police powers, to the same extent as if such game had been produced within such state, has taken away all questions of interstate commerce and given the states entire freedom to prohibit the importation of game into, or the exportation out of, its own territory, as well as power to prohibit the sale of imported game," etc.

In this connection I would call your attention to a recent case in the supreme court of the United States, *Silz v. Hesterberg*, 211 U. S. 31, in which that court held that it is within the police power of a state to prohibit possession of game during the close season even if brought from without the state, independent of the provisions of the Lacey Act. See also *Geer v. Connecticut*, 161 U. S. 519; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129; *In re Deininger*, 108 Fed. 623; *Sligh v. Kirkwood*, 237 U. S. 52.

You are therefore advised that the limitation as to bullheads of thirty pounds per day applies to those shipped into the state of Wisconsin from another state or territory. I have been unable to find any other limitations placed upon bullheads, or any limitations, as above said, upon perch, sunfish, strawberry bass, calico bass or silver bass.

I have not overlooked the provisions of sec. 29.47, to which

you refer me in your letter. The limitations contained therein are limited to fish from inland and outlying waters and those originating at any point in this state, but do not refer to importation from other states, so far as it relates to fish named in your inquiry.

Your specific question must, therefore, be answered in the affirmative, that is to say, bullheads, perch, sunfish, strawberry bass, calico bass and silver bass may lawfully be shipped into this state by wholesale dealers, to be reshipped to dealers and consumers, but the regulation as to bag limit for bullheads, as above stated, must be complied with.

Public Health—Registered Nurses—From 9 to 24 months' credit may be given in training schools for nurses, to college graduates who have had laboratory work in physics, chemistry and biology.

No credit in such schools can be given to health aides under state council of defense.

June 25, 1918.

HONORABLE L. C. WHITTET,

Secretary to the Governor.

In your communication of June 19 you refer to me a number of questions submitted to you by Dr. J. S. Evans, of the university clinic. Dr. Evans says that in reading the act relative to the registration of nurses passed by the 1915 legislature he finds that the state board of medical examiners and its subdivision, the state board of nurses' examiners are empowered to make such regulations as are necessary, which do not conflict with the spirit of the law, and he submits the following questions:

"1. How much credit may be given a college graduate fulfilling educational requirements as outlined by that amendment?

"2. Who decides how much credit may be given—the State Board of Medical Examiners or the Superintendent of the training school into which the girl enters?"

See. 1435c, Stats. 1917, contains the requirements for nurses which entitle them to registration. Pars. 3 and 4 require the applicant to be a graduate at the time of application from a reputable training school, and that such training school must

be connected with a general hospital and must require an adequate and systematic course of instruction for three or more years if the application is made before September 1, 1915; while if the application is made after September 1, 1915, the course of theoretical and practical training in the training school must be at least two years. The third paragraph contains the following proviso:

"* * * Provided that any college graduate who has completed college courses with laboratory work in physics, chemistry and biology may be given credit for such training school for at least nine months of such first two years," etc.

The fourth paragraph contains the following:

"* * * Provided that any such training school may give credit for at least nine months of such theoretical and practical training to any college graduate who has completed college courses with laboratory work in physics, chemistry and biology," etc.

These provisos were added by the amendment of ch. 4 of the laws of the special session of 1918. I must confess that the wording is peculiar but after a careful consideration of the matter I believe that a credit of from nine months to two years in the training school may be given under these provisos. It seems that the lawmakers had in mind that if any credit should be given for laboratory work in physics, chemistry and biology it should be at least nine months, but that it may be as much as two years. Nine months is the minimum expressly stated but no maximum credit is expressly given, so I take it that the necessary inference is that the maximum is two years, for the reason that that is the length of the two years' course.

In answer to your second question, I will say that the superintendent of the training school or other officer in control of the school is the one who decides how much credit may be given in the training school and the state board of medical examiners decide, when an application is made by a nurse for registration, whether the training school in which she had her training is up to the standard laid down in this statute.

You also direct my attention to the health aides trained under the supervision of the state council of defense to meet the war

emergency as authorized under ch. 356, Laws 1917, and you inquire:

"Is there any restriction in the Act to prevent training schools' giving credit to those young women who have completed the six months' training course for Health Aides, who may desire to continue the regular course of training in accredited training schools?"

This question must be answered in the affirmative. The statute expressly provides the length of the course of instruction in the training school and also provides what credit may be given for college graduates. There is no provision which authorizes a credit being given in these training schools for those who have completed the six months' training course for health aides.

I am therefore led to the conclusion that no credit is authorized to be given.

Elections—Public Officers—Secretary of state should inform county clerks of number of votes cast by soldiers in last election, although the statute does not require it.

June 26, 1918.

HONORABLE W. B. NAYLOR,

Assistant Secretary of State.

In your communication of June 24 you direct my attention to sec. 5.05, subd. (6), par. (d), which makes the highest vote cast for presidential electors the basis for estimating the number of signatures required on nomination papers for all candidates at the September primary. You state that there were many soldiers' votes cast for presidential electors in 1916, and that under sec. 11.81 the state canvassing board of 1916 was not required to certify these votes to the several counties, and that consequently the county clerks do not now have in their possession the complete data from which to compute the number of signatures required on nomination papers of county officers, legislatures, etc.

You state that it seems obvious that it is essential that both your office and the several county officers be supplied with the same complete figures, and that you are impressed with the

necessity of making a list of these figures and sending them to the county clerks regardless of the failure of the law to require it.

You ask for my opinion in this matter, coupled with suggestions as to how this should be done.

In answer I will say I have examined the statutes in question and it is apparent that there was an oversight by the lawmakers in not requiring under sec. 11.81 that the votes cast for the electors in each county by the soldiers be certified to the several county clerks of this state.

I believe your suggestion of making a list of those figures and sending them to the county clerks is a good one, and in view of the requirement of sec. 5.05, subd. (6), par. (d), that 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, it is an absolute necessity that this data be furnished to the county clerks of this state. My suggestion would be that you make a statement of the result of the canvass and the number of votes cast for the highest elector of each party in each county and certify to the same and forward it to the respective county clerks, together with a communication to them explaining to them why it was found necessary to do this. It may be well to suggest to them that publicity be given to the matter in the local papers so that the various candidates for nomination for political offices may be advised of the fact so that they may have the necessary data in order to comply with the statutes relative to the nomination papers.

Public Officers—Judgments—Under sec. 3716a, Stats., the secretary of state should apply towards the payment of judgments against state officers and employes, filed with him, any amounts due such officers and employes to reimburse them for expenses incurred.

June 27, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of June 25 you say that sec. 3716a, Stats., provides a method by which debts against state employes may be collected, and also provides for the payment of judgments filed

against any person, firm or corporation having money due from the state; that under an opinion rendered by my predecessor, which you believe was verbal, your department, when paying judgments against state officers or employes, has deducted only from the amounts due them as salary and has made no deductions from moneys due them for reimbursement for money advanced for traveling or other expenses; that the last session of the legislature amended this section to include the payment of judgments filed with you against any person, firm or corporation having money due from the state; that as the section now stands, the first part of it provides that judgment creditors may recover from any moneys due, and the latter part—particularly the old section—provides for certain exemptions when the money due is for salary.

You ask if, in case a judgment is filed with you against a state officer or employe having money due him for expenses as well as salary, or for expenses only, you have the right, or it is your duty under the law, to apply such expense money on any judgment which may be filed.

Sec. 3716a provides in part:

"Whenever any person, firm or corporation shall recover a judgment against any person, firm or corporation, and said judgment debtor at the time of the rendition of said judgment, or at any time thereafter during the life of said judgment, shall have money due, or to become due, from the state or any city, county, village, town, school district or other municipal corporation, said judgment creditor may file a certified copy of such judgment with the secretary of state or with the clerk of such county, city, village, town, school district or other municipal corporation, as the case may be. [Here follow provisions as to the duties of the proper officers upon the filing of such certified copy of judgment] provided that if the sum or sums due as aforesaid is for salary or wages of any officer or employe of any state, * * * the same shall be exempt from the provisions of this section to the same extent as salaries and wages are by law exempt from garnishment; * * *."

You will note that this applies to any moneys that may be due to any person, firm or corporation against whom such judgment is rendered and a certified copy thereof filed with you. That it is intended that all moneys due any officer or employe of the state, or any firm or corporation from the state, regardless of whether the moneys are due because of services rendered, goods

furnished, or expenses incurred on behalf of the state, for which the state should reimburse such officer, employe, firm or corporation, shall be included, seems clear especially in view of the specific exception from the moneys due of salary or wages of the same amount as is exempted from garnishment.

In my opinion money due from the state to reimburse an officer or employe for money advanced by him for traveling or other expenses is subject to the provisions of this section.

Bridges and Highways—Labor—Contracts—Eight Hour Day
—*Words and Phrases*—The provisions of sec. 1729m apply to contracts for the construction of bridges and highways under sec. 1321a, and ch. 175, Laws 1917.

Bridges and highways constructed by the state are "public works."

June 27, 1918.

HONORABLE M. W. TORKELSON,
Assistant Engineer,

Wisconsin Highway Commission.

In your letter of June 24 you ask me to advise if in my opinion the provisions of sec. 1729m, forbidding more than eight hours' work in any one calendar day on contracts made for the erection, construction, remodeling or repairing of any public building or works to which the state or any officer thereof is a party, applies to highways and bridges built by the state under the provisions of ch. 175, laws of 1917, or sec. 1321a, Stats.

Sec. 1729m provides, in part:

"Each and every contract hereinafter 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."

Sec. 1321a provides for the construction of bridges at the joint expense of the state, county and the city, village or town in

which the bridge is located. Subsec. 9 of said section provides that all contracts for the construction of such bridges shall be made and executed under the supervision and control of the state highway commission and that all moneys paid therefor shall be paid upon the order of the said commission.

Ch. 175, laws of 1917, provides for the improvement of highways by the state under the act of congress of July 11, 1916 (39 U. S. Stats. at Large, 355), providing for federal aid for highways so constructed. Sec. 1316 of that chapter provides that all contracts for road and bridge construction under that act shall be between the state and the contractor.

It necessarily follows that if bridges and highways are public buildings or works, sec. 1729m is applicable.

In a recent case in our supreme court, under an ordinance of the city of Milwaukee practically the same as sec. 1729m so far as material here, all parties seem to have proceeded on the theory that concrete work at the mouth of a tunnel emptying into a river was "public works," and in discussing the case Mr. Justice Rosenberry treats all public improvements, including streets, as such works, saying:

"In its capacity as a governmental agency the city is charged with the duty of determining the necessity and the extent and general character of all public improvements, *including streets, sewers, public buildings, lighting works, waterworks, and other public works*, and of providing for their construction and maintenance; * * *." (Italics ours.) *Milwaukee v. Raulf*, 164 Wis. 172, 179.

We believe that this classification is fully justified by the authorities and that streets and bridges should be considered as public works. We also believe that the word "public" as used in sec. 1729m applies to "works" as well as to "buildings."

Black's Law Dictionary defines the term "public works" as follows:

"Works, whether of construction or adaption, undertaken and carried out by the national, state, or municipal authorities, and designed to subserve some purpose of public necessity, use, or convenience; such as public buildings, roads, aqueducts, parks, etc."

Cyc. defines the same term:

"All fixed works contracted for public use." 32 Cyc. 1257.

Another well-known work defines the term:

"This term includes all fixed works constructed for public use, as railways, docks, canals, waterworks, roads, etc." 23 Am. & Eng. Ency. of Law (2d ed.) 459.

The Century Dictionary defines the term:

"All fixed works constructed for public use, as railways, docks, canals, waterworks, roads, etc.; more strictly, military and civil engineering works constructed at the public cost."

This latter definition has been referred to in several cases construing statutes of this kind.

Webster's New International Dictionary defines it as:

"All fixed works constructed or built for public use or enjoyment, as railways, docks, canals, etc., or constructed with public funds and owned by the public; often, specif., such works as constitute public improvements, as parks, museums, etc., as distinguished from those involved in the ordinary administration affairs of a community, as grading of roads, lighting of streets, etc."

We have not found this distinction made in any of the cases we have read. It may well be that the mere ordinary grading of roads, such as under the conditions formerly existing, was done annually in each town, and the mere lighting of streets should be considered in a somewhat different light than the more permanent public improvements, but the works contemplated by ch. 175, laws of 1917, and sec. 1321a, Stats., are both in the nature of permanent public improvements which would seem to come squarely within the term "public works."

The permanent improvement of public streets and highways seems to be quite generally considered as "public works," though in many cases that question is not specifically passed upon. *People ex rel. Rodgers v. Coler*, 52 L. R. A. 814, 166 N. Y. 1, 59 N. E. 716; *People ex rel. North v. Featherstonhaugh*, 60 L. R. A. 768, 172 N. Y. 112, 64 N. E. 802; *Lane v. State*, (Ind.) 46 N. E. 244; *Herrod v. State*, (Ind.) 43 N. E. 144; *State v. Sullivan*, 74 Ind. 121; *Dewey v. State*, 91 Ind. 173.

Federal District Judge Hanford uses the words "public works" and "public work" interchangeably and as synonyms. *United States v. Jefferson*, 60 Fed. 736.

Some of the dictionaries say that the term "public works" is improper, it being merely the plural of "public work," and that as ordinarily used both mean the same.

Under a statute exempting "public works" from taxation, a railroad has been held exempt. The court compares it to "a canal, turnpike or highway." *Worcester v. The Western Railroad Corporation*, 45 Mass. (4 Metc.) 464.

And so under constitutional authority to issue bonds for "perfecting public works." *Opinion of Justices*, 13 Fla. 699.

The supreme court of Michigan adopts the definition given in the Century Dictionary. *Ellis v. Common Council of the City of Grand Rapids*, (Mich.) 82 N. W. 244.

So does the supreme court of Minnesota. *Winters v. City of Duluth*, (Minn.) 84 N. W. 788.

In *Ellis v. United States*, 27 Sup. Ct. 600, 206 U. S. 246, 11 Ann. Cas. 589, Ellis contracted to construct a pier at the Boston Navy Yard, and under a statute similar to sec. 1729m, it was admitted that his employes "were employed upon 'public works.'" (P. 602 Sup. Ct., 257 U. S.)

In the same case, in considering those employed in dredging a channel in the harbor, the court said:

"The statute says, 'laborers and mechanics * * * employed * * * upon any of the public works.' It does not say, and no one supposes it to mean, 'any public work.' The words 'upon' and 'any of the,' and the plural 'works' import that the objects of labor referred to have some kind of permanent existence and structural unity, and are severally capable of being regarded as complete wholes. The fact that the persons mentioned as employed upon them are laborers and mechanics, words admitted not to include seamen, points in the direction of structures and away from the sea. The very great difficulty, if not impossibility, of dredging in the ocean, if such a law is to govern it, is a reason for giving the defendants the benefit of a doubt; and the fact that until last year the Government worked dredging crews more than eight hours is a practical construction not without its weight. A change seems to have been made simply for the sake of consistency between the different departments of the Government, as is stated in an order of the Secretary of War. A different conclusion is sought to be drawn from some appropriation acts, but they simply refer to the improvement of harbors in general terms among the public works for which appropriations are made. The improvement of a harbor may consist in the erection of structures as well as

in the widening of a channel, or the explosion of a rock. It is unnecessary to lay special stress on the title to the soil in which the channels were dug, but it may be noticed that it was not in the United States. The language of the acts is 'public works of the United States.' As the works are things upon which the labor is expended, the most natural meaning of 'of the United States' is belonging to the United States." (P. 602 Sup. Ct., pp. 258-259 U. S.)

There is a valuable note upon the term "public works" to this case as reported in Ann. Cas.

Of course, the building of permanent roads is quite different from the dredging of a harbor. These permanent roads have a permanent existence and structural unity and are severally capable of being regarded as complete wholes. So, too, as we understand it, the practice in the past has been to regard sec. 1729m as governing in the case of permanent improvement of highways under contract with the state. Nor could any of these permanent highways, built under contract with the state, be elsewhere than within this state. Consequently, much of the reasoning of the supreme court of the United States in the cited case is not applicable here.

The purpose of enacting sec. 1729m seems to have been to prohibit the employment of laborers or mechanics upon state premises for more than eight hours per day. The reasons for giving this eight-hour day to laborers and mechanics are equally applicable in the case of the construction of highways by the state as in the case of erection of buildings by the state. No good ground for any distinction between the two in this respect occurs to us.

Sec. 3327a, Stats., provides, in part:

"All contracts involving one hundred dollars or more hereafter made or let for the performance of any work or labor or furnishing any materials when the same pertains to or is for or in or about any public building, public improvement, public road, alley or highway, or *any other public work* of whatsoever kind of the state, * * * shall contain a provision for the payment by the contractor of all claims for such work and labor performed and materials furnished, * * *."

It will be noted that here the legislature has specifically indicated that the improvement of a public road or highway is a

public work. It is true that the plural form is not employed here, but we think the inference is clear that the legislature considers roads and highways as being in the same class as public buildings or other public improvements, and that it was intended that all contracts for the building or permanent improvement of roads and highways should contain the same clauses as are specifically required in the case of the erection or construction of public buildings or other public improvements.

In my opinion sec. 1729m is applicable to the highways and bridges built by the state under the provisions of ch. 175, laws of 1917, or sec. 1321a, Stats.

Criminal Law—Larceny—Under facts stated the crime of larceny was committed.

June 28, 1918.

WILLARD E. GAEDE,

District Attorney,

Sturgeon Bay, Wisconsin.

In your communication of June 24 you have submitted the following statement of facts as a basis for an official opinion:

*** * * The Peninsula Company, a Wisconsin corporation, has been doing business in this state for a period of about one year or more. One Mr. R. was its general manager, and a voluntary petition in bankruptcy was filed against this corporation, and on the 21st of February, 1918, the corporation was adjudged a bankrupt. Subsequent to that time one J. M. P. was duly elected trustee and has qualified. Among the assets of the firm was a claim due from the Chevrolet Motor Co. amounting to \$190.69. On the 22d day of February, 1918, the Chevrolet Motor Co. issued this check payable to the order of the Peninsula Co. for \$190.69 on the Industrial Savings Bank of Flint, Mich. It is evident that the check was deposited in an envelope and addressed to the Peninsula Company similar to the check. The defendant, R., who was formerly manager and owner of the stock, received this check and on or about the 30th day of March, 1918, at the city of Green Bay, he endorsed this check as follows: 'Peninsula Company, per H. W. R.—,' and appropriated the proceeds then and there to his own use. The trustee in bankruptcy on the 24th day of May made a general demand upon this defendant, R. for any sums so owing or amounts collected or received by him subsequent to Feb. 1st belonging to the Peninsula

Company. Personal demand was made upon the defendant for this particular sum and he claimed that he knew nothing about it and professed utter ignorance. Previous to this time and some time during the fore part of the month of Jan. he went to Green Bay and swore to a criminal complaint charging the party from whom he purchased this capital stock with the crime and alleging that this particular item was missing. It now appears from the copy of the check that he has the funds for it. A civil action has been instituted to recover this sum from him, which has not yet been brought to trial."

You inquire whether the defendant is guilty of the crime of embezzlement, and if not of this crime, what other crime he is guilty of. You state that upon examination of the statutes of embezzlement you question whether the prosecution of embezzlement can be had because of the relationship of the defendant, as he was not an officer or employe or servant of the corporation entrusted with the safe-keeping of its property at the time when he received the check and cashed the same.

After a careful examination and consideration of this matter, I have come to the conclusion that the party in question should be charged with the crime of larceny.

Our court, in the case of *Vought v. State*, 135 Wis. 6, 15, has held that it was not necessary that a trespass in the technical sense be committed in order to constitute larceny where the property is taken by artifice, fraud or false pretense. See cases cited on page 15. The court also said that, under sec. 4415, embezzlement is made larceny. You will note that said section provides:

"* * * Whoever being a bailee of any chattel, money or valuable security shall fraudulently take or fraudulently convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof on an indictment or information for larceny, and upon such conviction be punished as hereinbefore prescribed."

Sec. 4415 is the larceny section. Our court, in the case of *Burns v. State*, 145 Wis. 373, 380-381 said, concerning this provision:

"It is said, generally, in the books, that a bailment is created by delivery of the personality to one person by another to be

dealt with *in specie* as the property of such other person under a contract, express or implied, but the word 'contract' is used in a broad sense. The mutuality essential to the contractual feature may be created by operation of law as well as by the acts of the parties with intention to contract.

"So it makes no difference whether the thing be intrusted to a person by the owner, or another, or by some one for the owner or by the law to the same end. Taking possession without present intent to appropriate raises all the contractual elements essential to a bailment. So the person who *bona fide* recovers the property of another which has been lost, or irresponsibly cast away by an insane man, as in this case, is a bailee as much as if the same property were intrusted to such person by contract *inter partes*. In the latter case the contract creates the duty. In the former the law creates it. Such a situation is to be distinguished from that where one knowingly receives money paid him by mistake and fraudulently retains it. There the element of *bona fide* possession may be said not to exist and so the duty accompanied by such possession essential to a bailment not to have been created."

In the case of *Bergeron v. Peyton*, 106 Wis. 377, our court held that one who receives from a bank, upon a check, more money than he is entitled to, and with knowledge of the facts refuses to pay it back upon demand, is guilty of larceny; and on page 380, the court said, quoting from a New York case:

"One who receives from another money to which he knows he is not entitled and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to cheat and defraud the owner thereof, is guilty of larceny." See cases cited.

In the case of *Milbrath v. State*, 138 Wis. 354, our court held that a crime may be committed through the instrumentality of a corporation and that the party will not be heard to assert that acts in form corporate acts were not his acts.

From your statement of facts, it is clear that Mr. R—— had no right, after the trustee was appointed and had charge of the property of the bankrupt corporation, to cash the check in question. He was no longer the officer of the corporation with power to act for it. He obtained the money from the bank by artifice and fraud and appropriated it to his own use. It would seem from a mere statement of your facts that he had already formed the intent to appropriate the money for his own use when he

cashed the check. Under the principle laid down in the *Vought* case, he is guilty of larceny.

I am somewhat in doubt whether he could also be held guilty of the crime of obtaining money under false pretenses, in view of the fact that your statement of facts does not show that he made representations to the bank other than indorsing the name of the corporation to the check with the words, "per H. W. R____." It must be noted that he did not add to his signature the word "manager," so he did not represent himself to be the manager of the corporation at that time, unless such representation could be implied from his acts, oral words or all the circumstances in the case. My advice, therefore, is that you charge the man with larceny; and it may be well to charge him in a separate count with the offense of obtaining money under false pretenses, and if the evidence should be such that he would be guilty of such offense, instead of larceny, you could then elect at the end of the introduction of the evidence to hold him for obtaining money under false pretenses, instead of larceny.

Mother's Pensions—Relief under sec. 573f can be granted by a judge to residents of his county only while such residents. The town wherein beneficiary resides is chargeable.

July 2, 1918.

ORRIN H. LARRABEE,

District Attorney,

Chippewa Falls, Wisconsin.

Under date of July 1, 1918, you submit the following:

"1. A., residing with his wife and two children in P. county, in the latter part of May, 1917, removed to C. county, where he purchased a small tract of land and established a residence. Early in May, 1918, A. died leaving his family destitute and they applied to the commissioners of the poor for relief, which was granted, and due notice was given as provided by statute to the county clerk of P. county. After the expiration of one year from the date of their removal to C. county the widow of the deceased applied for a mother's pension. Public aid having been furnished to the family within one year after their removal from P. county and before they had acquired a legal settlement in C. county, may aid be lawfully granted under sec. 573f? And if granted, may C. county make and enforce a claim therefor against P. county?

"2. A widow residing in the town of S. applied for and was granted aid under the Mother's Pension Law, and several months later removed with her children to the town of B. in the same county. Subsec. 8, sec. 573f provides, among other things, that the county board at its annual meeting shall determine the amount to be raised and paid by each town, village and city to reimburse the county for the money so advanced. The order granting aid shows they are residents in the town of S. and there is no record of their removal therefrom. May any part of the amount paid to her be lawfully charged to the town of B?"

You have stated that the widow resides in C. county, and has resided there for more than six months. That fact is decisive of the question as to which county may grant her a pension. The place of her legal settlement has no significance in this connection. The fact that she has received aid under the poor

laws is no legal obstacle to her receiving a pension. Only the present receipt of such aid is a bar.

"Such aid shall be the only form of public assistance granted to the family" (sec. 573f) means simultaneous aid.

It has no reference to past or future grants of poor relief. Clearly the judge of C. county has jurisdiction to grant aid to this widow under said section.

There is no provision in the statutes for one county to make claim against another county for reimbursement of moneys expended for mothers' pensions. A county is authorized to pay pensions only to residents thereof. In every instance the claim for reimbursement is against a subdivision or subdivisions of the county making expenditures, never against another county or a subdivision of another county.

The pension paid the widow mentioned in paragraph 2 of your letter while she was a resident of the town of B. should be charged to that town. Subsec. 8, sec. 573f.

The question submitted has heretofore been passed upon by this department and discussed at considerable length. Vol. V, Op. Atty. Gen., pp. 124, 465; Vol. VI, Op. Atty. Gen., pp. 115, 743, 767.

Intoxicating Liquors—Baker Law—The favorable action of the council on an application for a saloon license will not preserve the rights of the location under the Baker Law when the license is not granted or paid for.

July 2, 1913.

RALPH E. SMITH,

District Attorney,

Merrill, Wisconsin.

In your favor of June 28 you state that several saloon keepers of the city of Merrill have put up to you the question:

"Will the failure to take out a license for a saloon at a place that has been used for that purpose for the past fifteen to twenty years, after having made application and the council having granted the application, result in the discontinuance of the business to such an extent that the owner of the property or his lessee will be denied the right to apply for license for 1919 and 1920, it being understood that the number of saloons in the city of Merrill is now above the number allowed in the Baker Law?"

As I understand it, the question really is whether the rights of the locations will be preserved by merely applying for a license and having the application allowed, but not having the same granted or taken out or paid for by the saloons. In answer to this question I would say I am satisfied that the rights to the location under the Baker Law will not be preserved, unless the license is granted and paid for. See. 1565d.

Indigent, Insane, etc.—The question of feeble-mindedness must be determined by a jury when afflicted person or his friends or relatives call for jury trial.

July 3, 1918.

D. K. ALLEN,

District Attorney,

Oshkosh, Wisconsin.

In your communication of June 29 you state that in January, 1915, upon the proper application made for that purpose, under sec. 573*l* and sec. 585*a*, Stats., one, Lillian Spieles, was committed to the home for the feeble-minded at Chippewa Falls; that she was at that time seventeen years of age but no guardian *ad litem* was appointed for her, and that she was not represented by an attorney; that she did not call for a jury trial, as provided by sec. 585*b*, and in due time was adjudged to be feeble-minded and committed to Chippewa Falls.

You direct my attention to the provision of sec. 573*l* which provides that substantially the same procedure shall be had in cases of this kind as in cases where an examination into a man's sanity is had, and in this way provides that a jury trial may be had before or after commitment. You state that her friends have now filed with the county court of Winnebago county, which had jurisdiction of the matter, a demand for a trial by jury, to determine whether the young woman was or was not feeble-minded. You state that it would seem to you that, in spite of the fact that the statute says that a jury trial may be called for before or after commitment, the interested parties have long since waived and lost the right to have a jury trial; that three and a half years have elapsed since the matter was before the court; and that upon the advice of the county judge you submit this matter to this department for a ruling.

Sec. 585b provides:

"If a jury trial be demanded by the person alleged to be insane or by any relative or friend acting in his behalf, before or after commitment, the judge shall direct that a jury be summoned to hear and determine the question whether such person is insane. * * *."

Sec. 587 provides:

"* * * Any person who has heretofore been, or may hereafter be adjudged insane by any court, tribunal, or officer having lawful authority so to adjudge, or any person restrained of his liberty because of his alleged insanity, may on his own verified petition or that of his guardian, or some relative or friend, have a retrial or re-examination of the question whether such person is sane or insane before the judge of the circuit court or county court or any other court of record of the county in which such person resides or in which he was so adjudged to be insane. * * *."

Under these provisions, I am clearly of the opinion that the application made for a jury trial and for an adjudication of the question of the feeble-mindedness of the party in question is proper and is authorized. The question before the court is not whether the party was feeble-minded at the time when she was committed, but whether she is so at the present time. This matter has not been outlawed and is expressly authorized by the statute.

Fish and Game—Confiscation—A boat used without knowledge of owner, for illegal fishing, may be confiscated.

July 3, 1918.

A. M. ANDREWS,

District Attorney,

Shawano, Wisconsin.

In your communication of June 27 you state that one, A., was caught by a game warden spearing fish at night with a light, on Shawano Lake; that the game warden confiscated his spear, jack and boat and caused his arrest; that he pleaded guilty and paid a fine; that the boat which was used belonged to B., and B. did not know that A. was using his boat and was absolutely ignorant of the fact that A. was using his boat for an unlawful

purpose or any other purpose; that A. took the boat without the consent of B.; that there is no question about the ownership of the boat being in B., and that there is no question about his knowing nothing about the fact that A. was using the boat; that B. has instituted a replevin action to recover the possession of the boat against the game warden, and that as district attorney, you are representing the game warden. You request my opinion as to whether or not the game warden is entitled to the possession of the boat in question, as against B.

The same proposition was submitted to my predecessor and an official opinion rendered, which you will find in Vol. III, Op. Atty. Gen., p. 410. It was there held that 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.

It is true that the law has been amended and changed since that time but not materially as to the point in question. At that time it was expressly provided that any boat when used in violation of any of the provisions of the act in question was a public nuisance and may be seized and disposed of as provided by law. In the revision of the game laws this specific provision was not inserted but the general language used in subd. (7), sec. 29.05 is intended to be broad enough to include any apparatus, appliance or device declared by statute to be a public nuisance.

A boat is an appliance, within contemplation of this statute, and it was intended to include it. That being true, the opinion rendered by my predecessor is applicable to the question submitted by you and is decisive of the question, unless a different ruling is made.

I see no reason for changing the ruling at this time, and as the legislature has been in session since that ruling was made and enforced by the administrative officers whose duty it is to enforce this law, and no change has been made therein, I take it that the ruling is satisfactory, and for that reason I believe it should be adhered to until changed by the legislature or until another ruling is made by our supreme court. Your question, therefore, is answered to the effect that the game warden is entitled to the possession of the boat, as against B.

Elections—Corrupt Practices Act—The Corrupt Practices Act does not contemplate or permit appointment of same person or persons to act as personal campaign committee of two or more candidates where it is contemplated that they shall make expenditures for the joint benefit of such candidates from a common fund to which the latter have contributed.

July 6, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

You have submitted to me a letter from Mr. F. E. Davidson, dated June 21, 1918, relative to the appointment, by several persons who intend to become candidates for state offices at the September primary, of a personal campaign committee, to act for them jointly. You ask whether the plan outlined in this letter complies with statutory requirements.

The plan, in brief, is that certain candidates for the offices of governor, lieutenant governor, secretary of state, state treasurer and attorney general, respectively, join in the appointment of a single campaign committee to act as the personal campaign committee of all five candidates. There are annexed to the letter forms to be used in connection with newspaper advertising and with literature to be distributed, designed to comply with the requirements of secs. 12.14 and 12.16, Stats. An examination of these forms of certificate make it clear that the proposed plan contemplates that all newspaper advertising and publicity work shall be joint. The use of the same personal campaign committee by the several candidates indicates that the entire primary campaign is to be thus jointly conducted by them, by and through this single committee, which will make the necessary disbursements from a fund to which each of the candidates thus represented contributes. Your inquiry, therefore, requires me to determine the validity of such a plan of campaign.

It will be noted on even a casual reading of the Corrupt Practices Act (secs. 12.01 to 12.29, Stats.) that it creates and imposes upon each candidate a liability for acts done for political purposes by him or on his behalf, which is *distinctly individual* in character. The prohibitory provisions of the act and its regulative requirements are in every case personal and

individual in character and phraseology. They are never general.

This is particularly true with reference to the personal campaign committee authorized by the act. Thus it is denominated by sec. 12.04 "a *single personal* campaign committee." It is thereafter repeatedly referred to with reference to the candidate as "*his personal* campaign committee." The act specifically centralizes upon each candidate responsibility for all acts done and expenditures made in his behalf by such committee. Thus, sec. 12.04, after providing for the appointment of the committee and the certification in writing to the proper officer by the candidate of the authority of this committee to represent him, provides as follows:

"* * * In civil actions and proceedings brought under this chapter, the acts of every member of such personal campaign committee shall be presumed to be with the knowledge and approval of the candidate, until it has been clearly proved that the candidate did not have knowledge of and approve the same, and that, in the exercise of reasonable care and diligence, he could not have had knowledge of and an opportunity to disapprove the same."

The act further makes elaborate provision for the institution of proceedings to establish violations by a candidate or his committee of its prohibitions; and in that connection, sec. 12.28, subd. (2), provides that if any member of a personal campaign committee shall be adjudged guilty of violating any provision of the act,

"the court entering such judgment shall immediately thereafter enter a supplemental judgment declaring a forfeiture of the candidate's right to the office."

Thus even this general consideration of the plan and purpose of the act, with reference to the centralization of responsibility upon the candidate, suggests the impropriety of a plan whereby a single committee is to represent five candidates as the "single personal campaign committee" of each. It is clearly out of harmony with this essential idea of individual responsibility. Furthermore, it suggests immediately the impossibility of compliance with the specific requirements of the act relative to the personal campaign committee, which requirements are plainly framed upon the basis of responsibility to a single principal.

This becomes apparent when we consider the restrictions of the act relative to limitation of expenditures (secs. 12.07, 12.09, 12.20, 12.21). The general plan of the act in this regard is to set a limit on the amount of the expenditures of the candidates for the several offices, to prescribe specifically the character of expenditures which are permissible, and to provide a system of reporting in detail all expenditures made. The limitation on the candidate for governor, to wit, \$5,000, differs from that affecting the other state officers, which is \$2,000. The personal campaign committee is required to report in detail every disbursement exceeding \$5 made by it in behalf of the candidate which such committee represents, and to report in like manner every obligation incurred to make any such disbursement. A careful consideration of these provisions of the statutes relative to expenditures and the reporting of the same leads irresistibly to the conclusion that the proposed plan of procedure above outlined would render compliance with these requirements of the act impossible.

The act manifestly contemplates that the expenditures of the personal campaign committee shall be so made that an accurate account of them can be kept and rendered and that it can be readily determined whether the limitations imposed by the act as to the character and amount of the expenditures have been exceeded, or any other requirement of the act in that regard violated by the candidate or his committee. This presupposes the preparation and rendition of an account covering expenditures which is applicable solely to the candidate in question. It cannot be complied with by the rendition of a list of items in which the candidate is interested jointly with others. Nor can it be complied with by any necessarily arbitrary action whereby a joint personal campaign committee may attempt to determine and segregate the proportion of an expenditure for joint advantage, representing the interest of a particular candidate therein, and report the same as an expenditure on behalf of such candidate.

The situation which would be created by these joint expenditures suggests another objection to the proposed plan. The making of expenditures by a joint personal campaign committee which shall be for the common advantage of several candidates necessarily presupposes that they be made out of a

fund to which contributions have been made by or on behalf of the candidates jointly. When such an expenditure is made out of a fund thus created it would in effect constitute an expenditure by one candidate in behalf of another candidate. In an opinion rendered on March 16, 1916, to Honorable John S. Donald, secretary of state, Justice Owen, then attorney general, held that the Corrupt Practices Act did not permit of a contribution by one candidate to the campaign expense of another candidate. Vol. V, Op. Atty. Gen., pp. 230, 232, *et seq.*

With this conclusion, I am in accord.

Other criticisms of this plan suggest themselves, but the foregoing is sufficient to support the conclusion to which I have arrived, viz., that this plan is out of harmony with the letter and spirit of the Corrupt Practices Act, and would involve a violation of its provisions.

Building and Loan Associations—Corporations—Membership
—A corporation may not become a member of a building and loan association even though the consent of $\frac{3}{4}$ of the stock holders of both corporations is given.

July 8, 1918.

HONORABLE A. E. KUOLT,

Commissioner of Banking.

The inquiries, as contained in your letter of June 29, read as follows:

"The law regulating building and loan associations requires that borrowers shall be members of the association; that they pledge stock in the association as collateral security to loans they may obtain.

"Is it legally permissible for corporations to obtain loans from building and loan associations if the provisions of the general law requiring the consent of three-fourths of the stock-holders of both corporations for the acquiring of stock of one corporation by the other has been obtained?

"Can loans be legally made by a building and loan association to a corporation without such procedure?"

The section, or rather, part of section, of the statutes of 1917 which defines membership in a loan and building association 2014—8, of which I quote the following:

"Any person of full age and sound mind may become a member of any such association in such manner as may be prescribed in the by-laws; but no person shall in any one association, in his own name or in the name of another, become the owner of shares of instalment stock exceeding in par value the sum of ten thousand dollars; nor of paid-up stock exceeding in par value the sum of ten thousand dollars; * * * Shares may be issued to minors above the age of fourteen years, who shall then be subject to the same duties and liabilities as adult members, and such shares, in the discretion of the directors, may be withdrawn by such minor, his parents or guardian, and in either case the payment made on such withdrawal shall be valid, as well as in relation to payments on shares forfeited, retired or matured. Minors under fourteen may hold by trustee or guardian."

There is nothing in this section from which it may be inferred that a corporation may be a member of a loan and building association. In absence of any other statute, the inference is irresistible that no corporation may become such a member. A member of such an association must be a person of full age and sound mind. Corporations are not spoken of as having such qualities or characteristics. The section also describes the conditions under which minors above and minors under the age of fourteen may become members. There is nothing in the statutes of our state by which a corporation is given authority to become a shareholder in a loan and building association.

In 9 C. J. 932, membership of corporations in such associations is discussed. The rule is laid down as follows:

"* * * In the absence of an enabling statute a corporation cannot be a member of a building and loan association, nor can a joint-stock association. Neither can one building and loan association become a member of another building and loan association."

The following cases are cited in support of the text: *Dilzer v. Beethoven Bldg. Assn.*, 103 Pa. 86; *Kadish v. Garden City Equitable L. etc.*, 151 Ill. 531; *North Am. Bldg. Assn. v. Sutton*, 35 Pa. 463, 78 Am. D. 349; *Mechanics, etc. Mutual Savings Bank Assn. v. Meriden Agency Co.*, 24 Conn. 159.

I quote the following from Endlich on Building Associations (2d ed.) sec. 323:

"It certainly does not appear to be consistent with the purposes of the building association's being, nor in any wise re-

lated to the policy which justifies the creation of these institutions with the extraordinary powers they possess, to have its membership in part composed of corporations, and there can be little doubt that the statutes never contemplated such a departure."

Sec. 2011 reads, in part, as follows:

"Such local associations shall have power:

"(1) To issue stock to members; to assess and collect from members fees, dues, fines, interest, premiums and other charges, and the same shall not be held to be usurious; to permit or force members to withdraw all or part of their stock; to make loans to members; all upon such terms and conditions as may be provided in the by-laws."

The foregoing paragraph gives building and loan associations the power to issue stock to members and to make loans to members. The word "member" or "members," as used in this chapter, should be given a uniform meaning. If a corporation is not authorized to become a member then a building and loan association has no authority to issue stock to such a corporation. Neither has it authority to make loans to such corporation.

Basing my opinion upon the language of our statutes relating to loan and building associations, and upon the authorities above cited, it is my opinion that it is not legally permissible for corporations to obtain loans from building and loan associations, even though the consent of three-fourths of the stockholders of both corporations for the acquiring of the stock of the building and loan association has been obtained.

Bridges and Highways—Proceedings laying out highway in town of Menon, Burnett county, examined and held invalid.

July 8, 1918.

CLIVE J. STRANG,

District Attorney,

Grantsburg, Wisconsin.

Under date of June 28, 1918, you ask for my opinion relative to the validity of certain highway proceedings, and on July 3, 1918, you transmitted the original papers in the highway proceedings, viz., the application of eight freeholders to lay out a

highway, the affidavit of service of notice of the time and place for hearing the application, the order laying out the highway, release of damages from two land owners, and survey of line of highway.

It appears from your letters that the way has been cleared, but has never been open to public travel; that a man who has acquired title to some of the lands over which this highway passes since the order laying out the highway was made has obstructed the highway with stumps and logs on both east and west lines of his farm and threatens to kill any one who attempts to open this highway, and that the public authorities have been dissuaded by said threats from proceeding; that a complaint for a criminal warrant has been made against this land owner.

Before issuing the warrant you desire an opinion as to whether this is a legally laid out highway, and if it is, what is the center line thereof.

This highway is in section thirty-four, town of Menon, Burnett county, and extends from the west-quarter post of said section east and along the quarter section line to Clam Lake, a distance I judge from the map to be about two hundred rods. That quarter section line forms the south boundary of the northwest quarter and lot three of said section, and forms the north boundary of the southwest quarter and lot four of said section.

The proof of service does not show that notice of the hearing was given to the owner of the east half of the southwest quarter and said lot four. Possibly those lands were not occupied and the statute (sec. 1267) requires notice only in case that lands are occupied. Again, it is possible that the owner or owners of the last described lands were signers of the application for the highway, and therefore would not be entitled to notice of hearing. It is impossible to say from the data before me whether there is here a fatal defect or not, especially in view of the fact that the order laying out the highway recites that the supervisors were "satisfied by due proof that the notice aforesaid had been duly given." This recital is made presumptive evidence of the facts by sec. 1298.

The order describes the highway as follows:

"Beginning at the southwest corner of the northwest quarter of section 34 * * *; thence running due east on the quarter line *or as near as practicable*, to Clam Lake,"

This is a void description. It was for the supervisors to determine the line of the highway and to decide where it was practicable to locate the road. No one can say with certainty where the highway is. When the supervisors lay out a highway they shall make an order therefor, "incorporating therein a description of the highway so laid out." Sec. 1269, Stats. This requirement of the statute is not complied with by this order. The highway remains a "float." It leaves the exact location of the highway to the surveyor or to the highway superintendent, or to any one, whereas the law vests that act absolutely in the supervisors.

In *Duthie v. Washburn*, 87 Wis. 231, 235, the supreme court said that it was error for the trial court, after reading to the jury certain requested instructions, to say to them "You may use them as far as the same are practicable." In *Guinard v. Knapp-Stout & Co.*, 90 Wis. 123, 128, the supreme court held that it was error for the trial court to tell the jury that certain requested instructions could be used by the jury as far as the instructions were "applicable." The court said that such an instruction "comes very near being an abdication of the functions of the court," and that remark applies to the action of the supervisors in this case. The order, in my opinion, is void upon its face for want of definiteness as to the highway intended to be laid out.

Another fatal defect in this highway proceeding is the failure of the supervisors to file an award of damages to the owners of those lands for which no release was obtained. The release from Spangberg covers lot three and the southeast quarter of the northwest quarter of said section. The release from Demarest covers the southeast quarter of the northwest quarter and the northwest quarter of the southwest quarter. You will notice the same forty acres are found in both releases. It is probable that "southeast" in the last mentioned release was intended for "southwest," for it is stated in the affidavit of service of notice that Demarest owns the west quarter of the section. Assuming that to be a fact, there remains unaccounted for lot four and the northeast quarter of the southwest quarter of the section. No release was made therefor and no damages were awarded to the owners thereof. In case of any owner failing to release the damages sustained or failing to agree with the

supervisors as to such damages prior to making the order laying out the highway, the supervisors shall

"at the time of making such order assess the damages which such owner will sustain." See. 1270, Stats.

This award of damages must be filed with the town clerk within ten days after the decision laying out the highway, together with the order,

"and in case such supervisors shall fail to file such order and award within the ten days aforesaid, they shall be deemed to have decided against such application." Sec. 1269, Stats.

The legal result, therefore, of the failure to file the award of damages is a denial of the application to lay out the highway. *Schillock v. Jones*, 147 Wis. 119, 123; *State ex rel. Hewitt v. Graves*, 120 Wis. 607.

It seems that the supervisors recognized their want of jurisdiction to lay a highway over any part of lot four or the northeast quarter of the southwest quarter, for you say that after the highway order had been made there was an oral agreement or understanding that there should be a jog or offset of two rods to the north at a point eighty rods east of the place of beginning. This agreement, of course, is a nullity. A written order of the supervisors certainly cannot be modified or changed by any oral understanding or agreement.

I am quite certain that the defects in these highway proceedings are fatal; that they are such as can be taken advantage of by any person in a criminal proceeding.

I express no opinion as to whether the person who obstructs this way might be estopped in a civil proceeding from questioning the validity of the highway proceeding.

It seems to me entirely unadvisable to undertake the prosecution based upon this record and equally unadvisable to involve the town officers and property owners in litigation where there is so much uncertainty as to outcome. If it is believed that a highway should exist at the place in question, the cheapest, quickest and most satisfactory way would be to have a new application filed with the supervisors to lay out such highway, and then see to it that the subsequent steps were taken in conformity to the statutes. The proceeding is statutory, and rather strict compliance therewith has been held to be necessary to the validity of the proceeding.

Insurance—Articles authorizing an insurance company to write fire insurance do not, under sec. 1897, authorize the writing of tempest and cyclone insurance.

July 9, 1918.

HONORABLE F. W. KUBASTA,

Deputy Insurance Commissioner.

In your letter of June 29 you submit the original articles of organization and amendments thereto of the Milwaukee Mutual Fire Insurance Company of Milwaukee and you state that the question arises as to whether or not under sec. 1897, Stats., this company can legally accept risks of insurance against loss or damage by reason of tempest, cyclone, tornado or windstorm. You ask:

"In other words, does the introduction to subsection 1 of section 1897 define what may be accepted or included under fire insurance, or is subsection 1 modified by the language of section 1897 which provides that insurance companies may be formed for the following purposes: (The mention of several subjects or risks of insurance in any subsection indicates that any one or more or all may be included) ?

"In other words, is a company which provides in its articles of organization for the acceptance of risks of insurance by reason of loss or damage by fire permitted to issue policies covering loss or damage by reason of cyclone, etc., even though there is no specific mention or reference to the terms tempest or windstorm and cyclone in such articles?"

Ch. 89, Wis. Stats., relates to insurance corporations. Sec. 1897 specifies the purposes for which insurance corporations may be formed. It provides:

"An insurance corporation may be formed for the following purposes: (The mention of several subjects or risks of insurance in any subsection indicates that any one or more or all may be included)."

Then follows a list of fifteen subheadings, each a general class of insurance containing thereunder subdivisions and branches which may be included. The purpose of the classification seems to be founded upon the different classes of risks: as, for instance, subd. (1) carries the general class of fire insurance and permits companies to organize, also to insure against loss by lightning, hail, tempest or explosion; subd. (2) covers marine insurance and permits companies in the marine insurance busi-

ness to organize also for insurance against risks of inland transportation, navigation and other perils usually insured against by marine insurance companies; subd. (3) permits companies to organize for insuring lives, and also permits the companies to insure the health of persons.

It will be noted, further, in sec. 1897a, relating to stock or mutual plan companies, subsec. 2 is as follows:

"No company shall be formed for the purpose of engaging in any other kind of insurance than that specified in some one of the subsections of section 1897, or more kinds of insurance than are specified in a single subsection, except that a company may be formed: * * *."

Then follow the combinations of classes of risks that may be included in the formation of single companies. A careful examination of the combinations permitted shows that risks somewhat allied in their nature are permitted in combination.

I find in the articles of organization signed by the incorporators the following statement:

"We, the undersigned, * * * do associate for the purpose of forming a mutual fire insurance corporation. * * * The name of such corporation shall be 'The Milwaukee Mutual Fire Insurance Company of the City of Milwaukee.'

"Article 7: 'The Wisconsin Standard Fire Insurance Policy is adopted for exclusive use by this corporation, * * *."

This provision would indicate that the standard fire policy was to be used in all risks, which substantially precludes the idea of writing cyclone, tempest or hail insurance. I am unable to find any mention in the articles of incorporation of any intention on the part of the incorporators to do other than a strictly fire insurance business.

The authorization cannot be broader than the purposes set out in the articles of incorporation. From a careful reading of the whole statute governing the organization of insurance corporations it is quite apparent that it was the intent of the legislature to permit companies to organize for the purpose of writing different classes of risks, and it seems to have been the intent to set out in the different subdivisions in sec. 1897 what risks might be grouped and covered by a single organization. If the claim now made by the applicant company be granted,

then any company organized to do a fire insurance business could engage in the business of hail insurance without any mention whatever of that purpose in the articles of incorporation. It is quite apparent that from the wide range of difference in the nature of hail risks and fire risks the legislature could not have intended to permit a company to do a hail insurance business when the articles of incorporation stated that it was organized for the purpose of doing a fire insurance business. If it was the intention of the legislature to permit any company organized to do a fire insurance business to write hail, tempest or explosion insurance, that purpose would no doubt have been indicated by some appropriate language in sec. 1897.

We find, however, the following words:

"An insurance corporation may be formed for the following purposes: (The mention of several subjects or risks of insurance in any subsection indicates that any one or more or all may be included.)"

A fair construction of these words is that an insurance corporation may be formed for any one or all of the purposes included in any group or subdivision. This is quite different from saying that a company organized under any one of the fifteen subheadings might accept any class of risk named in that group or subheading. I am of the opinion that an insurance company must state in its articles of incorporation the class of insurance risks that it expects to carry, at least in so far as those classes are recognized in the statute. Tempest insurance is a recognized class of risk found in the statute and cannot be said to be fairly included within the words "fire insurance."

You are therefore advised that under the articles submitted the Milwaukee Mutual Fire Insurance Company cannot legally issue policies insuring against loss or damage "by reason of tempest, cyclone, tornado and windstorm."

Agriculture—Police Regulations—Animals Running at Large
—A bull over 6 months old inclosed in a fenced pasture is not running at large.

July 10, 1918.

W. G. HADDOCK,

District Attorney,

Ellsworth, Wisconsin.

In your favor of July 2 you inquire whether a bull over six months old, under sec. 1482 is required to be kept in a box stall or tied up so as to be closely confined, or whether he would be considered running at large if he was within an ordinary inclosed pasture.

The statute prohibits such an animal to "run at large." The next section of the statute, 1483, provides for the taking up of such an animal "running at large." Undoubtedly the terms "running at large" and "run at large" refer to the same condition. It is impossible to conceive that the legislature intended to permit a bull that was in a pasture to be taken up by any one finding it there, give the notice and charge the owner for its keep, and the forfeiture prescribed in sec. 1483. I am therefore of the opinion that such an animal inclosed in a pasture or confined in any ordinary way is not running at large within the terms of these two sections of the statutes.

Bridges and Highways—The county state road and bridge committee can incur no county liability for maintenance of highways in excess of funds made available by law or by county board.

Maintenance of trunk line highways within cities, when improved under State Aid Law, is upon cities; of other trunk line highways, upon counties.

July 10, 1918.

E. S. JEDNEY,

District Attorney,

Black River Falls, Wisconsin.

I have yours of July 5, 1918, asking me to advise you as to the law applicable to the matter of repairing the damage done to the streets in the city of Black River Falls by a freshet which occurred May 24, 1918.

It is plain that a considerable expenditure of money will be necessary to accomplish that object, and you wish to know if the county state road and bridge committee has authority, in the absence of funds on hand, to have the reconstruction work done and thereby create an obligation against the county, or whether the county board must make provision for the funds.

It is my opinion that the committee has not the power of taxation, either directly or indirectly. It is authorized

"(d) To direct the expenditure of maintenance funds provided from automobile license fees or by direct tax by the county board." Subd. (3), subsec. 8, sec. 1317m—5.

As to new construction work to which county aid is contributed, the county board determines where the money shall be expended. The committee can expend upon its own authority the funds on hand and derived from automobile license fees. I understand, however, that no such funds are now in the county treasury, and that the amount which will come to the county during this year will not be sufficient to pay for the general maintenance work and also repair the damage to these streets, especially if the plan of improved reconstruction is adopted.

To accomplish that it seems to me necessary from the facts before me that there should be a meeting of the county board. That would be desirable, even if it were not legally necessary. You are confronted less by a legal proposition than by a practical matter of road engineering and of financing the same.

I am informed by the state highway commission that plans for a bridge and for a reconstruction of these streets are nearly completed. Those plans should be before the county board when it meets, and there should be called in conference some representative of the highway commission and also of the city for the purpose of harmonizing the various interests and agreeing upon a plan and providing the funds necessary to its execution.

You state that it is your understanding that it is "the duty of the county to repair and maintain the portion of street so damaged and destroyed."

With that I concur, except as to that portion of the street which was built "under the provisions of sections 1317m—1 to 1317m—15."

The sections last mentioned constitute what is known as the "State Aid Highway Act." The highways of that system and prior to their improvement constitute "the county systems of prospective state highways." 1317m—3, subsec. 1, subd. (a). After they have been improved pursuant to those sections or adopted by the county board, they are known as state highways. Sec. 1317m—7, subsec. 8.

Secs. 1312 to 1317, inclusive, which provide for the "state trunk highway system," were enacted to make effective the appropriations made by the United States for highway construction, and the roads contemplated by that act and which are to be improved with that aid are the trunk line system of highways. In the construction of these two acts we are to keep in mind the distinction between "state aid roads" and "trunk line highways." We are also to bear in mind that practically all of the highways of the trunk line system are state aid highways and that so far as the two systems of highway coincide any portion thereof may be improved under either act. It seems from the statutes about to be quoted that the source of the aid or funds with which the roads are improved has a bearing upon where the liability for maintenance shall rest as to highways within corporate limits.

Subds. (a), (b), (c), subsec. 1, sec. 1317 contain a general provision effective May 1, 1918, for the maintenance of highways of the trunk system at county expense.

Then follows the specific provision upon that subject.

"(d) The county shall maintain the streets and roads in incorporated cities and villages which have been improved under the provisions of sections 1312 to 1317, inclusive, of the statutes." Sec. 1317.

The language just quoted indicates that the legislature did not understand that the general provisions before mentioned were absolutely sweeping and without exception. This specific provision suggests that there is some exception against general liability for maintenance of the trunk system. Sec. 1317 was enacted by ch. 175, Laws 1917, approved May 8, 1917.

In the State Aid Highway Act there is a provision—in fact two provisions—as explicit for the maintenance at city expense of state highways as the above quoted provision is as to the

maintenance by the county of highways built in cities under the trunk line system.

I refer to subd. (g), subsec. 1 and subsec. 1*f*, sec. 1317*m*—5. Said subd. (g) is part of ch. 556, Laws 1917, approved June 29, 1917, and said subsec. 1*f* was enacted by ch. 643, approved July 12, 1917. You will notice that these two provisions were enacted subsequent to the passage of the Federal Aid or Trunk Line System Statute, 39 U. S. Stats. at Large 355.

"1*f*. Streets and roads, heretofore or hereafter built in any city under the provisions of sections 1317*m*—1 to 1317*m*—15, inclusive, shall be maintained by and entirely at the expense of the city in which they may lie."

I am informed by the highway commission that at one point of damage the street is of cement concrete construction and was built under the State Aid Highway Act. Those facts bring that part of the street squarely within the provisions of said subsec. 1*f*. The restoration or repair of that portion of the damaged street in my opinion is the duty of the city of Black River Falls.

These various and seemingly conflicting provisions of statute are harmonized and all of them given some force and effect by the interpretation which I have given. Speaking of a street which is at once part of the state aid system and also of the trunk line system, any portion thereof which has been improved "under the provisions of sections 1317*m*—1 to 1317*m*—15" is to be maintained entirely at the expense of the city. The remaining portions thereof are to be maintained at the expense of the county. Until the portion maintained by the county has been improved under the Trunk Line Act, the county is merely obliged to maintain it in a reasonably good condition, reference being made to the condition it was in when the system was adopted. This limits the county's absolute obligation or liability, but does not limit its power. It may, if it deems proper, extensively reconstruct the unimproved portion. Subd. (e), subsec. 1, sec. 1317, Stats.

It follows, therefore, that it is within the discretion of the county board to determine how extensive the repair or reconstruction work shall be beyond restoring the unimproved portion of this trunk line system which was destroyed or damaged by this flood,

Education—Normal Schools—Resolution establishing a normal school at Rhinelander is no longer binding upon the regents, as the condition of delivering a deed of the proposed site was not complied with.

July 10, 1918.

HONORABLE WILLIAM KITTLE, *Secretary,*

Board of Regents of Normal Schools.

In your communication of June 28 you state that on October 7, 1916, the board of regents of normal schools adopted a resolution as follows:

"Resolved, That pursuant to Chapter 507 of laws of 1913 a normal school is hereby located at Rhinelander on the site offered by the city authorities, a deed of said site to be delivered to this Board on or before January first, 1917."

You state that up to this date, June 28, 1918, no deed or abstract of any site in the city of Rhinelander has ever been delivered to the board of regents of normal schools, and that the board requests my opinion as to the status of a normal school site in the city of Rhinelander, under the resolution as adopted.

As I read said resolution, I take it that the location of the site is conditioned upon the delivery of the deed on or before January 1, 1917. As this has not been done, the location of said normal school at Rhinelander is not binding upon the board.

Ch. 507 provides:

"The board of regents of normal schools is hereby directed to select a suitable site for a state normal school in the northeastern part of the state, said suitable site to be selected by the board from those offered therefor and under the most favorable conditions to the state. After such selection the first new normal school hereafter located and constructed in the state shall be located and constructed in the northeastern part thereof and upon the site selected under the provisions of this act."

Under this resolution and the statute I believe that the normal school regents will have a right to declare said resolution as not binding, for the reason that the conditions therein contained were not complied with, and to select another location if more favorable conditions are offered for a site to the state.

Bridges and Highways—The apportionment of the cost of bridges built under sec. 1319, upon town line highways, considered.

July 11, 1918.

WISCONSIN HIGHWAY COMMISSION.

In your letter of June 19, 1918, you say:

"Sec. 1319 of the statutes, providing for the construction of bridges with county aid, is not definite with regard to the apportionment of costs where more than one municipality is concerned in the construction.

"There are frequent instances where a bridge is built on a town line spanning a stream which flows from one town into the other. It is customary in such cases for the county to pay one-half the cost of this bridge (where the cost is over \$400) and for the towns to share the other one-half equally. It is also quite common for a bridge to be built spanning a stream which is a town boundary, in which case the customary apportionment of costs is as stated previously.

"There are a number of other variations, one of which is where three towns are concerned, in which case the bridge might be built on a range line which formed the boundary between two towns on one side of the stream, but which was not a township boundary on the other side. In this case the bridge would lie one-fourth in two of the towns and one-half in the other. The most extreme case which we have ever encountered was a bridge which lies in four different towns located in three different counties.

"We have been unable to find any clear statement in the statutes with regard to the distribution of these costs, and therefore ask you to lay down some general rule."

Your system or plan of apportionment of the cost of construction of bridges is in accordance with the spirit of our statutes, even if not according to the letter of any discovered statutory provision.

Sec. 1338, Stats., provides among other things, for the building and repair under county authority, but at the town's expense, of bridges situate on town and county boundaries, in case the town or towns concerned neglect or refuse to do the work. The cost is apportioned among the towns that are by law bound to build or repair those bridges.

*** * In case of town line highways, and bridges thereon, which are also upon the line between two or more counties, and which highways and bridges have not yet been apportioned be-

tween the adjoining towns for the purpose of maintenance, and where an appeal may be taken to the county board of either or any of the counties bounded in whole or by said highway or highways as hereinbefore provided, the expense incurred * * * in building or repairing any bridge thereon, shall be paid primarily by the county to which the appeal is taken, and by said county apportioned among all of the counties which are bounded in whole or in part by such highway, and the proportionate share of such costs and expense shall be paid by the other adjoining county or counties to the county to which the appeal is taken, upon presentation of a proper claim therefor by the latter, and when such expense shall have been paid in the manner aforesaid by the counties liable therefor same shall be charged by the respective counties to their proper town or towns and added to the next county tax apportioned to such town or towns and collected therewith." Subsec. 3, sec. 1338, Stats.

The statutes, however, provide for the apportionment of town line highways among the abutting towns; that includes the bridges. A bridge may be divided by such apportionment. The part thereof set over or charged to any town is to be regarded as situate wholly in that town.

"* * * The said supervisors, upon laying out, altering or widening such highway may determine in their order what part of such highway shall be made and kept in repair by each town * * *; and each town shall have all the rights and be subject to all the liabilities in relation to the part of such highway to be made or repaired by such town as if it were wholly located in such town. * * * ." Sec. 1273, Stats.

This section further provides for such apportionment where the order failed to make one. Upon an application by a town to the county under sec. 1319, the fraction or part of any town line highway bridge the maintenance of which is chargeable to said town is properly looked upon as an entire thing and to be treated the same as are bridges wholly within the bounds of the town. What is here said relates, of course, to the financial features of the problem. When it comes to the matter of actual construction, coöperation may be necessary on the part of various towns and even of several counties.

Until there is further legislation on the subject I advise that the practice now in vogue and mentioned by you should be continued. No friction is likely to result. The liability of towns under sec. 1338, Stats., if they neglect this bridge work, is sure

to induce them to move promptly under said sec. 1319 in order to throw part of the expense of the work upon the counties, and the first move by a town is to vote the necessary money. Once that is done no trouble is apt to arise. Most of our troubles in construction on public account arise over the financing of the project.

Elections—Congressman—A candidate for nomination for both the unexpired and the full terms in the 11th congressional district must file separate nomination papers.

The election for both may be held at the time of the general election, but the nomination for the unexpired term must be made at a special primary.

July 11, 1918.

HONORABLE L. C. WHITTET,

Secretary to the Governor.

In your communication of July 10 you refer to the vacancy in the eleventh congressional district caused by the election of Honorable Irvine L. Lenroot to the senate, and you inquire whether the governor can issue a call for a special election which would enable candidates to file their nomination papers and run at the primary election in September, and become a candidate for the unexpired term at the general election in November, or whether that provision of the special election law would apply which provides that the primary and election shall be held within a forty-day period.

The nomination and election for the two-year term, beginning March 4, 1919, will, of course, take place as usual at the September primary and November election, respectively.

The question which confronts us is the filling of the vacancy for the unexpired term. Subd. (2), sec. 7.01 provides:

"A vacancy in the office of senator or representative in the congress of the United States, occurring not more than four months nor less than twenty days before a general election, may be filled at such election. Any such vacancy occurring more than four months, or less than twenty days, before a general election may be filled at a special election and if not so filled may be filled at any subsequent general election before the end of the term."

Mr. Lenroot resigned more than four months before the November election, and the vacancy created has not been filled at a special election heretofore, so that under the above provisions it may be filled at the November election.

Under sec. 7.04, subd. (1), all special elections for county officers are ordered by the county clerk, except that a special election for county clerk must be ordered and noticed by the sheriff, and it also provides: "All other special elections shall be ordered by the governor." It follows that the governor must order the special election for the filling of the congressional vacancy.

Subd. (2) of the same section provides:

"Every such order shall specify the office to be filled, how the vacancy occurred, the name of the officer, the time when his term of office will expire, the county or district in which and the day on which such election shall be held, which day shall not be less than thirty-five nor more than forty days from the date of such order."

Under this provision, it follows that the governor cannot call the special election to take place on the day of the general election more than forty days from the date of such election.

In subd. (3) it is provided:

"When made by the governor, such order shall be filed and recorded in the office of the secretary of state; * * * ,"

In this connection, it may be well to direct your attention to the provision of sec. 7.06, which reads:

"* * * No special election shall be held within sixty days next preceding a general election. * * * "

I find no provision which prohibits a special election to be held at the time of the general election nor sixty days prior to the date of the general election.

The question then confronts us: May nominations be made for the filling of the vacancy of the unexpired term at the September primary for the special election held at the time of the general election?

This question must be answered in the negative, for the reason that the call for the special election could not heretofore have been given because, under the above provision of the above quoted statute, it cannot be made prior to forty days of

the date of the special election, so that no call for a special election to be held in November was made at the time when the secretary of state gave the notice designating the offices for which candidates are to be nominated at the September primary, which notice must be given sixty days before the time of holding of such primary. See sec. 5.04, subd. (1). This notice has already been given by the secretary of state and, of course, does not include the vacancy for the unexpired congressional term.

Under sec. 5.25, subd. (1), it is provided:

"Whenever a special election shall be ordered as provided by section 7.04 of the statutes, all party candidates to be voted for at such election shall be nominated by a primary, which shall be held at a time to be fixed by the officer with whom the order for such special election is filed not less than twenty-five nor more than thirty days after the date of the filing of such order. This section shall apply to the filling of vacancies in the office of member of the assembly, state senator, United States senator, representative in congress and county officers."

It follows from the provisions of this section that the nomination for the unexpired term must be made at a special primary, which must be called by the secretary of state not less than twenty-five nor more than thirty days after the date of the filing of the order of the governor, calling the special election to be held on the date of the general election in November.

You are advised, therefore, that the governor may issue a call for a special election to fill the vacancy of the unexpired congressional term but that the nominations cannot be made at the primary election in September, but must be made at a special primary called by the secretary of state, as heretofore indicated. You are advised, also that the provision of the special election law which provides that the call for the special election must not be issued more than forty days prior thereto is applicable.

You also inquire whether it will be necessary for a person who wishes to run as a candidate for the unexpired as well as the full term to file separate nomination papers.

This question must be answered in the affirmative. It would, of course, naturally follow that it is necessary to file separate nomination papers, in view of the answer to your first question, that the two nominations must be made at separate primaries—

the one for the long term at September primary, and the one for the vacancy of the unexpired term at a special primary called by the secretary of state shortly before the special election to be held on the date of the general election, in November. But even if the nominations were made on the same date, I am of the opinion that separate nominations would have to be made, and that the two nominations could not be combined, as the people of the district have the right to elect a person for the unexpired term and a different person for the full term.

It is a well known fact in this state that at a special election held on January 18, 1887, to fill the vacancy caused by the death of Honorable William T. Price, congressman in the then eighth congressional district, Hugh H. Price, his son, was elected to fill the vacancy for the term ending March 4, 1887, and Nils P. Haugen was elected for the term beginning March 4, 1887. That is, Hugh H. Price was elected for the short term and at the same election Nils P. Haugen was elected for the long term.

That the electors in the district will probably elect the same person for the short term that they elect for the long term is no reason for combining the two terms into one, for they must be given an opportunity to elect two different persons, as the statute clearly gives them that right.

Public Officers—County Judge—Municipal Judge—A county judge is ineligible to the office of municipal judge.

July 16, 1918,

O. J. FALGE,

District Attorney,

Ladysmith, Wisconsin.

In your communication of July 12 you inquire whether one who holds the office of county judge would be eligible to hold the office, in the same county, of judge of the special municipal court established under ch. 115, Wis. Stats. You have directed my attention to sec. 2523—3, which contains the provision concerning the qualifications of a judge of the special municipal court, as follows:

“* * * No person shall be eligible to the office of judge of said court except an attorney of a court of record and such

judge shall hold no other county office during the time that he is judge thereof. * * * ”

The question confronts us whether the county judge is holding a county office within contemplation of this statute. In a restricted sense, the term “county office” often refers to the heads of the several major divisions of county government, such as sheriff, district attorney, county clerk, register of deeds, county treasurer, and clerk of the circuit court. The term, however, is sometimes used in a broader sense, referring to other offices, to which is delegated some of the work in the county, or whose duty pertains to the county. See the discussion relative to this matter in *State ex rel. Williams v. Samuelson*, 131 Wis. 499. You will note that this statute uses the expression, “shall hold no other county office.” It therefore contains an implication that the judge of the special municipal court is holding a county office. The word “other” would not have been used in this connection, if it was not to be inferred that in contemplation of this statute a municipal judge was a county officer.

In view of the fact that the municipal judge is not one of the heads of the several major divisions of the county government, any more than the county judge is, I take it that this indicates that the lawmakers used the term “county office” in the broad sense as including all offices whose duties pertain to the county and as including the county judge.

It seems to me that apart from the wording of this statute, it must be held that the office of county judge and that of the judge of the special municipal court, established under ch. 115, Stats., are incompatible and can not be held by the same person at the same time. The county judge is a court commissioner and therefore an examining magistrate by virtue of his office. The judge of the special municipal court is also an examining magistrate under sec. 2523—7. In the case of *State v. Jones*, 130 Wis. 572, our supreme court held that the office of county judge and that of justice of the peace were incompatible, because the consolidation in one person of the two offices diminished the number of examining magistrates by one, and this was sufficient to render the two offices incompatible, the court holding themselves bound by the decision in *State ex rel. Knox v. Hadley*, 7 Wis. 700, under the rule *stare decisis*.

Possibly upon a careful comparison of the duties of the two

offices, that of county judge and municipal judge, it may be possible to discover other grounds for holding the two offices incompatible, but I deem the above grounds sufficient to answer your question in the negative—that is, that a person who holds the office of county judge is ineligible to the office of judge of the special municipal court established in his county under ch. 115, Wis. Stats.

Bridges and Highways—County has authority to make highways passable at town expense.

July 16, 1918.

THOMAS M. PRIESTLEY,
District Attorney,
Mineral Point, Wisconsin.

In your letter of July 12, 1918, you state that you have given an opinion to the effect that any town highway that is dangerous or unsafe for travel or in poor condition for travel may be improved or repaired under sec. 1317m—9, and you call attention to the opinions of this department reported in Vol. IV, Op. Atty. Gen., p. 636 and Vol. V, Op. Atty. Gen., p. 569, which hold that sec. 1338, Stats., is the only provision for coercing town authorities in the matter, and you ask for my views upon this matter.

I agree with the opinion you have expressed. Subsec. 8, sec. 1317m—9 is an express provision for compelling town boards to repair and render passable and safe highways which are maintainable at town expense. That subsection is effective as far as it goes. You will observe, however, that the amount of public funds which may be expended under said subsection for any one repair is limited to one hundred dollars and within any town to three hundred dollars.

“* * * In making such repairs, the county highway commissioner may expend from the county road and bridge fund a sum not to exceed one hundred dollars in addition to any donations of money or labor. If the total of all sums available shall not be sufficient to properly repair the condition complained of, the county highway commissioner may refuse to make the repairs, and further action shall be in accordance with section 1338 of the statutes.” Subd. (b), subsec. 8, sec. 1317m—9, Stats.

"The amount thus expended shall be charged to the town and added to the next county tax apportioned to the town and collected therewith. Provided that not more than one hundred dollars shall be so chargeable for any one repair, nor more than three hundred dollars in any one year in any town. When paid in by the town, the amount shall be credited to the county road and bridge fund." Subd. (c), subsec. 8, sec. 1317m—9.

This subsection is part of sec. 8, ch. 668, Laws 1913, very evidently overlooked when the opinions above referred to and reported in Vols. IV and V were rendered.

Criminal Law—Military Service—State courts have jurisdiction to try case where offense was committed prior to time when party entered army; trial should proceed irrespective of call to military duty.

July 18, 1918.

JOHN ROBERTS,

District Attorney,

Grand Rapids, Wisconsin.

In your recent letter you state that a man classified as IA, subject to call but not yet called, was arrested charged with forgery; that he may be called in the United States service at any time. You inquire whether the federal government has any regulations or instructions covering cases of this kind, and what in my opinion would be the proper procedure as to holding or releasing a man so charged. You also inquire whether, if the man were arrested after call and before departure, the civil authorities of this state have the right to hold him charged with crime against the state laws.

The United States constitution gives congress the power, in sec. 8, art. I:

"To declare War, * * *;

"To raise and support Armies, * * *;

"To make Rules for the Government and Regulation of the land and naval Forces."

When congress carries out the power given to it and makes such rules, they are the supreme law of the land upon that subject. We must therefore look to the acts of congress to deter-

mine as to what extent its laws and rules for the regulation of the army affect the criminal prosecution in civil courts for offenses committed by those who form a part of such army. See *Ex parte Frederick Bright*, 1 Utah 145, 152, and *Colman v. Tennessee*, 97 U. S. 509.

Sec. 2308a, U. S. Comp. Stats., Vol. 4, 1916, contains the articles of war governing the army of the United States, as enacted August 29, 1916. In art. 2 we find the following provision:

"The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: * * *

"(a) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same."

The president was authorized by the Selective Service Law, approved May 18, 1917, to make rules and regulations, and in sec. 157 of such Rules and Regulations it is provided that the provost marshal general is to notify each state adjutant general to furnish at a specified time or times, or place or places, the net quota of the state, or any proportion or part thereof, and the adjutant general is then to notify each local board of the exact number of selected men to be furnished by such board, and of the date, place, and hour of entrainment, and the local board is required to mail to the address of each registrant specified an order to report to the local board for military duty at the hour, day, and place specified in the order from the adjutant general. Said section then provides:

"From and after the day and hour thus specified each such registrant shall be in the military service of the United States, and either the entry of such date after the name of any such registrant on the Classification List or the mailing to any such registrant of the order into military service as provided in this paragraph shall constitute the giving of notice to such registrant that from and after such day and hour he will be in the military service of the United States, and of his duty to report to the Local Board at the hour and on the day specified." Public, No. 12, 65th Congress,

Here we have a specific time set when a drafted person is deemed, in contemplation of the United States statute, to enter into the military service of the United States. Not only the day but also the hour is given, and it is the time and the hour when the registrant is required to report to the local board. Prior to that time, he is not subject to military law. His status, so far as being amenable to military law, is not different from that of any other citizen in this state until that time, but after that time he may be tried by a court-martial, if he commits an offense against the laws of the United States.

The party who is the subject of your inquiry is charged with having committed forgery at a time when he was not amenable to the military law of the United States. He can only be punished for his offense by the civil authorities. The proper procedure, therefore, is to hold and try the man for his offense in the same manner as you would if he had not been drafted.

Under Rule XII of sec. 79 of the Regulations of the Selective Service Law, all persons shown to have been convicted of any crime under the laws of the state, as treason, felony, or an infamous crime, are placed in Class V, and thus exempted from military service.

Rule XIII provides:

"Any registrant, not classified in Class V under subparagraph (h) of Rule XII who is—

- "(a) In prison serving sentence or awaiting trial; or,
- "(b) In a reformatory or correctional institution; or,
- "(c) At large on bail under criminal process;

"Shall first be classified and recorded as any other registrant; but, pending his discharge from confinement, or the final disposition of his case, he shall be treated as standing at the bottom of Class IV, and so recorded * * * ."

It is apparent from these various provisions that it is the policy of the federal government to eliminate from military service those who are guilty of a felony, and I am informed that in pursuance of this policy, the military authorities will not attempt to compel the entrance into the army of persons charged with felonies until the case is disposed of by the civil authorities. The military department of the federal government has always attempted to favor coöperation with the civil authorities

in the bringing of offenders to justice, and very few cases have been taken to the ultimate courts of the various states and the United states relative to this matter.

An interesting case, however, is that of *Ex parte King*, 246 Federal 868, which is the only case where a federal court construed the new articles of war since the amendment of August 29, 1916. It was there held that a soldier who killed a policeman of a Kentucky city, after the declaration of war between the United States and Germany, should be delivered up to the military authorities for trial and that the military authorities had superior jurisdiction of the offense. In that case, however, the soldier was in actual military service at the time when he committed the offense, and the court intimated that it was an open question whether the military courts had exclusive jurisdiction in such cases or not. The United States supreme court, in the case of *Colman v. Tennessee*, 97 U. S. 509, had held that under the articles of war prior to the last amendment the civil courts and military courts had concurrent jurisdiction of crimes committed by persons in the military service. To the same effect is *Grafton v. United States*, 206 U. S. 333, 348, and *Franklin v. United States*, 216 U. S. 559. And in a very learned opinion by the Honorable C. Cushing, at that time attorney general of the United States, to Honorable Jefferson Davis, then secretary of state (1854), it was held that an officer or soldier of the army, who does an act which is criminal both under the military and the general law, is subject to be tried by the latter, but his conviction or acquittal by the civil authorities of the offense against the general law does not discharge him from responsibility for the military offense involved in the same facts. Vol. 6, Opinions of U. S. Attorneys General, p. 413. The court, in the case of *Ex parte King*, *supra*, pointed out that the language used in the new articles of war might necessitate a different ruling, but did not definitely pass upon the question.

In the case of *Grafton v. United States*, *supra*, it was held that a soldier in the army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippine Islands, by a military court-martial of competent jurisdiction proceeding under authority of the United States, can not be subsequently tried for the same offense in a civil court exercising authority in that territory, but that a different rule of law

would apply if the act had been committed in a state; that the government of the state does not derive its power from the United States, while that of the Philippine Islands does owe its existence wholly to the United States, so that a person could not plead being put in jeopardy twice when the offense is one against the state law and the same facts are also an offense against the United States military law.

These are questions, however, which are not necessary for consideration in a determination of the question submitted by you. There can be no doubt as to the matter submitted by you under the statute and rules and regulations of the federal government at the present time. A person who has committed an offense against the laws of this state, prior to the time when he is required to report in answer to a call of the local board, may be arrested and prosecuted and punished for his offense by the civil courts of the state.

In an official opinion dated March 30, 1918, to H. B. Rogers, district attorney at Portage,* it was held that a bastardy proceeding is civil and not criminal, and that therefore the proceeding should be stayed during the time that the defendant was in the military service. The ruling there is in harmony with this opinion, as under the decisions of our court, we were constrained to hold that a bastardy proceeding is civil and not criminal in its nature.

Public Officers—Counties—County Board—A county board may transact any business at a special meeting that could be done at a regular one, unless especially provided otherwise.

July 20, 1918.

E. S. JEDNEY,

District Attorney,

Black River Falls, Wisconsin.

Your favor of July 17 is at hand. You inquire whether the county board called in special session can transact any other business than the special business for which it was convened in such special session.

* Page 189 of this volume.

Sec. 664, Wis. Stats., provides for the meetings of the county board, and among the provisions thereof is the following:

"* * * 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," etc.

It will be noticed that there is no requirement that the call for the special session or the notice of the same shall specify the business to be conducted. The powers of the county board are largely specified in sec. 669, and this section provides that such powers can be exercised as follows:

"The county board of each county shall have power at any legal meeting"

to do the things enumerated in said section. There is nothing here to prevent these powers being exercised at a special meeting. A special meeting is a legal meeting within the provisions of this section.

I am therefore of the opinion that except in special cases where the statute especially provides that certain things can only be done at the annual meeting of the county board, it can transact any business at a special meeting that can be transacted at the regular meeting.

Regarding the other questions to which you allude in your letter I would say they refer to obligations of the county to maintain and repair portions of the trunk highway system which are purely governed by statute, to which reference should be made for guidance. I am satisfied that this office should not attempt to give general directions as to all that can be done under a series of statutes. A general discussion of statutory law of that kind would probably lead to confusion rather than enlightenment.

Public Health—Nuisances—A stable is not a nuisance *per se*.

The refuse of the stable in question is probably a nuisance but it may be abated by the local health department without a suit.

July 23, 1918.

J. R. PFIFFNER,

District Attorney,

Stevens Point, Wisconsin.

In your communication of July 13 you state that the second ward school building in your city is located on grounds which front upon what is known as Water street; that it is one of the finest buildings in the city and the grounds upon which it is located have been used for school purposes since 1858; that across the street from these grounds and about sixty feet from the western limit of the grounds, and possibly four hundred feet more or less from the school building itself, is an old barn which abuts upon the sidewalk across the street from the grounds; that this barn contains from eight to ten horses; that the occupant of the barn throws the refuse from these stables out of the windows on to the open ground and allows it to accumulate there until it becomes a source of annoyance to the neighbors, and that sometimes the odor penetrates to the school building so that the windows on the side of the building next to the barn in said building have to be closed. You inquire whether or not this would be considered a public nuisance, and whether or not I would bring an action to abate it, under the provisions of sec. 3180a.

You enclose in your letter a petition to the board of education of the city of Stevens Point, signed by a great number of women, in which they state that this stable on Water street is a perpetual menace and that the owner allows the refuse to accumulate until at times from twenty-eight to thirty wagonloads have been taken away at a single hauling; that it is a plague spot and a fly breeder of the first magnitude, and that it is in close proximity to one of the leading ice cream and milk establishments, which furnishes milk to hundreds of little ones throughout the city. They ask that the stable be condemned.

The authorities are agreed that a stable is not a nuisance *per se*; that it often depends upon the manner in which it is built, kept, or used. In examining some of the cases which

were cited in note 2, par. 692, Vol. IV, Dillon on Municipal Corporations, I find that the attempt to remove stables as a nuisance by means of legal proceeding has generally failed, for the reason that the evidence was not strong enough to condemn the stable itself, as the courts generally recognize that the stable could be so run and used as not to be a nuisance. The courts have also recognized the fact that a stable is a necessary part of every community and must be tolerated somewhere. I doubt very much whether any court would declare the stable in question a public nuisance. The refuse, when accumulated to the extent of twenty-eight or thirty loads, is a nuisance, and probably a public nuisance, but it would not be practical to bring an action to abate this as a public nuisance, as the local board of health has ample powers to cause the removal of the same without a suit.

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."

If the local board will not take hold of the matter, complaint should be made to the state board of health. The express power given by statute to the health department is such that this nuisance can be removed without a resort to a legal suit.

Criminal Law—Fines—Public Officers—Weed Commissioner—Agriculture—Noxious Weeds—A fine under sec. 1480 is not a forfeiture. It must be collected in a criminal prosecution and paid into the school fund.

Weed commissioner draws no pay for serving notices.

Town chairman may limit number of days for which commissioner is paid.

Weed commissioner may hire boys under 16 and above 14 if they have permits.

Town is not authorized to pay weed commissioner more than \$3 a day.

Noxious weeds must be destroyed with as little damage to the crop as is reasonably necessary.

July 23, 1918.

HONORABLE A. L. STONE,

Deputy Weed Commissioner,

Department of Agriculture.

In your recent letter you refer to me that part of subsec. 2, sec. 1480, Stats., which reads thus:

"If such person or corporation shall fail to so destroy any weeds that, under the provisions of this section, are to be destroyed, within six days after being served with a written notice so to do, by any commissioner of noxious weeds, he shall be punished by a fine of five dollars for every day thereafter during which such neglect shall continue. * * * * ,"

You inquire whether this penalty is a fine or a forfeiture, and inquire how it may be collected and what disposition is made of it and whether it is to be paid into the town treasury.

Sec. 3294 provides:

"In all cases, not otherwise specially provided for by law, where a forfeiture shall be incurred by any person and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action. When such act or omission is punishable by fine and imprisonment or by fine or imprisonment or is specially declared by law to be a misdemeanor it shall be deemed a misdemeanor within the meaning of this chapter. The word forfeiture, as used in this chapter, shall include any penalty, in money or goods, other than a fine."

Under this provision the punishment, being by a fine of five dollars, is not a forfeiture, and can not be collected in a civil

suit. It is a misdemeanor and must be brought as all other fines are collected, by a criminal prosecution; the fines thus collected are a part of the school fund under the provisions in our constitution and must not be paid into the town treasury.

You also direct my attention to that part of sec. 1480b which reads as follows:

"Such commissioner shall carefully investigate concerning the existence of noxious weeds in his town, city, village or district; and if any person or corporation, owning, occupying or controlling any lands therein shall neglect to destroy any of the weeds which under the provisions of section 1480 are to be destroyed, and standing or growing on such lands or upon any highway, lane or alley adjoining and nearer to such lands than the center of such highway, lane or alley, he shall serve or cause to be served on such person or corporation the written notice provided for in said section 1480, and if said person or corporation shall fail to comply with the terms of said notice within the time specified in said section 1480, he shall destroy or cause all such weeds to be destroyed and may devote as many days to doing so as the officer appointing him shall direct, and for each day so used in destroying such weeds, he shall receive three dollars upon presenting to the proper treasurer his account therefor, verified by his oath and approved by the chairman, president or mayor, as the case may be. * * *."

You state that if the commissioner is required to carefully investigate concerning the existence of noxious weeds in his town, this would require time and labor on his part; that this section only provides for remuneration for the time spent in the actual destruction of weeds where the occupant of the land has refused to cut them. You inquire whether the weed commissioner may receive the same per diem for investigating as to the existence of noxious weeds and the serving of the notice as the law provides for the actual destruction of weeds. This question must be answered in the negative. A public officer takes his office *cum onere*, and when there is no compensation fixed by statute, he receives none. In this case, the only remuneration given him is for the destruction of the weeds. I believe the statute is clear and explicit and that there is no room for construction.

You inquire whether the provision in this section that he may devote as many days to the cutting of the weeds "as the officer appointing him shall direct" gives the town chairman, who is

the appointing officer, the power to prohibit further activities on the part of the weed commissioner at the end of thirty days, that being the time limit directed by the officer, whether the weeds of the entire township have been destroyed or not.

I take it that this is a limitation upon the amount of money that will be expended for this purpose and that the appointing officer has the right to limit the weed commissioner in the number of days for which he will be allowed pay. The commissioner is directed to destroy or cause all such weeds to be destroyed. I do not believe that the chairman would have the power to prohibit the weed commissioner from further activities after he has used thirty days in destroying weeds, if he takes additional time in destroying the remaining weeds, but in that case he can not receive pay for such services in excess of the number of days allowed by the appointing officer.

You also inquire whether the commissioner, who is empowered by law to hire others to assist him, may employ for this purpose boys under sixteen years of age. I see no objection to hiring boys under sixteen years of age and above fourteen years of age, if they have permits issued to them, as required by law.

You inquire whether the provision that the weed commissioner shall receive three dollars a day prohibits the town from paying a higher per diem, provided it will do so. This question must be answered in the affirmative. It is beyond the power of the town to pay more than the specific amount mentioned in the statute.

You also direct my attention to that part of sec. 1480b which reads thus:

"Any such commissioner may enter upon any lands upon which any of the weeds mentioned in section 1480 are growing and cut or otherwise destroy them without being liable to any action for trespass or any other action for damages resulting from such entry and destruction, if reasonable care is exercised in the performance of the duty hereby imposed."

You state that there is a large number of farms in this state where small grain has been sown on fields badly infested with one or more of the noxious weeds mentioned in sec. 1480; that they are in fact so badly infested that in many instances less than fifty per cent of a normal crop is being produced, and where the destruction of the weeds would include the destruc-

tion of a certain quantity of grain. You inquire as to the power of the commissioner in such cases and what would be the interpretation of the expression, "the exercise of reasonable care in the performance of his duties."

It would be the duty of the commissioner in such cases to destroy the noxious weeds with as little damage to the crop as it was reasonably necessary to cause. In all such cases it would be advisable to come to an understanding with the owner of the grain, if possible.

Intoxicating Liquors—Wholesale Licenses—Under a wholesale liquor license sales may be made in any quantity and to others than dealers so long as the liquor is not to be drunk on the premises.

July 24, 1918.

ARCHIBALD MCKAY,

District Attorney,

Superior, Wisconsin.

In your letter of July 19 you refer to the right of towns, villages and cities to grant wholesale licenses, apparently without a limit as to number, which wholesale license permits its holder to sell, deal or traffic in intoxicating liquors, no part of which shall be sold for consumption on the premises of the licensee.

You state that in the village of Oliver, situated about ten miles from Superior, the village board has granted six wholesale licenses and one retail license; that your investigation has led you to believe that the so-called wholesale establishments are really much more vicious than the place holding a retail license; that the practice of such wholesale houses is to sell liquor in any quantity, not to be consumed on the premises, the parties purchasing having the right to drink the same on the public streets or anywhere, so long as they do not consume the same on the premises for which the license is granted. You inquire whether the statute providing for the granting of wholesale and retail licenses may be so interpreted that it authorizes only sales in bulk for use by retail dealers only.

The history of this statute clearly shows that such an interpretation is not possible. Prior to 1915 for a number of years there was no distinction between wholesale and retail licenses.

Only one kind of license could be issued, and the licensee could sell at retail or wholesale under the same. By ch. 249, laws of 1915, the two kinds of licenses were provided for—a wholesale and a retail license. The law provided in sec. 1:

"* * * A wholesale license shall permit its holder to sell, deal or traffic in such liquors as a manufacturer or dealer only, no part of which said liquors shall be sold for consumption upon the premises of the licensee. A retail license shall permit its holder to sell, deal and traffic in any such liquors to be consumed on or off the premises so licensed."

In sec. 3 of said chapter it is provided that licenses may issue to sell intoxicating liquors

"at retail to be consumed on or off the premises where sold and may in like manner grant licenses to manufacturers and wholesalers located in their respective towns, villages or cities to sell as wholesalers and not to be consumed upon the premises where sold. The provisions of section 1565d shall not include or apply to manufacturers or wholesale dealers."

This statute soon came up for interpretation in the attorney general's office, and on June 30, 1915, my predecessor gave an official opinion in which it was held that under a wholesale license intoxicating liquors in any quantity to any person might be sold, provided only no part of such liquors should be sold for consumption on the premises. The attorney general, who was in close touch with the legislature, knew that that was the intent when the law was enacted, but as the law was somewhat ambiguous, and because another interpretation such as you suggest in your letter was possible, the attorney general said in said opinion:

"It must be admitted, however, that the law is ambiguous and that it is not certain that this construction would be given the law by the supreme court. As the legislature is now in session, and attention having been called to the ambiguous nature of this act, it would be well to have it so amended as to clearly express the legislative intent." Vol. IV, Op. Atty. Gen., pp. 570, 573.

Following the suggestion of the attorney general, the legislature again amended said sec. 1548 by ch. 476, laws of 1915. The law was there put in the form in which we find it today,

and it defines what is meant by a wholesale license and also by a retail license. It reads thus:

"* * * A wholesale license shall permit its holder to sell, deal or traffic in such liquors, no part of which shall be sold for consumption upon the premises of the licensee. A retail license shall permit its holder to sell, deal and traffic in any such liquors to be consumed on or off the premises so licensed."

These words are clear and unambiguous, and there is no room for construction. You can therefore see that the history of this statute clearly shows that the definition therein given is the only one that it is possible to give to a wholesale and retail license. It does not limit the quantity that is to be sold, nor does it in any way indicate the classes of persons to whom the sale must be made. The only distinction between the two kinds of licenses is that under a wholesale license liquor may be sold no part of which shall be consumed upon the premises, while under a retail license sales may be made for consumption on or off the premises.

Automobiles—Jitneys—One who goes to his work regularly each day in an auto of his own and takes with him the same persons each day, receiving pay therefor, is not within sec. 1797—62.

July 26, 1918.

HELMUTH F. ARPS,
District Attorney,
Chilton, Wisconsin.

Your esteemed favor of July 22 is at hand. You state that the owner of an automobile makes regular trips to his work from Kiel to New Holstein, where he is working; that he takes certain people each morning with him to work and brings them back each night, charging twenty-five cents therefor; that he takes only those certain persons each day. You inquire whether he comes under sec. 1797—62, Stats.

If he conducts no other business than that you have described, I am inclined to believe he does not come within the provisions of this section.

This section reads:

"Every person, firm or corporation operating any motor vehicle along and upon any public street or highway for the carriage of passengers for hire and affording a means of local, street or highway transportation similar to that afforded by street railways, by indiscriminately accepting and discharging such persons as may offer themselves for transportation along the course on which such vehicle is operated or may be running is hereby declared to be a common carrier," etc.

The man in question does not seem to fill in his line of business the calls of this statute. He does not afford a means of local street or highway transportation similar to that afforded by street railways and does not indiscriminately accept and discharge such passengers as may offer themselves. This fact, I think, takes him without the provisions of this statute.

Public Officers—County Chairman—County chairman may countersign his county orders by stamping his name with a rubber stamp thereon.

July 26, 1918.

O. J. FALGE,

District Attorney,

Ladysmith, Wisconsin.

You refer me to sec. 715, Wis. Stats., in your communication of July 23, which provides in subd. (2) among other things, that the county treasurer shall

"pay out all moneys belonging to the county only on the order of the county board, signed by the county clerk and countersigned by the chairman."

You state that the county chairman of Rusk county uses a rubber stamp signature, and you inquire whether the county treasurer should recognize an order on which the signature of the county chairman is stamped.

In 25 Am. & Eng. Ency. of Law (2d ed.) 1066, we find the following rule:

"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."

In the case of *Streff v. Colteaux*, 64 Ill. App. 179, a declaration containing three special counts in assumpsit was filed, and the declaration was signed only by an impression thereon made by plaintiff's attorneys with a rubber stamp. The court said:

"We are not aware of any authority to the effect that one may not so sign his name. It is ordinarily the act of making a paper one's own that is important, rather than the manner of so doing." P. 180.

In the case of *Bennett v. Brumfitt*, Law Rep. 3 C. P. 28, William Brumfitt objected to the name of Frederick Caple being retained on the list of voters for the borough, and it was contended that the notice of objection was not signed by William Brumfitt. The court said:

"The question in this case is whether the notice of objection was 'signed by the person objecting,' within the meaning of the 17th section of the 6 Vict. c. 18. The name of the objector was affixed to the notice by himself by means of a stamp upon which was engraved his ordinary signature. I am of opinion that that was a perfectly good signature within this statute. It is clear that it would be a good signature within the statute of frauds. It is equally clear that it would have been a good signature to a will. The decision of the revising barrister was therefore in my judgment perfectly correct. The ordinary mode of affixing a signature to a document is not by the hand alone, but by the hand coupled with some instrument, such as a pen or a pencil. I see no distinction between using a pen or a pencil and using a stamp, where the impression is put upon the paper by the proper hand of the party signing. In each case it is the personal act of the party, and to all intents and purposes a signing of the document by him." Pp. 30-31.

In a learned opinion given to the president of the United States by the Honorable William Wirt, then attorney general of the United States, dated July 5, 1824, it was held:

"If the Secretary of the Treasury is capable of seeing what he does, so that one paper cannot be passed upon him for another, he may impress his name with a stamp or copperplate instead of a pen, provided he keep the stamp or copperplate in his own possession and apply it himself, or cause it to be applied in his presence." Vol. 1, Opinions of U. S. Attorneys General, p. 670.

There were no direct decisions upon the point at that time and the opinion rested wholly upon analogy and the general reasoning of the law. Mr. Wirt says *inter alia*:

"There would be great difficulty in maintaining the proposition as a legal one, that when the law required *signing*, it means that it must be done with pen and ink. No book has laid down the proposition, or even given color to it. I believe that a signature made with straw dipped in blood, would be equally valid and obligatory; and if so, where is the legal restriction on the implement which the signer may use? If he may use one pen, why may he not use several?—a polygraph, for example, or types—or a *stamp*, which the court, in *Lemaign vs. Stanley*, said would be a sufficient satisfaction of the statutory requisition of *signing*. The law requires *signing* merely as an indication and proof of the parties' assent. It places the treasury of the United States under the guardianship of the Secretary. It requires that no money shall be drawn from the treasury without his authority. The evidence which it demands of his authority is, that the warrants shall be *signed* by him; but as to the method of *signing*, that is left entirely to himself. He may write his name in full, or he may write his initials; or he may print his initials with a pen: that pen may be made of a goose quill, or of metal; and I see no *legal* objection to its being made in the form of a stamp or copperplate. It is still his act; it flows from his assent, and is the evidence of that assent. * * *. It is true, that the stamp may be forged; but so also may the autograph of the Secretary. There would, perhaps, be more difficulty in the latter case than in the former; and the superior facility of forging a stamp, or a copperplate, may be a very good reason why the legislature should, by a positive law, prohibit the use of it, and define the manner in which the *signing* shall be done." Pp. 672-673.

In the case of *Scott and others v. Seaver*, 52 Wis. 175, it was held that under sec. 1696, which

"provides that the assignees named in a general assignment for the benefit of creditors, 'shall each, in the presence of the officer taking the bond, before delivering the copy of the assignment to said officer for the purpose specified in the preceding section, *indorse in writing* on such copy their consent to take upon themselves . . . the trusts specified in the assignment,' etc.: and that such officer 'shall *indorse thereon* his certificate,' * * * that it is sufficient if the names of the assignees and the officer are affixed in their presence and at their request to the declaration of consent and the certificate respectively; and that it is not necessary that such names should be affixed in their own handwriting."

It was held also that the provision of subd. (19), sec. 4971, that "in all cases where the *written signature* of any person is required by law, it shall always be the proper handwriting of such person, or, in case he is unable to write, his proper mark or his name written by some person in his presence," does not apply to the declaration of consent or the certificate above mentioned, as sec. 1696 does not expressly or by necessary implication require the written signature of the assignees and the officer."

In the case of *Mezchen v. More*, 54 Wis. 214, the court had under consideration the provisions of secs. 2629 and 2630 which provide that the summons in a civil action "shall be subscribed by the plaintiff or his attorney," and it was held that it was not necessary that the name of the plaintiff or his attorney be written in his own hand at the bottom of the summons, but that it may be printed.

In the case of *Dreutzer v. Smith*, 56 Wis. 292, the court held that under sec. 1140, Stats., which provides 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,"

such certificate may be assigned by the officer by stamping his name and his official character on the same with intent to assign. The court said:

"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. It is true, this definition does not in express terms define the words 'by writing,' and so it may be said it is not applicable, and has no force in defining the words 'by writing.'

We may, however, we think, consider the definition given by the statute to the words 'written' and 'in writing' as showing the liberal construction which should be given to all words or terms of a like character where used in the statute. It cannot, we think, be doubted that if it were not for the statute which declares that 'when the written signature of any person is required by law, it shall always be the proper handwriting of such person,' etc., the statute which requires him to assign the certificates 'by writing his name on the back thereof,' would be complied with by placing it on with a stamp, as was done in this case. [Citing cases.]

"* * * All the cases seem to hold that when a party places his name to an instrument in writing with the 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. If this be so, then we cannot say that such statute necessarily requires the written signature of the clerk, and so does not come within the provision above quoted. We think the cases of *Scott v. Seaver*, 52 Wis., 184, and *Mezchen v. More*, 54 Wis., 214, cover the point made by the learned counsel for the appellant, and are conclusive that the objection to the assignment is not well taken. The argument that it would tend to fraudulent assignments of certificates if allowed, does not seem to us to have any great force. As was said by Le Beanc, Justice, in *Schneider v. Norris*, *supra*, 'such stamping, if required to be done by the party or by his authority, would afford the same protection as signing.' See, also, remarks of Lord Ellenborough in the same case." Pp. 296-298.

The above authorities are decisive on the question submitted by you. I have found no ruling to the contrary. I am therefore constrained to hold that the county treasurer will be authorized to recognize an order on which the signature of the county chairman is stamped. Of course, this signature must be stamped upon the order by himself with the intent to authorize the issuance of the same, or by some one duly authorized by said chairman.

Public Officers—Town Treasurer—School District Treasurer—
The offices of town treasurer and school district treasurer are incompatible.

July 27, 1918.

A. J. O'MELIA,

District Attorney,

Rhinelander, Wisconsin.

In your favor of July 18 you ask whether the offices of town treasurer and school treasurer may not be held by the same person, the school district being within the town limits.

In reply thereto I would say I am satisfied these two offices are incompatible and should not be held by the same person. Their duties are such as to make the holding of the offices by the same person inconsistent, and one of the clearest reasons that I can assign therefor is that under sec. 40.19, subd. (3), it is provided that the school treasurer shall prosecute the treasurer of the town for the recovery of any money belonging to the district which the town treasurer refuses or neglects to pay over in the manner prescribed. You can hardly imagine a school treasurer suing himself as town treasurer, which clearly makes these offices incompatible.

*Prisons—Pardons—*A pardon does not become effective until accepted by one to whom granted.

A pardon may be recalled and revoked by governor at any time before acceptance by grantee; status of grantee is same as though no pardon had been issued.

If a conditional pardon is granted and accepted and later the conditions are violated, it can be revoked only in manner prescribed by secs. 4862 and 4863, Stats.

July 29, 1918.

B. M. JOSTAD,

State Probation Officer.

In your letter of July 26 you state that one, Patrick Brickle, was recently convicted in circuit court of Fond du Lac county and sentenced to a term of one year in the Wisconsin state prison; that thereafter, and, as I understand it, before he had been taken to state prison, upon your request Governor Philipp issued a pardon containing the following conditions:

"1. That said Brickle shall absolutely abstain from the use of alcoholic liquors.

"2. That he shall be employed on a farm, and

"3. That he shall comply with all conditions required of him by B. M. Jostad."

You say that you secured a place for him upon a farm at \$50 a month and maintenance, but that he absolutely refused to go thereon. As I understand from your letter, he has at no time accepted the pardon and has never been placed in your charge and that he still remains in charge of the sheriff of Fond du Lac county. You ask, under these circumstances, as to whether you have authority to take him to the state prison at Waupun without any further proceedings, or whether it will be necessary to revoke the pardon under the provisions of secs. 4862 and 4863.

You refer to an interview with Assistant Attorney General Gilman with regard to this matter, in which you were advised to proceed under these two sections. At that time Mr. Gilman had the impression that Brickle had accepted the pardon with its conditions and that after that the position was procured for him upon a farm, when he refused to go. If that is the true situation, if he accepted the pardon and was placed in your charge by reason thereof, or was released from custody by reason thereof, then in my opinion, the proceedings outlined in those two sections are the proper ones to be taken.

If, however, that is not the case but he has at all times remained in the custody of the sheriff of Fond du Lac county, without having at any time accepted the pardon, then the procedure outlined in those sections is not the proper one to be followed. In the latter event you should bring the matter to the attention of the governor, returning to him the pardon formerly granted and which I understand has at all times been in your possession; and thereupon the governor should recall the pardon and revoke the same without any further proceedings thereon, and should so notify the sheriff of Fond du Lac county and the warden of the state prison. Upon that being done, the warden would have the authority, and it would be his duty, to deliver the prisoner to the warden at Waupun the same as though no pardon had ever been issued. The authorities for this latter procedure will be found cited in 29 Cyc. 1565-1566 and 1572,

Elections—Nomination Papers—August 3 is the last day to file nomination papers for the September, 1918, primary.

August 1, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

I have your letter of July 31, in which you direct my attention to the provisions of sec. 5.05, subd. (1), which reads thus:

"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," etc.

You state that the September primary this year occurs on September 3; that excluding this day and counting back to the thirtieth day prior thereto brings us to Sunday, August 4; that under this situation you are disposed to hold that August 3 is the last day for filing nomination papers, as they cannot be filed on Sunday. You inquire whether you are correct in this, or whether the candidate should be allowed to file as late as August 5, by reason of the fact that the thirtieth day prior to September 3 is Sunday.

Prior to the decision of our supreme court in the case of *Fletcher v. La Crosse County*, 165 Wis. 446, it was the ruling in this state, as announced in *Ward v. Walters*, 63 Wis. 39, 44, 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 was applied to the above quoted provision of sec. 5.05 in an official opinion rendered by my predecessor, under date of June 5, 1916. (Vol. V, Op. Atty. Gen., p. 466.) That was the only conclusion possible under the decisions of the court, as is indicated in said opinion, but the case of *Ward v. Walters, supra*,

was overruled in the case of *Fletcher v. La Crosse County, supra.* Your conclusion in computing the time is therefore in harmony with the ruling of our supreme court, so far as making the last day for registering August 4; but that being Sunday, the question arises whether that fact will make Saturday, August 3, the last day for filing the papers, or whether this could be done on August 5. I think your ruling in this respect is also correct. If it were held that the papers could be filed on August 5, then it would be less than thirty days prior to the September primary, which is in direct violation of our statute.

The wording in subd. (24), sec. 4971, that "if the last day be Sunday, it shall be excluded" in the computation of time, cannot be applied in this case, as that section has reference to cases where the computation is of time within which an act is to be done, and not the computation of time where an act is required to be done a certain number of days or weeks before a certain other day. The only safe practice at this time is to rule as you have suggested, and require the nomination papers to be filed on or before August 3.

I realize that an argument may be made that in such cases the nomination papers should be received on Monday, August 5, but in the absence of a direct ruling of our supreme court on this matter, I am of the opinion that the day prior to Sunday, when Sunday is the last day, is the time when the nomination papers should be filed.

Automobiles—Registration—A party who has complied with the laws of another state, in which he resides, need not comply with the Wisconsin law in order to operate his automobile in this state.

August 1, 1918.

MARION F. REID,

District Attorney,

Hurley, Wisconsin.

In your letter of July 26 you state that a partnership composed of persons residing in Gogebic county, Michigan, operates an automobile bus line, under the name of Ramsey Bus Line Company; that they operate three or four automobiles between Bessemer and Wakefield, Michigan, maintaining a schedule of

one bus each way every half hour; that recently this partnership has operated one or two of its cars between Bessemer, Michigan, and Hurley, Wisconsin; that they make a practice of having these cars leave Hurley about 11:00, P. M., but have no regular time for the arrival of these cars at Hurley; that these cars take up and discharge passengers along the road from Hurley, Wisconsin, to Bessemer, Michigan. You inquire whether in my opinion persons operating these cars must obtain a state license under sec. 1636—47, Stats. You state that you are of the opinion that sec. 1636—53 exempts this company from the provisions of sec. 1636—47.

Sec. 1636—47 provides for the registration of automobiles, motor cycles, or other similar motor vehicles.

Sec. 1636—53 reads in part thus:

"The provisions of section 1636—47 shall not apply to automobiles or other similar motor vehicles owned by nonresidents of this state; provided, the owners thereof have complied with any law requiring the registration of such automobile or other similar motor vehicle, or its owner, in force in the state, territory or federal district of their respective residence, and the registration number of such state, territory or federal district shall be displayed on the rear of such automobile or other similar motor vehicle substantially as provided in section 1636—47. Nonresidents passing through this state from states having no registration as provided in section 1636—47 shall comply with all the provisions of sections 1636—47 to 1636—57, inclusive."

If the Ramsey Bus Line Company has its cars registered under the Michigan laws and has fully complied therewith, then it will not be required to register under the Wisconsin statute. Your conclusion in this matter is absolutely correct.

The statute is clear and explicit, and the fact that the bus line company is making a business of operating its cars in this state for commercial purposes does not in any way affect the conclusion to be arrived at.

Criminal Law—Confidence Game—Drifters who pretend to hire out in logging camps and thereby get supper, lodging and breakfast and then depart without performing any service, while not liable under sec. 4438b, may be liable under secs. 4568m and 4568n.

August 2, 1918.

HONORABLE G. A. BUCKSTAFF,
Oshkosh, Wisconsin.

Your esteemed favor of July 26, inquiring in behalf of the United States food administration of the state of Wisconsin regarding what remedy can be applied in case of floaters frequenting logging camps who pretend to hire out for service, get their supper, lodging and breakfast, and then depart for the next camp to do the same thing, is at hand. You state that they are probably not vagrants because they usually have some money with them, and you ask whether they can be prosecuted under the Hotel or Inn Statute, to wit, sec. 4438b.

In reply to this question I would say I am satisfied they would not come within the provisions of that statute, for the reason that the logging camp is not a hotel or inn within the meaning of that statute. It is possible they could be brought within the terms of sec. 4568m and sec. 4568n. I am satisfied that their practice, that is, where a man comes to a camp, pretends that he wishes to hire out and by that means obtains supper, lodging and breakfast, with the intention of doing no service at all, but of defrauding the employer of such food and accommodation, constitutes a confidence game within the meaning of these two statutes. The subject of confidence games is treated in two opinions rendered by my predecessor in Vol. III, Op. Atty. Gen., pp. 236, 251.

If the circumstances were such as to indicate that the man came to camp and pretended to hire out for the purpose of getting food and lodging and without any honest intention of obtaining employment, I am satisfied he would be guilty and could be found guilty under sec. 4568m.

Criminal Law—War Measures—Sedition—Facts submitted held to warrant prosecution under sec. 3, ch. 13, Laws 1918.

August 2, 1918.

CHARLES F. MORRIS,

District Attorney,

Washburn, Wisconsin.

In your letter of July 30 you submit testimony taken at a preliminary hearing and ask whether or not the testimony so submitted establishes an offense under sec. 3, ch. 13, laws of 1918, relating to seditious remarks.

Sec. 3, *supra*, provides:

"No person shall advocate, teach or advise, that citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."

The testimony shows that a conversation arose among a group of employees at the Dupont Powder Works over some newspaper reports of American victories in taking German prisoners; that during the conversation the defendant stated, among other things, that the report was false from start to finish. The conversation then shifted to cruelties committed by the Germans and the defendant stated there was nothing to prove that this was so, that he did not believe it, and that the cruelties committed in the Civil War were of equal brutality and asked the question why we should blame the Germans for their cruelties at this time. Among other things, he said: "This is war. We have no business in this war. We brought it on ourselves. Germany was not to blame for being in this war."

The question therefore arises as to whether or not the statements made by the defendant fall within the terms

"advocate, teach or advise that citizens of this state should not assist the United States in prosecuting or carrying on war with the public enemies of the United States."

The purpose of ch. 13 as set out in the title is as follows:

"An Act to prohibit interference with, or discouragement of the enlistment in the military or naval forces of the United States, or of the state of Wisconsin, and to prohibit teaching or advocating that citizens of this state should not aid or assist the

United States in prosecuting or carrying on war with the public enemies of the United States. * * * ”

“Teaching, advocating and advising” are terms of considerable breadth and one may teach by example, word, act or, as Socrates taught in the ancient times, by merely asking questions. One may advocate by word, act, example, command or inquiry. He may use direct, declaratory sentences or he may use sarcasm or ridicule with equal effect.

Turning now to the words uttered by the defendant, “We have no business in this war,” the word “we” is a very broad term and was intended to include the people as a whole in this country. To say that we have no business in the war is by innuendo saying that we should not be in the war, and that we should not take part in it, which clearly means that we should not assist the government in carrying it on, which clearly falls within the intent of the statute. The real effect of the words used by the defendant and the practical innuendo that attaches can be gathered by the circumstances and conversation that preceded and followed the words in question. Upon such an analysis it is found that only one meaning can be ascribed and that is that the defendant was criticising those who were engaged in the war and discouraging others from assisting in the war and teaching and advocating that we should not be in the war or take part or help in it.

A somewhat similar situation which explains the imputation of a certain meaning to the words spoken is found in the case of *Culver v. Marx*, 155 Wis. 453. This was an action brought to recover damages for slander. In that case the words “I don’t have to use my wife for immoral purposes” was held to impute the meaning that the plaintiff’s wife was unchaste and that the plaintiff profited thereby. It will be noted that there was no direct utterance here stating specifically that the plaintiff did use his wife for immoral purposes, yet, considering the words that were spoken in that conversation, there can be but one conclusion drawn from them and that is that the defendant intended to convey the idea that the plaintiff did use his wife for immoral purposes.

I am therefore of the opinion that the testimony you submitted shows the uttering of language sufficient to warrant a prosecution for violation of the statute in question.

Elections—Declarations—The declaration to be filed under sec. 5.05, subd. (5), par. (b), must be that of the candidate, not one made by an unauthorized third party for him.

August 3, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

Your esteemed favor of August 3, calling my attention to the provisions of sec. 5.05, subd. (5), par. (b), of our statutes is at hand. You, in substance, ask whether the declaration required to be filed in your office by the candidate can be made and filed by some one else for him. This provision of the statute reads as follows:

“* * * 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 am satisfied that the declaration required by this statute must be the declaration of the candidate. It must be a declaration that in a proper, true sense can be considered his declaration and not merely the declaration of some one else for him, which may or may not have been authorized by him. The purpose of the statute undoubtedly is to have the assurance of the candidate himself, his promise, that if nominated and elected, he will qualify. The statute does not prescribe any particular form of this declaration, but it must be in fact, I am satisfied, the declaration of the candidate.

Prisons—Convicts—A convict who violates his parole may be deprived of all good time earned, by warden of state prison with consent of state board of control.

August 5, 1918.

BOARD OF CONTROL.

With your communication of July 26 you have submitted a letter from Henry Town, the warden of the state prison, dated July 24, 1918, and addressed to you, which submits the question as to the time when the prison term of one, Adolph Limoge, will expire. You state that it has been the practice of the warden of the prison, when an inmate is returned for violation of

parole, to take from him all the good time earned up to the date of his return. The question now arises whether all of the good time allowed a convict when on parole can be taken from him for violation of his parole.

It appears from Mr. Town's letter that Adolph Limoge, Number 10418, was committed by the circuit court of Iron county October 28, 1908, to serve 11 years on a charge of murder in the third degree; that he was released on parole in a legal manner on October 9, 1914; that he violated his parole on July 17, 1915, by failing to comply with the rules and regulations prescribed by your board for inmates on parole; that he admits the violation of his parole and was arrested upon proper warrant and taken into custody and returned to the prison on July 23, 1915; that on the date of violation Limoge had served six years, eight months, and nineteen days, and in accordance with sec. 4928 had earned in that period four years, two months, and twenty-four days good time which was taken from him; that on an eleven-year sentence, deducting allowance for good behavior, Limoge would have been obliged to serve six years and nine months, and that he had therefore eleven days left to serve on his sentence. In computing his time when he was returned to the institution, there was added four years, two months, and twenty-four days good time forfeited, and eleven days that he had left to serve. If he had served his full sentence, he would have earned four years and three months good time, so an allowance of six days good time was granted him on that part of the sentence he had left to serve. But since his return to the institution, he has lost five days more through misconduct, and the date of his sentence as it now stands on your record will expire November 3, 1919. Limoge was at large from July 17, 1915, to July 23, 1915, a period of six days, which cannot be computed as any part of his sentence.

See. 4928, Stats., provides for the amount of good time earned each year, and then there is added the following:

"And in addition thereto, the warden may, with the consent of the [state board of control] directors, cancel and deprive him of all or any part of the good time theretofore earned."

Secs. 4960c—1 to 4960c—4 provide for the parole of prisoners from the state prison, and sec. 4960c—5 confers upon the board

of control authority to issue a warrant to return an inmate to the custody of the institution who has violated the conditions of his parole.

Concerning the question submitted by you, I will say that it must be answered in the affirmative. The language of the statute clearly gives the warden, with the consent of the state board of control, the power to cancel and deprive an inmate who has violated their rules, of all or any part of the good time he has earned. This was done in the case of Limoge. You are therefore advised that the computation of Mr. Town, as stated above, is in compliance with our statute, and that the cancellation of Limoge's time for good behavior is authorized.

Public Officers—School Director—A sale to his school district by a director in excess of \$100 a year raises no obligation against the district in excess of that sum; any excess paid him should be recovered.

August 5, 1918.

MISS L. JEANNETTE BUNKER,
Director of School Board,
Grantsburg, Wisconsin.

Your esteemed favor of August 1, regarding financial matters of your school district is at hand. I gather from your letter that a director on your school board who retired from office on July 1 of this year has presented to the school district for allowance a bill in his favor, of \$282.31, for coal, presumptively sold by him to the school district during the past year, while he was a director therefor. You further inform me that in looking up the records you find that this same director has been paid by the school district for coal supplied during the past year, being the same year in which the first bill above mentioned was incurred, amounting to \$1,908, amounting in all to \$2,190.31.

You further state that this same party, during the year 1917, and while he was a member of the village board, sold to the village large quantities of material for cement road work. As you give no figures regarding the village matter and as that does not come within your official duties, I will for the present refer only to the school district matters.

See. 4549, Stats. 1917 in their present form, was in force dur-

ing the time you mention. This statute clearly prohibits such an officer from making a contract with the district board or the district for the sale of such commodities, and our court has repeatedly held that no valid claim on such a sale can arise against the district.

These holdings of the court were all on the statute as it read prior to the session of the legislature for the year 1915. At that session of the legislature this statute was amended so that its provisions would not apply to such a contract for supplies not exceeding \$100 in any one year. In other words, a sale on such commodities by an officer of the school district to the district could be made if the aggregate amount did not exceed \$100. If it exceeded \$100 in the year, then the contract is absolutely void, at least for all amounts in excess of the \$100, and no claim could exist against the school district in favor of such an officer for such coal supplied during any one year in excess of said \$100.

I therefore advise you that the retiring director's claim of \$282.31 is absolutely void and unenforceable; and I further advise you that the district has a valid claim against him for \$1,908 wrongfully and improperly paid to him by the district during the past year, according to the facts you give. I base this opinion on the statute above cited and the following cases construing the same, to wit: *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, 451, 452; *Quayle v. Bayfield Co.*, 114 Wis. 108, 115; and *Arbuthnot v. Kelley*, 135 Wis. 362.

This last case above cited holds directly that the money paid out by the municipality—in your case the school district—on such an invalid claim may be recovered.

Public Officers—Education—Principal County Training School—The principal of a county training school for teachers would be aiding a book concern by running paid advertising in a magazine published by him, contrary to sec. 40.23, subd. (2).

August 5, 1918.

HONORABLE C. P. CARY,

State Superintendent of Public Instruction.

In your favor of August 2 you state that the principal of a county training school for teachers established under the pro-

visions of sec. 41.36 proposes to publish a periodical devoted especially to the interests of rural schools and rural school teachers; that he intends to carry therein advertising for book concerns, for which he will receive from said bookpublishing houses certain advertising compensation, and he expects to receive compensation from those taking the publication; and you inquire whether sec. 40.23 would prevent him from thus publishing such periodical and taking and receiving compensation for such advertising from schoolbook concerns.

Sec. 40.23, subd. (2), provides that no

"teacher connected with any public school shall act as agent or solicitor for the sale of any schoolbooks, maps, charts, school library books, school furniture, apparatus or stationery, or furnish any assistance to or receive any reward therefor from any author, publisher, bookseller or dealer doing the same. * * *

I assume that the principal of the county training school for teachers is beyond doubt an officer or teacher connected with a public school, within the meaning of the language of this section, and it seems clear that for such a person to conduct an advertising medium and thereby receive compensation from schoolbook publishers for advertising run in such a publication would be furnishing assistance to such publisher or book concern in the sale of its books, and would be receiving a reward therefor from such publisher or bookseller or dealer, within the terms of this statute.

It is therefore my opinion that it would be within the prohibition of this statute for such principal to so conduct such business.

Elections—A newly incorporated village containing parts of two assembly districts must be furnished by county clerk with ballots for election or primary for both districts in proportion to number of votes in each district.

August 6, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

With your letter of August 3 you enclose a communication to you from the county clerk of Rock county, in which it is stated

that in March, 1918, there was an election held in Footville, Wisconsin, to incorporate the village of Footville; that the village comprises territory lying in two towns, one-half in the town of Center and one-half in the town of Plymouth; that the town of Center lies in the first assembly district, and the town of Plymouth in the second assembly district; that in that part lying in the town of Center, as nearly as can be ascertained, there would be twenty-six votes; and that in that part lying in the town of Plymouth there would be seventy votes. The county clerk inquires how he is to furnish ballots for the village of Footville as to assemblymen, and you have submitted this question to me.

In view of the constitutional provision, sec. 4, art. IV, that assembly districts shall be "bounded by county, precinct, town or ward lines," and the decision in the case of *State ex rel. Hicks v. Stevens*, 112 Wis. 170, I take it that for the purpose of electing an assemblyman and determining the boundaries of the assembly districts the village of Footville may be treated as nonexisting, in other words, that the boundaries of the two assembly districts have not been changed.

In the *Stevens* case the court held that the constitutional provision was not violated by an act creating a new county out of a portion of the territory of one of the assembly districts in the old county but providing that it shall form a part of the original district until otherwise apportioned according to law. The court held that for the purpose of electing an assemblyman the new county in such a case may be treated as nonexisting.

It follows that part of the village of Footville is in one assembly district, and the other part is in another assembly district. The village constituting only one voting precinct, it will be necessary, in order to give the electors a chance to cast their ballots for their respective assembly districts, to have two kinds of ballots—some for each district.

Under sec. 6.26 you are required to print a sufficient number of ballots not to exceed seventy-five ballots for each fifty votes cast at the second last preceding general election, to be used at each election precinct in the county. In this case it will be necessary for you to determine as nearly as possible how many of the inhabitants of the village in each district voted at the second last

preceding general election, and to supply two kinds of ballots to the village and the proportionate number for each assembly district.

Bridges and Highways—Maintenance—As a general rule towns must maintain bridges and highways. This burden passes to counties whenever roads become state highways.

August 7, 1918.

J. R. PFIFFNER,

District Attorney,

Stevens Point, Wisconsin.

In a letter dated August 5, 1918, you state that about two months ago the bridge which spans the Plover River and which forms part of the highway in the town of Hull was destroyed, and that restoration of said bridge will necessitate the expenditure of considerable money; that

“this road was designated a county trunk line system road under the provisions of sec. 1317m—5 of the statutes”

by the county board, and that the county has allotted funds to said highway; and it is claimed that the county has maintained this highway for several years. It is not on the state trunk highway system.

You ask to be advised where the legal duty rests for the reconstruction of this bridge. The town board claims that the obligation is the county's, and you ask for my opinion upon that question.

The general rule governing the maintenance of highways casts upon the towns the burden of opening the highways and keeping them at all times passable and safe for public travel, and this includes bridges. Sees. 1223 and 1338, Stats. Unless this bridge forms an exception to that rule, the town is under obligation to replace the bridge. By including highways in the “county system of prospective state highways” (sec. 1317m—3, subsec. 1), or by deciding to improve portions thereof entirely at county and state expense (sec. 1317m—5, subsec. 1), this burden is not shifted to the county.

State highways form an exception to the general rule above stated.

"9. All state highways heretofore or hereafter constructed under the provisions of sections 1317m—1 to 1317m—15, inclusive, of the statutes, shall be maintained at the expense of the county in which they lie." 1317m—7, Stats.

The inquiry, therefore, turns upon what is or constitutes a state highway, and the answer to that inquiry is found in subsec. 3, sec. 1317m—3, and subsec. 8, sec. 1317m—7.

So much of the two subsections last mentioned as is strictly applicable reads as follows:

"3. The county board may adopt any part of the prospective system together with all bridges and culverts thereon as a state highway; provided (1) that such part has heretofore been improved with stone or gravel, (2) that it is in good repair; and (3) that all bridges and culverts on such part are well constructed and in good repair."

"8. Upon the completion of a highway or bridge for which state aid has been granted the same shall be inspected by the state highway commission. If the construction be completed as provided for in the plans and specifications * * * the road or bridge shall be deemed to have been accepted * * *. The term state highway as used in sections 1317m—1 to 1317m—15, inclusive, shall be construed to mean *only* such highways as have been so accepted, together with the permanently improved bridges and culverts thereon, and those adopted by the county board according to subsection 3 of section 1317m—3."

It has been repeatedly ruled by this department that until highways have been so improved and accepted, the obligation of the town to maintain the same remains unchanged and in full force. No doubt is entertained as to the correctness of those rulings. I gather from your letter that neither the bridge nor the highway at the place in question has been so accepted or adopted by the county board. It follows that the duty of replacing the bridge rests upon the town.

I am of the opinion, however, that sec. 1319, Stats., is applicable, and that the town may avail itself of the provisions thereof and thus require the county to contribute to the expense necessarily involved.

Regarding the matter of forcing said town to act, attention is called to the provisions of sec. 1338, and subsec. 8, sec. 1317m—9. Said sec. 1338 in express terms includes cases where a town shall "refuse, fail or neglect to repair any public highway or build or repair any bridge thereon,"

but the procedure prescribed by this section is far from expeditious.

The construction of this bridge, it seems to me, is clearly within the meaning of par. (a), said subsec. 8, sec. 1317m—9, and resort may be had thereto for putting this highway in condition for travel, provided the cost of the bridge is not too great. Evidently the sum required will exceed the amount available under said subsec. 8, and recourse would have to be had to sec. 1338 in case the town refuses to proceed in the matter.

Bridges and Highways—If a contractor, by active fraud and without full performance of a bridge contract, obtains payment in full, an action against him is maintainable.

August 7, 1918.

P. H. URNESS,

District Attorney,

Mondovi, Wisconsin.

I have yours of August 6, transmitting the letter of August 2 from the Wisconsin highway commission to Robert Ashton, town chairman, and also the letter of the latter to you, relative to the Jackson bridge, in the town of Glencoe, in Buffalo county.

Upon inquiry at the office of the highway commission, I find that the contract for the construction of this bridge was entered into between said town and two commissioners representing the county board, on the one hand, and A. D. Burnett & Co., contractor, on the other. A copy of the contract is on file with the commission. It would appear therefrom that a bond was given by the contractor. It seems quite plain from the contract that the bridge was constructed by the town with county aid, under sec. 1319, Stats.

It appears from your letter and from reports that have come to the highway commission that the reinforcement rods in the floor of the bridge are three feet apart, whereas the specifications called for placing such rods six inches from center to center. If that is a fact, the contractor must have willfully perpetrated a rank fraud upon the public officers in charge of this work. The contract recites that the work was to be completed by November 15, 1912. You say that the last payment was made in 1913. While I have not given this matter particular study, I

feel quite certain that a cause of action exists against the contractor and that it will be an action based upon said contract for failure to perform the contract and for fraud and misrepresentation in obtaining payment.

Section 4222 is a statute of limitations, which applies. Evidently an action is not yet barred by lapse of time.

My present notion is that an action upon this contract is maintainable in the name of the town. Possibly the county should be made a party plaintiff because it contributed to the expense of building the bridge and was in a sense a party to the contract and because the county under the present statutes is bound to maintain this part of the highway, it having become part of the state highway system. See subsec. 9, sec. 1317m—7.

This matter is certainly one that should be thoroughly investigated, and if the facts are as before represented, action should be taken.

Public Lands—State Parks—Public Officers—Conservation Commission—The state conservation commission has no power to bind the state to any conditions, restrictions or suggestions contained in a conveyance of land for park purposes which are not authorized by law.

August 8, 1918.

CONSERVATION COMMISSION.

Mr. F. B. Moody, on the 22d day of July, submitted to me a letter from D. E. Roberts, of Superior, Wisconsin, together with a form of a proposed deed to the state of Wisconsin to certain lands in Douglas county, to be used for state park purposes and to be known as the Patterson State Park.

I have examined said proposed deed, and am of the opinion that it attempts to impose conditions, reservations, restrictions, and suggestions which are not within the power of the conservation commission to agree to by the acceptance of the proposed deed.

In an opinion to the conservation commission dated May 3, 1918,* I considered the power of the commission in respect to a proposed conveyance from Mr. John A. Latsch, of Winona, Minnesota, to the state of Wisconsin, covering certain lands in Trem-

* Page 260 of this volume.

pealeau county for state park purposes. In that opinion I held that the commission has no power to accept a grant which is not in harmony with the statutes prescribing the powers and duties of the commission in respect to state park lands, and that the commission has no power by the acceptance of a deed to impose upon the state conditions or stipulations not conferred by law.

It is my opinion that all of the conditions, reservations, and restrictions contained in the proposed deed from Mr. Patterson should be eliminated.

Bonds—Trade Regulations—Collection Agencies—It is not the duty of the secretary of state to make investigations into merits of claims made by patrons of collection agencies nor to institute action on bond.

August 8, 1913.

W. B. NAYLOR,

Assistant Secretary of State.

In your letter of August 7 you submit the following:

"Complaints have been made to this office against certain individuals for alleged failure to properly account for the proceeds of various collections made by such individuals. The impression seems to be that it is the duty of this office to investigate such matters and to require proper accounts to be rendered or else to proceed upon the bond which is filed with us. Will you kindly advise what in your judgment would be the proper action for this department to take upon the filing of such complaint?"

Sec. 1747—150, Stats., provides, in substance, that no collection agency shall engage in the business of collecting without having on file with the secretary of state a good and sufficient bond; said bond is to be in the sum of \$5,000, and is conditioned that the collection agency will turn over and properly account for all moneys collected, in keeping with the terms of the agreement upon which the collection was received. The bond is to be approved by the attorney general.

"* * * The bond shall not be accepted unless approved by the secretary of state, and upon such approval it shall be filed in his office. * * *

"The secretary of state shall keep a record of the bonds filed with him under the provisions hereof, with the names, places of residence and places of business of the principals and sureties,

and the name of the officers before whom the bond was executed or acknowledged; and the record shall be open to public inspection."

It seems to have been the intent of the legislature to protect the public, and especially creditors who seek to avail themselves of the assistance of a collection agency, against fraudulent practices of unscrupulous agencies. Before the passage of this act the protection to the public generally against such practices was confined to the criminal statute punishing for the conversion of moneys held in trust for another, under the embezzlement statute. This, however, furnished to the creditor no financial recovery.

It seems to have been a part of the legislative purpose to provide for the bonding of collection agencies. It is quite apparent that it would be impracticable to require that each patron of the agency be furnished a separate bond, inasmuch as many of the collections are small amounts. The legislature has provided, therefore, that each agency shall furnish a general bond, conditioned that the amounts collected will be paid to the proper persons and this bond is to be filed in a public place, open to the public, to wit, in the office of the secretary of state. The requirement that the bond be filed with the secretary of state seems to have been merely a matter of public convenience for all those desiring information regarding the responsibility of collection agencies.

No further duty than to approve the bond, file it in the office and keep the same open to public inspection seems to have been imposed upon the secretary of state. In other words, it seems to have been the legislative intent that the secretary of state act merely as a custodian of the bond, whose duties cease upon approval, filing and keeping the same open for public inspection.

If any aggrieved patron of a collection agency desires to sue on the bond, that is a private matter, and the duties of the secretary of state with reference thereto, at most, are to appear when called into court by proper subpoena to identify or present the bond.

Municipal Corporations—Cities—Special charter cities may adopt the General Charter Law, under secs. 925—3 to 925—5, in which event the proceedings are to be certified to the secretary of state and letters patent are issued by the governor.

When only part of the General Charter Law is adopted the proceeding is complete when the ordinance is adopted as provided by sec. 926.

HONORABLE EMANUEL L. PHILIPP,
Governor.

August 9, 1918.

I herewith return to you the letter of P. T. Meeuwsen, city clerk of Oconto, dated August 2, 1918, and addressed to the secretary of state, and also the documents which accompanied said letter.

These papers relate to the adoption by the city council of Oconto of the provisions of sec. 925—126 of the General City Charter Law.

Evidently the city authorities are proceeding upon the assumption and are laboring under the impression that secs. 925—3 to 925—6, inclusive, are applicable to their case, and expect that you will issue a patent under the great seal, under the provisions of sec. 925—5.

As a matter of law, secs. 925—3 to 925—6, Stats., have no application to a proceeding to adopt a single section or portion of the General Charter Law.

The provision of the statute which applies to that proceeding is found in sec. 926, Stats. It is there provided that the common council of any city existing under special charter may, by a three-fourths vote of all the members, adopt the provisions of any subchapter, section or subdivision of the General Charter Law by ordinance, which ordinance when adopted as therein prescribed "shall operate to that extent as an amendment of such charter."

That is the extent of the formalities for adopting portions of the General Charter Law. There is no requirement that such proceeding shall be certified to the secretary of state, or that any patent shall issue.

There is no duty, therefore, for you to perform as governor in connection therewith, and you are advised that you are simply to return the papers to the secretary of state, or to the city clerk of Oconto, as you deem best.

Criminal Law—Offenses against Property—Sec. 4441 discussed with reference to removal of plants trailing on line fence.

August 10, 1918.

E. E. BRINDLEY,

District Attorney,

Richland Center, Wisconsin.

In your letter of August 7 you state:

"D. erects a partition fence between his property and that of his neighbor B. The fence is presumably upon the line between the two properties. B. plants sweet peas and beans along his side of the fence and the plants climb upon the fence using the same as a support. The plants, however, do not climb over upon D.'s side of the fence.

"D. comes out in the evening about ten o'clock P. M. and takes the peas and beans belonging to B. down from B.'s side of the fence and lays them upon the ground without, however, uprooting them or tearing them up, the result being that the plants will soon die, as climbing peas and beans cannot thrive when deprived of their support.

"The question is: Can D. be taken on a criminal charge under sec. 4441 of the Wisconsin statutes?"

Sec. 4441, Stats., provides, among other things, for the punishment of persons who willfully, maliciously or wantonly destroy or injure any personal property of another. I assume from your letter that the partition fence is on the line between the two properties. The line between the property is a mathematical line without magnitude. The fence, of course, has magnitude, and if the center line of the fence is on the partition line, then the side of the fence facing B.'s property is on his land. You state in your letter:

"The plants, however, do not climb over upon D.'s side of the fence."

I am assuming, therefore, that no part of the plants projected over upon B.'s property.

"A partition fence on the line between adjoining lands has generally been held to be the common property of the owners of the adjacent lands." 12 Am. & Eng. Ency. of Law (2d ed.), 1060.

"Though a division fence be built in separate sections, each of the adjoining owners has an interest in the whole, and in

every section; and when built the fence belongs beneficially to both, as much as if it had been done by contract and the expense divided, or if the two had joined in building the whole fence. *Newell v. Hill*, 2 Met. (Mass.) 183; * * * *Holladay v. Marsh*, * * * 20 Am. Dec. 678." Ibid., note 5.

It would appear, therefore, that B. would have the right to use the portion of the fence on his side of the line, providing he made such use of it as was reasonable, and such use did not constitute a willful destruction of the fence. This leads us to the conclusion that B. has committed no trespass, either upon the land or the property of D.

Turning now to the question of B.'s liability under sec. 4441, Stats., the fact that the plants were near the line between adjoining property owners but not extending over the line does not seem to change the situation with reference to the essential requirements of the offense.

There are three essential elements necessary to the commission of the offense named in sec. 4441, Stats., specified above: first, ownership of the property destroyed or injured; second, injury or destruction of B.'s property by D.; third, intent willfully, maliciously, and wantonly to injure or destroy the property. Whether or not all of these essentials attended the conduct of D. at the time of the acts complained of is a question for the jury.

I quote from your letter, referring to his handling the plants, the following:

"* * * And lays them upon the ground without, however, uprooting them or tearing them up."

This does not seem to be quite consistent with a malicious intent to destroy or injure the plants, and if D. honestly believed that B. had no right to have his plants trailing on the fence and took the plants down, using care not to cause unnecessary injury to them, the element of willful intent to wantonly destroy and injure the property would be wanting. This, however, as I have stated before, is a question for the jury.

Whether or not it is advisable to initiate a criminal prosecution in a case involving trivial matters of this kind, you are in better position than I to determine, as you have all the surrounding facts and circumstances before you.

Bridges and Highways—Maintenance of Bridges—Whether the duty of maintaining a bridge in a public highway devolves upon the town or county depends upon whether the place in question is a state highway or not.

August 10, 1918.

WILLARD E. GAEDE,

District Attorney,

Sturgeon Bay, Wisconsin.

You state under date of July 30, 1918, that the Baileys Harbor road was included in the Door county system of prospective state highways; that prior to such incorporation this highway had been graveled and a good bridge thereon then spanned a certain creek; that such bridge must now be replaced by a more substantial structure, and this question arises: Who must build the new bridge, the town or the county? You express the opinion that the burden is on the town.

The answer to your question depends on whether or not this bridge is part of a "state highway." If it is, the county must maintain it; otherwise, the town must do that.

"3. The county board may adopt any part of the prospective system together with all bridges and culverts thereon as a state highway; provided (1) that such part has heretofore been improved with stone or gravel, (2) that it is in good repair; and (3) that all bridges and culverts on such part are well constructed and in good repair." Sec. 1317m—3, Stats.

In case the county board have adopted this stretch of road as a "state highway" and at the time such action was taken this bridge was "well constructed and in good repair," the county thereby assumed the obligation of maintaining the same. Subsec. 9, sec. 1317m—7.

The question is therefore resolved into an inquiry as to the facts.

This department has frequently considered the statutes which control the passing from a town to the county of such obligation to maintain highways. Vol. VI, Op. Atty. Gen., pp. 313, 421; opinion to district attorney, Portage county, dated August 7, 1918.*

* Page 438 of this volume.

Courts—Escheats—Escheated personalty should be converted into cash in the court and then paid to the state treasurer.

Long time bank certificates of deposit should not be accepted by the latter.

August 10, 1918.

HONORABLE HENRY JOHNSON,
State Treasurer.

Replying to your inquiry of August 3, 1918, relative to the action which you should take in the matter of three certificates of deposit, Numbers 3634, of the American Trades & Savings Bank, of Racine, dated July 17, 1916, issued to Elizabeth C. Carpenter and indorsed by her to John D. Rowland, administrator, and by him to you as state treasurer, said certificates being for \$35.71 each, you are advised that these certificates and also the bank draft for \$14.82 should be returned to John D. Rowland, administrator of the estate of Andrew Steingruber.

It is my opinion that when personal property escheats, it should be converted into cash under the direction of the county court and that you, as state treasurer, should receive as escheats only cash or the equivalent thereof.

To begin with, this escheated property belongs to the state school fund, and subd. (7), sec. 3935 directs that it

"shall be paid to the state treasurer and become a part of the school fund."

Sec. 3937 provides:

"The sum paid * * * into the state treasury shall be refunded to the proper owner, * * * upon his establishing his right to the same as herein provided. * * * When the claim is finally adjudicated * * * the county court shall so certify to the secretary of state, who shall thereupon audit and the state treasurer shall pay the same; but no interest on the claim shall be paid by the state."

These statutes contemplate that you are to receive only what can properly be said to be paid into the public treasury. That means currency or legal tender. You are not authorized to accept property in any other form, nor are you authorized to act as a sales agent and convert other property into cash. That matter is the province of the county court and the administrator. The latter is protected upon a sale by having the court confirm

his acts. You would have no such protection, should you make a sale of these certificates. Should you sell them, it would be at the peril of having a claimant subsequently prove that the certificates were worth more than you sold them for.

It seems to me plain that these securities should be liquidated by the administrator and that the net estate in the form of cash is what should be paid to you.

Public Officers—Secretary of State—Elections—Secretary of state is required to furnish certified copies of nomination papers in his custody upon receipt of proper fees.

August 10, 1918.

HONORABLE WILLIAM B. NAYLOR,
Assistant Secretary of State.

In your communication of August 9 you state that your department has received a request from an individual to furnish him with a certified copy of the nomination papers as procured in one county for a certain candidate for congress; that he demands this copy and is ready to pay your fee for the same. You inquire if it would be lawful and proper for you to comply with this demand, or whether there is anything in the Primary Election Law or elsewhere which would preclude you from complying with this request.

The nomination papers for representative in congress are required to be filed in your office under sec. 5.07. Subd. (5) of said section reads thus:

"All nomination papers in the custody of any official under the provisions of this section shall, four months after the day of the election at which the nominees sought to be named by such nomination papers have been voted for, be destroyed, by the official having such custody. Such papers as are material to any investigation or litigation then pending, shall not be destroyed, however, until the final determination of such investigation or litigation."

Sec. 14.29, subd. (9) provides, concerning the duties of the secretary of state:

"FURNISH CERTIFIED COPIES. Make a copy of any law, resolution, deed, bond, record, document or paper deposited or kept

in his office, upon request therefor, attach thereto his certificate, with the great or lesser seal affixed, and collect therefor twelve cents per folio and twenty-five cents for such certificate."

A nomination paper of a representative in congress filed in your office is a paper within contemplation of this statute, as it is placed in the custody of your department until it is required to be destroyed by express provision of the statute.

You are therefore advised that it is your duty to furnish certified copies of nomination papers filed in your office to the applicant for the same, upon the receipt of the proper fees therefor. I find no provision in the statute which militates against the conclusion here arrived at.

Elections—Nomination Papers—Declarations—Nomination papers for county officers must have as many signers as 3% of highest vote cast for presidential elector in preceding election.

Candidate must file statement that he will accept within time limit.

Place may be filled on ballot only when there is a vacancy.

Person may be nominated at primary even though he has not filed nomination papers.

August 13, 1918.

W. T. DOAR,

District Attorney,

New Richmond, Wisconsin.

Your letter of August 10 states that your county clerk has directed your attention to the nomination papers of Ervin Hawkins, who has filed papers as candidate for the Democratic nomination of clerk of the circuit court at the September primary, and also to the nomination papers of Henry O'Connell for the Democratic nomination of county treasurer at the September primary, and to those of Charles Cole, filed as candidate for the Democratic nomination of register of deeds. You state that Mr. Hawkins has filed names from more than seven election precincts with a total number of 64 names; Mr. O'Connell has filed names from seven precincts with a total of 52 names; Mr. Cole has also filed names from seven precincts with a total number of 53 names. You also state that the largest vote for presidential elector at the last preceding presidential election in your

county for the Democratic candidate was 2,352 and you direct my attention to par. (c), subd. (6), sec. 5.05, which requires the nomination papers for county officers to be signed by at least three per cent of the party vote in at least one-sixth of the election precincts and in the aggregate not less than three per cent nor more than ten per cent of the total vote of the party in such district.

Under par. (d) in said subdivision the basis of percentage in each case is the vote of the party for the presidential elector receiving the largest vote at the last preceding presidential election. Three per cent of 2,352 is 71. Neither of the candidates having that number of names on the nomination papers, it follows that they have not sufficient names to make a legal nomination. The above statute is the one governing such cases and it is clear and must be complied with. You also state that each one of the above named persons failed to file a declaration that he will qualify as such officer if nominated and elected within five days after filing the nomination papers, as is required by par. (b), subd. (5), sec. 5.05.

This is also a fatal infirmity in the nomination papers, as the statute clearly requires it, it being mandatory and not directory. See Opinions of Attorney General for 1910, p. 296; Vol. III, Op. Atty. Gen., p. 331.

You further inquire whether other names may be placed upon the primary ballot under the provisions of sec. 5.28 which contains the following:

"* * * 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, * * * "

This provision would not be applicable to the cases referred to because there is no vacancy caused by their failure to file legal nomination papers. Had the primary been held and no nominations had been made, by reason of the fact that the nomination papers of the parties were defective or insufficient, then the vacancy thus created might be filled as indicated in this section.

You are advised, therefore, that the names of the parties in question cannot be placed upon the primary election ballot in the manner indicated in this section.

You have another question, and that is whether a candidate may be nominated on the Democratic ticket at the September primary, by writing in the name of the person on said ticket.

This must be answered in the affirmative, provided the nomination is made in compliance with sec. 5.17. I direct your attention specially to subd. (3) of said section, which provides thus:

"But no person shall be entitled to have his name placed on such ballot who has not filed a nomination paper as provided in sections 5.05 and 5.07 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 5.05 and 5.07 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."

Bonds—Department of Agriculture—State Fair—Bonds of secretary and accountant of state fair may be paid for by state if officials are required to give such bonds by rule, by-law or regulation of department of agriculture.

August 13, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

Under date of August 8 you have submitted to me three bonds, which you state were filed with your department for the secretary and accountant of the state fair and one for the commissioner of agriculture, and you request that I give you an opinion as to whether or not the premium on these bonds may be paid for by the state.

Sec. 1966—38 provides:

"The state, any county, town, village, city or school district may pay the cost of any official bond furnished by an officer thereof, pursuant to law or any rules or regulations requiring the same, if said officer shall furnish a bond with a surety company or companies authorized to do business in this state, said cost not to exceed one-fourth of one per cent per annum on the amount of said bond or obligation by said surety executed. The cost of any such bond to the state shall be charged to the appropriation for the state officer, department, board, commission or other body, the officer of which is required to furnish the bond."

There is no statute which in express terms requires the giving of an official bond of the officers here under consideration. The question then confronts us: Is there any rule or regulation by the department of agriculture under which the cost of this bond may be paid?

In sec. 1458—3 it is provided:

"It shall be the duty of the department of agriculture and it shall have power, jurisdiction and authority:

"* * *

"(2) (a) To control all state fairs and state fairgrounds, and to make such rules, by-laws and regulations in relation to the management of the business of such department and state fairs, and the offering of premiums thereat, as it shall from time to time determine, subject to the provisions of section 1458—2 of the statutes."

Said sec. 1458—2 provides for the appointment of a state fair advisory board by the governor, with the consent of the senate, and contains the following:

"* * * It shall be the duty of the department of agriculture to co-operate and advise with said board on all matters relating to the conducting of the state fair, and it is hereby made the duty of said board to advise and assist said department of agriculture in promoting the state fair in all of its departments. The decision of the department of agriculture upon all matters connected with the said state fair shall be final."

I have been informed that it has been deemed advisable to have the officers in question under bond, for the reason that they receive in their custody money belonging to the state during the time when the state fair is conducted. If the department of agriculture, with the advice of the state fair advisory board, duly passes a rule, by-law, or regulation to the effect that the officers in question shall give an official bond, such as the bond enclosed with your letter, and the bond is given pursuant to such rule, by-law, or regulation, it will be lawful for you to audit a claim for the cost of the same. I understand that the department has not as yet passed such a rule, but they have assured me that they will do so.

If such a rule is passed, then the cost of the bond may be paid by the state.

Elections—Nomination Papers—Affidavits—Declarations—
Statement at top of nomination papers for county officer must give precinct of signers; so must affidavit attached thereto.

Affidavit cannot be made by candidate.

Candidate must file statement that he will accept within five days of filing papers.

August 13, 1918.

GEORGE E. O'CONNOR,

District Attorney,

Eagle River, Wisconsin.

With your communication of August 10 you have submitted some nomination papers and four questions, which I will take up in their regular order.

1. "Should the county clerk place C. H. Adams' name on the sample and primary ballots?"

It appears from your statement and from a certified copy of the nomination papers enclosed in your letter that the residence of the signers is given as "Phelps," meaning the town of Phelps, and you state that it is a fact that they live in the town of Phelps. The same is true in the second nomination papers, where the residence is given as "Arbor Vitae," meaning the town of Arbor Vitae, and their residence is in said town. This, I take it, is no defect.

The form at the top of the papers and the affidavit at the bottom are not in compliance with the requirements of the statute, as given in the form, sec. 5.05. It is not stated in what town or precinct the electors reside who have signed the paper, and the affidavit of the elector attached thereto does not state that those who have signed the paper are electors in a certain precinct or town in said county, which is required under par. (b), subsec. (5), sec. 5.05. I think that this is a serious defect as it is material to know in what precinct the electors reside in order to determine whether the nomination papers filed are sufficient to meet the requirements of the statute.

This question must, therefore, be answered in the negative.

2. "Should the county clerk place McIntyre's name on the sample and primary ballots?"

The defect which appears in the nomination papers of Harry B. McIntyre is that the statement at the top of the nomination

papers says that the undersigned are electors of the town of Eagle River, while they give their residence in the nomination papers as "State Line," meaning the town of State Line. The affidavit of the elector is to the effect that he is a qualified elector in the above named precinct and that he is personally acquainted with all the persons who have signed the above nomination papers and that he knows them to be electors of the precinct named therein. The precinct named in which the undersigned are electors is the town of Eagle River. It is true that their residence is given as "State Line," but a person may be a resident of a place and not an elector.

This question must be answered in the negative, as I am of the opinion that this is a fatal defect in the nomination papers.

3. "Should the county clerk place on the sample and primary ballots the names of candidates who have failed to file the 'Declaration' required by sec. 5.05?"

This will necessitate a negative answer, as the provision of par. (b), subd. (5), sec. 5.05,

"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,"

is mandatory. See Opinions of Attorney General for 1910, p. 296, and Vol. III, Op. Atty. Gen., p. 381.

4. "Should the county clerk place on the sample and primary ballots the names of the candidates who made affidavit to one of their nomination papers contrary to the provisions of sec. 5.05 when if such nomination papers are void they have only two nomination papers, which is one less than the minimum and therefore insufficient?"

The fourth question must also be answered in the negative, as the same paragraph of the above section provides: "Such affidavit shall not be made by the candidate." A violation of this provision, therefore, is a fatal defect.

Education—School Districts—Municipalities—Cities—Joint school district part of which lies in incorporated village and part in town, maintaining a graded school, entitled to special state aid after village has become an incorporated city.

August 14, 1918.

HONORABLE C. P. CARY,

State Superintendent of Public Instruction.

I have your letter of August 15, which reads as follows:

"The village of North Milwaukee has for many years maintained a state graded school of the first class under the provisions of 40.41. This school was organized many years ago.

"School opened in September, 1917, and has been maintained in accordance with statutory requirements. In March, 1918, the electors of the village voted to incorporate as a city. A question has arisen as to the right of this school to share in the apportionment for the current year as provided by statute for state graded schools of the first class.

"Subdivision 10 of 40.41 reads as follows:

"“(10) No more than one such graded school in any village shall receive the state aid as herein provided, nor shall any graded school in any incorporated city participate in said state aid.”

"The statute requires that a state graded school shall be maintained for nine months in order to be entitled to share in the special apportionment. This school has been maintained in the village for at least six months but for the rest of the year will be in the city.

"Part of this district lies beyond the city limits and consequently is a joint district. This fact is likely immaterial.

"Will the fact that during the year a change was made from village to city government prohibit the apportionment that would have been granted if the village had not incorporated as a city?"

While you do not give the corporate name of the school district concerned, it appears from your statement of facts that it is a joint school district and that only a portion of said school district is within the limits of the newly incorporated city of North Milwaukee. Your statement does not disclose what relative portion of said school district is included within the limits of said city, but I do not know as that is important. The fact remains that the school district is not wholly included within the city and is not maintained as a city school and had not been

maintained as a village school while the municipality was a village.

The first paragraph of sec. 40.41 reads as follows:

"The school board of any school district maintaining a graded school but no free high school nor a school of a grade equivalent to a free high school, town free high schools excepted, may receive special state aid as hereinafter provided upon full compliance with the following conditions."

As I understand it, the said school district has complied with all the conditions required by law.

The essence of the paragraph just quoted, in connection with the essence of subd. (10) of said section, which is set forth in your letter, would make a sentence reading about as follows: The school board of any school district maintaining a graded school may receive special state aid upon compliance with said section, but no graded school in any incorporated city shall participate in such state aid.

The fact that the electors of that portion of the joint school district lying within the village voted to incorporate as a city did not in any manner disturb the existing joint school district. If it was entitled to state aid before the granting of a city charter, it seems to me it is entitled to state aid since that event. I am informed that the village of North Milwaukee was chartered as a city on April 2, 1918.

The "graded school" of this joint school district is partially in the city of North Milwaukee and partially in the town of Granville, and is therefore maintained in part by said city and in part by the town of Granville. In other words, the said graded school is as much the graded school of the town of Granville as it is of the city of North Milwaukee and is maintained as such by both municipalities.

It is therefore my conclusion that the school district in question is entitled to an apportionment of special state aid for graded schools, and the fact that the village of North Milwaukee is now the city of North Milwaukee should not interrupt the granting of such state aid.

Intoxicating Liquors—City Parks—The giving of intoxicating liquors to persons in a park who have paid admission under circumstances stated is a violation of state excise law.

August 16, 1918.

A. R. JANECKY,
District Attorney,
Racine, Wisconsin.

I have your letter of August 14, in which you submit the question whether the following facts and circumstances will constitute an illegal sale of liquor under sec. 1565, Wis. Stats.:

"In a private park in this city, adjacent to which there formerly was a saloon but which is no longer operated due to the fact that the owners of the same were several years ago denied a liquor license, numerous gatherings (picnics) are now being held. People who attend pay \$1.00 which is used to cover expenses; said expenses consisting mainly in paying for beer which is purchased, brought to the grounds and there consumed by those present."

Sec. 1550, Stats., provides in part:

"If any person shall vend, sell, deal or traffic in or, for the purposes of evading any law of this state, give away any spirituous, malt, ardent or intoxicating liquors or drinks in any quantity whatever, without first having obtained a license or permit therefor as required by this chapter, he shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished therefor," etc.

Sec. 1565 contains the following:

"The giving away of intoxicating liquors or other shift or device to evade the provisions of any law of this state relating to excise or the sale of intoxicating liquors shall be deemed and held to an unlawful selling within its provisions * * *."

As a general rule, the test whether an illegal sale has been made is where the title of the liquor has passed from one person to another. Under the facts stated by you, the liquor is purchased by the proprietors of the park. It passes to the consumer from such purchaser for a consideration. The title to the liquor, therefore, has passed from the original owner to the purchaser and then from the purchaser to the consumer. The purchaser had no license. He has certainly violated our statute.

It has been held by this department, on careful consideration, that an incorporated club which distributed liquor to its members for a consideration is violating the excise laws unless a license has been procured. See Opinions of Attorney General for 1912, p. 506.

Since that opinion was rendered our supreme court has decided the case of *State ex rel. Attorney General v. Stoughton Club*, 163 Wis. 362. In this case liquor was purchased and distributed to the members of the club. While the supreme court did not directly pass upon the question here involved, it is a fact that the club was abated, and the matter was not thereafter appealed to the supreme court.

I am clearly of the opinion that the above facts constitute the sale or giving away of intoxicating liquors under our law; that the method by which this is done is simply a subterfuge, or a "shift or device to evade" the excise law.

Public Officers—County Judge—Vacancies—The office of county judge is vacated upon the incumbent's conviction of an infamous crime.

August 16, 1918.

HONORABLE E. L. PHILIPP,
Governor.

It appears that on the seventh day of August, 1918, J. M. Beeker, county judge of Green county, was found guilty of violating the espionage laws of the United States by the federal court of the western district of Wisconsin, and for said offense he has been sentenced to three years at Leavenworth. You inquire what effect these facts have upon his qualifications to hold the office of county judge.

Sec. 4935, Wis. Stats., deals with vacancies in offices created by commitment to the state prison, but, as the officer in question here has been sentenced to the federal prison at Leavenworth, it is probable that this statute has no application.

Sec. 17.02, dealing with how vacancies in office are caused, provides as follows:

"Every office shall become vacant on the happening of either of the following events:

"* * *

"(5) His conviction of any infamous crime or of any offense involving a violation of his official oath," etc.

There is no question but that the offense of which the officer in question has been convicted is an infamous crime within the meaning of this language, and there is no question but that, after sentence has been pronounced, the conviction is complete, so that it seems clear that the matter comes within the provisions of this statute.

The question, however, need not rest on mere statutory authority, as sec. 3, art. XIII of the constitution of the state of Wisconsin contains this provision:

"* * * No person convicted of any infamous crime in any court within the United States * * * shall be eligible to any office of trust, profit or honor in this state."

The facts above recited bring the Becker case clearly within the terms of this constitutional provision. He has been convicted of an infamous crime by a court within the United States and he is therefore ineligible to hold the office of county judge from the time of his conviction.

Public Officers—Highway Patrolman—Judgments—Judgment creditor should file certified copy of judgment with county clerk and not with secretary of state.

August 16, 1918.

CLIVE J. STRANG,

District Attorney,

Grantsburg, Wisconsin.

In your letter of August 15 you submit the following:

"A judgment has been recovered against one of the patrolmen on the federal trunk system in this county and a certified copy of same has been filed with the county clerk under sec. 3716a of the statutes, with the request for payment. According to the system of payment of the money under the federal trunk system, should not this notice be filed with the secretary of state instead of the county clerk?"

Your attention is called to sec. 1317, subsec. 2, Stats., which provides that after the county has adequately maintained the trunk system within its limits, there shall be paid into the county

treasury out of the state trunk highway appropriation, such cost of maintenance plus an allowance for machinery, but that these are paid only upon presentation by the county clerk of itemized vouchers supporting the account.

You will notice, also, that sec. 20.04, Stats., subd. (3), par. (d), provides for the allotment to the counties upon the basis of mileage of trunk highway system lying within the county. The state does not recognize the claims of individuals in this connection but pays directly to the county treasurer upon proper vouchers. The statute provides for the payment of the allotment above mentioned and the actual cost of maintenance. The salary of a patrolman is an item of maintenance and is paid out of the county treasury and later reimbursed by the state to the county. Here, also, the individual claim of a patrolman is not made to the state, and therefore the secretary of state does not audit his voucher and is not the proper person with whom to file a certified copy of judgment, under the provisions of sec. 3716a.

You are advised, therefore, that the certified copy provided for in sec. 3716a should not be filed with the secretary of state.

Public Officers—Justice of Supreme Court—Special Messenger—A justice of the supreme court may act as messenger under so-called Soldiers' Voting Law.

August 17, 1918.

HONORABLE J. B. WINSLOW,

Chief Justice:

You ask whether the acceptance by a justice of the supreme court of an appointment as messenger, under the provisions of secs. 11.69 to 11.77 and 11.82, Stats., as amended by ch. 16 of the laws enacted at the special session of 1918 (the so-called Soldiers' Voting Law), is forbidden by sec. 10, art. VII, state constitution.

This section reads as follows:

"Each of the judges of the supreme and circuit courts shall receive a salary, payable at such time as the legislature shall fix, of not less than one thousand five hundred dollars, annually; they shall receive no fees of office, or other compensation than their salaries; they shall hold no office of public trust except

a judicial office, during the term for which they are respectively elected, and all votes for either of them for any office, except a judicial office, given by the legislature or the people, shall be void. No person shall be eligible to the office of judge who shall not at the time of his election, be a citizen of the United States and have attained the age of twenty-five years, and be a qualified elector within the jurisdiction for which he may be chosen."

Manifestly the answer to your inquiry turns upon the question of whether the appointment as messenger under the foregoing statutes confers upon the appointee an "office of public trust."

Sec. 11.70, Stats., provides as follows:

"The secretary of state, not less than ten days before any election held under sections 11.69 to 11.82, inclusive, shall designate one or more employes in his department, or, if there are not sufficient employes in his department available for that purpose, he shall appoint one or more other persons, as special messengers to provide and make arrangements for elections and to act as election supervisors at such place or places as may be necessary to carry out the purposes of sections 11.69 to 11.82, inclusive, and to personally deliver to the secretary of state at his office the ballots cast at such elections and such other certificates, documents and papers as are required to be enclosed, sealed and returned therewith; but no more than one messenger shall be designated for any such election when all such electors are so grouped that one messenger may perform the duties imposed by sections 11.69 to 11.82, inclusive. Any such special messenger so designated is endowed with all powers conferred by law upon election inspectors, including the power to appoint all necessary assistants, administer oaths, and may perform any duties imposed by law upon such inspectors. Each such messenger shall be reimbursed for his actual and necessary expenses incurred in the performance of his official duties, and in the event such messenger is not an employe in the department of the secretary of state he shall receive as compensation for his services as such special messenger not to exceed five dollars per day for the time actually spent in the discharge of his duties as such special messenger. Such special messenger shall not be subject to the provisions of chapter 16 of the statutes."

Other sections of the law make it the duty of these special messengers to receive from the secretary of state the necessary ballots and other printed matter pertaining to the holding of the election, to proceed to the place where the soldiers are stationed and there to arrange, in coöperation with the commanding officer,

for the holding of the election on the day specified by the law therefor.

Sec. 11.82 provides that except so far as is inconsistent with the act, the election laws of the state, including "those relating to election officers," shall apply.

From this review of these provisions of the act in question, it is apparent that these so-called "messengers" are appointees of the secretary of state for a special purpose, and are limited strictly as to authority and tenure. While they are "endowed with all the powers conferred by law upon election inspectors," there is no provision of the act requiring them to take the oath required of inspectors of election, unless such requirement be inferred from the general language of sec. 11.82 above referred to. In view of the fact that the act [sec. 11.74, subd. (2)] expressly requires the oath to be taken by the inspectors selected at the polls, it would seem clear from the absence of any such express requirement as to the messengers that no oath is required of them.

Is the position held by these appointees of the secretary of state, who are thus selected to perform a specific task defined in detail by the statutes and of very limited duration, who are denominated "messengers" and of whom no oath of office is required, an "office of trust," within the meaning of the foregoing section of the constitution, or a mere employment? It would seem very clear that it is the latter.

While the distinction between an office and an employment is not easy to define with precision, and certain positions are difficult to classify, the present case does not fall within the "twilight zone" which undoubtedly exists. For, as the supreme court of this state has said, in interpreting the very section of the constitution here under consideration:

"The doctrine is well-nigh universal that the duties [of an office, as distinguished from an employment] must be *continuous and permanent, and not merely transient, occasional, or incidental.*" *In re Appointment of Revisor*, 141 Wis. 592, 608.

And see: *State ex rel. Brown v. Myers*, 52 Wis. 628; *Hall v. State*, 39 Wis. 79; *United States v. Germaine*, 99 U. S. 508, 512.

When in addition to the limited tenure of the appointment we consider the statutory designation of these appointees as "messengers," the fact that the appointment of "employes" in the

department of the secretary of state to perform these duties is expressly contemplated by the act and that no oath of office is required of them, clearly justifies us in classing the position as an employment rather than an office.

The conclusions here reached are in harmony with the opinion heretofore rendered, to the effect that the position of messenger under the foregoing act does not constitute a "civil office" under sec. 12, art. IV, of the state constitution.*

I am therefore of the opinion that the question you ask should be answered in the negative.

Public Officers—Justice of the Peace—Where a justice of the peace upon reelection refuses to qualify a situation is created requiring the choosing of a successor and the assumption of the office by him upon his qualification.

August 19, 1918.

D. K. ALLEN,

District Attorney,

Oshkosh, Wisconsin.

In your letter of August 8 you state:

"Section 811 of the statutes seems to provide that a justice of the peace shall hold office until his successor is elected and qualified. One justice in this county was elected in the spring of 1916. He qualified and served his full term of two years. In the spring of 1918 he was a candidate again and was elected but has failed to qualify. He claims to hold office because no successor to him has qualified. If he can do this for this term, it would seem that he could do the same thing in 1920 for the next term and so hold office indefinitely without qualifying.

"Please advise me whether he can lawfully do this."

The term of office of a justice of the peace is fixed by sec. 15, art. VII of the state constitution, which reads as follows:

"The electors of the several towns at their annual town meeting, and the electors of cities and villages, at their charter elections, shall in such manner as the legislature may direct, elect justices of the peace, whose term of office shall be for two years, and until their successors in office shall be elected and qualified.

*Page 225 of this volume.

In case of an election to fill a vacancy, occurring before the expiration of a full term, the justice elected shall hold for the residue of the unexpired term. Their number and classification shall be regulated by law. And the tenure of two years shall in no wise interfere with the classification in the first instance. * * *."

Standing alone, this section of the constitution might appear to determine the question in favor of the contention made by the justice of the peace in question.

However, there is another section of the constitution to be considered: Sec. 10, art. XIII provides:

"The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution."

Acting under the authority thus conferred, the legislature has enacted sec. 17.02, Stats., which, so far as it is material, provides:

"Every office shall become vacant on the happening of either of the following events:

"* * *

"(7) The neglect or refusal of any person elected or appointed, or *re-elected* or re-appointed * * * to give or renew his official bond, or to deposit the same in the manner and within the time prescribed by law," etc.

Secs. 809, 846, and 847, relating to the oath of office and bond to be given by justices of the peace in order to qualify, must be read in connection with preceding constitutional and statutory provisions. The constitution being silent as to the manner and time in which justices of the peace must qualify for office, the legislature had power to enact these provisions on the subject. *State ex rel. Tesch v. Von Baumbach*, 12 Wis. 310, 313.

How shall these constitutional and statutory provisions be read together to avoid conflict? The language of sec. 15, art. VII, providing that the term of office of justices of the peace

"shall be for two years, and until their successors in office are elected and qualified"

is specific and must be held to override any statutory enactment in conflict with it.

But it should be noted that this section of the constitution re-

lates wholly to the *term* of office of the justice. It does not pretend to specify the time or manner in which he must qualify. Nor does it cover the proposition of *how* a vacancy may occur in the *office*. It does, however, expressly recognize the possible occurrence of a vacancy by specifying the tenure of the person selected to fill it.

It follows from this consideration of the scope of this section of the constitution that its framers evidently contemplated (a) that the legislature would provide in detail for the qualification of these officers, as it has done by the statutes cited, and (b) that it would under the express delegation of sec. 10, art. XIII, Const., define, as it has done in sec. 17.02, the manner in which a vacancy in this office might be created.

The supreme court of this state had occasion to consider and apply these provisions of the constitution and statutes to a situation somewhat comparable to the one presented by your inquiry, in the case of *State ex rel. Wheeler v. Nobles*, 109 Wis. 202.

The relator, who was treasurer of a school district, presented his resignation to the electors of his district before the expiration of his term of office, and it was accepted by them, and he was forthwith elected district clerk. The statute provides that the district treasurer cannot also hold the office of district clerk; likewise, that a district treasurer can resign only to the district officers. The electors, immediately after choosing the relator clerk, elected the defendant treasurer. The relator qualified as clerk and took over the books and records and performed some of the duties of the office, until later ousted by the defendant. The defendant refused to qualify as treasurer, and never accepted the funds of the district from the relator. The town clerk, conceiving that a vacancy in the office of district clerk existed, because of the insufficiency of the attempted resignation of the relator, appointed the defendant district clerk and the defendant thereupon assumed the duties of that office and excluded the relator therefrom.

Under these facts, the supreme court held that the relator, never having lawfully resigned the office of treasurer, did not become eligible to the office of clerk; that the acceptance of the office of clerk did not operate to vacate the office of treasurer on the ground of the statutory incompatibility of the two of-

fices, because his term as treasurer not having been terminated in a lawful manner and his tenure as treasurer being expressly made to continue until his successor was chosen and qualified, he could not divest himself of his office as treasurer by the acceptance of the incompatible office of clerk, and therefore his attempt to assume the duties of the latter office was nugatory. The court said that the general rule that the acceptance of an incompatible office absolutely vacates the prior office held by the incumbent without any other act or proceeding, while a well recognized principle, is subject to the important exception that where the officer holding the first office has his tenure fixed by law until his successor is elected and qualified, he cannot terminate his first office by resignation or acceptance of the second office and thus be relieved from the duties of his prior incumbency.

Answering the argument that sec. 433a, Stats. 1898 (40,24, subd. (3), Stats. 1917), provides that where a treasurer is absent from his district for a period exceeding sixty days his office must be deemed vacant, the court says that such absence is merely authority for the appointing power to fill the vacancy, and that the new appointee when qualified succeeds to the office without further action, but that until the event mentioned takes place, the prior incumbent continues in office.

A similar situation came to the attention of the court in the case of *School Directors v. Kuhnke*, 155 Wis. 343, 346. In this case the district treasurer failed to qualify upon his reëlection and the question arose relative to the responsibility of the sureties on his official bond, for transactions which occurred during the period when he held office without having lawfully qualified. The court said :

"Under the decisions in *State ex rel. Wheeler v. Nobles, supra*, and *Supervisors v. Kaine, supra*, Peterson was *de facto* and *de jure* treasurer during the entire time which he acted, but the sureties upon the bond in suit were only held until the expiration of Peterson's term in July, 1908, and for such further time as was reasonably necessary for the election and qualification of his successor. Such successor should have been appointed by the remaining members of the district board at the expiration of ten days after Peterson's election, when it appeared that he had failed to file a new bond."

The cases of *Supervisors v. Kuime*, 39 Wis. 468, 475, and *State ex rel. Finch v. Washburn*, 17 Wis. 658, are also in point.

Construing the constitutional provision embodied in sec. 15, art. VII with the other provisions of the constitution and the statute hereinbefore quoted, and applying them in the light of the foregoing decisions to the situation confronting us, it is my opinion that the justice in question has by his failure to qualify created a situation where it is the right and duty of the proper officers to provide at once for the appointment of a successor. When a successor has been chosen and qualified, the incumbency of the present justice will terminate forthwith.

It is perhaps unnecessary to determine the exact status of the justice at the present time. In my opinion, he holds merely as a *de facto* officer, although it must be admitted that there is some language in the case of *School Directors v. Kuhnke, supra*, which might be construed to hold that he is also a *de jure* justice. Even if it be conceded that he holds as a *de jure* justice at the present time, the conclusion in regard to the right to proceed forthwith to choose a successor is affirmed by all of the foregoing cases.

This interpretation of the statutes and constitutional provisions is supported not only by the above authorities, but by the unquestioned rule:

"* * * The purpose of a holdover provision is to conserve the public interests by preventing vacancies in office, and * * * it is never designed to extend the tenure of office of an incumbent for his own benefit beyond the specified term. * * *" 23 Am. & Eng. Ency. of Law (2d ed.) 417, tit. Public Officers.

Furthermore, the requirement of qualification anew of a re-elected officer is fully as important as the requirement that such officer shall qualify upon his original election. Courts will be loath indeed to give to the constitutional provision in question a construction which will enable any officer willfully to disregard this plain and salutary requirement of the statutes.

This conclusion necessitates brief consideration of the question of how this vacancy may be filled. It may be argued that because sec. 15, art. VII of the constitution uses the term "election" in regard to the filling of vacancies, it militates against the constitutionality of that portion of sec. 845 of the statutes which provides for temporary appointments, until an election

can be held. I do not think that this argument can be successfully sustained. In the first place, the statute does provide for the filling of the office by election as soon as it can conveniently be done; the appointment is merely temporary to bridge over an unavoidable emergency. In the second place, the courts are inclined to give this word "election," when used in similar context, a broad construction, interpreting it as equivalent to *selection*, and thus as including an appointment to office. *State ex rel. Schommer v. Vandenberg*, 164 Wis. 628; *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. R. 663.

I am of the opinion that the ordinary statutory method of filling the vacancy should be followed.

In connection with this opinion, your attention is called to sec. 812, Stats. This statute is a legislative expression of the duty which the common law recognized to accept and qualify for an office for which one has become a candidate. Meehem, Public Offices and Officers, secs. 241 and 242. While all of the facts are not before me and I do not desire to express a final opinion upon the matter, it would seem from your letter that the statutory penalty had been incurred in this instance.

Appropriations and Expenditures—Dependents of Enlisted Men—State aid to parent of enlisted man does not include stepmother.

August 19, 1918.

HONORABLE ORLANDO HOLWAY,

Adjutant General.

You asked to be advised, in your letter of August 16, whether sec. 1, ch. 487, laws of 1917, would authorize state aid to go to the dependent stepmother of an enlisted man. Said sec. 1 provides as follows:

"Any dependent parent, wife or child of any enlisted man of the Wisconsin national guard in the service of the United States, or of any resident of this state mustered into any branch of the military or naval forces of the United States, who is a resident of this state, shall be entitled to aid as provided in this act."

The answer to your question will depend upon the meaning and construction to be given to the word "parent," as used in this statute.

The word "parent" is defined in Anderson's Law Dictionary: "The lawful father, or the mother, of another person."

In 21 Am. & Eng. Ency. of Law (2d ed.) 1035, it is said:

"* * * The ordinary sense of the word 'parent' is confined to the immediate father or mother," etc.

Our court, in the case of *Hole v. Robbins*, 53 Wis. 514, 519-520, defined the word "parents," as used in the statute providing for the descent of real property, as meaning natural parents, and not parents by adoption. The court said:

"* * * The word 'parents,' both by derivation and common understanding, means the natural parents."

It is true that the rule laid down in the above case was changed by sec. 2272a, but we are not concerned with said rule here but rather with the meaning of the word "parents" as used in the statutes.

It has been held that the word "parents" does not include persons who stand *in loco parentis*. *Castner v. Egbert*, 12 N. J. L. R. 259, 260.

In the legal or ordinary acceptation of the term, "parent" does not include a stepfather or a stepmother and a child has no right of action for the homicide of its stepmother under Civil Code, providing that a widow, or, if no widow, a child or children may recover for the homicide of the husband or parent. *Marshall v. Macon Sash, Door & Lumber Co.*, 103 Ga. 725.

Under a statute providing that where the parents of a minor live together the father is the natural guardian, but where the parents do not live together, their rights are equal, and the guardianship may be assigned to either, etc., it is held that the term "parent" does not include a stepfather or stepmother. *Heinemeyer v. Arlitt*, 67 S. W. 1038 (Texas).

While there are statutes in which the word "parent" or "parents" has been construed in a broader sense than that here indicated, for the reason that the context of the statute showed that it was not used in its ordinary and limited sense, I am nevertheless constrained to hold that in the statute here under consideration the word "parent" is used in its ordinary sense. There is nothing in the context to indicate that a more liberal construction should be adopted.

Your question is therefore answered in the negative,

Taxation—Income Taxes—Lessee of a mine may not deduct from his income for depletion of mine.

August 19, 1918.

MARION F. REID,

District Attorney,

Hurley, Wisconsin.

You ask for instructions relative to the claim presented under sec. 1164, Stats., by the Odanah Iron Company to the town of Carey, for a refund of \$2,397.18, income taxes paid under protest.

This company operates an iron mine under a lease upon a royalty basis. It does not own the mine. Deductions, under sec. 1087m—3 were claimed by the company in its income report amounting to \$202,807.53, which were disallowed by the tax commission.

"These deductions just named were shown by books of the Company to have occurred on account of depletion of ore values resulting from the extraction from the mine during the year for which the report was made."

This is the company's statement, in a letter of June 27, 1918, of the ground on which the deductions were claimed. Any deduction on account of depletion of ores is to be credited to the owner of the mine and not to the lessee, who pays for the ore he takes and is allowed to deduct such purchase price from his gross income. I am surprised that the company should at this late date be making the contention that it is entitled to make deductions on account of depletion of ores, in view of the very explicit decision to the contrary made by our supreme court more than two years ago.

"In making a return for income taxation the lessee of a mine on a royalty basis is not entitled to make any deduction for ore depletion in addition to the sum paid as royalty. Even if the lease or right to mine is perpetual it is not, for the purposes of income taxation, equivalent to ownership." Syllabus, *Klar Piquett Mining Co. v. Platteville*, 163 Wis. 215.

Any hope which may have heretofore been entertained that the United States supreme court would decide contrary to our own court was set at rest by a decision made May 20, 1918, by the first named court, in *United States of America v. Biwabik Mining Co.*, 38 Sup. Ct. 462.

The Biwabik Mining Company was operating under a lease and claimed certain large deductions entered upon its books of account as the "increment value" at the time the taxing act was passed. This claim was allowed by the circuit court of appeals but was disallowed in the supreme court. The conclusion was reached that such leases are not conveyance of ore in place but are mere grants of the privilege of entering upon the lands and removing the minerals; that the lessee is not the purchaser of ore in place and that he is not entitled to an allowance upon gross income for capital depletion.

You are advised that this claim should be disallowed by the town board.

Criminal Law—United States Flag—Use of emblem as submitted on calendar constitutes a violation of sec. 4575h.

August 19, 1918.

RALPH E. SMITH,

District Attorney,

Merrill, Wisconsin.

In your letter of August 9 you submit a calendar used by the Merrill Candy Company and ask my opinion as to whether or not its use violates sec. 4575h, Stats.

I notice that the calendar seems to be used for advertising purposes for the Merrill Candy Company, Merrill, Wisconsin. It contains the following printed matter, on the same sheet with the emblem containing the United States flag:

"Merrillite

The
Guaranteed
Chocolates

A Real Inspiration
Merrillite Chocolates and Fine Confections
Manufactured by
Merrill Candy Company
Merrill, Wisconsin."

There can be no question but that the matter appended and attached to the calendar, upon the same page with the emblem in question, is advertising matter. The statute provides, in part;

"Any person who * * * shall expose or cause to be exposed to public view any such flag, standard, color, or ensign of the United States, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any words, or figures, or numbers, or marks, or inscriptions, or pictures, or design, or device, or symbol, or token or notice, or drawing, or any advertisement of any nature or kind whatever, * * * shall be deemed guilty of a misdemeanor."

There is no doubt but that the stars and stripes, as used on the emblem, constitute a flag, within the definition of the word "flag" in sec. 4575*i* of the statutes, which provides in substance:

"The words 'flag,' * * * as used in this act, shall include * * * a picture, or a representation * * * upon which shall be shown the colors, the stars and the stripes, in any number, of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, or the colors, or the standard, or the ensign, of the United States of America."

The picture upon the calendar is a very attractive one, and one of the first impressions that the observer gets is that it is a Red Cross nurse holding and partially draped in the American flag. The emblem comes clearly within the statutory definition.

The language of the statute is very broad. It is hardly possible to use general words that would make the meaning broader, and it prohibits the attaching or appending of advertising matter to a picture or representation of the American flag.

I am of the opinion, therefore, that the calendar submitted by you is a violation of sec. 4575*h*, Stats.

Corporations—Religious Societies—Method of dissolution of religious society organized under ch. 91 outlined.

August 19, 1918.

CLIVE J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

In your letters of August 1 and August 15 you submit a certificate of organization of the corporation known as The Swedish Trade River Hall of the town of Trade Lake, and ask how the same may be dissolved. You state that it is organized under ch. 91; that its purposes are similar to those of the Young Men's

Christian Association, and that the same has been in operation since 1912; that it is not affiliated or connected in any way with the general organization of the Young Men's Christian Association of the United States, and that it is not an income producing institution but is organized merely for social and religious purposes, and is a nonstock corporation.

Inasmuch as you desire to organize a new corporation with substantially the same membership and of the same general character, with changes in name and other slight modifications, I would suggest that you organize your new corporation upon the basis that your present membership desires to operate; that upon the completion of the new organization you hold a meeting of the old corporation and transfer all of the property to the new corporation. Then you would be in a position to dissolve your old corporation without any complications with reference to the disposition of the property.

You are advised that sec. 1789, Stats., provides in substance that any corporation organized under any law may, when no other mode is specifically provided, dissolve, in the case of nonstock corporations, on a vote of one-half of the members. This section also provides for the filing of copies of the resolution of dissolution, certified by the president and secretary or corresponding officers, with the secretary of state, and also recorded by the register of deeds of the county in which the corporation is located.

The above quoted statute outlines the necessary steps in such dissolution.

Elections—Precincts—Failure to transmit copy of resolution changing place of voting held, under circumstances, a mere irregularity.

August 19, 1918.

CLARENCE J. TESELLE,
District Attorney,

Antigo, Wisconsin.

In your letter of August 8 you state that in the town of Elton, in Langlade county, the town board, proceeding under sec. 6.05, divided the township into two election districts; that this was done during the month of March, 1918; that all of the statutory

requirements were complied with in detail except that the town clerk failed

"to transmit a copy of the order to the county clerk until five days ago," and that "the town has already built an additional election booth and the voters of the town generally understand that there are to be two election precincts in said town."

You ask:

"Does this invalidate the division as made by the town board?"

Sec. 6.05 provides for division of election precincts and among other requirements provides in subd. (2) :

"* * * The order or resolution making such division shall be filed with the proper city, village or town clerk, who shall within five days after such filing transmit a copy thereof to the county clerk, and in towns and villages the clerks thereof shall post copies of such order or resolution in five public places therein."

In determining whether or not election laws are complied with sufficiently the test is usually whether or not any elector will be misled and whether or not a fair and honest register of the sentiment of the district can be had upon the issues presented.

In the case you present it would be hard to conceive of any voter being misled upon the facts stated by you, in the ensuing election. Considerable time has passed since the division of the district, and it is generally known, in fact, a booth has been built. The detail that has been omitted, to wit, the filing of the resolution with the county clerk, is not a matter of any great importance at this time, under all the circumstances, with respect to giving notice to prospective electors in the precinct. I do not believe that filing the notice with the county clerk some time later than the time required in the statute tends to lessen the publicity of the change of voting place. There has been, therefore, it seems to me, a substantial compliance with the statute.

I think it must be held also that this provision of the statute requiring the transmission of this copy of the resolution within five days after filing with the town clerk is a directory provision only.

A fair test, and one used by the courts quite generally, as to

whether an election statute is mandatory or merely directory, is found in *Parvin v. Wimberg*, 30 N. E. 790, 130 Ind. 561:

"* * * If a statute simply provides that certain things be done within a particular time or in a particular manner and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory, if they affect the merits of the election; and as directory only if they do not affect its merits." P. 568.

Another rule of construction of election laws is found in the same case, substantially as follows: a construction of an election law that has been accepted and acted upon by the officers whose duty it is to administer the law will not be ignored by the courts, unless it is palpably wrong. P. 565.

If the electors of the newly created precinct proceed at the coming election in a legal manner and conduct the election properly, no substantial reason suggests itself for holding that the election held in the newly created district would not be a fair register of the wishes of the electors participating therein; and, likewise, it would be difficult to conceive of the results of the election being disturbed because of the failure of the town clerk to transmit a copy of the resolution dividing the district to the county clerk within the exact time prescribed by the statute.

You are therefore advised that, in my opinion, there has been a substantial compliance with the law in dividing the election district.

Employment Agencies—The industrial commission has not power to furnish equipment for more than four employment offices.

August 20, 1918.

INDUSTRIAL COMMISSION.

In your communication of August 6 you state that by order of the president the United States employment service on August 1 took charge of the recruiting of all unskilled labor for government contractors; that in connection with this program the industrial commission has been designated as state director for the United States employment service; that it has been ordered to open employment offices in all cities in the state with a popu-

lation in excess of 10,000, and in such other places as may be deemed necessary; that you are endeavoring to get the city councils in all cities where employment offices are to be established in accordance with the government program, to provide the necessary quarters and to defray the expenses for rental, light, heat, janitor, and telephone service; that the employes of all of the new offices will be furnished by the United States employment service; that the United States employment service also has taken over most of the employes in the free employment offices hitherto conducted by the commission; that the question has arisen in connection with this program, whether the industrial commission can pay for incidental expenses in connection with the establishment of the new free employment offices.

You may direct my attention to the provisions of subd. (9), sec. 2394—52, which directs the commission:

"To establish and conduct free employment agencies," and "to do all in its power to bring together employers seeking employes and working people seeking employment;" and again, to "devise and adopt the most efficient means within its power to avoid unemployment, to provide employment, and to prevent distress from involuntary idleness."

Subd. (11) of the same section provides that the commission shall have authority

"To rent and furnish not to exceed four offices as needed in cities for the conduct of its affairs."

You inquire whether the provisions of the two subsections referred to, taken together, would prevent the commission from paying incidental expenses connected with the establishment of new employment offices, since the commission has already supported employment offices in the four cities of Milwaukee, Superior, LaCrosse, and Oshkosh. You state that in none of these four cities, however, have you rented the quarters, and that you do not propose to do so in other cities; that there will, however, be incidental expenses for supplies and equipment which you would like to defray in order to carry out the government program with the least possible delay.

While the provisions of subd. (9), sec. 2394—52 give the commission broad powers, as indicated above, still the commission is expressly limited in the renting and furnishing of four of

fices. In giving effect to the wording of this statute, I believe the commission is prohibited from paying for the equipment and furnishing of more than four offices.

Elections—Vacancies—When one who has secured enough signers to nomination papers to entitle him to have name printed on party primary ballot withdraws, no vacancy is created.

August 20, 1918.

A. R. JANECKY,
District Attorney,
Racine, Wisconsin.

I have your communication in which you state that two candidates for county offices at the next fall election filed nomination papers, but have since withdrawn, leaving vacancies on the ticket. You direct my attention to sec. 5.28, Stats., which provides for the filling of a vacancy in the nomination. You state that the question has been raised whether or not this can be done where the vacancy occurs before the primary. You ask to be advised whether the names of candidates may be still put on the primary ticket, under the provisions of sec. 5.28.

Said sec. 5.28 reads, in part, as follows:

"Any person nominated to office may decline and annul the same by delivering to the officer with whom his certificate of nomination or nomination paper is filed, not less than seven days before election in case of town, village or city officers, and nine days in other cases, a declination in writing signed by him and acknowledged before some officer authorized to take acknowledgments. 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 in case the candidate is the nominee of a political party, by the committee representing the party, the chairman and secretary of which in such case shall make and deliver to the proper officer for filing a certificate, duly signed, certified and sworn to, as required in case of original certificates, setting forth the cause of the vacancy, name of new nominee, office for which nominated, and such other information as is required in case of original certificates. * * *"

It also provides that the certificate must be filed six days before election, in case of town, village, and city officers, and eight

days in other cases; it also provides that in case the candidate is a nonpartisan nominee, the vacancy shall be filled by the personal campaign committee of the candidate, who is to make and file the certificate; it further provides that if such declination, death, or permanent removal of the nominee take place after the ballots are printed and before election, the proper chairman of the committee authorized to fill the vacancy may make a nomination to fill the vacancy and provide the election boards with pasters.

You have directed my attention to subd. (2), sec. 5.02, which gives as one of the methods of nomination, nomination papers signed and filed as provided in said chapter. It appears from the provisions of ch. 5, Stats., that nominations may be made at a primary and also by nomination papers signed and filed, as provided in said chapter. The nominations spoken of are, however, nominations for office to be voted for at an election. The filing of nomination papers for the purpose of placing a person's name on a primary ballot is not a completed nomination for an office. While it authorizes the person's name to go on the primary ballot, the person is not fully nominated until he has received a sufficient number of votes at the primary.

This chapter contains, besides nominations to be made at the primary, specific instances in which nominations for office may be made by nomination papers signed and filed, as provided in said chapter. Nominations for town and village officers may be made in this manner under subd. (2), sec. 5.27. Independent and nonpartisan nominations may be made by nomination papers, as provided in sec. 5.26.

As I understand your letter, county officers who have withdrawn had nomination papers circulated and filed, which authorized their names to be printed upon the primary ballot. They will, however, not be nominated completely until they have received a sufficient number of votes at the primary. Their withdrawal, therefore, does not create a vacancy as contemplated by sec. 5.28. The primary ballot will not have a name on it, but the voters in the county may nominate a person by voting for a person at the primary as provided in sec. 5.17..

If no nomination is made at the primary then there will be a vacancy, and it may be filled, but not before,

Bridges and Highways—Public Lands—Public Officers—Board of Control—Town supervisors have power to lay out highways over state lands. Where lands are in charge of board of control no consent of such board or grant from it is necessary. No damages are awarded to the state.

August 21, 1918.

BOARD OF CONTROL.

I have your letter of August 19, 1918, and accompanying documents. It appears therefrom that the supervisors of the town of Tomahawk laid out a public highway, a portion of which is state forest reserve lands now occupied by Tomahawk Lake Camp for Wisconsin tubercular convalescents; that no award of damages was made to the state on account of lands so taken for a highway; that a release of damages has been asked for, and that the construction of such highway is highly beneficial to the public and particularly to the maintenance and operation of the Tomahawk Lake Camp.

You state that you find no statutory provision giving you authority to grant either an easement or permission to the town to put a road through state lands, and you desire my opinion as to whether you or any other board or official has such power. You are advised that the supervisors of the town have power to lay out a highway through state lands and that no award of damages to or release from the state is necessary, and that no compensation is to be made the state on account of a changed use to which this land is to be devoted. You will observe that no place is more public than a highway and no use more general or public than the use of a public highway. The statute empowering the supervisors to lay out highways makes them the agents of the state and confers upon them sovereign power. It is their duty

"(8) To lay out and establish upon actual survey, as hereinafter provided, such new roads in their town as they may deem necessary and proper. * * *." Sec. 1223, Stats.

No exception is made of the public domain. The power to lay out the highways is entirely general.

The exception is found in sec. 1263, Stats. The places where the supervisors may not lay out highways is defined in the last named section, and state lands are not mentioned.

Sec. 1265, Stats., provides for a petition for the laying out of a highway and names the qualifications of the petitioners. Homesteaders on the United States lands are qualified to petition, and the inference is broad and unmistakable that highways are to be laid out on the lands of the United States for the accommodation of the homesteaders as well as others.

The supervisors are commanded by sec. 1270, Stats., to ascertain by agreement, if possible, with the owners of lands taken the damages occasioned thereby. Failing to make such agreement or to obtain a release of damages, the supervisors must make an award of damages to the land owners and file the same within ten days after the order laying out the highway. Failure to make and file such award renders the highway proceedings void. Lands of this state and the United States are excepted from the provision of sec. 1270.

The inference is unescapable that it was expected by the legislature that highways would be laid through state and United States lands, and that no compensation would be made to either. Nothing is taken from them. Their domain is simply changed to furnish a greater public service.

This is the view taken by our supreme court many years ago, and the fact that the statutes with reference to this point have remained unchanged satisfies me that such is the legislative intent.

"It has been held by other courts, and such appears to be the settled construction, that when the legislature authorizes a public highway, or other public improvement of a like nature, by a corporation, the making of which will necessarily require the use or taking of the public lands, and no negative words are contained in the charter, and no provision made for making compensation to the state for public lands so required to be taken, the right to use or take the same for such purpose is conferred upon the corporation without making compensation therefore. * * *. No case can probably be found where any compensation was required to be paid to the state for the opening of ordinary public highways through lands owned by the state; and, in relation to the construction of railroads, as early as 1857 the legislature passed an act giving a right of way, without compensation, through the university, school, swamp and overflowed lands of the state, one hundred feet in width, to every railroad thereafter constructed in this state." *The Black River Improvement Company v. The LaCrosse Booming & Transportation Company and others*, 54 Wis. 659, 676-677,

I therefore advise that the supervisors be permitted to proceed with the opening of the highway in the manner they would proceed if the lands were privately owned, with the exception that no release of damages or compensation is necessary.

Mother's Pensions—Aid may be granted without regard to the county appropriation.

Orders for aid should be paid if there are any funds available therefor.

August 22, 1918.

BOARD OF CONTROL.

You have forwarded me the letter of C. R. Freeman, county judge of Dunn county, and ask that I answer the questions submitted by him.

- (1) Can the county judge issue orders, under sec. 573f, Stats., upon the county treasurer, without any regard to the amount which the county board has appropriated for the purposes of said section?
- (2) Can the county treasurer pay such orders when they exceed the amount so appropriated by the county board?

Both of these questions have been considered and answered by this department. Vol. V, Op. Atty. Gen., p. 5. The first question was there answered in the affirmative; the second question is answered to the effect that the county treasurer should continue to honor and pay such orders, so long as there is money in the general fund, or money which has not been specifically appropriated to some other purpose. I see no reason for withdrawing or changing the opinion then advanced.

Public Officers—Board of Control—Cities—Board of control may make any arrangements, reasonably necessary, with a city to supply a state institution with water service and fire protection; cannot grant city permanent easement to maintain water mains on state lands.

August 22, 1918.

BOARD OF CONTROL.

By letter of August 19, 1918, you ask for my opinion as to your power to transfer to the city of Janesville the title to a

six-inch water main situated at the grounds of the school for the blind and connected with the city water mains.

It appears from said letter and one of earlier date and correspondence accompanying it that some years ago the state laid a six-inch water main from a city water main across Rock River and said school grounds to the school buildings. The end of this water main is near the intersection of Oak Hill Avenue and State Street in Janesville. Several hydrants are located on this main in close proximity to the school building. At present this main serves simply for fire protection, water for domestic purposes being supplied by a separate water system belonging to the school. The city of Janesville desires to have this water main transferred to the city, and also the right of extending the main to State Street, with a view of ultimately forming part of a water main circuit and furnishing water and fire protection to privately owned property in this section of the city. In return therefor the city offers to maintain and keep this water main in repair and install additional fire hydrants upon the grounds.

You have authority to maintain and govern this school, to direct and manage its affairs and to preserve and care for the buildings, grounds and other property connected therewith. This main, I assume, was laid without special legislative enactment and, I think, could be removed by you without legislative act. Still I have some doubts as to your authority to transfer to the city the title to so much of this main as is upon state ground, together with the easement to maintain such main there. It seems to me that the object really sought to be accomplished may be achieved without such transfer of the title.

To save the state the burden and expense of repairing and maintaining this main and to improve the fire protection and water service, you have authority in my opinion to enter into an arrangement with the city whereby the city shall keep the main in repair and extend the main into the public street and install additional hydrants on such extension, either in the street or on the grounds, or both.

Public Officers—District Attorney—Income Tax Assessor—
The offices of district attorney and income tax assessor are incompatible.

August 22, 1918.

HONORABLE TIMOTHY BURKE,

State Senator,

Green Bay, Wisconsin.

In your letter of August 20 you ask if the offices of district attorney and income tax assessor can be held by the same person at the same time.

In reply thereto I would say I am of the opinion that these two offices are incompatible and cannot properly be held by the same person at the same time. Sec. 1087m—24, subsec. 2, Stats., provides for the criminal prosecution of the income tax assessor, among other officers, and reads as follows:

"Any officer, agent, clerk or employe violating any of the provisions of this section shall upon conviction thereof be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by imprisonment in the state prison for not more than two years, at the discretion of the court."

You can readily see that it would become the duty of the district attorney to prosecute the income tax assessor under this statute, should he violate subsec. 1 of the same section, which I think is sufficient to make the two offices incompatible.

Furthermore, subd. (4), sec. 1087b provides as follows:

"Whenever the assessor of incomes ascertains, or has good reason to believe, that any assessor is guilty of a violation of law, he is authorized to make complaint to the presiding judge of the circuit court for the removal of such assessor. The district attorney shall attend and prosecute such proceedings for removal."

This provides a particular method for removal of assessors, the complaint to be made by the income tax assessor, and the matter to be prosecuted by the district attorney. This statute evidently contemplates that the two offices should be held by distinct persons.

Furthermore, it is the duty of the income tax assessor to lay tables of assessment values before the county board and advise

said board regarding the apportionment of state and county taxes among the several assessment districts. One of the duties of the district attorney is to advise the county board in legal matters which may involve this same matter.

The above I think is sufficient to indicate that the two offices are incompatible.

Fish and Game—Constitutionality of federal Migratory Bird Act considered.

In so far as state law is inconsistent with it the federal law will prevail.

August 22, 1918.

GEORGE E. O'CONNOR,

District Attorney,

Eagle River Wisconsin.

In your communication of August 8 you refer to the federal Migratory Bird Act, and you inquire when the season opens for game birds listed under classes 11, 12, and 14, on pages 43 and 44 of the pamphlet containing the statutes relating to wild animals, issued by the state conservation commission.

Under class 11, we find wild goose and brant, and the open season given as September 7 to December 20, and the bag limit ten each day. In class 12 are wild duck, including American coot or mud hen, but excepting wood duck. The open season is from September 7 to December 10, and the bag limit is fifteen each day. In class 14, we find plover, snipe, rail, and rice hen. The open season is from September 7 to December 20, and the bag limit is fifteen each day. See. 29.18, Stats.

Those are the regulations as found in the Wisconsin statutes. The federal statutes on the question have undergone a change within the last few months.

The McLean Law, relating to the protection of migratory and insectivorous birds, was passed March 4, 1913, sec. 8837, U. S. Comp. Stats. 1916. Under this act, the department of agriculture was authorized and directed to adopt suitable regulations to prevent the destruction of migratory birds. Pursuant to the powers there granted, the department of agriculture did make rules and regulations prescribing open and closed seasons for the various migratory birds found not only in this state but

also in other states of the Union. The constitutionality of this legislation by congress and of the rules made pursuant thereto by the department of agriculture has been seriously questioned, but has never been passed upon by the supreme court of the United States.

It is well known that the national constitution is an enabling instrument, and therefore congress possesses only such powers as are expressly, or by necessary implication, granted by that instrument. It follows that unless there is some provision in the national constitution granting to congress, either expressly or by necessary implication, the power to legislate on the question of migratory birds, the statutes and rules of the department cannot be sustained. A number of federal district courts and state courts have had the McLean Law and the rules and regulations made thereunder under consideration, and it was held that the act cannot be sustained as an exercise by congress of the power to regulate commerce, nor as an exercise of the power to protect the property of the United States, nor as an exercise of the implied powers of the national government. See *U. S. v. Shauver*, 214 Fed. 154; *U. S. v. McCullagh*, 221 Fed. 288; *State v. McCullagh*, 96 Kans. 786; *State v. Sawyer*, 113 Maine 458. Whether or not the supreme court of the United States would arrive at the same conclusion may never be known, as the McLean Law has been repealed, and a new statute and new regulations have taken its place.

In a note to the *State v. Sawyer* case, *supra*, found in 58 L. R. A. (N. S.) 1031, it is stated that the opinions holding the law unconstitutional are somewhat unsatisfactory, at least from the point of view of those who would preserve the migratory birds from extinction. It is said that the decisions are unsatisfactory because they are based upon decisions and statements of courts made in a general way, without any thought of the distinction in the mind of congress when it passed the act in question: Justice Field's dissenting opinion, in the case of *Geer v. Conn.*, 161 U. S. 519, is referred to and rather approved, in which he held that the proposition that the state owns the wild game at large within its borders is a fiction of the law, and that in reality they are owned by no one, and that the ruling that the state holds such animals in trust for the people would seem to be based upon the obvious fact that she is the best trustee be-

cause best able to protect the game; that it is, however, a fact and admitted that the states are unable to prevent the extermination of the migratory birds, so the reason for the fiction fails.

A convention between the United States and Great Britain for the protection of migratory birds was signed at Washington on August 16, 1916. It was ratified by Great Britain and the senate and president, and proclaimed December 8, 1916. A copy of this treaty is found in 39 U. S. Stats. at Large, Part II, p. 1702. An act to give effect to said convention between the United States and Great Britain was passed on July 3, 1918. This act takes the place of the McLean Act, and repeals all acts or parts of act inconsistent therewith, which of course includes the McLean Act. It contains the following:

"That subject to the provisions and in order to carry out the purposes of the convention, the Secretary of Agriculture is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the convention to allow hunting, taking, capture, killing, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President." Public, No. 186, 65th Congress.

In pursuance to said new act, the president approved and proclaimed, on the 31st day of July, 1918, a new regulation made by the department of agriculture. In said proclamation, after quoting the above section of the new act of congress, it is said:

"AND, WHEREAS, The Secretary of Agriculture, pursuant to said section and having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of migratory birds included in the terms of the convention between the United States and Great Britain for the protection of migratory birds concluded August sixteenth, nineteen hundred and sixteen, has determined when, to what extent, and by what means it is compatible with the terms of said convention to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, trans-

portation, carriage, and export of such birds and parts thereof and their nests and eggs, and in accordance with such determinations has adopted and submitted to me for approval regulations, which the Secretary of Agriculture has determined to be suitable regulations, permitting and governing hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, and export of said birds and parts thereof and their nests and eggs, which said regulations are as follows:

"REGULATION 3. MEANS BY WHICH MIGRATORY GAME BIRDS MAY BE TAKEN.

"The migratory game birds specified in Regulation 4 hereof may be taken during the open season with a gun only, not larger than number ten gauge, fired from the shoulder, except as specifically permitted by Regulations 7, 8, 9, and 10 hereof; they may be taken during the open season from the land and water, from a blind or floating device (other than an airplane, powerboat, sailboat, or any boat under sail), with the aid of a dog, and the use of decoys.

"REGULATION 4. OPEN SEASONS ON AND POSSESSION OF CERTAIN MIGRATORY GAME BIRDS.

"For the purpose of this regulation, each period of time herein prescribed as an open season shall be construed to include the first and last days thereof.

"Waterfowl (except wood duck, eider ducks, and swans), rails, coot, gallinules, black-bellied and golden plovers, greater and lesser yellowlegs, woodcock, Wilson snipe or jacksnipe, and mourning and white-winged doves may be taken each day from half an hour before sunrise to sunset during the open season prescribed therefor in this regulation, by the means and in the numbers permitted by Regulations 3 and 5 hereof, respectively, and when so taken, each species may be possessed any day during the respective open season herein prescribed therefor and for an additional period of ten days next succeeding said open season.

"In * * * Wisconsin * * * the open season shall be from September 16 to December 31;

"* * * 40 U. S. Stats. at Large, Part II, p.—.

This includes all the birds mentioned in classes 11, 12, and 14 of the state game laws except rail, and as to those we find the following regulation:

"Rails (except coot and gallinules). The open season for sora and other rails (except coot and gallinules) shall be from September 1 to November 30, except as follows.

"* * *

"In * * * Wisconsin * * * the open season shall be from September 16 to December 31;
" * * ." Ibid.

Regulation 5, referring to bag limits, is as follows:

"A person may take in any one day during the open seasons prescribed therefor in Regulation 4 not to exceed the following numbers of migratory game birds:

"*Ducks (except wood duck and eider ducks).* Twenty-five in the aggregate of all kinds.

"*Geese.* Eight in the aggregate of all kinds.

"*Brant.* Eight.

"*Rails, coot, and gallinules.* Twenty-five in the aggregate of all kinds.

"*Black-bellied and golden plovers and greater and lesser yellowlegs.* Fifteen in the aggregate of all kinds.

"*Wilson snipe, or jacksnipe.* Twenty-five.

"*Woodcock.* Six.

"*Doves (mourning and white-winged).* Twenty-five in the aggregate of both kinds." Ibid.

Regulation 6 refers to shipment and transportation of certain migratory birds, and provides:

"Waterfowl (except wood duck, eider ducks, and swans, rails, coot, gallinules, black-bellied and golden plovers, greater and lesser yellowlegs, woodcock, Wilson snipe or jacksnipe, and mourning and white-winged doves and parts thereof legally taken may be transported in or out of the State where taken during the respective open seasons in that State, and may be imported from Canada during the open season in the Province where taken, in any manner, but not more by one person in one calendar week than the number that may be taken under these regulations in two days by one person; any such migratory game birds or parts thereof in transit during the open season may continue in transit such additional time immediately succeeding such open season, not to exceed five days, necessary to deliver the same to their destination; and any package in which migratory game birds or parts thereof are transported shall have the name and address of the shipper and of the consignee and an accurate statement of the numbers and kinds of birds contained therein clearly and conspicuously marked on the outside thereof; but no such birds shall be transported from any State, Territory, or District to or through another State, Territory, or District, or to or through a Province of the Dominion of Canada contrary to the laws of the State, Territory, or District, or Province of the Dominion of Canada in which they were taken or from

which they are transported; nor shall any such birds be transported into any State, Territory, or District from another State, Territory, or District, or from any State, Territory, or District into any Province of the Dominion of Canada at a time when such State, Territory, or District, or Province of the Dominion of Canada prohibits the possession or transportation thereof." Ibid.

Regulation 8 contains provisions for permits to propagate and sell migratory waterfowl.

Regulation 9 relates to permits to collect migratory birds for scientific purposes.

Regulation 10 pertains to permits to kill migratory birds injurious to property. This regulation contains the following:

"When information is furnished the Secretary that any species of migratory bird has become, under extraordinary conditions, seriously injurious to agricultural or other interests in any particular community, an investigation will be made to determine the nature and extent of the injury, whether the birds alleged to be doing the damage should be killed, and, if so, during what times and by what means. Upon his determination an appropriate order will be made." Ibid.

I have copied extensively from these regulations, as they have been recently made and you may not be in possession of them at this time.

You have submitted a few specific questions, which I will now take up in their order.

1. You inquire when the season opens for the game in classes 11, 12, and 14 of our game laws: first, under the state law; and second, under the federal law.

The former has been given in the above quoted statute. Under the federal law, the open season is from September 16 to December 31. The open season under the state law has already been referred to and differs somewhat from that of the federal law.

2. At what time in the morning is it lawful to commence hunting game birds last referred to, and what time in the evening must such hunting stop: first, under the state law; and second, under the federal law?

The state law has no regulation on this subject. The federal regulation provides that waterfowl, except wood ducks, eider ducks and swans, but including the other birds mentioned in

classes 11, 12, and 14 of the game laws, may be taken each day from half an hour before sunrise to sunset during the open season.

3. Is it an offense punishable under the federal laws for one to hunt these birds commencing on September 7th and prior to September 15th? If an offense, then can the offender be proceeded against under the federal law and in the federal court at any time within three years from the commission of the offense?

From September 7 to September 15 is the closed season under the federal law, and of course a violation of it may be prosecuted. Prosecution may be had within the time when the statute of limitations is to run. Whether or not the statute of limitations is three years on this subject, I have not ascertained.

4. If a hunter violates the provisions of a state law and is convicted and punished for that, can he then also be arrested and prosecuted in the federal court, under the federal law, for the same act, if such act is also prohibited by the federal law?

Sec. 7 of the federal act, approved July 3, 1918, Public, No. 186, 65th Congress, contains the following provision:

"That nothing in this Act shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said convention or of this Act, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open seasons for such birds beyond the dates approved by the President in accordance with section three of this Act."

The ordinary rule is that the state may punish the same act that constitutes an offense against the laws of the federal government, unless the federal legislation is made exclusive, expressly or by fair implication. 12 Cyc. 137; *Sexton v. California*, 189 U. S. 319. In view of this rule of law and the express provision in the federal law authorizing the states to enact additional protection for migratory birds, your question must be answered in the affirmative.

The constitutionality of this new act of congress made pursuant to the treaty with Great Britain and the rules and regulations made thereunder, has not been adjudicated by any state

or federal court. It is believed that it is constitutional, in view of the provision of art. VI, U. S. Const., which provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

It has, however, been questioned whether the federal government may acquire powers to enact certain legislation by making a treaty which it would not have in the absence of such treaty. This will be an important question for the supreme court of the United States to ultimately determine.

It was contended on the floor of congress that this new law could be sustained as a war measure, being necessary for the conservation of food; that the conservation of bird life will materially aid in the production of food, as the insectivorous birds feed on the insects which destroy the products of the farm. Important statistics from the bureau of entomology are given which are quite startling. They are found in the Congressional Record of the Sixty-fifth Congress, second session, Vol. 56, on page 7955. Unless these federal acts and regulations will be of help, it is impossible to prevent the destruction of some of our most valuable migratory birds, as the states are powerless to prevent their destruction when the animals are not within the borders of the state.

I believe that the attitude taken by my predecessor on the federal legislation on migratory birds, in an opinion given to the district attorney at Green Bay under date of April 27, 1914, Vol. III, Op. Atty. Gen., p. 405, in which it was assumed that the federal act is a proper and constitutional exercise of legislative power delegated to the federal government, and that, in so far as our laws are inconsistent with the federal law, the latter would prevail over the former, is correct.

Until the question is authoritatively decided by the supreme court of the United States, I believe this should be the attitude of the people of this state. In all cases where our law grants additional protection to the migratory birds, in so far the law may be enforced and the violators punished.

Fish and Game—Conservation commission has power to re-establish the One-buck Act and provide additional protection for deer.

August 23, 1918.

CONSERVATION COMMISSION.

I have your communication in which you state that the commission, having received petitions from thirty-one counties that have open seasons for hunting deer asking that it use such methods as the law provides for changing the present law and re-establishing the One-buck Law or such other laws as will provide proper protection for conserving the deer in Wisconsin, has proceeded under ch. 668, laws of 1917, sec. 29.21, and has called and held the hearings as required by said section. You inquire if you have the authority to close the season for killing does and fawns, and require that no deer can be killed with horns less than four inches long during the open season extending from the 20th day of November to the 30th, inclusive. You enclose the petition of Polk county, signed by twenty-five citizens, and you say the form is the same as those presented by all of the other counties.

The question as to your powers under the statute in question has been considered heretofore by this department, and my predecessor gave two official opinions in which the conclusion was reached that the conservation commission has no powers under sec. 29.21 to issue orders taking away protection given to wild animals by statute or previous orders of the commission; that it, however, has the power to make orders providing for the protection to wild animals where no protection is now given, or additional protection where protection is already given by the statute. See Vol. VI, Op. Atty. Gen., pp. 578, 852.

It will not be necessary for me to restate the reasons which led to this conclusion. That would be a work of supererogation. I believe that the construction given to this law was the correct one, and a correct conclusion was reached. Under this rule, you will have the power to close the season for killing does and fawns and requiring that no deer can be killed with horns less than four inches long during the open season, as you are giving protection to the deer which they have not heretofore had.

I have carefully examined the petition, to ascertain whether it complied with the requirements of the statute so as to give

you authority to act. This statute required the petition to state

"the extent such protection or additional protection is desired and the grounds therefore."

While the petition might have been more specific, I take it, however, in view of the fact that this is a proceeding before an administrative body and not a court proceeding, and that the petition is supposed to be made by laymen, that a liberal construction will be given to the wording of the petition, and that it will be held that the grounds and the extent of the protection required are sufficiently stated so as to comply with the requirements of this law.

Your question is therefore answered in the affirmative.

Fish and Game—Conservation commission has no power to change the open season for deer from November 20 to November 30 to a period beginning November 10 and ending November 20.

August 23, 1918.

CONSERVATION COMMISSION.

In your letter of August 22 you submit the following:

"Does ch. 668, sec. 29.21, laws of 1917, extend authority to the conservation commission, after due process of hearings as provided by said section, to change the open season for deer as provided in said chapter from November 20 to November 30, to November 10 to November 20?"

It has heretofore been held by this department, in official opinions to the commission, that it has no power to issue orders taking away protection given to wild animals by statute or by previous orders of the commission; that sec. 29.21 authorizes the commission to provide for protection to wild animals where no protection is now given, or additional protection where protection is already given by the statutes or order of the commission. See Vol. VI, Op. Atty. Gen., pp. 578, 852.

Under the present law, it is unlawful to kill deer between November 10 and November 20. This is a protection given to the wild deer by the statute. Your suggestion would involve

the repeal of this part of the statute. This the commission has no power to do.

The commission has the power to close the open season for deer, or to close part of the open season for deer, for that would be giving additional protection to the deer, but the commission has no right and has been given no power by sec. 29.21 to repeal any statute of this state which gives protection to a wild animal.

Your question is therefore answered in the negative.

Insurance—Fire Insurance—A domestic fire insurance company is not authorized to invest its funds in the bonds of a drainage district located in Clark county.

August 24, 1918.

HONORABLE M. J. CLEARY,

Commissioner of Insurance.

In your favor of August 20 you call my attention to the provisions of subd. (b), sec. 1903, Stats., and ask whether a fire insurance company subject to this statute is authorized to invest its funds in the bonds of a regularly organized drainage district located in Clark county, Wisconsin, under said subd. (b) of said section of the statutes.

Said subd. (b) reads as follows:

"In the lawfully authorized bonds or other evidences of indebtedness of any county, city, town, village, school district or other municipal district within the United States or the Dominion of Canada, which shall be a direct obligation of the county, city, town, village or district issuing the same; provided, that any such municipal district other than a county, city, town, village or school district shall have a population according to the last national or state census preceding the date of such investment of not less than one hundred thousand."

There is considerable doubt whether the term "other municipal district" would include a drainage district, that is, whether a drainage district is a municipal district within the terms of this statute. However this may be, it is not difficult to answer your question, as the latter part of the statute above quoted requires that such other municipal district other than county, city, town, village or school district shall have a population of ~~not~~ less than one hundred thousand. We are absolutely safe in

assuming that no drainage district in Clark county has such a population, and therefore such drainage district cannot come within the provisions of this statute.

I therefore advise you that a domestic fire insurance company is not authorized by subd. (b), sec. 1903 to invest its funds in the bonds of a drainage district located in Clark county, Wisconsin.

Criminal Law—Evidence—Corporations—Blue Sky Law—Words and Phrases—A voluntary trust styling itself a company and issuing shares representing an interest in its property comes within definition of word "company" as defined by statutes.

Any person selling shares in such a company illegally may be prosecuted criminally. The burden of proof showing noncompliance with the law is upon the state.

August 24, 1918.

W. G. HADDOCK,

District Attorney,

Ellsworth, Wisconsin.

Your letter of August 19 reads as follows:

"One Galland has been arrested in this county, on a warrant charging that he did on the 30th day of July, A. D. 1918, at said county, 'directly by himself offer to issue and did then and there issue and sell to one F. C. Teubert certain securities in an alleged corporation called the Automatic Thresher Company, contrary to the provisions of sec. 1753—48 to 1753—53 inclusive of the Revised Statutes of the state of Wisconsin, and in violation of an order of the Wisconsin Railway Commission, made July 17th, 1918, ordering him, the said Charles N. Galland to desist then and there from selling securities in said state, against the peace and dignity of the state of Wisconsin.' The preliminary hearing will be held on August 27th.

"The attorney for the defendant admits that his client has not secured the permission of the Railway Commission to sell securities in the state, but he contends that the Automatic Thresher Company is not a corporation or an individual nor a copartnership, but is a voluntary trust, created under the common law, and having its office in Minneapolis, Minnesota, and that Galland was selling shares therein which shares represented beneficial interests in the property of the trust. He admits that the state of Wisconsin can possibly regulate in some ways, the disposing of these securities, but that the laws of this state

cannot compel this trust to secure the permission of the Railway Commission before it can dispose of its securities, as this would be contrary to the Federal Constitution as interfering with the right of individuals to contract. He cites the case of *Elliott v. Freeman et al.*, 31 Sup. Ct. Rep. 360, as holding that the interest of the shareholders, or *cestuis que trust* cannot be taxed in this state and he also contends that this is authority for holding that the trustees do not have to comply with our corporation laws.

"He also contends that Galland is the owner of these shares or rather the beneficial interest that they represent, and therefore he does not come within the definition of dealer, under sec. 1753—48, subd. (c). In the subscription blank that is signed by the subscriber, it is stated that 'I, the undersigned, agree to purchase — shares in the Automatic Thresher Company, etc.' and Galland fills these orders by assigning a certain number of shares of his stock to the subscriber.

"I have not been able to find very much about these so-called trust estates, but have been reading Sears, on Trust Estates as Business Companies, and I judge from what this attorney says that they have followed the form outlined therein, used by the Massachusetts Gas Company, and it would seem that there is some support for the position taken by this attorney that they do not have to comply with this law. I am in correspondence with the Railway Commission in the matter and perhaps they have taken this matter up with you already. In case I go ahead with the prosecution, in your opinion, will I have to prove noncompliance, or is the burden of proof upon them to show compliance? I would like to be advised as to whether you think I should dismiss the case or proceed."

I have not read any of the authorities referred to in your letter but it is my opinion that the language of sec. 1753—48, subd. (a), which defines the word "company" is sufficiently broad to cover the so-called "voluntary trust."

According to said section the word

"* * * 'Company' means and includes all corporations, associations, or joint stock companies, whether organized or located within or without this state, issuing or authorized to issue any stocks, bonds, or other evidence of title to or interest in or lien upon any or all of its property."

The name "Automatic Thresher Company" in itself declares that it is a company. It may be that it is not an incorporated company, but, according to the facts stated in your letter, the organization certainly constitutes an association issuing evidence

of title to or interest in its property. I conclude that the name, as well as the scheme of organization, is within the definition of the section above cited.

I have consulted with the railroad commission of this state and am satisfied that the Automatic Thresher Company has not complied with the provisions of secs. 1753—48 to 1753—53, inclusive, Stats., and is not authorized to sell its stock within this state. It may be that the defendant, Galland, can establish to the satisfaction of the court or jury that he is a *bona fide* owner of shares in said company as an investor. His contention, if proved, would be a defense to the action.

In a statement filed by the Automatic Thresher Company the name of Charles N. Galland is mentioned as one of its authorized agents. This statement would, it seems to me, go a long way to annihilate the claim made by the defendant that he is not an agent but a *bona fide* investor in the stock of said company. The fact that he is making use of the subscription blanks furnished by the Automatic Thresher Company also indicates that he is acting as agent and that in assigning certain shares of stock held in his own name he is simply trying to circumvent the statute. It is my opinion that this case should be vigorously prosecuted against the defendant.

As to the burden of proof, I think it will be necessary for you to prove noncompliance on the part of the Automatic Thresher Company and on the part of the defendant with the provisions of the statute above cited. The defendant is entitled to the presumption of innocence, and the burden of proof is upon the state. This proof may be made by subpoenaing Mr. G. H. Eckhart, of the railroad commission, who has charge of such matters in its department.

Corporations—Foreign Corporations—A foreign corporation need not comply with sec. 1770b where it is either an agency of the federal government or is not organized for profit.

August 26, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

I am in receipt of your letter of August 23, enclosing communication from the United States Housing Corporation. It

appears that the United States Housing Corporation has been incorporated under the laws of the state of New York to carry into effect certain governmental purposes expressed in the so-called "Housing Acts"; that it is proposed to issue 1,000 shares of stock of no par value, all to be held by the secretary of labor for the benefit of the United States with the exception of two shares for qualification purposes; that the corporation proposes to acquire land and build houses thereon, to be occupied by war workers as a war measure, and to make loans to municipalities and transportation companies in furtherance of this purpose; and that it is the plan of this corporation to carry on its business to a certain extent in the state of Wisconsin. You ask to what extent the laws of this state relative to the entrance and activity of foreign corporations within this state will apply in this case.

I assume from this letter that the United States Housing Corporation is to act as a purely governmental agency, and that it is not to be conducted for profit. Proceeding on these assumptions, it will not be subject to the provisions of the statutes of this state relative to foreign corporations. This will be true for two reasons.

In the first place sec. 1770b of our statutes, with the immediately succeeding sections, which are regulatory of foreign corporations, does not apply to corporations

"created solely for * * * charitable purposes, * * * or corporations not organized or conducted for profit."

In the second place, under the decisions of the United States supreme court, *Pembina Mining Company v. Pennsylvania*, 125 U. S. 181, 186; *Horn Silver Mining Company v. N. Y.*, 143 U. S. 305, 314—315, and many other cases, a foreign corporation engaged purely in an enterprise of the federal government cannot be compelled by the individual states to conform to their regulations relative to ordinary foreign corporations. This is a companion to the exception exempting corporations engaged in interstate commerce from liability to state regulations.

Our supreme court has consistently interpreted sec. 1770b so as to recognize the exception relative to interstate commerce, *Loverin & Browne Co. v. Travis*, 135 Wis. 322; *Elwell v. Adder*

Machine Co., 136 Wis. 82, and other cases, and would of course take a similar position relative to corporations involved in enterprises of the general government, if the question came before it.

You are therefore advised that the United States Housing Corporation is not subject to the statutes of the state of Wisconsin regulatory of foreign corporations seeking to do business within this state.

Education—Textbooks—A manufacturer of textbooks who undertakes in a special contract to sell his books in another state at a lower price than that listed in Wisconsin automatically reduces the price of said books in this state.

August 27, 1918.

WINFRED C. ZABEL,

District Attorney,

Milwaukee, Wisconsin.

Your letter of August 7 reads as follows:

"Sec. 40.35 of the revised statutes of this state regulate the prices of textbooks sold in the state of Wisconsin by requiring the company manufacturing such school textbooks to file copies of the same proposed to be sold, in the office of the state superintendent of public instruction, with a sworn statement of the list price, the lowest wholesale price and the lowest exchange price at which said book is sold or exchanged for an old book on the same subject. It also requires that said manufacturer of books shall file with the state superintendent of public instruction a bond, containing among other provisions that he will reduce the prices of his books automatically in Wisconsin whenever reductions are made elsewhere in the United States, so that at no time shall any book so filed and listed by him be sold in the state of Wisconsin at a higher net price than is received for such book elsewhere in the United States. I am informed that many other states of the Union have substantially the same or similar statutes but that certain schoolbook concerns after having met the requirements of our statute in Wisconsin, make special agreements in other states to sell their textbooks at a reduced price. I am informed they do this by making contracts for the sale of a certain quantity of the books and in their contract fix the price at less than that which they list for the same book in Wisconsin. I am therefore asked to request of you an opinion as to whether or not such manufacturer of schoolbooks will be permitted to maintain the price which he lists for his book in Wisconsin, when he undertakes by virtue of a special contract

to sell the same book in other states at a lesser price, or would the fact that he undertakes by special contract to sell his textbooks in another state at a certain price lower than that which he lists in Wisconsin tend to automatically reduce the price of his book in Wisconsin so that his obligation of the bond which he filed with the said superintendent of schools can be enforced in that respect."

According to sec. 40.35,

"No person shall offer any school textbook for adoption, sale or exchange in the state of Wisconsin until he shall have complied with the following conditions:

"(1) (a) He shall file copies of all textbooks proposed to be sold in the state of Wisconsin by the company manufacturing such book, in the office of the state superintendent of public instruction with a sworn statement of the list price, the lowest wholesale price, and the lowest exchange price at which said book is sold or exchanged for an old book on the same subject of like grade and kind but of a different series in states of the United States including the state of Wisconsin.

"(2) He shall file with the state superintendent of public instruction a bond running to the people of the state of Wisconsin, with a responsible surety company authorized to do business in the state of Wisconsin as surety thereon, in a penal sum to be determined by the state superintendent of public instruction, of not less than two thousand dollars nor more than ten thousand dollars, conditioned as follows:

"(a) That he will furnish any of the books listed in said statement and in any other statement subsequently filed by him within five years, to any school district, to any school corporation and to any person or corporation in the state of Wisconsin at the lowest price contained in said statement and that he will maintain said price uniformly throughout the state;

"(b) That he will reduce such prices automatically in Wisconsin whenever reductions are made elsewhere in the United States, so that at no time shall any book so filed and listed by him be sold in the state of Wisconsin at a higher net price than is received for such book elsewhere in the United States."

The bond forms provided by the superintendent of public instruction for book dealers who desire to comply with the provisions of this section contain the following provision, in compliance with par. (b), above quoted:

"That he will reduce such prices automatically in Wisconsin whenever reductions are made elsewhere in the United States,

so that at no time shall any book so filed and listed by him be sold in the state of Wisconsin at a higher net price than is received for such book elsewhere in the United States."

The language of the above section and the form of the bond which a manufacturer of school books must file with the superintendent of public instruction clearly indicates that the moment a textbook is sold in any other state of the union at a lesser price, that moment the price of said textbook is automatically reduced in the state of Wisconsin, and a manufacturer of textbooks violates his bond in case he thereafter offers for sale such a textbook at a higher rate in this state than the book is sold for in another state. See Vol. V, Op. Atty. Gen., pp. 797, 881; Vol. VI, Op. Atty. Gen., p. 246.

It is therefore my opinion that if the manufacturer in question has undertaken, by virtue of a special contract, to sell a certain textbook in another state at a lesser price than the price list of said book in this state, he automatically reduces the price of said textbook in Wisconsin, so that his obligation on his bond filed with the state superintendent of schools can be enforced against him in that respect.

Constitutional Law—Insurance—Bill No. 610, A., providing a scheme of compulsory insurance against all sickness and disability of employes not covered by the Workmen's Compensation Law, the expense to be paid by state, employer and employe in stated proportions, is unconstitutional.

August 28, 1918.

HONORABLE W. W. ALBERS,

State Senator,

Wausau, Wisconsin.

Under date of July 29 you wrote me inquiring as to the constitutionality of Bill No. 610, A., which was introduced in the assembly March 26, 1917. This bill relates to a system of insurance to provide for employes in case of death, sickness and accident, not covered by workmen's compensation.

Subsec. 1 provides that the act shall be known as the Health Insurance Act. Subsec. 2 defines certain terms as used in the act.

Subsec. 3 provides:

"Every person employed in the state at manual labor under any form of wage contract, unless exempted under subsection 4 of this section, and every other employe whose remuneration does not exceed one hundred dollars a month on the average, shall be insured in a fund or society, except employes of the United States and except employees of the state or of municipalities for whom provision in time of sickness is already made through legally authorized means which in the opinion of the commission are satisfactory."

Subsec. 4 provides:

"Special regulations shall be made by the social insurance commission for the insurance of home workers and casual employes, or for their exemption from compulsory insurance."

Subsec. 5 provides for certain classes who may insure themselves voluntarily in the local or trade funds of the locality in which they live.

Subsec. 6 provides that insured members shall receive benefits in case of any sickness or accident or for death not covered by the Workmen's Compensation Act.

Subsec. 7 provides the benefits that must be provided for insured members. Subsecs. 8, 9, 10, 11, 12 and 13 relate to the benefits to be provided. Subsec. 14 provides for the settlement of disputes between the insured and physicians or between funds and physicians concerning medical benefits. Subsecs. 15, 16, 17, 18, 19 and 20 also relate to the benefits to be received by the insured employes. Subsec. 21 provides that when contributions cease on account of unemployment not due to sickness the insurance shall continue in force for the subsequent periods therein provided.

Subsec. 22 provides:

"The expenses of the funds shall be met by contributions from employes, employers and the state. The state shall contribute two-fifths of the total expenditures for benefits, subject to the provisions of subsection 42; one-half of the balance shall be paid by the employer, one-half by the employe, except that if the earnings of the insured fall below twelve dollars a week, the shares of the employer, employe and state shall be the proportion indicated in the following schedule: * * *."

This schedule provides that the state shall in all cases contribute 40%; the employe a percentage varying from nothing to

22%, depending upon the earnings, and the employer a percentage varying from 38% to 60%, depending upon the earnings.

Subsec. 23 provides that the contributions shall be so computed as to be sufficient for the payment of benefits and expenses of administration and necessary reserve and guarantee funds. Subsecs. 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33 relate to the formation of so-called funds, local and trade, which in effect are insurance carriers formed for the purpose of paying the benefits provided. Subsec. 34 provides that every person subject to insurance shall be an insured member of one of such funds, and that all employers shall be members of such funds. Subsec. 35 provides for membership of those persons who are entitled to voluntary insurance, and subsec. 36 provides for a loss or transfer of membership in the funds under certain conditions. The other subsections relate to the administration of the law.

Thus it will be seen that with certain exceptions, not important to the questions here under consideration, all employes are insured against all sickness or accident, not provided for by the Workmen's Compensation Act, wholly irrespective of their ability to meet the losses and expenses incident to such sickness or accident, and wholly without regard to any connection between the employment and such sickness or accident; that the expense of carrying on such insurance and paying such benefits is to be met by a contribution from the state treasury of two-fifths of the necessary amount, a certain percentage to be contributed by the employers and a certain percentage to be contributed by the employes. It will be further noted that the act is compulsory.

Our supreme court held that an act of the legislature providing that when any citizen of the state becomes an habitual drunkard and is pecuniarily unable to procure and pay for treatment for such disease, he may be committed to some institution for the cure of drunkenness and drug addiction at the expense of the county was unconstitutional as an appropriation of public funds for a private purpose. It was therein pointed out that the language used did not mean that the person who could be so committed had become a pauper or dependent upon charity or benevolence for support, but merely that he did not have the ready means or money to make the payment for such

treatment. *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153.

It was later held that an act appropriating money from the state treasury for the payment to innocent purchasers of orders issued under the act held unconstitutional in the case just cited, was itself invalid for the same reason. *State ex rel. Garrett v. Froehlich*, 118 Wis. 129.

It is difficult to see any distinction in principle between these two cases and the provision in the proposed act requiring contributions on the part of the state for the payment of benefits to employes disabled by reason of sickness or accident. There is no requirement in the present act that such benefits shall be paid only to those who are indigent, but on the contrary such benefits are payable to all employes regardless of their financial ability. In my opinion this feature of the act is unconstitutional and invalid because calling for an expenditure of public funds for a private purpose.

It is further my opinion that that part of the proposed act requiring employers to contribute to the payment of the expenses of sickness or accident of employes, such sickness or accident having no causal connection with the employment, cannot be sustained. I shall not, in this opinion, take the time to discuss this provision more fully because the act is so clearly unconstitutional under the other provision heretofore pointed out.

Subsec. 4, quoted above, seems to me to be an invalid delegation of legislative power. It requires the social insurance commission to make special regulation for the insurance of home workers and casual employes, or for their exemption from compulsory insurance. In other words, it authorizes the social insurance commission to arbitrarily determine whether home workers and casual employes shall come within the compulsory features of the act or be exempted therefrom. This is not like those acts which have been sustained on the theory that the legislature had enacted a complete law but had left it to certain boards or officers to determine certain facts upon which the law would go into effect.

You are therefore advised that in my opinion this act is not constitutional.

Constitutional Law—Pharmacy Law—A proposed amendment to the Pharmacy Law requiring that owners of drug stores shall be registered pharmacists is constitutional, provided it is prospective in operation and fully protects present owners of drug stores in their property.

August 28, 1918.

HONORABLE O. J. S. BOBERG, *President,*

State Board of Pharmacy,

Eau Claire, Wisconsin.

I have your letter of August 14, in which you request my opinion as to the constitutionality of a proposed amendment to the Wisconsin Pharmacy Law, which proposed amendment provides, in effect, that all future purchasers or proprietors of retail drug stores in this state must be registered pharmacists.

In connection with your question you make the following observations:

"It is the writer's personal opinion that no person, not a registered pharmacist, should be permitted to own or to manage a retail drug store, for the reason that public welfare and safety is not fully protected under such ownership or management.

"The state pharmacy law provides that there must be a registered pharmacist in charge of a retail pharmacy or drug store, but there are instances on record where nonregistered owners of drug stores have been unable to secure such qualified assistance on account of the present, persistent shortage of clerks who are registered pharmacists.

"If this happens to be the case in a small town, where such store is the only drug store, it would greatly inconvenience the people to have the store closed, as it may be several miles to the nearest neighboring drug store; but at the same time, the law is there, regarding the proper method of conducting a drug store, and it should be enforced for the protection of the public.

"The older European countries long since have seen the necessity of taking the full step, and, in Denmark, for instance, it is the law that nobody but a registered pharmacist can be the owner of even the smallest drug store in the land. The law in that country further demands the presence of a registered pharmacist during the entire twenty-four hours of day and night."

The constitutionality of the law regulating the practice of pharmacy in this state has been sustained by our supreme court in two quite notable cases: *State v. Heinemann*, 80 Wis. 253; *State v. Evans*, 130 Wis. 381.

In the former the court held that the provisions of the act which imposed a penalty upon any person dealing in, compounding or dispensing drugs, not being, or not having in his employ a registered pharmacist possessing certain qualifications, and having a license from the state board of pharmacy, is a valid exercise of the police power of the state and that the law does not deprive any one of his property without due process.

In the latter case the court reaffirmed the constitutionality of the law on the same ground, and said, in effect, that the business or profession of pharmacy is a legitimate field for police regulation by reason of peril to health or lives in the community generally which may result from incompetence therein.

The tendency of modern legislation and judicial decisions seem to tend to enlarge, rather than restrict, the exercise of the police power of the state, not only as to the practice of the so-called "learned" professions, such as law, medicine, dentistry and pharmacy, but also to regulate the manner in which certain other vocations or businesses are conducted, such as those of barbers, plumbers and bakers.

"The police power includes legislative authority to make all regulations reasonably necessary or conducive to the public welfare." *State ex rel. Milwaukee Medical College v. Chittenden et al.*, 127 Wis. 468, 519.

See also *State v. Redmon*, 134 Wis. 89.

The proposed amendment does not, in my judgment, contravene any of the provisions of the state or federal constitution. It deprives no one of property and affords to all the equal protection of the law. The amendment would be justified under the police power of the state. I find that many states in the United States have now on the statute books laws which, in effect, make it unlawful for any person not a registered pharmacist to conduct any pharmacy or drug store or to engage in the business of selling at retail drugs, medicines, chemicals, etc. As far as I have investigated, such laws are in force in the states of New Hampshire, Connecticut, Massachusetts and Iowa.

Assuming that the proposed amendment will so provide that it is prospective in its operation and will fully protect present owners of drug stores who are not registered pharmacists in their property, it is my opinion that such an amendment to the Pharmacy Law will be constitutional.

Bridges and Highways—Materials of an old bridge may be wrought into a new structure. No credit is given for materials so used.

Credit where old bridge is sold or moved discussed.

August 29, 1918.

WISCONSIN HIGHWAY COMMISSION.

You have called attention to the fact that some highway bridges are built at town expense, others at town and county expense, while still others are erected with county, state and federal funds jointly. Most of the bridges hereafter built will replace existing ones and in some instances the materials in the old structures are valuable.

You ask who is the owner of the material in an old bridge which is rebuilt or replaced at county and state and United States expense. The question is: Who gets the proceeds from or the credit for that material?

These bridges form part of the public highways and partake of all of the characteristics of the latter as to title and ownership. Neither the town nor the county has any proprietary interest in the bridges or any other part of the public highways. The title and interest therein, aside from the title of the abutting property owners, is vested in the state in its sovereign capacity in trust for all the people and is generally called an easement.

The materials in the highway, forming part thereof, belong to the public and may be used to any extent for public highway purposes. In this regard no distinction is to be made, I think, between earth and rock, on the one hand, and timber and metal materials, on the other. *Houston v. Ft. Atkinson*, 56 Wis. 350.

Any earth or rock which forms part of an old bridge, or a support or approach thereto, is available, so far as suitable, for like use in the construction of a new bridge without credit to any political unit.

I have no doubt that any material from an old bridge which can be wrought into the new one to advantage may be used in that way without raising any question of ownership or of credit. Materials so used simply go to lessen the cost of the new struc-

ture. The contract in such a case would, of course, authorize the contractor to make use of the old bridge.

Where materials of the old bridge are not used in the construction of a new one the solution is not so easy or evident. The statutes are silent upon the question and no authority upon it has been found.

In case the work is maintenance, as distinguished from original construction, it would seem but just that the old bridge materials should belong to that subdivision of the state which is charged by law with the maintenance expense. For example, take a bridge of a state highway: the county is required to maintain it, and the county should have the same benefit from the existing bridge, when it is replaced, that the county would have if it merely repaired the old bridge; the salvage in such case should by right belong to the county.

Again, in case of original construction of a bridge it would seem that those furnishing the funds should have the benefit that may be derived from a sale of the old structure.

But it sometimes happens that a bridge which is too light or too short or too narrow for a trunk line highway would answer elsewhere, and the best and most advantageous use to be made of such bridge would be to move it to some other place in the public highway. In such a situation I think that the bridge would simply continue its service as part of the public thoroughfare, and that no credit would be given or taken on account thereof.

The absence of statutes or decisions upon this matter restrains me from giving you a more positive or explicit opinion upon the matter submitted.

Public Officers—County Judge—Vacancies—Conviction of an officer of an infamous crime creates a vacancy without notice or declaration.

Vacancy in office of county judge is filled by appointment.
Term of appointee considered.

August 30, 1918.

HONORABLE E. L. PHILIPP,
Governor.

In the matter of the conviction
of John M. Becker, county
judge of Green county:

The conviction of John M. Becker of an infamous crime *ipso facto* vacated his office of county judge. Such a conviction creates at once as absolute a legal vacancy as would the death of the incumbent.

"Every office shall become vacant on the happening of either of the following events:

- "(1) The death of the incumbent.
 - "(2) His resignation.
 - "(3) His removal.
 - "(4) His ceasing to be an inhabitant of this state; ***.
 - "(5) His conviction of an infamous crime ***. Sec. 17.02,
- Stats.

No notice or declaration of vacancy is required or necessary. The appointing power is to take notice of the facts which create a vacancy and acts upon its own initiative. Of course, it will satisfy itself in such manner as seems best of the actual happening of some of the events enumerated in the statute.

The vacancy in this instance is filled by appointment, and the appointing power is vested in you as governor. Sec. 2441, Stats.

The appointment will be made for the balance of the current term, as an election will be held next April for the regular or full term.

"1. There shall be a general election of county judge in each county on the first Tuesday in April, 1913, and every sixth year thereafter. The term of office of county judge shall be six years, commencing on the first Monday in January after such election." Sec. 2441, Stats.

It follows from this statute that an election will be held in April, 1919, and that the term of the judge heretofore elected will expire on the first Monday in January, 1920. Under some circumstances the appointments to fill vacancies in the office of county judge are for the balance of the current term, and under other circumstances until the first Monday of the June next succeeding.

The classification depends upon the statute providing for an election to fill a vacancy. It is provided by sec. 8.03 that no election to fill a vacancy shall be had at the time of an election for a full term. I quote from that section:

"In all cases of vacancy in the office of circuit judge or county judge, the election to fill such vacancy shall be held on the first Tuesday of April next after the vacancy happens, in case such vacancy happen forty days or more before such day; * * *. Provided, that no election to fill a vacancy for justice of the supreme court, circuit judge or county judge shall be held at the time of holding the regular election for such office."

It has already been pointed out that the election for the full term according to statute will occur next April, and it follows that no election to fill the vacancy can then be had. The result is that the appointment to the vacancy in question will be for the balance of the term.

Taxation—Delinquent Drainage Assessments—The liability of a county to drainage districts considered.

August 30, 1918.

WISCONSIN TAX COMMISSION.

You have submitted the following for my consideration:

"In making county audits our accountants have in many instances to deal with delinquent drainage assessments. There seems to be various interpretations of the liability of counties under section 1379—25a to drainage districts for moneys collected by the former after delinquent returns have been made.

Example No. 1.

Original tax returned	Collected before sale				
	Fees	Interest	Advertising fee	Total	Date
\$30.37	\$1.52	\$1.52	\$.25	\$33.66	5/8/14

"In this case what is the county's liability, original tax only, or is the drainage district entitled to interest and fees or some part thereof in addition to original tax?

Example No. 2.

Original tax returned	Sold					
	Advertising fee	Coll. fee in cert.	Int. in cert.	Amount sold for	Cert. fee	Total of cert.
\$8.05	\$.25	\$.40	\$.40	\$9.10	\$.25	\$.35

"To what sum is the drainage district entitled?

Example No. 3.

Orig- inal tax re- turned	Bid in by county					Redeemed			
	Adv. fee	Col. fee	Int. in cert.	Sold for	Cert. fee	Total of cert.	Int.	Tot. re- dem- tion	Redemp. fee
\$44.66	\$.25	\$.23	\$.23	\$49.37	\$.25	\$49.62	\$.97	\$53.59	\$.30

To what sum is the drainage district entitled in Example 3?"

It is my opinion that the county in Example 1 is liable for the original tax, \$30.37; that in Example 2 the county is liable simply for the original tax, \$8.05; and that in Example 3 the county is liable for the original tax, \$44.66, and for interest paid upon the plaintiff's drainage assessment certificate of sale.

The statutes governing this matter are in some respects in-

complete, and in other respects obscure and conflicting. The statute most directly involved is the one you cite, viz., see. 1379—25a.

The questions presented by you are involved in the case of *Portage County Drainage District v. Hebard et al.*, tried in the circuit court for Portage county. Judge Park has expressly decided that the two per cent penalty and the interest penalty belong to the district, and I understand that he has decided that every item mentioned in your letter of fees, charges, interest, advertising sales, original tax, belongs to the drainage district. His interpretation of the section before mentioned makes the word "principal" as used in subds. (b) and (c) of the section mean precisely the same as the words "face," used in subd. (d). With that interpretation I am unable to agree. To begin with, it makes most of the language of those subdivisions pure surplusage and leaves it without any meaning whatever. For instance, his construction makes subd. (b) mean "all sums received by the county at the tax sale." In the next place, if the legislature had in mind the same meaning in the three places indicated, it would have used the same word. Furthermore, the word "principal" as used in connection with many matters in commercial circles has a well defined meaning and is not the one given it by the court in this case. Interest and principal mean entirely different things. Principal and percentage are not at all the same. To my mind the word "principal" as used in this connection refers to the original drainage assessment which is returned delinquent by the local tax collector.

Corporations—Foreign Corporations—Railroads—A foreign railroad corporation is not required to comply with sec. 1770b.

September 5, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

Your favor of August 27, enclosing application of the Wisconsin and Michigan Railroad Company to secure a license under the provisions of sec. 1770b, Wis. Stats., is at hand.

In reply thereto I would say the Wisconsin and Michigan Railroad Company is a foreign corporation organized under the laws of the state of Michigan, and apparently they desire to receive a license to do business in the state of Wisconsin as a foreign corporation under sec. 1770b. There is excepted from the provisions of sec. 1770b, by subsec. 2 thereof, the following named corporations, by this language quoted from the statute:

“ * * * Except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, or corporations not organized or conducted for profit * * * ”

I am satisfied that a foreign railroad company is not required to comply with sec. 1770b, and that it is by the above quoted language specially exempted from the necessity of compliance with said statute.

Education—Supervising Teachers—Under sec. 39.14, Stats., supervising teacher cannot be paid more than \$80 a month salary.

September 6, 1918.

Albert W. Grady,
District Attorney,

Port Washington, Wisconsin.

In your letter of August 28, you ask whether or not a supervising teacher provided for in sec. 39.14 can be paid a salary in excess of \$80.00 a calendar month.

Sec. 39.14, subd. (2), provides, in part:

"The committee on common schools shall make the appointment * * * from the eligible list * * * and fix the monthly salary to be paid such supervising teacher or teachers within the salary limitations fixed in this section. * * *. The salary of the supervising teacher shall not be less than sixty dollars nor more than eighty dollars per calendar month. In addition to this salary the supervising teacher shall be reimbursed for all actual and necessary expenses incurred in the performance of his duties. * * *"

The statute is very explicit and fixes the maximum and minimum limits of salary to be paid to supervising teachers. Within these limits the committee on common schools can fix the teacher's salary. In no event, however, can the salary exceed \$80.00 a month. The statute above quoted, however, provides that the teacher may be reimbursed for actual and necessary expenses incurred in the performance of his duties.

Bridges and Highways—Counties—County is not liable for injuries due to defects in unimproved portions of prospective state highways.

County may be answerable for accidents upon roads which county must maintain, i. e., state highways.

September 6, 1918.

WISCONSIN HIGHWAY COMMISSION.

Under date of August 31, 1918, you ask if an opinion has been rendered by this department upon the subject of the liability of counties for injuries resulting from defect in highways, and

particularly unimproved portions of the county system of prospective state highways.

I beg to inform you that such an opinion was rendered February 25, 1918, to the district attorney of Brown county.* I enclose the February pamphlet of opinions, which contains the one above mentioned.

It was then held, and I believe correctly, that the county is liable only when the accident occurs on a road which the county "is by law bound to keep in repair." Sec. 1339, Stats.

The county is not liable to maintain or keep in repair the county system of prospective state highways outside of those portions thereof which have been improved and which have become state highways, within the definition and meaning of subsec. 3, sec. 1317m—3, and subsecs. 8 and 9, sec. 1317m—7, Stats.

The real test of the county's liability for injury upon the highway is the county's liability to maintain the portion of highway in question.

Taxation—Personal Property—Automobiles—An automobile owned by a nonresident of this state if in charge of an agent is taxable in the assessment district where the agent resides, otherwise in the district where the automobile is located.

September 6, 1918.

JOHN ROBERTS,

District Attorney,

Grand Rapids, Wisconsin.

In your favor of September 3 you state that a single man who is engaged in the ice business in the state of Illinois owns an improved farm in your county; that he comes to this farm in the spring and stays there until fall each year and works the farm during that time, living on it, and goes back to Illinois and lives there during the winter. You state that he has an automobile which is used by him and kept at the farm in your county; that the automobile has not been out of the state for the last three years; that the automobile license used on the car is an Illinois license, and the question you ask is whether or not the car is taxable as personal property in this state.

*Page 124 of this volume.

In reply thereto I would say, assuming that the man's residence is in Illinois, in other words, that he is a nonresident of this state, it would seem that the car is taxable under sec. 1040 Stats., in the town or assessment district where the car is, or if it is in the charge or keeping of an agent, the owner being a nonresident, it would be taxable in the assessment district where the agent resides.

Elections—Under sec. 5.17 and facts stated the person in question has right to have his name placed in the independent column on the ballot but not in the Democratic column.

September 9, 1918.

HELMUTH F. ARPS,

District Attorney,

Chilton, Wisconsin.

In your letter of September 6 you submit the following statement of facts as a basis for an opinion:

"No nomination papers were filled by any candidates for the office of county treasurer on the Democratic ticket. At the primary election held last Tuesday, the aggregate votes of all candidates for county treasurer on the Democratic ticket numbered one hundred and twenty. Of these one *X* received ninety-one votes. The Democratic candidate for governor at the last preceding general election received 1,352 votes.

"It is now being contended by Democrats that *X* is entitled to have his name placed on the official ballot as a Democratic candidate for the above office, basing their construction upon subsec. (3), sec. 5.17. They contend that *X* received a sufficient number of votes not less than the number of signers required to file nomination papers, and therefore can become a candidate for the Democrat ticket on the official ballot."

You state that you have advised the county clerk that *X* is not entitled to have his name placed on the official ballot as candidate for county treasurer on the Democratic ticket, for the reason that the aggregate number of votes for all candidates on the Democratic ticket is less than ten per cent of the number of votes cast for governor at the last preceding general election; and that you have further advised him that if *X* filed notice that he will qualify within the period prescribed by statute, he is entitled to

have his name placed on the official ballot as an independent candidate.

Under sec. 5.17 it is necessary for all the candidates for nomination for any one office voted for on any party ballot to receive in the aggregate ten per cent or more of the votes cast for the nominee of such party for governor at the last general election, in order to entitle the one receiving the greatest number of votes to have his name placed upon the ballot as the nominee of said party.

Subd. (2) provides as follows:

If all the candidates for nomination for any one office voted for on any party ballot, shall receive in the aggregate less than ten per cent of such votes so cast at such last general election, no person shall be deemed to be the party nominee for such office, but the person receiving the greatest number of votes at such primary as the candidate of such party for such office, shall be deemed an independent candidate for such office, and his name shall be placed on the official ballot in the column of individual nominations and he shall be denominated in such column as "independent."

Subd. (3) provides:

"But no person shall be entitled to have his name placed on such ballot who has not filed a nomination paper as provided in sections 5.05 and 5.07 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 5.05 and 5.07 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."

Under these provisions of the statute, it is perfectly clear that you have arrived at the correct conclusion in your opinion to the county treasurer. One hundred twenty is less than ten per cent of 1,352 votes. X is therefore not entitled to be the party nominee for county treasurer on the Democratic ticket, but, having received more votes than the number of signers required to the nomination papers for the office of county treasurer, he will be entitled to have his name placed upon the official ballot as an independent candidate, if he files within five days after receiving official notice of his nomination a declaration that he will qualify as such officer if elected.

The above quoted provision of subd. (3), sec. 5.17 is clearly applicable to his case.

Fish and Game—Rough Fish—The conservation commission has no right to grant a license to fish with nets for rough fish in Lake Koshkonong.

September 10, 1918.

CONSERVATION COMMISSION.

I have your communication of September 6, in which you state that an application has been made to your department by Nathaniel N. Ehrlich et al. for leave or license to fish with nets for rough fish in Lake Koshkonong, and that they contend that the conservation commission has power to grant such leave or license. You state that you desire my opinion as to the power of the commission in this matter.

I have a brief submitted by the firm of Bloodgood, Kemper & Bloodgood, of Milwaukee, in which the contention is made that the commission has this power. After a careful consideration of this matter, I have come to the conclusion that no such power is given to the commission by the statutes of this state.

Sec. 29.15 provides:

"Guiding licenses, net and set line licenses, and clamping licenses, shall be issued by the state conservation commission as provided in subsection (3) of section 29.22 and sections 29.33, 29.34, 29.35, 29.36, 29.37 and 29.38, respectively."

Under sec. 29.30 it is provided:

"Nets and set lines may be used for the purpose of taking, catching, or killing rough fish and game fish, subject to the conditions, limitations and restrictions prescribed in this chapter; * * * ."

Then we find general restrictions on the use of nets and set lines, and specific instances in which licenses may be granted given in secs. 29.33, 29.34, 29.35, 29.36, 29.37, and 29.38. In none of these is there any power given to the commission to grant a license for fishing with nets in Lake Koshkonong. Sec. 29.38 refers only to clamping licenses.

It has been argued that sec. 29.30 in providing for fishing with nets by licenses, and sec. 29.21, which gives the right to the state conservation commission to determine in what manner and in what places fish shall be taken in this state, gives the commission the power to grant a license to catch rough fish by nets in Lake Koshkonong; that these two sections should be

construed together, and a liberal construction given so as to authorize the granting of such licenses.

While subsec. (1), sec. 29.21 uses very broad language, the subsequent subsections clearly indicate that no protection given to the wild animals by statute can be taken away by the commission; that the conservation commission can only grant additional protection in cases where protection is already given by statute, and in cases where no protection is given, the commission may give some protection to the wild animals; but the commission has not the right to take away protection given, or, in other words, to repeal or amend a statute which gives to wild animals protection.

This has been held in a number of opinions heretofore given to the commission.

That I am right in my conclusion in this matter is further shown by the provisions of sec. 29.62. Subsec. (1) reads:

"The state conservation commission is authorized to take rough fish by means of nets, or cause the same to be so taken, from any of the inland waters of this state other than those specified in subsection (2), whenever it shall find that such fish are detrimental to, retard the propagation of, or destroy game fish therein."

Subsec. (2) provides:

"The authority granted to the commission by subsection (1) does not extend to Lake Koshkonong."

You are therefore advised that the commission has no right to grant a license or leave to fish with nets for rough fish in Lake Koshkonong.

Intoxicating Liquors—Licenses—Where no valid license has been granted to a certain location for a few years the right to a license has been forfeited if the ratio of sec. 1565d is exceeded.

September 10, 1918.

A. J. O'Melia,

District Attorney,

Rhineland, Wisconsin.

In your letter of September 6 you state that the town of Schoepke in your county has a population of 300; that there had

been in existence for the last fifteen years five saloon licenses; one of these licenses was issued to Mr. X; that on the first of July of this year the town board refused to grant a license to Mr. X for the reason that he was an alien enemy. You inquire whether the fact that Mr. X had been an alien enemy during the last few years during which he held his license would make it impossible for the town board to grant a license at the present time for the location for which his license had been granted.

This question must be answered in the affirmative. Under sec. 15651 no license can be granted to a person who is not a full citizen of the United States. If Mr. X was not a citizen of the United States, as you state in your letter, then the license granted to him was absolutely void and no legal license has been granted for said location for a number of years. The right to a license for said location would therefore be forfeited. See *Slate v. Koch*, 157 Wis. 437.

Criminal Law—Rape—A man 38 years of age cannot be convicted under sec. 4382 for having carnal knowledge of a female 17 years old.

September 10, 1918.

Thomas M. Priestley,
District Attorney,
Mineral Point, Wisconsin.

In your communication of September 7 you state that a man of thirty-eight years of age was recently arrested on a charge of rape. At the preliminary examination the defendant was bound over to the county court. The complaining witness is seventeen years of age. You inquire whether he may be convicted under sec. 4382, Wis. Stats.

Said sec. 4382 provides as follows:

"Any person over eighteen years of age who shall unlawfully and carnally know and abuse any female under the age of sixteen years shall be punished by imprisonment in the state prison not more than thirty-five years nor less than one year, or by a fine not exceeding two hundred dollars; and any person of the age of eighteen years or under who shall unlawfully and carnally know and abuse any female under the age of eighteen

years shall be punished by imprisonment in the state prison not more than ten years nor less than one year, or by fine not exceeding two hundred dollars."

The first part of this section requires the man to be over eighteen years of age and the female to be under the age of sixteen years. This excludes the defendant in question, as the female was seventeen years of age, under your statement of facts. The second part of said section requires the male person to be of the age of eighteen or under and the female under the age of eighteen years. This does not include the defendant.

It therefore appears that the defendant is not included under the clear wording of this statute. It is true that under the wording of this section, a boy under the age of eighteen may be sent to the penitentiary for ten years for carnal knowledge of a girl of seventeen, while a man of thirty-eight who commits the same offense cannot be.

I have made a careful examination of the records in the office of the secretary of state, to ascertain whether a clerical error has been made in the printing of this section of the statutes. I find, however, that the statute was enacted in the exact words as here printed, but I find that ch. 611, laws of 1915, changed the wording of this section of the statutes and also amended secs. 4381, 4580, 4581a, 4581b, and 4588a. The effect of the changes made in these sections was to change the age of consent from fourteen years to sixteen years. Bill 150, S., as originally introduced, changed the age from fourteen to eighteen years. While the bill was pending in the legislature, Assemblyman Donnelly from Milwaukee moved an amendment to the bill by changing the word "eighteen" in lines 4, 13, 22, and 68, and substituting therefor in each case the word "sixteen." This was evidently done to change the age of consent from eighteen years, as found in the bill, to sixteen years. In every case where Mr. Donnelly's amendment substituted the word "sixteen" for "eighteen," the word "fourteen" also appeared with a line drawn through it, as is necessary under the rules of the legislature in printing bills for passage; but that part of sec. 4382 which follows the semicolon was a new part added, and appeared in italics in the bill, and the word "fourteen" consequently did not appear therein with a line drawn through it. It seems very evident that, by reason of this fact, the lawmakers

omitted to change the word "eighteen" to "sixteen" in this part of the section. I believe, if their attention had been called to the fact, they would have changed it, as it was manifestly the intent of the amendment of Mr. Donnelly to change the age of consent from eighteen to sixteen years throughout the sections contained in the bill.

If the defendant in the case under consideration were under eighteen years of age, it would be necessary to construe the part of sec. 4382 following the semicolon, and it would be necessary to decide whether a person under the age of eighteen could be convicted, if the female in question was above sixteen and below eighteen years of age. This question is not before us now, and consequently does not require consideration.

You are therefore advised that it is my opinion that under the facts stated in your letter, the party in question cannot be convicted under sec. 4382, Wis. Stats.

Criminal Law—Indians—An Indian who has not received his allotment under the Dawes Act is not subject to the criminal laws of this state.

September 11, 1918.

J. C. DAVIS,

District Attorney,

Hayward, Wisconsin.

I have your letter of September 2, in which you state that you have been asked to prosecute an Indian residing on the Lac Court Oreilles Reservation, for desertion and nonsupport of his wife and children under the state law; that the situs of the crime is on said reservation in Sawyer county, and that all parties concerned live on the said reservation; that the offender holds an allotment of land selected under the authority of the treaty of 1854 (10 U. S. Stats. at Large 1043). You inquire whether or not the state court has jurisdiction of the case. You also inquire whether or not the granting of a certificate of competency to the Indian, whereby his lands become taxable, makes him amenable to the state law for all purposes.

In the case of *In re Heff*, 197 U. S. 488, it is held that an Indian and allottee under the Dawes Act (24 U. S. Stats. at Large 388) is subject to the civil and criminal laws of the state. In

the case of *United States v. Celestine*, 215 U. S. 278, it is held, that where an Indian received his allotment under the authority of the treaty with the Omahas (1854) (10 U. S. Stats. at Large 1043), he will be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen, but that he is not subject to the criminal laws of the state.

An official opinion on this matter was rendered by my predecessor on September 3, 1915, to the conservation commission of Wisconsin. Vol. IV, Op. Atty. Gen., p. 731. The question there involved is practically the same question submitted by you. I refer you to said opinion. Your statement of facts brings your defendant under the rule laid down in the case of *United States v. Celestine*, *supra*.

You are therefore advised that the state court has no jurisdiction of the case.

Concerning the issuing of a certificate of competency to the Indian, I find that the act of May 8, 1906 (34 Stats. at Large 182), which was an act to amend sec. 6 of an act approved February 8, 1887 (24 U. S. Stats. at Large 388), contains the following:

"* * * Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: * * *

The *Celestine* case arose in 1908, while this law was enacted in 1906. It would therefore seem that the *Celestine* case is decisive of the matter. There is no express provision here that the Indian who receives such so-called certificate of competency shall be subject to the criminal laws of the state.

I am therefore constrained to hold that the granting of a certificate does not alter the legal status of the Indian in question, and that he is not subject to the criminal laws of the state, and cannot be prosecuted for abandonment of wife and children committed on the reservation,

Marriage—A common law marriage cannot now be legally contracted.

September 11, 1918.

G. H. DAWSON,

District Attorney,

Crandon, Wisconsin.

You have inquired whether a common law marriage entered into subsequent to the enactment of ch. 218, laws of 1917, would now be valid in this state; that is, whether it would be a good defense in a criminal prosecution.

In the case of *Becker v. Becker*, 153 Wis. 226, decided by the supreme court in the January term, 1913, it was held that an oral contract of marriage made between competent parties *per verba de praesenti*, although without witness or ceremony of any kind, if consummated by cohabitation and corroborated by holding themselves out to the public as husband and wife, is a valid and binding marriage. This was the law prior to the enactment of said ch. 218, laws of 1917. In said chapter, there were added twenty-seven new sections, of which sec. 2339n—1 is the first, and provides as follows:

"Marriage may be validly contracted in this state only after a license has been issued therefor, in the manner following:

"(1) Before any person authorized by the laws of this state to celebrate marriages (and hereinafter designated as the officiating person), by declaring in the presence of at least two competent witnesses other than such officiating person, that they take each other as husband and wife; or,

"(2) In accordance with the customs, rules and regulations of any religious society, denomination or sect to which either of the parties may belong, by declaring in the presence of at least two competent witnesses, that they take each other as husband and wife."

Here it is expressly provided that a marriage may be validly contracted in this state only after a license has been issued therefor in the manner prescribed in subds. (1) and (2). Neither of said subdivisions prescribes a common law marriage.

It follows that a common law marriage cannot be entered into in this state. The wording of this statute is such that it precludes a common law marriage.

Public Officers—Sheriff—Sheriff cannot collect from county for services rendered to local draft board in rounding up slackers and deserters.

September 13, 1918.

GEORGE CRAWFORD,

District Attorney,

Gillett, Wisconsin.

In your letter of the September 11 you state that certain bills "for services rendered the local draft board in rounding up slackers and deserters" are presented by the sheriff, and you wish to know if the county is liable for payment of these bills. You do not state the exact nature of the services rendered in "rounding up slackers and deserters." Much of this work of local officials has been in the nature of volunteer service to assist the local draft boards.

As a general rule of law only such service as is required by statute can be paid for by a county. No payment for services can be made by the county without statutory authority.

I am unable to find any authority in the statutes for the payment to a sheriff by the county for services rendered to local draft boards in rounding up slackers and deserters. A sheriff, like many other officers, has certain duties which fall to him "*cum onere*"—as burdens incident to the office." *Hartwell v. Supervisors of Waukesha County*, 43 Wis. 311.

The reasons for this rule apply with even more vigor where the sheriff is paid a salary instead of being paid on the fee basis. For analogous holdings see notes to sec. 731, Wis. Ann.

I am therefore of the opinion that the county cannot legally pay the sheriff for the services mentioned.

Criminal Law—Embezzlement—Question when a demand is necessary in embezzlement charge discussed.

September 13, 1918.

O. J. FALGE,

District Attorney,

Ladysmith, Wisconsin.

In your favor of September 12 you state that A. was the town treasurer of the town of Hubbard, in Rusk county, for the years

1914 and 1915; that on April 3, 1915, he turned over his books, together with cash on hand, to his successor; that in 1917 an examination of his books was made that showed a shortage of \$512.65; that he failed to turn over this amount to his successor; that at the time of this examination or audit of the books A. had removed from that vicinity and his location was not known until recently; that no demand has ever been made upon him for the amount of this shortage for that reason; and you inquire whether a demand is necessary for the \$512.65 before prosecuting him for embezzlement.

In reply thereto I would say the gist of the crime of embezzlement is the fraudulent appropriation of trust funds, a fraudulent failure to account therefor. Where the fraudulent conversion or appropriation of the funds can be proved, the demand otherwise necessary and required by sec. 4419, Stats., is dispensed with. See *Prinslow v. State*, 140 Wis. 131, 134-135. You will see from this that the question of fraudulent intent is governed in each case by the circumstances. The circumstances of the case you relate are not given. It is entirely possible that the treasurer was himself ignorant of the fact that there was a shortage. If you are not prepared to show that he failed to turn over this balance intentionally and through fraud on his part, I am satisfied that a demand would be necessary. It is entirely possible that the matter has never come to his attention or knowledge.

Public Health—Quarantine and disinfecting expenses are a charge against the municipality on order of board of health; but food, care and medical attention for patients are not a charge against a municipality except in indigent cases.

September 13, 1918.

DR. C. A. HARPER,
State Health Officer.

In your favor of September 11 you state that a certain physician is health officer for a town and also physician for the poor; that during his term of office in these two positions a smallpox epidemic occurred in the town over which he was acting as health officer; that he took care of the cases, treated them, attended to the quarantine and disinfection of the premises, and

presented a bill for his services for something like \$100.00; that the town board now refuses to pay the bill on the ground that the work came as a part of his duties as physician for the poor and health officer; and you inquire whether the work that he has done in the care of these smallpox patients should be considered a part of the work of the county physician or health officer, or whether he should be compensated for the work that he did in taking care of the cases of smallpox.

These questions are controlled and governed by sec. 1416-17, Stats., as far as the health officer's duties and expenses thereof are concerned. One of the provisions in this regard reads as follows:

"The expenses for necessary nurses, medical attention, food and other articles needed for the comfort of the afflicted person, or persons, shall be a charge to the person so taken care of, or against any other person who may be liable for his support. Indigent cases shall be cared for at public expense upon the order of the local board of health."

From this language it will be seen that unless the persons cared for were indigent, the expenses of nurses, medical attention and other articles needed for the comfort of the afflicted persons must be paid for by them or by those upon whom they depend for their support. In indigent cases such expenses may be paid by the municipality, but only upon the order of the local board.

Regarding the quarantine and disinfection expenses the statute reads as follows:

"* * * The expense of maintaining quarantine and disinfection of persons and premises after death or recovery, shall be paid by the city, incorporated village, or town, upon the order of the local board of health."

It is clear from this that the expenses of maintaining quarantine and disinfection of the premises of the persons is a proper bill against the municipality after being ordered and audited by the board of health.

I think the above answers your questions as far as they concern your office.

Fish and Game—Trawler Nets—The conservation commission has no authority to grant a license to fish with a trawler net in Lake Michigan.

September 16, 1918.

CONSERVATION COMMISSION.

In your communication of September 13 you state that you are in receipt of a letter from Tessler Brothers, commercial fishermen at Milwaukee, asking whether or not they would be permitted to use a trawler in catching fish in Lake Michigan.

You state that a trawler is a new kind of net for Lake Michigan waters, and the law of Wisconsin does not make any provision for the licensing of such nets. You inquire if you are authorized to issue a license for such a net, and if so, what fee shall be charged for the same. You also state that a trawler net is a type that is used by the fishermen operating in the ocean.

Sec. 29.09, subd. (1), contains the following:

"* * * * Except as expressly provided, no person shall hunt, trap or fish any game or game fish unless a license therefor has been duly issued to him which shall be carried on his person at the time and shall be exhibited to the state conservation commission or its deputies on demand. * * * *

The conservation commission can grant licenses only for such fishing nets as the statute prescribes. There being no provision for the licensing of trawler nets, it follows that the same cannot be used in that part of Lake Michigan which is included within the boundaries of the state of Wisconsin.

You are therefore advised that you are not authorized to issue a license for such a net.

Appropriations and Expenditures—Normal Schools—Appropriations under sec. 20.74 may be made only for ordinary regular work of the normal schools and not to carry on a work foreign to the purpose of normal school work.

September 16, 1918.

HONORABLE E. L. PHILIPP,
Governor.

You inform me that the government, as one of its war measures, is planning to have several of the normal schools of this

state establish at those schools Students' Army Training Corps for the purpose of training young men in the arts of war, with a view of fitting them for positions as officers and for other responsible positions in the military service of the United States. It is planned to have from one hundred and fifty to three hundred or more of this class of young men at each of several normal schools of the state. The government requires that these institutions giving this training to these young men must provide suitable barracks accommodations to house and feed them. Practically none of said normal schools contemplating this work are equipped at present to house and feed this extra number of persons, with the possible exception of the Oshkosh normal school.

It has been suggested to you that possibly the emergency board, consisting of the governor, secretary of state and state treasurer, acting under sec. 20.74, might make available sufficient funds under said section by which these normal schools could construct these barracks and mess halls and carry out the purposes of the government with reference to these Students' Army Training Corps in the schools, and you inquire whether the emergency board, under said sec. 20.74, can make available for the use of these normal schools state funds or normal school funds with which this work can be conducted and the barracks and mess halls constructed.

Said sec. 20.74, as far as applicable, reads as follows:

"There is annually appropriated such sums as may be necessary, payable from any moneys in the general fund or other available funds not otherwise appropriated, as an emergency appropriation to meet operating expenses of any state institution, department, board, commission or other body for which sufficient money has not been appropriated to properly carry on the ordinary regular work. No moneys shall be paid out under this appropriation except upon the certification of the governor, secretary of state and state treasurer that such moneys are needed to carry on the ordinary regular work of the institution, department, board, commission or other body for which the moneys are to be used and that no other appropriation is available for that purpose. Any moneys so required beyond the regular appropriation shall appear on the books of the secretary of state as an additional cost of operating the institution, department, board, commission or other body as the case may be."

It will be noted that this power given to the emergency board is: first, "to meet operating expenses;" and second, it must be for the purpose of carrying "on the ordinary regular work;" and the emergency board is required to certify that the moneys are needed "to carry on the ordinary regular work of the institution."

The statute further requires that the expenditures of the appropriation must appear on the books of the secretary of state as an additional cost of operating the institution.

Can it be said that the building of these barracks and mess halls and the boarding of these young men and their instruction in the science and art of warfare comes within the "ordinary regular work" of the normal schools? If it does not come within the ordinary regular work of the normal schools, then I am satisfied the emergency board has no such power.

Sec. 37.09 is one of the statutes defining the objects of normal schools and reads as follows:

"The exclusive purposes and objects of each normal school shall be the instruction and training of persons, both male and female, in the theory and art of teaching, and in all the various branches that pertain to a good common school education, and in all subjects needful to qualify for teaching in the public schools; also to give instruction in the fundamental laws of the United States and of this state in what regards the rights and duties of citizens."

Sec. 37.13 provides for the diplomas to be given by normal schools and, in part, reads as follows:

"Said board may grant diplomas in testimony of scholarship and ability to teach, but no such diploma shall be granted until such graduate shall have passed a thorough and satisfactory examination in the course of study prescribed by the board. When any such graduate has, after receiving such diploma, taught a public school in this state one year, the state superintendent, may, after such examination as to moral character, learning and ability to teach as to him may seem proper, issue to such teacher an unlimited state certificate, and thereafter such unlimited certificate shall be evidence of his qualification to teach in any common school. The said board may also, on such conditions as they may determine, grant a certificate of attendance certifying that the holder has completed the elementary course in a normal school and is qualified to teach a common school; and the said superintendent may, upon conditions above pre-

scribed respecting diplomas, issue a limited state certificate, and thereafter such certificate shall be evidence of his qualification to teach in any common school of the state."

In addition we find in subd. (8), sec. 37.11, among the powers of the board of regents, the following:

"To require any applicant for admission, other than such as shall, prior to admission, sign and file with said board a declaration of intention to follow the business of teaching common schools in this state, to pay or to secure to be paid such fees for tuition as the board may deem proper and reasonable."

All of these provisions clearly point to the idea that the purposes of the normal schools are to train its students as teachers in the school system of the state. It seems a radical departure from this purpose to convert these normal schools, or any particular part of their energies, to the purpose of instructing young men in the art and science of warfare.

It might be suggested that the provisions of sec. 37.12 are an extension of the powers of normal schools. This section authorizes the normal schools in certain cases to extend their courses of study to what is equivalent to the instruction given in the first two years of a college course, but it seems to me that this extension of power shows even more clearly the intention to limit the purposes and the course of instruction in normal schools, and the fact that the legislature deemed it necessary to provide for this extension suggests the thought that they acted upon the theory that the purposes of the normal schools were confined by the provisions of the statutes above quoted to the training of teachers for school work in the state.

I am satisfied, therefore, that the training of these young men in the art and science of warfare, the training of them for the particular purpose of military service, is entirely without the scope of the purpose for which the normal schools are designed, and that this military training and work does not come within the provisions of sec. 20.74, "the ordinary regular work" of the normal schools. Therefore it is my opinion that the emergency board would have no authority under said sec. 20.74 to make available to the normal schools funds of the state for the purpose of building the proposed barracks and mess halls and fitting these young men for the purpose of training them for the military service of the United States.

Elections—Candidate who has filed nomination papers as a candidate of a party for an office and then receives the highest number of votes or all the votes must be placed in independent column if party did not receive 10% of vote cast at last general election.

September 17, 1918.

HONORABLE MERLIN HULL,

Secretary of State.

In your letter of September 13 you have directed my attention to sec. 5.17, Stats., and you submit the following inquiry:

"In the event of there being more than one candidate for nomination for a certain office voted for on any party ballot at the primary, and the total vote received by these candidates aggregated less than ten per cent of the votes cast for the nominee for that party for governor at the last general election, is it compulsory that the one of these candidates receiving the greatest number of votes at the primary as the candidate of his party for said office, shall be deemed the independent candidate for that office and his name placed on the official ballot in the column of individual nominations and denominated as 'Independent'?"

"If there is only one candidate for nomination under the above situation and this one candidate receives less than ten per cent of the votes as above stated, is it compulsory that such candidate make the run as an independent candidate for that office?"

Subd. (2) said sec. 5.17 provides as follows:

"(2) If all the candidates for nomination for any one office voted for on any party ballot, shall receive in the aggregate less than ten per cent of such votes so cast at such last general election, no person shall be deemed to be the party nominee for such office, but the person receiving the greatest number of votes at such primary as the candidate of such party for such office, shall be deemed an independent candidate for such office, and his name shall be placed on the official ballot in the column of individual nominations and he shall be denominated in such column as 'independent.' "

Subd. (2) said sec. 5.17 provides as follows:

"(3) But no person shall be entitled to have his name placed on such ballot who has not filed a nomination paper as provided in sections 5.05 and 5.07 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 5.05 and 5.07 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."

Your question must be answered in the affirmative, in case the party receiving the highest number of votes or all the votes at such primary for a certain office has filed a nomination paper as provided in secs. 5.05 and 5.07; but if this has not been done, then the provisions of subd. (3), as above quoted, are applicable, and he must file within five days after receiving official notice of his nomination a declaration that he will qualify as such officer if elected. This is not required of a person who has regularly filed his nomination papers, for the reason that he has already filed such declaration with his nomination papers, as provided in sec. 5.05, subd. (5), par. (b). Of course, the party nominated has the right to decline to accept the nomination, but if such declination is not filed, then the name must be printed on the ballot in the independent column. I believe this is the manifest intent of the statute.

Education—Textbooks—A manufacturer of textbooks who has complied with the Textbook Law thereby publicly offers to sell books of the kind as filed and at the price as listed in the office of the superintendent of public instruction.

September 19, 1918.

HONORABLE C. P. CARY,

State Superintendent of Public Instruction.

I have your letter of September 9, in which you refer to me for an opinion three questions relating to the construction to be given to sec. 40.35, Stats., submitted to you by a publisher of school textbooks. These questions read as follows:

"1. Under your existing textbook law whereby we are required to list our books in your state, does independent action of a board of education adopting a certain book at a price authorized by the publisher's listing constitute a contract enforceable at law, compelling the publisher to furnish the book to the district so adopting for the entire period of the adoption?

"2. In addition to the facts stated in No. 1 above, suppose

that the president of the board or the secretary of the board should furnish to the publisher a certificate, certifying that at a certain meeting of the school board a motion was made and passed to adopt for exclusive use in the schools under the jurisdiction of the board, a certain book, naming it, at a certain price, and that price is the price at which it is listed in Wisconsin. Does the issuance of that certificate to the publisher in conjunction with appropriate action on the part of the board as stated in No. 1, constitute a contract obligating the publisher of the book to furnish the book to the board or the dealers at the listed and adopted price?

"3. Suppose a publisher should make a written proposition to the board that, if it would regularly adopt a certain book at a certain price for exclusive use as a basic text in the schools under the jurisdiction of the board and thereupon the board should meet in regular session and duly accept this proposition by adopting the book; in other words, by complying with the conditions of the proposition. Does that constitute in the eyes of the Wisconsin law a contract obligating the publisher to continue to furnish said book on the terms mentioned in the proposition for the entire length of the adopting period?"

Said sec. 40.35 reads, in part, as follows:

"No person shall offer any school textbook for adoption, sale or exchange in the state of Wisconsin until he shall have complied with the following conditions:

"(1) (a) He shall file copies of all textbooks proposed to be sold in the state of Wisconsin by the company manufacturing such book, in the office of the state superintendent of public instruction with a sworn statement of the list price, the lowest wholesale price, and the lowest exchange price at which said book is sold or exchanged for an old book on the same subject of like grade and kind but of a different series in states of the United States including the state of Wisconsin.

*** *

"(c) School districts are hereby authorized to purchase textbooks from the publishers at the prices listed with the state superintendent of public instruction as hereinbefore provided and to sell said books to the pupils at said listed prices or at such prices as will include the cost of transportation and the cost of handling.

"(2) He shall file with the state superintendent of public instruction a bond running to the people of the state of Wisconsin, with a responsible surety company authorized to do business in the state of Wisconsin as surety thereon, in a penal sum to be determined by the state superintendent of public in-

struction, of not less than two thousand dollars nor more than ten thousand dollars, conditioned as follows:

"(a) That he will furnish any of the books listed in said statement and in any other statement subsequently filed by him within five years, to any school district, to any school corporation and to any person or corporation in the state of Wisconsin at the lowest price contained in said statement and that he will maintain said price uniformly throughout the state;

"* * *

By complying with the provisions of said section a manufacturer of school textbooks publicly offers the books so filed and listed by him with the state superintendent of public instruction for sale to any school district, to any school corporation, and to any person or corporation in the state of Wisconsin at the list price, the lowest wholesale price, and the lowest exchange price contained in his sworn statement; and he also undertakes, and in the bond furnished by him, obligates himself to furnish said book at no higher net price than is received for such book elsewhere in the United States.

An acceptance of said offer by any school district or school corporation when thereunto duly authorized by law or by the electors of the district in my opinion constitutes a completion of the contract which is mutually enforceable. The enforcement against the textbook publisher may be upon the bond provided for and in the manner prescribed by subd. (4) of said section.

See. 40.355, Stats., empowers and directs district school boards and boards of education, and makes it their duty, to adopt for their respective schools from the list of school textbooks on file with the state superintendent all textbooks necessary for the use of the schools under their charge and authorizes said boards on behalf of their districts and from district funds to purchase such textbooks direct from the publisher in the manner there provided. Action on the part of a district board or a board of education adopting a certain textbook at a price authorized or listed by the publisher thereof constitutes in my opinion the consummation of a contract enforceable in the manner provided by law or in the manner specified in said sec. 40.35. Of course, before a school corporation can enforce the performance of such a contract in court it must show that sufficient notice of the adoption of the textbook was given to the manufacturer, or, in

other words, that the manufacturer has had notice of the acceptance of the offer; that a demand for the book was duly made, and that there has been a refusal to furnish the same. To enforce the penalty of the bond mentioned in sec. 40.35 the proceedings set forth in subd. (4) of said section must be followed.

It is also provided in sec. 40.355, above cited, that a school book when once adopted by a school corporation shall not be changed for a period of five years. Both parties to the contract are charged with knowledge of this provision.

Having in mind the foregoing general observations as to the Wisconsin law on school textbooks, it is my opinion that each one of the questions submitted to you should be answered in the affirmative.

Education—Textbooks—Company by law of another state bound to furnish a book at price lower than list price of said book in Wisconsin is bound to reduce price in this state; violates condition of bond if it demands higher net price in this state than it receives in such other state.

September 19, 1918.

EDWARD W. MILLER,
District Attorney,

Marinette, Wisconsin.

In your letter of August 23 you call attention to an opinion rendered by this department to the Honorable C. P. Cary, state superintendent, under date of December 7, 1916 (Vol. V, Op. Atty. Gen., p. 881), wherein it was held that a schoolbook company selling textbooks in Wisconsin could, from time to time, change the price list without violating the terms of the bond required under sec. 40.35, and you desire an opinion upon the following statement of facts:

"I am informed that the state of Illinois has a law requiring textbook companies to file schedules of prices and that the Illinois law also provides that the prices so filed cannot be changed for a term of five years. Under the law, as I understand it, in this state, a textbook company may change its prices, provided the prices charged and filed in Wisconsin are not higher than the prices charged in any other state. The question then is

whether or not a textbook company which has filed in Illinois and which under that law cannot change the prices there, is precluded from changing its prices or from advancing them over the prices as filed in the state of Illinois."

Sec. 40.35 reads, in part, as follows:

"No person shall offer any school textbook for adoption, sale or exchange in the state of Wisconsin until he shall have complied with the following conditions:

"(1) (a) He shall file copies of all textbooks proposed to be sold in the state of Wisconsin by the company manufacturing such book, in the office of the state superintendent of public instruction with a sworn statement of the list price, the lowest wholesale price, and the lowest exchange price at which said book is sold or exchanged for an old book on the same subject of like grade and kind but of a different series in states of the United States including the state of Wisconsin.

"* * *

"(2) He shall file with the state superintendent of public instruction a bond running to the people of the state of Wisconsin, with a responsible surety company authorized to do business in the state of Wisconsin as surety thereon, in a penal sum to be determined by the state superintendent of public instruction, of not less than two thousand dollars nor more than ten thousand dollars, conditioned as follows:

"(a) That he will furnish any of the books listed in said statement and in any other statement subsequently filed by him within five years, to any school district, to any school corporation and to any person or corporation in the state of Wisconsin at the lowest price contained in said statement and that he will maintain said price uniformly throughout the state;

"(b) That he will reduce such prices automatically in Wisconsin whenever reductions are made elsewhere in the United States, so that at no time shall any book so filed and listed by him be sold in the state of Wisconsin at a higher net price than is received for such book elsewhere in the United States."

In a recent opinion to the district attorney of Milwaukee county, dated August 27, 1918,* I held that if a manufacturer of textbooks undertakes by virtue of a special contract to sell a certain book in another state at a lower price than the list price of said book in this state, he thereby automatically reduces the price of said textbook in Wisconsin and his obligation on his bond filed with the state superintendent of schools may be en-

* Page 500 of this volume.

forced against him. In harmony with this ruling, I am of the opinion that a textbook company which is bound by the terms of some law, instead of a contract, to sell a textbook in the state of Illinois at a certain price, which price is lower than the list price of said book as filed with the state superintendent of public instruction in Wisconsin, thereby automatically reduces the price of said book in this state and violates a condition in its bond if it sells the same book in this state at a higher net price than it receives for such book in the state of Illinois.

I have not examined the Illinois law but am assuming that it is as stated in your letter.

Appropriations and Expenditures—Agriculture—Department of Agriculture—Tuberculin Farm—The expense of insuring property on tuberculin farm operated under sec. 20.60, subd. (2), should be charged to appropriation created by said subd. (2).

September 20, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your favor of September 19 you state that the legislature in 1917 authorized the department of agriculture to maintain a farm for the temporary care of tubercular cattle; that the cost of such maintenance was authorized by subd. (2), sec. 20.60, and you state you have considered that the expense of insurance on property owned by the state on this leased farm will be a charge against the above appropriation for the maintenance and operation of this farm rather than against the operating appropriation of the department of agriculture, and you ask my opinion as to to which of these appropriations the cost of this insurance should be charged.

Said subd. (2), sec. 20.60, after providing regarding payment for tubercular animals, provides as follows:

"* * * The department of agriculture shall dispose of reacting animals in a manner most advantageous to the state, and from any moneys received as net proceeds may pay for temporary care, pasturage, feeding of such animals and for renting and handling farm lands to be used for that purpose."

Under this authority and appropriation the department of agriculture has leased a farm and is operating it for the purpose of handling and disposing of reacting animals in a manner considered advantageous to the state. In order to properly handle such a farm, of course, it is necessary to have certain property there at the farm for its operation, and it is good business policy to have that property properly insured. This particular insurance is not contemplated as within the ordinary operating expenses of the agricultural department, but seems to come clearly within the necessary and proper expenses of the operation of said tuberculin farm.

I am of the opinion, therefore, that the expense of such insurance should be charged to the appropriation as suggested by you contained in subd. (2), sec. 20.60.

Public Printing—Publication of Notices—Fees—Fees for publication of notices outside this state not governed by sec. 35.69 nor sec. 4275.

September 20, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your favor of September 19 you submit the bill of The Improvement Bulletin, a magazine published at Minneapolis, in the state of Minnesota, for the insertion of certain advertisements in that magazine advertising for bids by contractors for the construction of certain work on the state trunk highway system, these advertisements being those of the state highway commission. You call my attention to sec. 35.69, Wis. Stats., governing rates for publication of notices, and state that these bills are for amounts in excess of the rates prescribed by said section of the statutes, and you ask whether the state authorities are authorized and would be permitted to pay for this advertising in excess of the rates prescribed by said section of the statutes.

The work contemplated by this advertisement was a part of the work to be done under the state Trunk Highway Law and the advertisement was placed in this magazine outside of the state under sec. 1316, subsec. 1. This section requires that the work contemplated

"shall be advertised for bids in a manner determined by the commission and shall be let to the lowest competent and responsible bidder * * *."

This raises the question whether the commission was authorized to advertise the advertisement for bids in a magazine published outside of the state. Much of the work to be done under the state Trunk Highway Law consists of roads located near the boundary of the state. It is quite possible that a great advantage to the state might be had by advertising for these bids outside of the state. It would be shortsighted policy indeed to restrict such advertising to the boundaries of the state, and I cannot believe that the legislature had any such idea in view. The language of this statute—"advertised for bids in a manner determined by the commission"—certainly is very broad, and I am satisfied was intended to give the commission authority and power to use their best judgment as to what publications the advertisement for these bids should be published in. That being the case, I am satisfied that the rates prescribed in sec. 35.69 would not control in an advertisement like this published in a magazine outside of the state. Sec. 35.69 is accompanied by several other sections of the statute dealing with similar matters, to wit, secs. 35.63 to 35.70. A careful reading of those statutes will disclose that they were evidently and clearly intended to apply only to local publications, that is, publications within this state.

Furthermore, sec. 4275 is a section of our statutes prescribing fees for publication of notices. This likewise is accompanied by other statutes dealing with similar statutes, to wit, sec. 4270 to sec. 4276a.

It will be noticed that sec. 4274 provides:

"If the publisher or printer of a newspaper shall, after payment or tender of his legal fees therefor, refuse or wilfully neglect to publish any legal notice required in pursuance of law or a lawful order of publication to be published in his newspaper, being able to make such publication, he shall forfeit twenty-five dollars, one-half to the party prosecuting therefor."

It could hardly be said that the Minneapolis publication would be subject to the provisions of this statute. It is therefore my opinion that if the bill of The Improvement Bulletin is reasonable for the services rendered, it should be paid, and that it is authorized by sec. 1316, subsec. 1.

Elections—Democrat duly nominated for office as Republican candidate has right to have name placed on Republican ballot as such candidate.

September, 20, 1918.

GEORGE F. MERRILL,

District Attorney,

Ashland, Wisconsin.

In your communication of September 19 you state that at the primary in September in your county the Democratic party had no candidates for county officers; that two or three Democrats ran for nomination on the Republican ticket and that one of these received the most votes; that the one nominated has always been a Democrat and has never professed to be anything but a Democrat, and the question has arisen whether the county clerk should place his name upon the Republican ticket, at the November election. You ask for my opinion on this matter.

Your question must be answered in the affirmative. There is nothing in our statutes which would militate against this party's having his name put upon the Republican ticket as long as he has received a sufficient number of votes, and as long as he is willing to have his name placed upon the Republican ticket. The candidate in question having complied with the requirement of the statute, it is the duty of the clerk to place his name on the ticket as the nomination papers call for. See sec. 5.17.

Insurance—Corporations.—An insurance corporation proposing to insure against risks other than those enumerated in the first 14 subdivisions of sec. 1897, Stats., must specify the particular subject proposed to be covered, in its articles of organization.

Doubt expressed as to the validity of a clause in such articles that it is proposed to transact all the kinds of insurance business enumerated in sec. 1897, Stats.

Under sec. 1896, Stats., it is doubtful whether nonresidents may join with 15 or more residents of this state as organizers of an insurance corporation.

September 23, 1918.

HONORABLE M. J. CLEARY,

Commissioner of Insurance.

I have examined and return herewith the articles of organization of the Bankers Assurance Company, sent me in yours of this date.

In these articles the business and purposes of the corporation are stated in said articles to be:

"To transact the business of insurance against loss from the defaults of persons in positions of trust, public or private, and to guarantee the performance of contracts and obligations other than that of insurance; against loss or damage by burglary or theft or both; and against other loss or damage which may lawfully be compensated by insurance, including any or all of the purposes specified in section 1897 of the Wisconsin Statutes, * * *,"

Sec. 1897, Stats., prescribes the different purposes for which insurance corporations may be organized. Subd. (15) of that section reads:

"Other Casualty Insurance.—Against loss or damage to property by any other casualty which may lawfully be the subject of insurance, and which shall be specified in the articles of organization, and for which no other provision is made by law."

In my opinion where a corporation includes as one of the purposes of its organization insurance against loss or damage not specifically mentioned in any of the first fourteen subdivisions, it is required by subd. (15) to specifically state in its articles just the subject of insurance intended to be covered.

For that reason I cannot approve these articles in their present form.

I am also inclined to think that the articles are required to specify each particular kind of insurance intended to be authorized even though it be specified in the statute, and that a blank provision such as is here named is not sufficient. I have not gone into this subject and do not expressly pass upon it at this time, but call your attention to what I am inclined to think the law is in that respect.

There are twenty-two signers of these articles, and there is attached to them an affidavit,

"and that more than fifteen of said signers, namely, Herman L. Ekern, Ernest J. Perry, W. G. Coapman, Walter Kasten, F. K. McPherson, J. M. Hays, Franz Siemens, E. J. Hughes, Wm. M. Post, G. W. Augustyn, E. H. Williams, Niel J. Gleason, Edw. A. Farmer, E. A. Reddeman and J. H. Puelicher are residents of the State of Wisconsin."

It will be noted that those named are just fifteen. This would seem to raise the presumption at least that the other seven are not residents of this state.

Sec. 1896 provides:

"Subject to the conditions and in the manner prescribed by law, a corporation may be organized by fifteen or more residents of this state to transact the business of insurance * * *."

I have considerable doubts as to whether any one not a resident may sign articles of organization of an insurance corporation attempting to organize here, and am inclined to think that the articles themselves should show that all of the signers are residents of the state. It is true that no question could be raised upon this ground had the articles been signed by only the fifteen named, and it had been made to appear by the articles that they were residents of the state. There may well be a question, however, as to whether or not the signing by other persons, not residents of this state, in addition to the signing by fifteen of such residents, renders invalid the said articles. I do not specifically pass upon this question at this time but suggest it for the consideration of the incorporators, as the articles cannot, in any event, be approved at this time for the reason first stated.

Bridges and Highways—Municipal Corporations—Cities—
City must maintain streets within its limits which have been constructed under secs. 1317m—1 to 1317m—15.

September 25, 1918.

THORWALD P. ABEL,

District Attorney,

Sparta, Wisconsin.

In yours of September 17 you submit the following:

"Wisconsin Street in the city of Sparta was constructed with funds provided by the city, county and state, under the provisions of sec. 1317m—1 to 1317m—15, inclusive, such street being surfaced with crushed stone.

"Referring to sec. 1317m—5, 1, (g), which provides that such street shall be maintained by the city, except when such road is a surface stone or gravel road, the county shall oil or tar a portion of such road complete, with county and state funds.

"Referring to sec. 1317m—1f, which provides that streets built in any city under the provisions of 1317m—1 to 1317m—15, inclusive, shall be maintained by and entirely at the expense of the city in which they may lie.

"Will you advise me whether or not any part of the expense of maintaining Wisconsin Street should be paid by Monroe County?"

The two provisions above referred to are the results of two pieces of legislation enacted by the legislature of 1917.

You will note that sec. 1317m—5, subsec. 1, subd. (g), provides, in part:

"* * * Shall be maintained by *the city or village* in which it lies, except that when such road is a surfaced stone or gravel road, the county shall oil or tar, or cause to be oiled or tarred, the portion of such road built with county and state funds."

I find that this is the result of ch. 556, laws of 1917, which took effect July 3, 1917.

Sec. 1317m—5, subsec. 1f, provides:

"Streets and roads, heretofore or hereafter built in *any city* under the provisions of sections 1317m—1 to 1317m—15, inclusive, shall be maintained by and *entirely* at the expense of the *city* in which they may lie."

Sec. 1317m—5, subsec. 1f, it will be noted, is the later legislative enactment, being ch. 643, laws of 1917, taking effect

July 14, 1917. This section is definite and explicit and fixes the liability upon the city for the improvement of the highway in question. By a familiar rule of statutory construction, which gives effect to the later enactment, this section must govern.

I am therefore of the opinion that the city of Sparta should bear the entire expense of maintaining that part of Wisconsin Street within the city limits, which was constructed under the provisions of secs. 1317m—1 to 1317m—15, inclusive. Your question is, therefore, answered in the negative.

Criminal Law—Bastardy—Requisitions—A drafted man who has an illegitimate child born since he entered service cannot be tried for bastardy nor can he be brought from another state on requisition to this state.

The matter should be taken up with military authorities.

September 25, 1918.

C. T. EDGAR,

District Attorney,

Wausau, Wisconsin.

In your communication of September 20 you state that a young man from your county went into the military service of the government as a drafted man some time last spring; that since that time, a child has been born, and is now alive, to a young woman who claims that the aforesaid young man now in the military service is the father thereof; that there has been considerable complaint about your failure to have this man brought back here for trial. You state that you have examined my opinion dated March 30, 1918, to H. B. Rogers, of Portage,* and you agree that this man could not be held under a warrant for bastardy, that being a civil action; and inasmuch as he is now in another state, he could not be returned on such complaint on a requisition. You state that you have considered whether or not it would be advisable to bring an action for abandonment of the child in question; that this young man has not admitted the paternity of the child, and in fact denies it, but you state that this might be alleged and proved on trial.

* Page 189 of this volume.

You submit the following questions:

- "1. Is abandonment the proper remedy under the facts stated?
- "2. How would you proceed to get this young man in custody after a warrant for abandonment was issued?
- "3. From the standpoint of public policy and the principle involved, do you believe I am warranted in proceeding in this case to the extent of asking the military authorities to return this man here for trial on a charge of abandonment?
- "4. Are there any cases now pending that you know of in any courts or heretofore decided that definitely decide and establish the principle involved herein, to wit: The right of the civil authorities to obtain custody of a man in military service for a felony, and whether or not the nature and magnitude of the offense makes any difference."

In an official opinion rendered by this department on May 15, 1912 (Opinions Attorney General for 1912, p. 961), it was held that a requisition will not issue where application shows on its face that accused was not in this state at the time the crime is alleged to have been committed. It was there pointed out that the child was not born until after the party had left the state, and that he was not a fugitive from justice, in contemplation of sec. 5278, U. S. Rev. Stats. It was conceded to be the law, in this opinion, that the crime of abandonment does not require the physical presence of the accused where the crime is committed, and that the same may be committed in this state, although the party is in another state.

It would follow that the soldier in question cannot be prosecuted in the state in which he is located by the civil authorities for abandonment, as the prosecution in a civil court must take place in the location where the crime has been committed, in this case where the child is located. (See Opinions Attorney General for 1912, p. 320.)

Under the facts stated by you, it seems clear that the party in question is not a fugitive from justice, and cannot be returned to Wisconsin on a requisition. That you cannot reach him by a bastardy proceeding is evident from the opinion rendered to Mr. Rogers, to which you refer.*

In answer to your first question, I will say that it would seem that abandonment is the only offense with which the party in question can be charged.

* Page 189 of this volume.

In answer to your second and third questions, I will say that the party cannot be returned on a requisition, for the reasons already indicated, and that in view of the fact that the military authorities are constantly endeavoring to coöperate with the civil authorities in matters of this kind, I believe it would be proper for you to get into communication with the military authorities and see if they cannot be induced either to send this man back for trial, or to give him a trial before a military tribunal.

In the case of *Ex parte King*, 246 Fed. 868, which is the only case where a federal court construed the new articles of war since the amendment of August 29, 1916, 39 U. S. Stats. at Large 650, 2308a, U. S. Comp. Stats. 1916, it was held that a soldier who killed a policeman in a Kentucky city after the declaration of war between the United States and Germany should be delivered up to the military authorities for trial, and that the military authorities had superior jurisdiction of the offense. The court intimated that it was an open question whether the military court had exclusive jurisdiction in such cases or not. This is surprising, in view of the fact that the United States supreme court, in the case of *Colman v. Tennessee*, 97 U. S. 509, had held that under the articles of war prior to the last amendment, the civil courts and the military courts had concurrent jurisdiction of crimes committed by persons in the military service. To the same effect is *Grafton v. United States*, 206 U. S. 333, 348, and *Franklin v. United States*, 216 U. S. 559. See also opinion of attorney general of the United States (1854), in Vol. 6, Opinions of U. S. Attorneys General, p. 413.

I find, however, in a manual for court-martial of the United States army, prepared under the direction of the secretary of war in the office of the judge advocate general for use in the army of the United States, it is said on page 19:

"Courts-martial have exclusive jurisdiction to try persons subject to military law for all purely military crimes and offenses; they have concurrent jurisdiction with the proper civil courts to try such persons for civil crimes and offenses denounced and punished under A. W. 92, 93, 94, and 96."

A. W. 96 (39 U. S. Stats. at Large 666, 2308a, U. S. Comp. Stats. 1916) provides as follows:

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline,

all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

It would seem clear under these provisions that the court-martial would have jurisdiction of a crime of abandonment, and that the court-martial may take cognizance of the case against the party in question. Under the case of *In re King, supra*, it might be a question whether such court has not exclusive jurisdiction under the new articles of war, but it seems that is not the opinion held by the secretary of war and his department. I think it is the correct practice to assume at the present time that civil courts have concurrent jurisdiction with the military courts of civil crimes and offenses, until the question is authoritatively decided by the ultimate court.

It occurs to me that it is possible that by coöperation with the military officers, some arrangement may be made whereby this child will be taken care of, or the soldier returned, so as to determine the question in the civil courts whether he is in fact the father of said child. If this cannot be done, then the matter will have to be postponed until the defendant is discharged from military service.

Intoxicating Liquors—A sale of liquor on registration day for men to be drafted into the army is not in violation of law.

September 25, 1918.

ORRIN H. LARRABEE,

District Attorney,

Chippewa Falls, Wisconsin.

In your letter of September 10 you state that the governor issued a proclamation that all saloons should close on registration day, September 12, 1918; that one saloon located in the town of Edson just outside the city limits of Stanley, Wisconsin, did not obey the order, and kept the saloon open all day on the 12th of September; and that a complaint stating these facts has been made to you.

The proclamation of the governor is to be construed as having

an advisory significance, rather than a mandatory one. In fact, the power to enact or amend the criminal law of this state has not been delegated to the governor, and he could not, if he would, make an order that would have the effect of a criminal statute. The provisions of ch. 196, laws of 1917, in which the governor is authorized to make proclamations relative to the registration of citizens for the United States army, do not give the governor the power to order the saloons closed on the day when the registration is to take place.

Your inquiry, however, presents the question whether the party who has sold liquor on that day has violated any penal statute of this state.

In an official opinion rendered by my predecessor under date of June 2, 1917 (Vol. VI, Op. Atty. Gen., p. 380), it was held that the law forbidding the sale of liquor and requiring the closing of saloons on election day is applicable to registration day. This opinion was bottomed upon the provision in ch. 196, laws of 1917, which reads thus:

“All the provisions of the election laws of this state so far as applicable and necessary for the carrying out of the purposes of this act, and which are not contrary to the provisions of any federal law shall apply to the holding of such registration.”

It was held that the provisions of law forbidding the sale of liquor on the day of any annual town meeting, or any general or special election day, are for all practical purposes a part of the election laws of this state.

After a careful consideration of this question, I find it impossible for me to agree with the conclusion reached by my predecessor. The law prohibiting the sale of liquor on election day is contained in sec. 1564. It is one of the sections contained in ch. 66, Stats., which pertains to excise and the sale of intoxicating liquors. It reads 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 and imprisonment.”

Can it be said that this statute is enlarged so as to include registration day, by the provision of said ch. 196, laws of 1917, which makes the provision of the election laws of this state, so far as applicable and necessary for the carrying out of the purposes of said act, applicable to such registration day? Sec. 1564 is a criminal statute, and must be strictly construed against the state. The above general provisions cannot have the effect of adding registration day to those days enumerated in said sec. 1564 on which no liquor can be sold. Only in the broadest sense could it be said that it is necessary to close the saloons on registration day. I believe that the provisions of the election laws made applicable are those that are necessary in running the machinery provided for such purposes, and those that pertain to the manner of conducting the registration, the various steps necessary to be taken by the officers, etc.

In the case of *State ex rel. Bancroft v. Frear*, 144 Wis. 79, our court held:

"The provisions of the general election law contained in sec. 34, Stats. (1898), relating to the filling of vacancies caused by declination, death, or other disability of a nominated candidate, are not imported into the primary election law or made applicable to primary elections, although sec. 11—25 * * * declares that the provisions of the general election law in relation to the manner 'of counting the ballots and making return thereof, and all other kindred subjects, shall apply to all primaries in so far as they are consistent with' the primary election law." Syllabus.

Among the reasons given why sec. 34, Stats. 1898, was not a part of the primary election law was the following:

"We should have as little confusion as possible in our statute law. Where the attempt is made to incorporate parts of a former law into one that is being presently made, the language used should be such as to indicate with a reasonable degree of certainty what was in the legislative mind. A careful and intelligent reading of the two acts should be sufficient to indicate to the reader what parts of the old law were applicable to and were incorporated in the new. People are obliged to obey the laws, and in order that they may do so they should be put in a position where they can ascertain what they are," etc. *State ex rel. Bancroft v. Frear, supra*, 94.

The reasoning of the court is doubly applicable where the question involves the interpretation of a criminal statute. While

a liberal construction was permissible under the acts in question by our court, a strict construction is necessary in the case before us. Sec. 1564 is not given as one of the election laws in our statutes. It is given in the chapter on excise laws. It regulates the sale of liquor, not only on election day, but also on Sunday.

While I am reluctant to disagree with my predecessor in this matter, still I am constrained, after a careful examination of these statutes, to hold that the party in question has not violated any criminal law of this state in selling liquor on September 12, registration day.

Intoxicating Liquors—Wholesale liquor licenses may be granted without limit as to number.

September 25, 1918.

MAX SELLS,

District Attorney,

Florence, Wisconsin.

In your communication of September 24, you state that one, W. L. Dennis, runs a summer resort at Spread Eagle; that he was refused a license in July by the town board of the town of Florence, for the reason that if the license were granted to him, there would be a greater number of licenses in force than is permissible under sec. 1565d; that he has now made application for a wholesale license to the town of Florence. You inquire whether or not the issuing of an additional wholesale license under sec. 1548 would be a violation of sec. 1565d, or whether the town board has the power to issue wholesale licenses without limitation.

In par. 1a, sec. 1548, we found the following:

" * * * * The provisions of section 1565d shall not include or apply to persons having wholesale licenses only."

Under this provision, I am constrained to hold that the issuing of additional wholesale licenses would not be a violation of sec. 1565d, and that the town board is not limited in the number of wholesale licenses that it may issue.

Fish and Game—Trap shooting of domestic pigeons is not prohibited by law in this state.

September 26, 1918.

PETER FISHER,
District Attorney,
Kenosha, Wisconsin.

In your letter of September 23 you inquire whether trap shooting of live pigeons is forbidden under the laws of the state of Wisconsin. After a careful examination of our statutes I have come to the conclusion that it is not. It is true that sec. 4565 as contained in the statutes of 1913 has been repealed so that now no reference is made to trap shooting of live pigeons. I take it that this was done because as a practical proposition pigeons used for that purpose are not game birds, but are domestic fowl, and for that reason there was no necessity for having the exception in the game statute. If, however, wild pigeons are used that are game birds, then, of course, it would be in violation of law to have them in one's possession and kill them except as authorized by law; but I am informed that wild pigeons are not used for that purpose. If I have been correctly informed, then a negative answer to your question must be given.

Elections—Primaries—Votes cast for persons for whom no nomination papers were filed are to be counted in determining whether 10% of total vote cast for nominee of party for governor at last general election has been received by all candidates for any particular office at primary election.

September 26, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of today you state that in the seventh congressional district, Honorable Arthur A. Bentley received 1,361 votes as the Democratic nominee in the recent primary election; that in addition there were eleven scattering votes; that the Democratic candidate for governor received 13,671 votes at the last general election in the same district; that if the eleven scattering votes be added to the 1,361 Democratic votes received by Mr. Bentley, it makes a total Democratic vote in that district of 1,372,

being more than ten per cent of the Democratic vote cast for governor in that district at the last general election; that if the eleven scattering votes are not added, then Mr. Bentley, having received only 1,361 votes, will have to run as an independent candidate because of falling six short of the necessary ten per cent. You ask me to advise you as to your duty in the matter, under sec. 5.17, and state that it has been your idea that Mr. Bentley should go on the ticket as the regular party nominee.

Subd. (1), sec. 5.17 provides:

"If all candidates for nomination for any one office voted for on any party ballot shall receive in the aggregate ten per cent or more of the vote cast for the nominee of such party for governor at the last general election, the person receiving the greatest number of votes at such primary election as the candidate of such party for such office, shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election."

If, then, the parties receiving the eleven scattering votes may be considered as candidates within the meaning of that term as used in this subdivision, Mr. Bentley's name should go upon the official ballot as the Democratic nominee.

See. 5.01 provides among other things that the primary election law shall be so construed as to give effect to the will of the electors. There probably will be no controversy, but the act should be liberally construed with a view of carrying out the intentions of the legislature in enacting the law. The purpose of the quoted provision would seem to be to give every political party a place upon the official ballot for each office to be voted for, wherever the total number of votes of that party cast at the primary is equal to ten per cent of the votes cast for the candidate of that party for governor at the last general election. It would seem that it was not the number of votes cast for any one person that was intended to govern, but the number cast for all persons for any one office. The term "candidate" as therein used was not intended to be used in a technical sense, as meaning only those persons for whom nomination papers had been filed.

The provisions of subd. (3), sec. 5.17 tend to strengthen this construction. That subdivision provides:

"But no person shall be entitled to have his name placed on such ballot who has not filed a nomination paper as provided in sections 5.05 and 5.07 of the statutes, unless he shall have re-

ceived at such primary election a number of votes not less than the number of signers required by sections 5.05 and 5.07 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."

Thus it appears that a person may be voted for although his name does not appear upon the official primary ballot, and that it is possible for such a person to be declared the nominee although no nomination papers have been filed. In other words, it would seem that any person for whom any votes are cast at the primary election is a candidate within the meaning of subd. (1), sec. 5.17.

It is therefore my opinion that Mr. Bentley's name should go upon the official ballot as the Democratic candidate.

Automobiles—Jitneys—A motor bus carrying passengers between fixed points for a fixed charge, making no intermediate stops, is not subject to provisions of the Jitney Law.

September 26, 1918.

C. F. MORRIS,

District Attorney,

Washburn, Wisconsin.

In your letter of September 24 you submit the following:

"A man by the name of R. E. Kamm, of Ashland, purchased an automobile bus with a capacity for sixteen passengers, *leaving a certain point at Ashland*, running to Barksdale, Wisconsin, thence from Barksdale to Washburn, then back over the same route, stopping again at Barksdale on the way back to Ashland, *making but one stop, namely, at Barksdale on the trip from Ashland to Washburn*, and the same returning. He charges passengers 25¢ from Ashland to Barksdale, 25¢ from Barksdale to Washburn, or 50¢ for transportation from Ashland to Washburn or Washburn to Ashland.

" * * * * I desire to know whether or not Mr. Kamm has violated the statute in question by operating a jitney in violation of this statute."

The statute in question, sec. 1797—62, provides:

"Every person, * * * operating any motor vehicle along and upon any public street or highway *for the carriage of pas-*

*sengers for hire and affording a means of local, street or highway transportation similar to that afforded by street railways, by indiscriminately accepting and discharging such persons as may offer themselves for transportation along the course on which such vehicle is operated or may be running is hereby declared to be a common carrier, * * * .”*

For such a common carrier as above indicated a bond is required in the ensuing sections.

Whether or not a bond is required depends upon whether or not the motor vehicle in question comes within the wording of sec. 1797—62 above quoted, when operated as you indicate.

First: Is the operation of the motor vehicle in the manner described by you in the above quoted portion of your letter affording “a means of local, street or highway transportation similar to that afforded by street railways?”

Second: Is the operation of the motor vehicle in question “indiscriminately accepting and discharging” persons who offer themselves for transportation along the course on which the vehicle is operated?

In an opinion rendered by this department to Louis J. Fellenz, district attorney, Fond du Lac, August 27, 1915, Vol. IV, Op. Atty. Gen., p. 709, it was held that the law in question does not apply to persons who under special contract convey persons from place to place, their route depending upon the desire of passengers carried, and a distinction was made between ordinary livery service and the so-called jitney bus. It was held that such service was not

“similar to that afforded by street railways by indiscriminately accepting and discharging such persons as may offer themselves for transportation along the course on which such vehicle was operated or may be running.”

In an opinion rendered to C. J. Smith, district attorney, of Viroqua, Wisconsin, October 14, 1915, Vol. IV, Op. Atty. Gen., p. 876, this department held that the law in question did not apply to a person operating a five passenger automobile between Viroqua and Viola, a distance of fifteen miles, where daily trips were made, leaving each terminus at a certain hour, at a fixed price per passenger, no stops being made at intermediate points.

It seems to me, considering the intention of the legislature and the obvious purpose sought to be accomplished by the legisla-

tion, it must be held that the service rendered by a motor bus which carries passengers only between fixed points for a definite and fixed charge, there being no uncertainty as to distance to be traveled by the passenger, is not similar to the service furnished by street railways, and it seems also that it is not an indiscriminate accepting and discharging of passengers along the route.

I am therefore of the opinion that the person in question is not required to furnish a bond for the transportation service he proposes to render. Consequently in operating without having furnished a bond he has not violated the provisions of secs. 1797—62 to 1797—68, Stats.

Criminal Law—A new trial may not be ordered after one year after term at which a criminal conviction occurred. Thereafter relief can be had only through executive clemency.

September 28, 1918.

HONORABLE E. L. PHILIPP,
Governor.

In the matter of Erculano Martinez, which has been called to your attention by Robert Lansing, secretary of state, upon the request of the Mexican ambassador to the United States, I have to advise you that the correspondence submitted has been examined. Martinez was convicted of murder in the second degree in the circuit court of Grant county, October 25, 1910, and sentenced to twenty years' imprisonment, and is now a prisoner in the state prison. He has always protested his innocence, and it is now claimed that he and his witnesses, who had to speak through an interpreter, did not present to the jury the truth in the matter, because the interpreter did not sufficiently understand Spanish to translate correctly between the witnesses and the court.

Said ambassador asks, through the national secretary of state, that the Wisconsin authorities take up this matter with a view of granting a new trial or granting a pardon or commutation to Martinez.

By sec. 4719, Wis. Stats., the time for a new trial is limited to one year after the term at which the trial took place: You are,

therefore, advised that the only relief which can be afforded the petitioner is through the exercise of the pardoning or commutation power which is vested in you by the state constitution, art. V, sec. 6.

It seems to me that it will be entirely proper for you to call the attention of the secretary of state, in your reply to his letter, to the statutes of this state relative to the making of applications for pardon, and to give him any information which might be helpful relating to the manner of presenting such an application.

Public Officers—City Treasurer—School District Treasurer—
Offices of city treasurer and school district treasurer are incompatible.

September 30, 1918.

HONORABLE C. P. CARY,

State Superintendent of Public Instruction.

You ask my opinion upon this question:

"Is it legal for the same individual to hold the office of school district treasurer and city treasurer?"

The question contemplates a city of the fourth class organized under the General City Charter Law in which city a school district system still obtains and wherein the treasurerships mentioned are separate and distinct.

In an opinion to the district attorney of Oneida county July 27, 1918,* speaking of the offices of town treasurer and school district treasurer it was said:

" * * * * Their duties are such as to make the holding of the offices by the same person inconsistent, and one of the clearest reasons that I can assign therefor is that under sec. 40.19, subd. (3), it is provided that the school treasurer shall prosecute the town treasurer of the town for the recovery of any money belonging to the district which the town treasurer refuses or neglects to pay over in the manner prescribed. You can hardly imagine a school treasurer suing himself as town treasurer, which clearly makes these offices incompatible."

* Page 424 of this volume.

In principle the two cases are alike. I can see no material difference between the case which you present and the one treated in that opinion.

It is provided by the General Charter Law that in every city other than of the first class, incorporated under that law, or which shall adopt the subchapter thereof which treats of schools (subch. XIV, ch. 45^t, Stats.) in which there

"Shall be * * * a board of education or a school board elected by the people, or the ordinary school district system is in force, the plan of school organization and management shall continue until changed by a majority vote of the electors of such school district," etc. Sec. 925—113.

At the time of incorporation the city in question had the ordinary school district system, and that system has not since been changed.

I find nothing in the statutes which makes the relation of the office of city treasurer to the office of school district treasurer in such city distinguishable from the relation that obtains between the office of town treasurer and that of a school district treasurer within the town. Your question is therefore answered in the negative.

Public Health—Minors—Cigarettes—A license under sec. 4608^f does not authorize sale of cigarettes to minors.

September 30, 1918.

R. M. ORCHARD,

Acting District Attorney,

Lancaster, Wisconsin.

Your esteemed favor of September 27 is at hand. You inquire whether a person under a license issued under sec. 4608^f, Stats., may sell cigarettes to minors.

In reply thereto I would say I am satisfied that under this section a license does not authorize the sale of cigarettes to minors. The first subsection of this section is a positive prohibition against the sale to minors, and the sixth subsection of the section compelling a minor to reveal where he obtained the cigarettes indicates more clearly, if necessary, that a minor is not supposed to have the cigarette under any circumstances.

Peddlers--A meat dealer having a regular place of business and passing through the country selling meat to regular customers is not a peddler.

October 2, 1918.

J. C. DAVIS,

District Attorney,

Hayward, Wisconsin.

You have submitted the following statement of facts as the basis for an official opinion:

"A. is a resident of Sawyer county, and operates a meat market in a small way at his home. He buys cattle, butchers them, and sells the meat. Twice a week he sends out a wagon through the country and sells meat to the farmers from the wagon and also sells to retail merchants such meat as they wish to buy."

You inquire whether this man is required under the state law to obtain a license before he can peddle meat through the country from his wagon. And if he peddles the meat without license, is he liable to prosecution?

In an official opinion rendered by this department (Opinions of Attorney General for 1908, p. 607), it was said:

"* * * I am of the opinion that the business that is conducted by such dealers as milk peddlers and butchers, who drive about among their customers taking and filling orders and making sales is not within the intent of the peddlers' act, said chapter 490. Such persons are conducting business usually by carrying out prior contracts and, if, in doing so, they incidentally make a few additional sales, I am not inclined to hold them within the strict letter of the law as peddlers * * *." P. 608.

In an official opinion rendered by this department under date of April 25, 1917 (Vol. VI, Op. Atty. Gen., p. 253), where a similar question to the one submitted by you was under consideration, it was said:

"* * * The meat dealer in question travels along his route or to his regular customers after he has received orders from a great many of them, which orders he fills, and incidentally sells

meat to others along the route, who may not have ordered any meat from him simply because they have no 'phones or for other reasons have neglected to do so. I agree with my predecessor in office that such a person is not a peddler within contemplation of the Wisconsin Hawkers' and Peddlers' Act, secs. 1570 to 1582."

You do not state sufficient facts for me to give you a definite answer, but it would seem that the meat dealer in question is operating under a somewhat similar plan. The fact that he goes twice a week would indicate that he is furnishing meat to certain customers, and incidentally he may sell to some that have not ordered or are not expected to buy as a general rule. If that is the case, he is not required to take out a peddlers' license, and cannot be prosecuted.

It must, however, be borne in mind that our supreme court, in the case of *DeWitt v. State*, 155 Wis. 249, stated that it is possible for a person to have a fixed domicile and business to which he occasionally resorts, and still be a peddler. No conclusive answer can be given, however, to your question without a more definite statement of the activities of this man.

I believe I have stated enough in this letter so that you may be able to judge for yourself whether the man in question is a peddler or not.

Public Officers—County Clerk—Fish and Game—Marriage—
A county clerk cannot charge a fee for taking oath of applicant for hunting license or marriage license.

He cannot charge more than \$1.00 for former nor more than 50¢ for latter license.

October 3, 1918.

FRANK W. BUCKLIN,
District Attorney,

West Bend, Wisconsin.

In your letter of September 28 you inquire whether a county clerk may legally charge applicants regular notarial fees for taking their affidavits in connection with applications for hunting licenses or marriage licenses; and if so, whether or not such clerks are entitled to retain such fees for their personal use, or must be turned over to the county treasurer. You further observe that you have advised your county clerk that, in the light

of former opinions rendered by this department, it is the duty of the county clerk to make out such applications when requested, take the affidavit of the applicant in connection therewith, and that no charge should be made therefor.

I think you have advised your county clerk correctly. On September 6, 1911, this department rendered an opinion found in Vol. I, Op. Atty. Gen., p. 287, wherein it was held that a county clerk cannot charge more than the fee of one dollar in connection with the issue of a hunting license. I am unable to discover any change in the statutes relating to hunting licenses which would reverse or even modify the conclusion reached in said opinion. Little more need be said.

The principle involved is the same in the law governing the issue of marriage licenses, but the duties of the clerk in connection with such an application are more clearly defined than under the game laws.

Sec. 709 enumerates the various duties of the county clerk, but by subd. (20) he is further required to perform all other duties required of him by law. By law he is required to issue hunting licenses and marriage licenses, and the parties applying therefor must comply with all the requirements imposed upon them in the statutes before they are entitled to such licenses. The county clerk is by law in the possession of all the required forms for these applications, and has the authority to administer the oath when required of an applicant, and thereby enable the applicant to present a written verified application or statement, as the law requires. The legislature has fixed the fees of the county clerk in these matters: in the case of a hunting license the fee is one dollar, and in case of a marriage license the fee is fifty cents.

The duties of the county clerk in reference to game licenses are prescribed by secs. 29.09 and 29.10, and as to marriage licenses, by secs. 2339n—2 to 2339n—8.

Appropriations and Expenditures—Public Officers—Normal School Officers—Only one officer or employe of a state normal school may have account for expenses incurred in attending conference outside state allowed.

October 3, 1918.

HONORABLE EMANUEL L. PHILIPP,
Governor.

You have submitted to me requests of F. A. Cotton, president of the state normal school at La Crosse and of J. A. Fairchild, one of the professors in said normal school, requesting authority to attend a conference of the war department and college and normal school presidents, relative to the organization of the S. A. T. C. held August 30 and 31, 1918, at Fort Sheridan, Illinois, together with a letter signed by said F. A. Cotton and directed to you, stating in explanation of his claim for reimbursement for his expenses in attending said conference, that the war department had asked all the presidents of the normal schools of Wisconsin to attend said conference, that the board of regents of normal schools passed a resolution authorizing the presidents and one member of each faculty to attend said conference, and that he supposed that these facts were sufficient to warrant your department to audit his account.

This department has repeatedly held that only one member of any department or institution of the state may have his items of expenditure audited and paid out of the state treasury in attending any convention or meeting held outside of the state of Wisconsin. See Vol. VI, Op. Atty. Gen., p. 789, and opinion to Honorable Merlin Hull, April 30, 1918.* In both of these opinions the construction to be given to sec. 14.32 was thoroughly discussed, and it is only necessary here to give the conclusion reached in said opinions.

You are advised, therefore, that the claims of only one of the persons connected with the state normal school located at La Crosse, Wisconsin, for expenses incurred in attending the conference above mentioned may be audited by the secretary of state and paid out of the state treasury.

* Page 245 of this volume.

University—Tuition—A mother who has separated from her husband by voluntary separation and supports herself and daughter may establish a separate residence in this state so as to exempt her daughter from payment of tuition.

October 4, 1918.

HONORABLE M. E. McCAFFREY, *Secretary,*
Board of Regents,

University of Wisconsin.

In reply to your request by 'phone for a construction, in part, of sec. 36.16 I would say I understand the question you want determined is whether a student in the university is required to pay nonresident tuition fees under the following facts:

The student's parents formerly were residents of another state. For several years the father and mother have been living separate under a voluntary arrangement or agreement for such separation, and the mother, together with the student child, has taken up a permanent residence in the state of Wisconsin and is supporting herself and child independent of the husband and father, and considers Wisconsin her residence and permanent home; that it is not a temporary arrangement between the father and mother, or husband and wife, for convenience or on account of health, but is a permanent arrangement that they have entered into without any intention of resuming their former relations of husband and wife, and the mother and student child have been maintaining their residence in the state of Wisconsin as their permanent home for more than one year preceding the beginning of the present semester of the university.

The statute in question, so far as material here, reads as follows:

"* * * Any student whose parents have been bona fide residents of this state for one year next preceding the beginning of any semester for which such student enters the university shall be entitled to exemption from fees for tuition. * * *"
Sec. 36.16.

Under this statute there would be no question if both the father and mother of the student had for the required time (one year) established their residence in Wisconsin. The difficulty here lies in the fact that the father, one of the parents, is a non-resident of this state, so that the question is whether one of the parents, the wife, answers the call of the statute, and whether

she can establish a separate residence in this state, not being divorced from her husband.

The word "parents" in the above quoted statute implies, of course, the plural, but I am satisfied that there are many circumstances in which it should be read in the singular. For instance, if one of the parents were dead, the residence of the survivor would undoubtedly meet the calls of this statute. Furthermore, sec. 4971, subd. (2), provides, in part, as follows:

"* * * Every word importing the plural number only may extend and be applied to one person or thing as well as to several persons or things. * * *."

This is a provision of the statute prescribing rules for the construction of statutes. Therefore I am satisfied that in this particular case the residence of one of the parents in the state for the required time would be sufficient to meet the calls of this statute, and if the wife in this case can establish a separate residence in this state, she, being the only parent in the actual position of parent of this child, would, I am satisfied, come within the terms of the statute.

Regarding the residence of a wife, the general rule undoubtedly is that it follows that of the husband, but this is not universal, and the tendency of modern times is to apply this rule much less peremptorily than was formerly the case. For instance, for purposes of suing for divorce it is almost universally held that a wife can obtain a separate residence from that of the husband. In the case of *Town of Watertown v. Greaves*, 112 Fed. 183, it was held that a wife could acquire a separate residence and citizenship in a state other than that of the residence and citizenship of her husband within the removal statutes for the removal of cases from state to federal courts, on the ground of diversified citizenship. In the case of *In re Florence*, 54 Hun (N. Y.) 328, it is held that for the purpose of giving jurisdiction to a probate court to administer on the estate of a wife, deceased, she can acquire a residence in another state from that of her husband, although there has been no divorce. This was a case where the husband and wife had voluntarily separated, similar to the situation under consideration. On pages 330-331 of the case last cited the court uses this language:

"The whole claim of plaintiff is based upon the old rule that a woman by marriage acquires the domicile of her husband and changes it with him. It is admitted that a wife may procure a

separate domicile for purposes of divorce, but it seems to be claimed that such domicile cannot be procured for any other purpose. The old rule in reference to a married woman's domicile cannot, certainly, prevail in view of the rights which are recognized to be hers by the statutes.

"The property relations between husband and wife have been entirely changed since the rule in question has obtained, and the reasons for the rule no longer exist. The wife is now a distinct legal entity, having in the disposition of her property all the rights and even more than a husband has ever possessed, and the husband has no control whatever over her movements or her disposition of her property."

The court further says on page 331 of the opinion:

"* * * If she was enough of a resident to institute divorce proceedings, as is conceded, she is enough of a resident to leave her property to her children and to be protected from the claims of a husband with whom she has not lived for twelve years, and who has not, during that time, either contributed or offered to contribute to her support or that of their children and who desires now, under a legal fiction, to take away from his own children a portion of their mother's inheritance."

The rule is well established in this state that the wife may establish a separate residence from that of her husband for purposes of divorce. *Craven v. Craven*, 27 Wis. 418, 420. See also *Dutcher v. Dutcher*, 39 Wis. 651, 659. In this last case our own court seems to recognize that a wife, under other circumstances than for the purpose of divorce, might acquire a separate residence and citizenship than that of her husband.

On page 659 of the opinion in the *Dutcher* case we find this language:

"Doubtless for certain purposes the domicile of the husband is the domicile of the wife. That rule, however, goes upon the unity of husband and wife, and very generally, if not always, implies continuing, though temporarily interrupted, cohabitation. It excludes, or should exclude, permanent separation. Permanent separation implies separate domicile of husband and wife."

This language indicates very clearly that in a case like the one under consideration, where the husband and wife have permanently separated and are no longer sustaining towards each other the relation of husband and wife, the wife may establish a separate residence and citizenship from that of her husband.

I am therefore of the opinion that if the facts are that the mother in this case is permanently separated from her husband, that she came to this state with the student in question with the intention of establishing her permanent residence and citizenship here, that that situation has existed for the year prescribed by the statute, and that she is supporting herself and child independently from her husband, then the student in question is exempt from the payment of tuition under sec. 36.16, Stats.

Building and Loan Associations—The rate to borrowers in building and loan associations must be definitely fixed in by-laws.

The rate fixed in by-laws is applicable to all borrowers at any given time.

October 5, 1918.

HONORABLE A. E. KUOLT,
Commissioner of Banking.

In your letter of October 2 you submit a letter from George L. Mensing, vice president of the Bahnfrei Mutual Building and Loan Association, of Milwaukee, and ask that the questions therein stated be answered.

The questions are:

First: Must the rate of interest be definitely fixed in the by-laws of the building and loan association?

Second: Is it necessary, when the rate of interest has been changed in the by-laws, to make that rate applicable to all borrowers, including those who have been borrowers for a number of years and who entered the association when the prevailing rate of interest was lower than that now provided in the by-laws?

Your first question is answered in the affirmative.

The law requires in sec. 2014—11 that the articles or by-laws of each association must specify

“the time and manner of paying and the amount of * * * interest * * *; whether dividends shall be allowed on dues paid in advance.”

This department held in an opinion to W. H. Richards, deputy commissioner of banking, July 10, 1912, in Vol. I, Op. Atty.

Gen., p. 76, that the interest rate must be stated in the by-laws and it must be stated specifically, giving the exact amount to be paid.

Referring to your second question, this department held in an opinion to you February 7, 1917, that the rate of interest on loans to members of the building and loan association could be changed at any time, Vol. VI, Op. Atty. Gen., p. 79.

In the case of *Columbia Building & Loan Association v. Junquist et al.*, 111 Fed. 645, 646, the court said:

" * * * The principle underlying its method of transacting business is mutuality, its object being to raise funds from its members to be loaned among themselves, or to such as may desire to avail themselves of the privilege. * * *; and the stockholders, whether borrowers, or nonborrowers, participate alike in the earnings of the association, and alike must assist in bearing the burden of any loss which it may sustain. * * *. All members receive the same per cent. of profit, for the reason that the dividends are declared on the entire business; and all payments made by every member go into the common fund, the profits of which are divided among the shareholders, * * *. To allow payments to be applied to mature the loan of a borrowing member by a definite and fixed number of payments would destroy the essential principle upon which the business is transacted, viz., that of mutuality. * * *"

See also *Leahy v. The Nat. Bldg. & Loan Assn.*, 100 Wis. 555.

It was held by this department in the opinion last above quoted, Vol. VI, Op. Atty. Gen., p. 82,

"I am firmly of the opinion that the association may change the rate of interest and that such change effectively binds members who are at the time borrowers."

Considering, therefore, the principle upon which building and loan associations are founded, their general purpose and the method of operation evidently intended by the legislature when such associations were authorized, it would seem that to allow any member a loan for a definite and fixed period at a stated rate of interest, which might result in requiring of any other borrowing members a higher rate of interest, would squarely conflict with the underlying principle of the association. The members are all to join mutually in the profits and privileges and burdens of the association. Every contract entered into with the borrowing member carries with it all the provisions in the by-laws and all the implied powers given the association.

with respect to the members by the legislature. It follows that the association can have at any time but one rate of interest which is applicable to all borrowers, and this rate of interest must be fixed in the by-laws. Any other arrangement would destroy the mutuality of the benefits that flow from the association.

You are therefore advised, in answer to the second question submitted, that the rate of interest so fixed in the by-laws must apply alike to all borrowers regardless of whether or not they have outstanding loans for a less rate of interest at the present time.

Contracts—Contractor's Bond—Surety's Liability—The delivery of a surety bond constitutes execution thereof; the surety cannot thereafter withdraw from a public contractor's bond or limit the liability.

October 7, 1918.

WISCONSIN HIGHWAY COMMISSION.

On October 1, 1918, you submitted a contract known as "Project Number 29" which was entered into between James E. Talbot, contractor, and the state of Wisconsin, for the construction work upon a specified portion of the state trunk line highways, the work to be completed by July 1, 1919. A bond in a penal sum equal to the contract price was executed by the contractor and the Massachusetts Bonding and Insurance Company and delivered September 3, 1918. It was approved by the governor of Wisconsin on the 6th day of September, 1918. On September 21, 1918, said surety demanded that the bond be surrendered and returned to it, with a view of canceling the bond and terminating the liability of the surety. You maintain that the surety has no right to thus terminate its liability, but submit the following question:

Has a bonding company the right to withdraw as surety from a contract which has been already commenced by the contractor?

Your question is answered in the negative. *A. S. Ripley Building Company et al. v. Coors*, 84 Pac. 817.

The reason suggested for this action on the part of the bonding company is that the prospect of unfavorable labor conditions and the advance in price may result in bankrupting the

contractor and preventing his fulfilling the contract. That is to say, the surety wishes to withdraw from this bond because it will incur financial hazard by remaining upon it.

That a surety on the bond of a public contractor may terminate its liability at any time is a startling proposition and wholly out of harmony with public interest, and contrary to the purpose of the bond. It makes a "mere scrap of paper" of a most formal and solemn document, shocks the sense of justice and does violence to the meaning of the word "bond." There is a very widespread notion that a bondsman's obligation is as stated in the bond. This popular belief dates back we do not know how far, but at least to the decision of Portia in the celebrated case of *Shylock v. Antonio*. Literally, a bond is a band; something very binding, as, for instance, the "bonds of matrimony." Chains and fastenings are given by lexicographers as synonyms of bonds. Therefore we say without hesitation that upon principle the proposition that contractors' sureties can withdraw at pleasure is unsound, for otherwise a bond would be no bond at all. The bond in this contract adds little or nothing to the liability of the principal obligor. His obligations are fixed by the construction contract. The object of the bond is to obtain security in addition to that of the contractor for the fulfillment of the terms of the main contract. Additional security is not obtained if the surety may cancel his liability at pleasure, for he is sure to withdraw at the very time the obligee will wish him to remain. By signing a bond the surety becomes a party to the entire contract. Sureties become parties to a building contract the same as if they had actually made the contract. *W. P. Fuller & Company v. Alturas School District*, 153 Pae. 473.

We have here a detailed and explicit contract between Talbot and the state of Wisconsin for the construction of a highway by the former according to plans and specifications, and for which the state is bound to pay him \$11,165.72. To make the writing a binding contract Talbot was by statute required to, and he did, furnish a bond in a penal sum equal to the contract price of the work to be performed. Upon the signing and delivery of the construction contract and bond, the rights and obligations of the parties became fixed. Talbot acquired a right to earn the price named in the contract, and if prevented from doing so by the state or any one else, without his fault, he would be entitled

to damages suffered by him. On the other hand, the state officials must insist upon performance of the construction work within the time specified or upon the damage occasioned for any default therein. In the event of any default the surety is answerable for the damages. That is the surety's undertaking.

The bond in this instance is attached to the construction contract, and the two form the entire contract and measure the obligations of the principal and surety upon the bond. The condition of the bond is that Talbot

"shall, in all things, well and truly perform all the terms and conditions of the within and foregoing contract, to be by him performed, within the time therein mentioned, and shall pay all lawful claims for labor performed and materials furnished in the construction of said highway, and shall have paid and discharged all liabilities for injuries which have been incurred in said construction, under the operations of sections 2394—1 to 2394—31 of the statutes, inclusive, and all acts amendatory thereto."

If these conditions are not complied with, the bond "shall be and remain in full force and virtue."

This bond is in strict conformity to the requirements of the statute:

"All contracts involving one hundred dollars or more hereafter made or let for the performance of any work or labor or furnishing any materials when the same pertains to or is for or in or about any public building, public improvement, public road, alley or highway, or any other public work of whatsoever kind of the state, or of any county, city, * * * shall contain a provision for the payment by the contractor of all claims for such work and labor performed and materials furnished, and no such contract shall hereafter be made or let unless the contractor shall give a good and sufficient bond, the penalty of which shall not be less than the contract price, conditioned for the faithful performance of the contract, and the payment to each and every person or party entitled thereto of all the claims for work or labor performed, and material furnished for or in or about or under such contract, such bond in the case of the state to be approved by the governor, of a county by its district attorney, * * *. No assignment, modification or change of the contract, or change in the work covered thereby, nor any extension of time for completion of the contract shall release the sureties on said bond." Sec. 3327a, Stats.

No authority, I venture to say, can be found which holds that this bond and said statute do not mean exactly what they say.

"* * * If the consideration for the surety's contract is entire, and has been executed fully, as in the case of a bond for the payment of a sum certain, or for the performance of services, the surety is bound indefinitely, and cannot terminate his liability by notice, even though by death or insolvency of co-sureties he is the only responsible party remaining; * * *." 32 Cyc. 85-86.

"The contract of suretyship is the joint and several contract of the principal and surety: * * *."

"* * * He is bound originally in all respects upon the same footing as the principal. His is not an offer depending for efficacy upon acceptance, but an absolute contract depending for efficacy upon complete execution, and its execution is completed by delivery. From that moment his liability continues until discharged in accordance with stipulations of the instrument, or by some unauthorized act or omission of the obligee violative of his rights under the instrument, or by a valid release. Nothing that he can do outside of the letter of the bond can free him from the duties and liabilities it imposes. He cannot assert the right to revoke, unless the right is therein nominated. As was said by the English court, 'if he desired to have the right to terminate his suretyship on notice, he should have so specified in his contract:' *Calvert v. Gordon*, 3 Man. & R. 124; Brandt on Suretyship and Guaranty, secs. 113, 114." *Saint v. Wheeler & Wilson Mfg. Co.*, 36 Am. St. Rep. 210, 213-214, 10 So. 539, 541.

After careful search only one case has been found where the precise right claimed by the surety in this instance has been asserted. That is the case cited at the beginning of this opinion. The absence of other adjudicated cases is probably due to the fact that few have been bold enough to take so untenable a position.

In *A. S. Ripley Building Company et al. v. Coors, supra*, 818, the claim of cancellation of the surety's obligation was made under conditions much more favorable to the surety than are the conditions which confront the surety in this instance. In the case cited the action was against the surety upon a building contractor's bond brought by the obligee, damages resulting from failure to perform the contract. The surety defended upon the ground that the principal in the bond had obtained the surety's signature through fraud and false representations, and notice of such fraud was given to the obligee thereof that the surety demanded release and surrender of the bond before any work had been done, and before the owner had been in any way in-

jured. The surety relied upon the proposition that nothing had been done under the contract when this notice was given, which was the fact. The court, however, answered that the obligee had at that time

"bound himself by a written contract to the payment of the sum of \$6,750 upon the performance by the building company of the terms of that contract. The cancellation by him at this time of such contract would have made him liable to a claim and an action for damages by the building company for the breach of his contract, the seriousness of which, in all probability, would only have been established at the termination of protracted and expensive litigation. Sureties should not be allowed to relieve themselves of liability imposed upon them by their voluntary contracts, by a mere notice to the obligee, that they were induced to enter into such contracts relying upon false statements made to them by the principal, of which statements the obligee was entirely ignorant, unless there be a stipulation in the contract of indemnity to such effect. The rule is thus stated in 27 A. & E. Ency. of Law, 447: 'A surety who has signed a contract of suretyship cannot ordinarily and before the breach of the contract by giving notice terminate his suretyship or escape future liability for his principal unless a stipulation to that effect appears in the contract'—citing cases."

Said defense was rejected by the court and the surety held liable upon the bond, notwithstanding said fraud and notice thereof subsequently given.

There is a federal statute, 28 U. S. Stats. at Large 278, of the same character as said sec. 3327a, Wis. Stats., and it has been sustained in its entirety by the federal courts. *U. S. v. Rundle*, 100 Fed. 400.

I have no hesitation in advising you that the demand of this surety should be denied, and that it and the contractor should be told that the state expects the contract including the bond to be carried out according to the letter.

Elections—Nomination Papers—Independent nomination papers for office of county clerk must be filed in county clerk's office 30 days before election day computed by excluding the first and including the last day.

October 7, 1918.

M. R. MUNSON,

District Attorney,

Prairie du Chien, Wisconsin.

You inquire whether a party proposing to be a candidate for the office of county clerk has complied with the law in a case where he filed insufficient nomination papers in the office of the county clerk of your county on Saturday afternoon, October 5, and on Sunday afternoon, October 6, other nomination papers containing additional names, making a sufficient number, were deposited in the post office at Prairie du Chien, addressed to the proper county clerk, the envelope being postmarked at Prairie du Chien at nine o'clock, P. M., October 6, and the papers not having been received by the county clerk until Monday morning, October 7.

I am satisfied that he has not complied with the law and that his name cannot properly be put upon the election ballot. The depositing of the papers in the post office was insufficient.

The statute, subd. (6), sec. 5.26 provides as follows:

"Such nomination papers shall be filed as follows: * * * for candidates to be voted for wholly within one county, in the office of the county clerk, not more than forty nor less than thirty days before such election. * * *."

The office in question here is that of county clerk, to which the above provision applies. The election will be held November 5. The computation of time in such a case is that as held in the case of *Fletcher v. La Crosse County*, 165 Wis. 446, which is, I believe, now the uniform rule for computation of time within this state. Under this rule the thirty days required by the statute must be computed by excluding the first day and including the last. The filing here was completed Monday, October 7, which leaves only twenty-nine days, beginning the computation on October 8, excluding the first day. Therefore, the papers were not filed in time.

- *Intoxicating Liquors*—Under statement of facts person is guilty of sale of liquor where he received order to get liquor from person in another municipality.

October 14, 1918.

S. G. DUNWIDDIE,

District Attorney,

Janesville, Wisconsin.

In your letter of October 2 you state that the city of Beloit in your county is now dry, and the city of Janesville still has saloons; that one, Hayes Connors, a resident of Beloit, is requested by several other residents to procure for them in Janesville intoxicating liquors; that Connors takes the money and comes to Janesville and purchases several quarts of whisky, which on his return he delivers to the Beloit residents ordering the same. The Beloit residents are not licensed liquor dealers, and Connors receives from them no direct written order. You inquire whether this statement of facts brings Connors within the prohibition of the last sentence of sec. 1565, Wis. Stats.

Said section reads as follows:

"* * * 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."

Under your statement of facts, Mr. Connors receives from the persons in Beloit, who are not licensed liquor dealers, orders for the purchase of liquor, to be filled by another person, firm or corporation outside of the municipality of Beloit, and the liquor

is afterwards delivered by Mr. Connors to the persons ordering it.

Mr. Connors is therefore, under the express terms of this statute, liable for the sale of such liquors at the place where he receives the orders.

Elections—Filing Expense Accounts—Candidate who has no disbursements need not file statement of accounts and cannot be barred from having his name on ballot.

Independent candidate cannot be barred from having his name printed on ballot because he did not file statement of disbursements as party candidate at primary.

October 14, 1918.

GEORGE E. O'CONNOR,
District Attorney,
Eagle River, Wisconsin.

In your recent letter you state that one of the candidates for county office failed to get his name on the printed primary ballot for the reason that he made an affidavit to one of his nomination papers but that afterwards his name was written in by enough voters to give him a place on the election ballot; that this candidate before the primary filed an expense account showing that he had made certain disbursements, but after the primary he did not file any expense account. You inquire whether such candidate is entitled to have his name appear on the printed ballot for the November election.

If this candidate had no disbursements after the primary or after the last statement he made, he would not be required to file a statement, under the ruling of this department in an official opinion rendered by my predecessor. See Vol. I, Op. Atty. Gen., p. 244. It is also held in that opinion that such failure in such case will not prevent the candidate's name from going on the ballot. Under the facts stated by you, it does not appear whether the candidate had any expenses after the primary.

In an official opinion by my predecessor, Vol. III, Op. Atty. Gen., pp. 343, 344, it was said:

*** * * 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*."

Your question must therefore be answered in the affirmative, unless it appears that he had disbursements for which he has not filed any report.

You state that another candidate failed to get on the printed primary ballot, for the reason that he failed to file his statement; that this candidate, not knowing that the law had been changed, filed expense accounts every two weeks, until he learned that his name could not appear on the ballot on account of his failure to file such statements; that he then quit, but filed another and final expense account showing all his disbursements; that later he determined to run as an independent candidate; that he has now filed the necessary nomination papers in due form as an independent candidate. You inquire whether this candidate is eligible and whether his name may appear on the November ballot in the independent column.

Sec. 12.10 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 chapter up to the time for such certification.
* * *"

The party in question here was not chosen at the primary, but he was nominated as an independent candidate to be voted for at the ensuing election by nomination papers duly signed by qualified electors. The fact that he did not comply with the law as to filing his accounts as a party candidate in order to have his name appear on the primary ballot would, in my judgment, not bar him from having his name go on as an independent candidate. It would be too liberal a construction for a law which is of a penal nature, and I am of the opinion that the language used is such that a more restricted construction can be placed upon it. His candidacy is not the same as it was when he was a candidate to have his name printed upon the primary ballot as the party nominee. His candidacy now is that of an independent.

I believe it must be held that the failure to file expense accounts previous to that time when the person was a candidate, either at another election or primary or for another office, will not bar him from having his name placed upon the ballot so long as he has complied with the law as respects the present candidacy. I believe that his name may appear on the November ballot in the independent column, and it must be presumed, so far as the county clerk is concerned, that he is eligible to that office.

Intoxicating Liquors—Bonds—Person who has signed saloon keeper's bond cannot be released therefrom during license year.

October 16, 1918.

FRANK W. BUCKLIN,

District Attorney,

West Bend, Wisconsin.

In your letter of October 8 you inquire what steps are necessary in order for a bondsman on a saloon keeper's bond to obtain his release therefrom; whether it would be sufficient for the bondsman seeking his release to simply notify the municipal authorities in writing to that effect, and then have the municipal authorities demand a new bond from the saloon keeper.

A bond is a contract which is binding upon all parties that have entered into it, and no party can withdraw from the obligations incurred, unless the statute so provides or unless it is part of the agreement constituting the bond. I find no statutory provision which authorizes the discharge of any person from the obligations of the bond during the time that the license is in force.

In the case of *Fidelity & Deposit Company of Maryland v. Jenness*, 116 N. W. 709, 711 (Iowa), the court had under consideration the liability of a surety on a saloon keeper's bond, and in the course of the opinion said:

"* * * As there is no provision as to the term for which the bond is required to be given, we think it was the evident purpose of the Legislature to permit a continuing bond which shall not be subject to revocation during any year with reference to which it has taken effect."

So the Michigan court has held that the removal of the surety from the corporate limits does not relieve him from the obligations of the bond. *Wright v. Treat*, 83 Mich. 110.

In the absence of a statutory provision on the subject, I am of the opinion that the bondsman of a saloon keeper cannot obtain a release therefrom during the license year.

Bonds—Municipal Bonds—Municipal Corporations—Cities—
Commissioners of public lands have no authority to agree to extension of time of payment of municipal bonds held as an investment and purchased with trust funds.

Neither has city authority, in consideration of such extension, to agree to payment of higher rate of interest.

October 17, 1918.

HONORABLE W. H. BENNETT, *Chief Clerk,*
Commissioners of Public Lands.

In a recent oral communication you stated that a portion of the state trust funds is invested in one hundred refunding bonds of the city of Superior of \$1,000 each, dated February 2, 1904, due February 2, 1919, and bearing interest at the rate of $3\frac{1}{2}\%$; that the city of Superior has requested an extension of payment, a portion thereof to be paid February 2, 1920, another portion February 2, 1921, and another portion February 2, 1922, and that in consideration of said extension the city promises to pay interest at the rate of $4\frac{1}{2}\%$ per annum.

I am unable to find any statute which authorizes the commissioners of public lands to grant any extension of payment on the bonds in question. Furthermore, I find no authority in law which authorizes the city of Superior to pay an increased rate of interest on said bonds, in consideration of an extension of the time of payment.

These bonds appear to have been issued under and by virtue of the provisions of sec. 926—11, Stats. 1898, as amended by ch. 228, laws of 1903. The bonds are denominated "refunding bonds" and were undoubtedly issued to refund a previous issue of valid general city bonds, and at the time of their issue the common council provided for the collection of a direct annual tax sufficient to pay the interest on said bonds as it falls due and

to pay and discharge the principal thereof on February 2, 1919.

Sec. 959—2 authorizes any city to pay up and retire its present bonded indebtedness by the issuance of bonds of the same amount, when such indebtedness can be retired or paid by the issuance or negotiation of new bonds bearing a rate of interest not exceeding that of the bonds so authorized to be retired or paid; and sec. 959—3 makes it optional for the holder of such existing bonds to surrender the same and accept in their place and stead other bonds, at the same or a lower rate of interest. It is clear that these sections do not authorize the city of Superior to bind itself to pay a larger rate of interest than the bonds now bear.

It might be claimed that this extension of time desired by the city of Superior could be granted under sec. 25.11, Stats. This statute reads as follows:

"All loans made or which may be made from any of such funds to any municipality may be extended for such time and upon such terms as may be agreed upon by and between the commissioners and such borrower; * * *."

This statute further provides that such extension cannot be granted if there is any default in the payment of interest nor to any period beyond twenty years from the inception of the indebtedness. I am satisfied that this statute does not apply. These bonds were purchased as an investment for the trust funds. They were not a loan made upon an application under ch. 25 of our statutes. I am satisfied that this statute for extension applies only to those loans that are applied for and granted by the land commissioners under said ch. 25, and that they do not apply to bonds regularly issued by municipalities as bonds and purchased by the land commissioners as an investment of trust funds.

It is therefore my opinion that the commissioners of public lands may not extend the time for the payment of the bonds.

Taxation—Inheritance Taxes—Public Officers—County Treasurer—On or before 5th of each January, April, July and October county treasurer should pay into state treasury all inheritance taxes collected by him during quarter preceding first of said months. On all amounts not paid in within five days after 5th of said months he is chargeable with 10% interest from and after 5th of said months.

October 17, 1918.

HONORABLE HENRY JOHNSON,
State Treasurer.

Your letter of October 15 reads as follows:

"Will you please render an official opinion in regard to sec. 1087—19, relating to county treasurers making returns to the state treasurer on inheritance taxes, when such payment should be made and when the penalty for said amount can be enforced?

"I am now referring to report made by the county treasurer of Wood county to me on September 30, which report I am herewith enclosing. In this he reports only two cases of inheritance taxes. On October 5 I received from him a receipt covering the amount of \$10,588.88, which according to his receipt was paid in to him on the 24th of September. I take it for granted that this should have been included in his report made to me on September 30. For what period can I enforce a penalty against said county treasurer?

"There also seems to be some question as to the time that reports should be made to the state treasurer. Formerly, before the statute was amended in 1917, such reports were to be made the first of the month following the end of the quarter; now it seems to be from the fifth of the following month. Are there five days added after the fifth of the month for them to make their reports before they are subject to penalty?"

You also submit for my inspection an inheritance tax receipt dated September 24, 1918, for the sum of \$10,588.88, signed by the county treasurer of Wood county.

Sec. 1087—19, as amended by ch. 115, Laws 1917, reads as follows:

"Each county treasurer shall make a report under oath, to the state treasurer, on and prior to the fifth day of January, April, July, and October of each year, of all taxes received by him under the inheritance tax laws, up to the first day of each of said months, 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."

Under said section it was clearly the duty of the county treasurer to include in his report all inheritance taxes received by him during the quarter ending with September 30, 1918. The item of \$10,588.88 covered by said inheritance tax receipt does not appear in his report for said quarter. On the face of said receipt it shows that said inheritance tax was received by the county treasurer on the 24th day of September 1918, and this collection should have been noted in his report. The section as amended makes it the duty of each county treasurer to make his report on and prior to the fifth day of the months of January, April, July, and October of each year, and he is required at the same time he makes his report to pay the state treasurer all the taxes received by him under the inheritance tax laws and not previously paid into the state treasury. It is evident that under this section a county treasurer may defer the making of his report on all inheritance taxes collected by him for the quarter ending September 30, 1918, until the fifth day of October, 1918, and may defer the payment of the taxes so received by him until said fifth day of October.

The said section further says:

"* * * 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."

Prior to the amendment of 1917, it was the duty of the county treasurer to make a report and make payment of all taxes collected to the state treasurer on the first day of said months, and for failure to pay such taxes into the state treasury within five days thereafter, he was subject to the payment of ten per cent interest thereon. So now, failure to pay "within five days from the time herein required," or within five days from the fifth day of October, will subject the county treasurer to the payment of interest at the rate of ten per centum per annum from the day it was by said section due and payable, or from and after the fifth day of October.

While the question as to the time from which the ten per cent

interest attaches is not free from difficulty, the construction given has the advantage of being definite and furnishing a rule which may be applied in all cases of neglect or default arising under said section. A county treasurer should make his report and should make his payment on or before the fifth day of each January, April, July and October. On taxes collected by him and not paid in within five days from the fifth of each of said months he should be charged with interest and the interest should begin to run with the sixth of each of said months.

It is therefore my opinion that in the instant case the county treasurer had until the fifth day of October within which to make out his report and within which to pay to the state treasury all taxes received by him under the inheritance tax laws, for the quarter ending on September 30, and that he is now subject to the interest penalty provided by said section, from and after the fifth day of October, or beginning with the sixth.

Criminal Law—Requisitions—Sec. 5278, U. S. Rev. Stats., does not require a copy of warrant for arrest of accused to accompany demand of governor of demanding state.

Mere clerical errors not going to substance of charge of crime and which cannot mislead anyone should be disregarded.

Requisition and accompanying papers should be liberally construed.

Where accused was in demanding state when alleged offense is claimed to have been committed and is later found in another state, even though in meantime and for space of several years he may have been frequently and openly and notoriously in demanding state he is fugitive from justice.

October 18, 1918.

HONORABLE EMANUEL L. PHILIPP,

Governor.

In re: Requisition of the governor of Illinois
upon you for the apprehension and return to
that state of W. C. Henke.

This matter came on for hearing October 18, 1918, Mr. Henke being represented by Mr. L. G. Wheeler, of Milwaukee, and the state of Illinois being represented by Wayne H. Dyer, state's attorney, of Kankakee.

Mr. Wheeler objected to the granting of the requisition upon several grounds:

First, that the warrant issued by the justice of the peace in Illinois, and which was attached to the requisition papers, is not a legal warrant in that it requires "me" to be produced "before me" instead of requiring the production of Mr. Henke before said justice.

Second, in that the petition to the governor of Illinois by the state's attorney is for a writ of requisition on the governor of Illinois, instead of upon the governor of Wisconsin.

Third, on the ground that Mr. Henke is not a fugitive from justice.

With reference to the first objection it is to be noted that sec. 5278, U. S. Rev. Stats., does not require a copy of the warrant to be attached to the papers, or to accompany the papers sent to the governor of the asylum state. If the demand for the surrender of the alleged fugitive is accompanied by a copy of an indictment found or an affidavit made before a magistrate, charging the person with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state from whence the person so charged has fled, that is sufficient. No claim was made here but that the affidavit accompanying these papers sufficiently charged the commission of an offense.

In addition to that, it is respectfully submitted that it sufficiently appears from the said warrant that in fact it was Henke and his codefendant who were to be brought before the justice, and that no officer could possibly be mistaken as to what was intended.

The second objection relates wholly to what is very clearly a mere clerical or typographical error. No one could be deceived thereby. The general rule in extradition proceedings is that the demand is not to be denied, nor is the accused to be released, upon *habeas corpus* proceedings, upon any mere technical grounds where it sufficiently appears from the papers that the accused is in fact charged with the commission of some offense in the demanding state.

Upon the question of whether Mr. Henke is a fugitive from justice Mr. Wheeler filed the affidavit of George A. Bates to the effect that during the years 1916 and 1917 Mr. Henke had frequently been a guest of the LaFayette Hotel in Kankakee, Illi-

nois, either for lodging or meals, and had received much mail at said hotel throughout said years at numerous intervals; that frequently in the latter half of the year 1917 said Henke was at said hotel and that at all said times he was in and about the hotel openly and publicly; that there was nothing concerning his conduct that appeared to indicate any stealth or effort to conceal his presence or movements.

He presented also the affidavit of Werner W. Schroeder to the effect that he is one of the attorneys for Gerald A. Rolfes in an action in which L. H. Weis is plaintiff, involving the same matters concerned in the prosecution of Mr. Henke on complaint of Mr. Weis; that in taking evidence in that case it appears that all of the transactions in which Henke was concerned occurred on and between the 4th day of November, 1915, and the 7th day of April, 1916; that the only representations that the said L. H. Weis, when on the witness stand, claims were made by Mr. Henke, were made at or before the 4th day of November, 1915, except one statement made shortly thereafter; that in a letter introduced in evidence and admitted by Weis to be his, dated August 7, 1916, and addressed to Mr. Rolfes, he stated among other things that he saw Mr. Henke

"some over a week ago and asked him to have the notes renewed, and said he would do so, those that are due and the ones that are coming due, as to our understanding and agreement."

This affidavit also contains other statements with reference to the commission of the alleged offense.

Mr. Wheeler filed also the affidavit of Mr. Henke himself with reference to the transactions out of which the charge against him arose, and that he was in Illinois from August 18, 1916, to July, 1917, and among other portions, was at Kankakee on numerous occasions openly and publicly, and frequently met Mr. Weis and exchanged greetings with him, and that such meetings with Weis extended at numerous intervals throughout the entire period of time from August 18, 1916, to July, 1917; that from July, 1917, to about the 15th of December, 1917, he made his headquarters at the LaFayette Hotel in the city of Kankakee and was in said city and the surrounding territory constantly during said period, and frequently met Weis on the streets of Kankakee and exchanged greetings with him; that during that period Weis never made any complaint to him that he had been

defrauded; that he, Henke, went openly about and through the state of Illinois, through the county and city of Kankakee, continually, meeting the said L. H. Weis casually upon the streets and exchanging greetings as aforesaid; that during all of the times since he first became acquainted with Weis in November, 1915, the latter knew that he, Henke, had resided in the city of Milwaukee, where he had numerous relatives and friends, and where his property was located, and knew at all said times that said Henke went home to Milwaukee regularly almost every one or two weeks during all of his stay in Illinois; that he frequently bought eggs and butter of Weis to carry to his home in Milwaukee and frequently talked with Weis concerning his home in Milwaukee.

He also presented the affidavits of four citizens of Milwaukee with reference to the residence in Milwaukee of Mr. Henke.

In opposition to this Mr. Dyer filed the affidavit of Mr. Weis to the effect that the offense upon which these requisition proceedings are based was committed on November 4, 1915, and that at that time Henke was personally present in the state of Illinois, and in the county of Kankakee; that between November 4, 1915, and February 14, 1916, he met Henke several times in Illinois.

Also a certified copy of an indictment is submitted found by the grand jury of Kankakee county, Illinois, at the October term of the circuit court for that county in the year 1918; also a certified copy of the proceedings had in the district court of the county of Milwaukee of this state upon the fugitive warrant proceedings against said Henke.

It was stated by Mr. Dyer that the offense for which the requisition papers were issued was actually committed on the 4th day of November, 1915, and it was conceded by Mr. Wheeler that no question should be raised because of the difference between that date and the date stated in the requisition papers.

The contention of Mr. Wheeler was that because, as he claimed, Henke was openly and notoriously in Illinois, constantly and repeatedly from the time the offense is alleged to have been committed until some time in 1917, and left there openly and notoriously for the purpose of returning to his home in Milwaukee, therefore he is not a fugitive from justice. To sustain this contention he cited 12 Am. & Eng. Encl. of Law (2d ed.), 601 and 602, with the notes thereto, and Spear on Extradition

(2d ed.), 381-384, and the cases there cited. A reference to these authorities shows that those cited in the Ency. of Law are the same as those cited in Spear on Extradition. The only one of these cases that seems to be squarely in point is an opinion by Governor Fairfield of Maine, given in 1838. One other case, that of John J. Patterson, in 1877, decided by Judge Humphreys of the supreme court of the District of Columbia, in 1877, might at first sight seem to be in point, but it appears that no record of the case was kept, and the reference is to a newspaper report from which it appears that the ground of Judge Humphrey's decision was that Patterson had not voluntarily fled from South Carolina, but had been sent therefrom by the people of South Carolina as their senator, and consequently could not be said to be a fugitive from justice.

In view of the later decisions of the United States supreme court, I am of the opinion that Mr. Henke is a fugitive from justice.

In a case decided in 1907 the supreme court said:

"A person charged with crime against the laws of a State and who flees from justice, that is, after committing the crime, leaves the State, in whatever way or for whatever reason, and is found in another State, may, under the authority of the Constitution and laws of the United States, be brought to the State in which he stands charged with the crime, to be there dealt with according to law." *McNichols v. Pease*, 207 U. S. 100, 108.

It appears to me, under this authority, that it is immaterial how much time Mr. Henke may have spent in Illinois since the alleged commission of the offense. The fact remains that he was in Illinois at the time the offense is charged to have been committed, and afterwards left that state. He is a fugitive from justice within the meaning of the constitution and laws of the United States.

For the reasons stated, it is my opinion that the requisition of the governor of Illinois upon you should be honored.

Civil Service—Public Printing—Biennial Report—Biennial report to governor by civil service commission must contain copy of its rules and regulations although such rules and regulations have recently been printed in booklet for distribution.

October 21, 1918.

HONORABLE JOHN A. HAZELWOOD,

Secretary and Chief Examiner,

Wisconsin Civil Service Commission.

In your letter of October 18 you submit the following:

"Par. (4), sec. 16.04, ch. 16 of the statutes relating to the duties of the Wisconsin civil service commission reads as follows:

"‘Make a biennial report to the governor on June thirtieth in each even-numbered year, showing its own actions, the rules and regulations,’ etc.

"During the past year the commission has published in booklet form the civil service law, rules and regulations under which it operates. To reprint the rules and regulations in their entirety in order to have them under the same cover as the regular biennial report of the commission seems to us like a useless duplication.

"May the civil service commission consider the booklet of law, rules and regulations already published as part two of the biennial report to fulfill the intent and purposes of the law as set forth in sec. 16.04, par. (4), ch. 16?"

That part of sec. 16.04 which is pertinent here is as follows:

"The commission shall:

"(1) Prescribe, amend and enforce rules and regulations for carrying into effect the provisions of this chapter. * * * Notice of the contents of such rules and regulations and of any modifications thereof shall be given by mail in due season to appointing officers affected thereby, *and such rules and regulations shall also be printed for public distribution.*

"* * *

"(4) Make a biennial report to the governor on June thirtieth in each even-numbered year, showing its own actions, the rules and regulations and all the exceptions thereto in force, and the practical effects thereon, and include therein any suggestions it may approve for the more effectual accomplishment of the purposes of this chapter. * * *."

You will note that subd. (2), sec. 35.35 requires the reports mentioned in sec. 35.27, which includes that of the civil service commission, to be

"seven and one-quarter inches high and four inches wide, the text of the * * * reports in eight-point type on a ten-point body with all extracts, lists, tabulations, syllabi, indexes and digests printed solid in such type as the printing board shall designate * * *."

It is not required that the booklet containing the rules and regulations and modifications to be printed for public distribution shall measure up to these measurements and sizes, so that the booklet published by you cannot be said to be in compliance with the requirements of subd. (4), said sec. 16.04.

Whether this is a useless duplication, as you suggest in your letter, is not a matter for this department to determine, nor for the civil service commission to pass upon. That is a question solely for the legislature to determine. The law may be unwise, but it is clear, and there is no room for construction. The language used has a peremptory meaning, and administrative officers have no choice except to comply with it.

I have therefore come to the conclusion that your question must be answered in the negative. If the law is unwise, it will be a matter to present to the legislature for consideration.

I believe, however, the legislature had some reason for requiring these reports to be printed of a certain size. Formerly, it was required by statute that the reports from the different departments should be bound in a volume, or volumes. See sec. 319, Stats. 1898. This law has, however, been repealed, and there is no statute requiring the binding of these various reports. It may be of value, however, to have the various reports from the departments and public officials of a standard size, so that they may be bound in volumes by anyone at his own expense, or for use in libraries, or otherwise.

Corporations—Insurance—Provision in articles authorizing representatives and officers of corporation, at any regular or special meeting, to determine times and places for holding regular meetings does not authorize changing of duly called special meeting into regular meeting, at such special meeting.

Mutual benefit society may amend its articles in manner specified in subsec. 7, sec. 1958, Stats., or in manner specified in its articles, as it chooses.

October 23, 1918.

HONORABLE M. J. CLEARY,
Commissioner of Insurance.

Yours of October 22, with reference to the amendment to the articles of the Bohemian Roman Catholic Central Union of Wisconsin, received.

Under date of September 19 Mr. Kubasta, deputy commissioner of insurance, sent us this amendment, by which this organization attempted to change its name to "American Catholic Union." He then stated:

"This society was organized prior to the passage of sec. 1958—7 and a question arises as to whether or not the society may be permitted to amend its original articles without compliance with the provisions of the section above referred to. In other words, if a society complies with the provisions of its original articles, is such compliance sufficient or will such articles be affected by the passage of a subsequent statute relative to the regulation of societies of the same character?"

It appeared that this proposed amendment was adopted "at a special and general meeting of the officers and representatives" of the organization. It further appeared from the articles of organization, a copy of which Mr. Kubasta enclosed, that the articles could be amended by two-thirds of the members present "at its regular or adjourned meeting and voting." Another provision of the articles that was noted by me at the time, and to which you call my attention in your present letter, provides:

"Regular meetings of this corporation hereby formed may be held at such time and place as the corporation at any regular or special meeting may by a majority vote of its representatives and officers present and voting determine."

I took this matter up with Mr. Kubasta and suggested to him that in my opinion this provision did not authorize the representatives and officers present at a special meeting to change that

particular meeting into a regular meeting, but merely authorized such representatives and officers to determine at any regular or special meeting when the next regular meeting should be held, and of course the proper notice of such regular meeting should be given. I suggested to him that he take this matter up with the officers of the organization and get their views upon it before proceeding to pass upon the particular question asked by him. It would appear from your letter that there has been a little misunderstanding as to what my position is in the matter. I am still of the opinion that the special meeting cannot be changed into a general meeting under the provision quoted. As it appears from the certificate of the president and secretary

"that the foregoing amendment to the articles of association of the Bohemian Roman Catholic Central Union of the state of Wisconsin was duly adopted at a special meeting of the representatives, duly convened according to the articles and by-laws of said union,"

it would follow that if I am correct in my construction of the provisions of the articles these amendments were not validly adopted.

As to the question asked by Mr. Kubasta, it has been my idea ever since the enactment of subsec. 7, sec. 1958 that where the articles of organization provide a method of amendment, the corporation may amend either in the manner provided in such articles or in the manner provided in that subsection.

Bridges and Highways—Payments may be made under sec. 1317m—7, subsec. 3, subds. (c) and (d) in advance of the audit commanded by sec. 1317m—5, subsec. 8, subd. (3), par. (e), Stats.

October 23, 1918.

WILLARD E. GAEDE,

District Attorney,

Sturgeon Bay, Wisconsin.

In your letter of October 14, 1918, you quote sec. 1317m—5, subsec. 8, subd. (3), par. (e), and also section 1317m—7, subsec. 3, subd. (c), and ask for a construction thereof. You say:

"Trouble has arisen in this county over payments on road construction. The county highway committee insist that the

county clerk and the highway commissioner have no right to issue an order in payment of any work performable under contracts for road construction or bridges until they shall have first audited the same as provided in 1317m—5. 8. (3) (e). My predecessor in office and the highway commissioner have ruled to the contrary and hold that to audit the bill does not necessarily mean that it must be gone over by the committee before the same is paid. Upon the examination of *Corpus Juris* and the cases cited therein, it appears to me upon the face of it that they are correct, but in order to satisfy everybody I am asking for a ruling from your department as to whether or not it will be necessary for the pay rolls of all work to be done on contract for state roads to be audited by the committee before payments are made."

This question was considered at some length in an opinion rendered to the highway commission February 11, 1916, Vol. V, Op. Atty. Gen., p. 133, 137. The conclusion was there reached that the audit which the county committee is directed to make was not a prerequisite to and need not precede the payment of claims for highway work or materials. Doubtless your predecessor and the highway commissioner were acting under that opinion. It was there said:

"The term 'audit' has two different meanings. It may mean the examination and allowance of claims, or it may mean the examination of accounts to ascertain their correctness and whether or not items have been included that should not have been. See *Century Dictionary*, *Bouvier's Law Dictionary*, Vol. 1 *Words and Phrases*, (2d series) pages 367 and 368.

"In my opinion the provision for auditing the pay rolls and material claims and vouchers resulting from the construction of state aid roads and bridges, found in subd. (e), subsec. 3, see. 1317m—7, uses the term in its latter sense. In my opinion the claims are allowed by the county highway commissioner, and the orders are issued as heretofore set forth, and then the county committee meets from time to time to examine the accounts. Their duties are quite similar to those of a public auditor who is called in to audit the books and accounts of a private corporation."

" * * * The word 'audit' is sometimes restricted to a mere mathematical process, but generally is extended to include the investigation, weighing of evidence, and deciding whether items should or should not be included." *Travelers Ins. Co. v. Pierce Engine Co.*, 141 Wis. 103, 106-107.

Doubtless the practice in the various counties very generally conforms to the opinion of this department before given, and

I see no reason for receding from it. In fact, reexamination of the question leads me to the conclusion that was reached on the first investigation.

Elections—Special Messengers—Messengers not to be sent to university to take vote of S. A. T. C., as members of that organization do not come within provisions of sec. 11.69.

October 23, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your favor of October 22 you inquire

“whether or not it is the duty of this department under sec. 11.69 to cause election messengers to be stationed at the S. A. T. C. at the university of Wisconsin for the purpose of receiving the vote of the members of that organization.”

I understand that the members of the S. A. T. C. at the university of Wisconsin are inducted into the military service of the United States and would come within the provisions of sec. 11.69, if they were stationed outside the state of Wisconsin. Not being stationed outside the state of Wisconsin, I am unable to find any provision of that statute that brings them within its provisions.

The provisions of that statute apply to electors of this state in the military service of the United States:

“(1) * * * Stationed at any camp, army post, station or cantonment without this state but within some other state of the United States or the District of Columbia, * * *

“(2) * * * Stationed at any camp, army post or cantonment in any foreign country * * *.”

The members of the S. A. T. C. come within neither of these two provisions, as they are stationed within the state of Wisconsin.

A third provision of the statute provides as follows:

“ * * * Whenever any company of the Wisconsin national guard, or any temporary military force provided for by section 21.02 of the statutes, is stationed at any camp, army post, station or cantonment within this state twenty-five days prior to the day prescribed by law for holding any such election the adjutant general shall certify such fact to the secretary of state.” See. 11.69, subd. (2).

This provision does not apply to the S. A. T. C., as they are not members of the Wisconsin national guard, nor are they a part of the temporary military force provided for by sec. 21.02 of our statutes.

I am therefore of the opinion that you are not required to provide any messenger for the purpose of taking the vote of the S. A. T. C. at the university.

Trade Regulations—Trading Stamps—Construction and application of sec. 1747m, the so-called “Trading Stamp Law.”

October 23, 1918.

HONORABLE GEORGE J. WEIGLE,

Dairy and Food Commissioner.

Referring to the recent request of the Downey-Farrell Company and others for rulings relative to their future operations in this state under the so-called “Trading Stamp Law” as recently interpreted by our supreme court, you are advised as follows:

Regarding the right of the above named corporation to continue to send into this state in connection with its product the so-called “merchants’” coupons, you are advised that such right undoubtedly exists, so long as such coupons are so introduced and used that the transaction forms a part of the interstate commerce with respect to the product. You are familiar with the established limits of the interstate transaction created by the so-called “original package” and “first sale” doctrines. They will guide your department in testing any particular transaction. If you are in doubt in any instance, the specific case can be referred to this department for an opinion.

It has been suggested by the parties interested that they be permitted to continue to distribute in this state (for a limited time, at least) in connection with single cartons or retail packages of the product, consumers’ coupons in the general form of those involved in the recent case, provided the trading stamp companies concerned pledge themselves not to redeem such coupons coming from this state. In support of this suggestion it is pointed out that the coupons now contain a statement on their face that they are void where prohibited, and hence that they are void and their circulation ineffective in this state. Va-

rious practical difficulties are pointed out which it is claimed will result if a manufacturer is required to prepare that portion of his product destined for this state in a different manner than that which is to be shipped elsewhere.

You are advised that the request made cannot lawfully be granted. The consumers' coupons which the interested parties thus desire to continue to send into this state do not comply with the law. They are on their face redeemable by a third party. In my opinion they are not saved from this criticism by the fact that they contain also a statement that they are void where prohibited. Nor do I believe that it is necessary for your department to wait until such a coupon has actually been redeemed by the trading stamp company and until you are in possession of proof of the fact of such redemption before you are warranted in declaring that the law has been violated and in proceeding accordingly.

The circulation of such coupons in this state is subject to another criticism. Though not intended to mislead or defraud the consumer, it would actually result in so doing. The ordinary purchaser in Wisconsin of a product containing such a coupon naturally assumes that it has been placed there for his advantage. He reads on its face the statement of its redemption value and the manner in which he may redeem it. Perhaps he has collected and redeemed such coupons in the past. He naturally concludes that the coupon would not be issued in Wisconsin at all if it was not for use in the manner indicated. The words "void wherever prohibited," if noticed at all, are meaningless in the face of this natural assumption and of his ignorance of the law. He is undeceived only after he has made a collection of the coupons and sends them to the trading stamp company, when he is informed that the coupons cannot be redeemed because they have originated in this state. A person passing through such an experience will most naturally conclude that he has been tricked and misled in a wholly unjustifiable manner.

Another objection to the suggested practice is that it would open the door to the evasion of the statutes of this state by the collection of these coupons in this state and the forwarding of them to the trading stamp company for redemption through and with the aid of a person residing in an adjoining state. Instances of this have already come to my notice.

For these reasons, I am firmly of the opinion that the suggested

practice should not be permitted by your department. Such hardships as may result from the enforcement of the law are matters for which your department cannot be held responsible and which cannot be deemed a sufficient cause for failing to enforce the statute in question according to its terms.

Criminal Law—Assault—Under an information charging assault not armed with a dangerous weapon with intent to murder, defendants may be convicted of assault with intent to do great bodily harm, or assault and battery, or simple assault.

October 24, 1918.

C. M. HILLIARD,

District Attorney,

Durand, Wisconsin.

I have your letter of October 21, together with a copy of the information in the case of *State v. Henry Bauer and Alfons Bauer*. The information is one charging the defendants with assault and battery, not being armed with a dangerous weapon with intent to murder, and you inquire whether under this information they may be convicted of assault with intent to do great bodily harm, or assault and battery, or simple assault.

This question must be answered in the affirmative. In the case of *Kilkelly v. The State*, 43 Wis. 604, the court had under consideration an information which charged assault, being armed with a dangerous weapon, with intent to murder. The court said, on page 608:

" * * * If the felonious intent charged be negatived or stricken out, there remains a charge of assault and battery. And if the battery be negatived, there remains a sufficient charge of simple assault. Hence, on this information, the plaintiff in error may lawfully be convicted, either of an assault with the felonious intent charged, or of a simple assault and battery, or of a mere assault."

In that case the court, however, held that an information charging one with assault and battery with intent to murder was not sufficient to sustain a conviction of assault and battery with intent to maim.

That same ruling was adhered to by our court in the case of *State v. Yanta*, 71 Wis. 669.

But in a later case, that of *Birker v. The State*, 118 Wis. 108, these latter cases were reversed on said point. Justice Siebecker, speaking for the court, on page 112 said:

"The information in the present case charges that the plaintiff in error, being armed with a dangerous weapon, did make an assault upon another with intent to murder. The verdict declares him guilty of an assault with intent to do great bodily harm. All the elements of the offense charged are found, except the particular intent to murder, but that the accused had a different intent, namely, the intent to do great bodily harm. It seems that an assault with intent to murder must, from the very nature of the acts constituting the offense, embrace an intent to do great bodily harm. It therefore follows that the offense of which plaintiff in error was convicted is necessarily included in the offense charged in the information, and we are of opinion that the information, as presented, sustains the conviction of an assault with intent to do great bodily harm."

You are therefore advised that under the information submitted, the defendants may be found guilty of assault with intent to do great bodily harm, of assault and battery, or of simple assault.

Public Officers—City Officers—Corporations—Contracts—A stockholder of a corporation is interested in its contracts; if an officer of a city the contracts are void.

October 29, 1918.

E. S. JEDNEY,

District Attorney,

Black River Falls, Wisconsin.

In your letter of October 25 you state that a man in your city who is engaged in the undertaking business is also a member of your city council; that he has stated to you that he wanted to form a partnership or a corporation to carry on this business, in order that such partnership or corporation might transact business with the city of Black River Falls by selling caskets, undertakers' equipment, etc.

You state you advised him that this would be just as much of a violation of the provisions of sec. 4549, Wis. Stats., as if he

sold these things directly and performed the services directly for the city. You ask for my opinion on this matter, and you also inquire whether this officer is violating the provisions of sec. 4549, Stats., by selling caskets and performing undertakers' services for the city of Black River Falls in indigent cases, provided he does not vote or take any part in the proceedings in any way which have anything to do with the contracting for such services or merchandise, or the auditing or paying of the bills.

Your advice in this matter was certainly correct. This department has ruled that a city officer who is also a stockholder in a corporation cannot legally contract with such corporation for goods purchased by the city. See Opinions of Attorney General for 1906, p. 742; see also Opinions of Attorney General for 1912, p. 766, and other opinions referred to on page 768.

A partner in a partnership is certainly interested in a contract made by the partnership, and sec. 4549 includes not only contracts in which the officer has a direct interest, but also those in which he has an indirect interest. The same is true of a stockholder of a corporation. A stockholder in a private corporation clearly has an interest in its contracts, and when the city cannot make a contract with the officer himself, it cannot make it with the corporation in which such officer is a stockholder. There would at least be an indirect interest by the officer in such a contract.

Under the decision of our supreme court in the case of *Menasha Wooden Ware Company v. Winter*, 159 Wis. 437, 451, 452, sec. 4549 includes a contract made with a city in which contract the officer has a direct or indirect interest, although the contract was not made directly through him.

The contract would also be void under the provisions of sec. 17.21, Stats.

Appropriations and Expenditures—Normal Schools—The board of regents of normal schools is empowered to expend money for erection of barracks and equipment of mess halls and barracks and operating same although it has not entered into a contract with the federal government that such money be refunded by the U. S. to the state or to a board thereof.

November 4, 1918.

THE BOARD OF REGENTS OF NORMAL SCHOOLS.

You have referred me to ch. 1, laws of 1918, passed at the last special session of the legislature, and you have requested an opinion concerning the construction to be placed upon said law. The question submitted may be stated as follows:

Does ch. 1, laws of 1918, empower the board of normal school regents to expend money to be used for the building of barracks and for the construction and equipment of mess halls and barracks for the use of students enrolled in the Students' Army Training Corps at the several normal schools and for the operation of mess halls and barracks thereat, in the absence of a provision in a contract between the said board and the federal government that the moneys so used will be refunded?

Sec. 1 and sec. 2 of the act authorize the board of regents of normal schools:

"1. To contract with the various departments of the United States Government for the purpose of furthering the plans of the United States in its conduct of the present war.

"2. To utilize their buildings, grounds and equipment in cooperating with the federal government in its plans for the conduct of the present war.

"3. To advance moneys from their appropriations for operation, maintenance, and capital for the purpose of expediting its contracts with the various departments of the federal government in their plans for the conduct of the present war; such funds, however, to be refunded to the proper appropriations from which they have been advanced upon their receipt from the federal government."

Sec. 4 of said act contains the following:

"(1) There is hereby appropriated to the State Board of Education from any moneys in the general fund not otherwise appropriated an amount not to exceed ninety thousand dollars to be used for the construction of barracks at such of the state normal schools as may be necessary in order to properly house the students enrolled in the student army training corps; such barracks to be constructed in accordance with the plans approved by the United States Government, and on file in the State Department of Engineering.

"(2) There is hereby appropriated to the State Board of Education from any moneys in the general fund not otherwise appropriated an amount not to exceed fifty-five thousand dollars to be used for the construction and equipment of mess halls and barracks to be used for students enrolled in the student army training corps at the several normal schools and Stout Institute. Of this amount fifty thousand five hundred dollars is to be available only for the normal schools and four thousand five hundred dollars for Stout Institute.

"(3) There is hereby appropriated to the State Board of Education from any moneys in the general fund not otherwise appropriated an amount not to exceed fifty thousand dollars to be used as a revolving appropriation for the operation of mess halls and barracks at the University, the several normal schools and Stout Institute; this sum to be allotted in such manner as the State Board of Education deems proper.

"(4) * * *

"(5) All moneys received by each and every person for or on account of subsistence or operating expenses of housing students enrolled in the student army training corps or similar work at the several normal schools shall be paid within one week of receipt into the normal school fund income and are appropriated therefrom for the operation of mess halls and barracks at the several normal schools.

"(6) * * * ."

Sec. 5 provides:

"All moneys received from the United States Government on account of contracts for student army training corps or similar work shall be treated as a repayment of moneys advanced by the state and shall not increase the several appropriations of the educational institutions with the exception of moneys received for the furnishing of subsistence and operating expenses of housing which are distinctly appropriated to the respective institutions in subsections 4, 5, and 6 of section 4 of this act."

Under subsec. (1), sec. 4, as above quoted, it clearly appears that there is an appropriation to the state board of education to

be used for the construction of barracks at such of the state normal schools as may be necessary to properly house the students enrolled in the Students' Army Training Corps. Here express authority is given to construct these barracks but they must be constructed in accordance with the plans approved by the United States government.

Subsec. (2) contains an appropriation to the state board of education to be used for the construction and equipment of mess halls and barracks used by students enrolled in the Students' Army Training Corps, at the several normal schools.

And subsec. (3) appropriated to the state board of education money to be used as a revolving appropriation for the operation of mess halls and barracks at the several normal schools. The right to use these appropriations for the purposes specified is not dependent upon the existence of a contract with the federal government that the money so used should be refunded to the state or to any board thereof. The contracts which the board of normal school regents are authorized to make with the federal government are not a condition precedent to the expenditure of the appropriations here given. Had the legislature intended to make these appropriations on condition that the normal schools were able to make a contract with the federal government to have the funds so expended refunded to the state, it would have been an easy matter for them to have said so in clear and explicit language. The phraseology of this statute is not open to construction as there is no ambiguity, and it seems to me that the intent appears fairly clear from the wording of the same.

I am therefore constrained to answer your question in the affirmative.

Dairy and Food—Words and Phrases—Public Health—Ch. 152, Laws 1905, is no longer in force.

Under sec. 4601, subd. (2), it cannot be required that the percentages of ingredients be stated.

"Character" and "composition" defined.

November 9, 1918.

DAIRY AND FOOD COMMISSIONER.

Your letter of September 10 reads as follows:

"The question has arisen as to whether it is necessary to state the percentages of glucose, or corn syrup, and refiners' syrup

on mixtures of these two substances when the same is shipped into this state in interstate commerce.

"The legislature of 1905 enacted a statute relating to the sale of syrups, molasses and glucose mixtures, which statute is found in chapter 152, laws of 1905. The legislature of 1907 amended that statute by passing section 4601—1a, chapter 557, laws of 1907. The supreme court of the United States held this statute to be unconstitutional. The legislature of 1913 passed section 4601—1a, chapter 657, laws of 1913, relating to the labeling of glucose and syrup mixtures and on April 5, 1915, Judge Sanborn of the federal court for the western district of Wisconsin issued a decree restraining George J. Weigle, dairy and food commissioner, from enforcing the provisions of section 4601—1a, chapter 657, as far as interstate shipments of syrup and syrup mixtures were concerned. The law was held valid and applicable to interstate shipments, however.

"Do the provisions of the law, as found in chapter 152, laws of 1905, apply, or were the provisions of that statute nullified when it was amended by chapter 557 of the laws of 1907? If the latter is the case, then is the matter covered by our general food law, sections 4600 and 4601? Section 4601 says that an article of food shall not be deemed adulterated within the meaning of the preceding section, in the case of mixtures or compounds sold under their own distinctive names or under coined names, if the same be so labeled, branded or tagged as to plainly show their true character and composition. Can the true composition of mixtures or compounds of this kind be shown without stating the percentages of the ingredients?"

Ch. 152, Laws 1905, relating to the sale of syrups, molasses and glucose mixtures was amended and superseded by ch. 557, Laws 1907, and the law as amended was numbered secs. 4601—1a, 4601—2a and 4601—3a, Stats. 1898. Sec. 4601—1a, the act of 1907, has the same numbering in the statutes of 1917.

After the supreme court of the United States, in the case of *McDermott v. Wisconsin*, 228 U. S. 115, declared sec. 4601—1a void as to interstate commerce, the legislature of 1913, by sec. 1, ch. 657, expressly repealed sec. 4601—1a, and, by sec. 2 of said chapter, created a new section bearing the same number, viz., 4601—1a. This act of 1913 is still in force and is numbered 4601—1a in the statutes of 1913, 1915 and 1917. This section relates to the sale of syrups, molasses, glucose mixtures and maple syrup mixtures.

In March, 1915, a suit was brought in the United States district court for the western district of Wisconsin, by the Corn Products Refining Company against George J. Weigle as a dairy

and food commissioner of this state to restrain him from enforcing the provisions of said section on the ground that it is in conflict with the Federal Pure Food Act of June 30, 1906, ch. 3915, sec. 2, 34 U. S. Stats. at Large, 768 (8718, U. S. Comp. Stats. 1913), prohibiting the introduction into any state from any other state of any article of food which is adulterated or misbranded, as defined by sec. 8 (8724, U. S. Comp. Stats. 1913). That court found that sec. 4601—1a, Wis. Stats., is invalid as applied to sales in interstate commerce and granted a perpetual injunction restraining the dairy and food commissioner of Wisconsin from putting into force against the complainant or its jobbers or retailers the provisions of said section. No appeal was taken from this decision. The opinion of the court expressly sustained the statute as to purely internal commerce and held further that it was probably effective as to "dealers using trademarks or names." *Corn Products Refining Co. v. Weigle*, 221 Fed. 988, 993.

From the foregoing brief history of the section referred to it is evident that ch. 152, Laws 1905, no longer is in force. It was amended by ch. 557, Laws 1907, and as amended was by ch. 657, Laws 1913, expressly repealed.

Sec. 4600 prohibits the sale of any adulterated drugs or foods and defines the term "drugs" and the term "food."

Sec. 4601 defines what articles of drugs and what articles of food shall be deemed adulterated.

Sec. 4601aa prohibits the misbranding of foods, as defined by sec. 4600 and declares what shall be held to be misbranded.

Secs. 4600 and 4601 are statutes covering generally the subject of adulterated drugs and foods and the latter section defines what shall be deemed adulteration of drugs and foods. To the end of subd. (2), sec. 4601, is added the following proviso relating to foods:

" * * * * Provided, that any article of food which is not adulterated under the provisions of the fourth, fifth, sixth and seventh specifications of this section, and which does not contain any filler or ingredient which debases without adding food value, shall not be deemed adulterated in the case of mixtures or compounds sold under their own distinct names or under coined names, if the same be so labeled, branded or tagged as plainly to show their true character and composition. And provided further, that nothing in sections 4600 and 4601 shall be construed as requiring or compelling proprietors or manufacturers of pro-

proprietary foods to disclose their trade formulas, except as far as may be necessary to secure freedom from adulteration, imitation or fraud."

The questions to be determined are: What is to be understood by the language "true character and composition?" Can the true character and composition of an article of food be shown without a statement of the percentages of the ingredients therein?

As to syrups, the legislature has passed a special law known as sec. 4601—1a, Stats. 1917. It prohibits a person from selling syrups mixed with glucose unless the same be distinctly branded, tagged or labeled so as to show plainly the percentage of each ingredient composing such mixture and specifies how the names and percentages of such ingredients shall be typed.

As to maple syrup, the legislature has gone a step farther and has required that "the true name of each and all of the ingredients composing such mixtures" be given. Sec. 4601—2a.

I am unable to find where the words "character" and "composition," as used in this section, have been construed by the courts of last resort. It is necessary, therefore, to have recourse to dictionaries and encyclopédias for the purpose of securing definitions of these terms.

The Century Dictionary and Cyclopedie gives the following definitions of the word "character" in the sense in which the word is undoubtedly used in the said section:

"4. A distinguishing mark or characteristic; any one of the properties or qualities which serve to distinguish one person or thing from others; a peculiarity by which a thing may be recognized, described and classified.

"5. The combination of properties, qualities or peculiarities which distinguishes one person or thing, or one group of persons or things, from others; specifically, the sum of the inherited and acquired ethical traits which give to a person his moral individuality.

"* * *

"9. Strongly marked or distinctive qualities of any kind."

In the same work the word "composition" is given the following definitions, which seem applicable:

"1. The act of composing or compounding, or the state of being composed, compounded or made up; union of different things or principles into an individual whole; the production of

a whole by the union or combination of parts, constituents, or elements.

"* * *

"6. The manner in which or the stuff of which any thing is composed; general constitution or make-up; structure."

None of these definitions seem to favor a construction which would warrant me to hold that in order to plainly show the true character and composition of a food it is necessary to state the percentage of the ingredients therein.

The supreme court of the state of Michigan had occasion to construe a statute reading something like ours. The proviso at the end of its pure food statute reads as follows:

"And provided further that the provisions of this act shall not apply to mixtures and compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered for sale shall bear the name and address of the manufacturer and be distinctly labeled under its own distinctive name, and in a manner so as to plainly and correctly show that it is a mixture or compound." 2 Compiled Laws, sec. 5012.

I quote the following from the opinion in the case of *Armour & Co. v. Bird*, 159 Mich. 1, 123 N. W. 580, 584, 25 L. R. A. (N. S.) 616, relating to the above quoted proviso.

"* * * * The statute does not require the label to state the proportion of the ingredients comprising the mixture, but only the names of the ingredients. The statute makes special provision for butter, cheese, lard, canned fruits and vegetables, coffee and molasses. There are other statutes governing the manufacture and sale of specific products requiring the proportions of the ingredients to be placed upon the label, as Act No. 123, p. 145, Pub. Acts 1903. *People v. Harris*, 135 Mich. 138, 97 N. W. 402. It is within the power of the Legislature to pass an act specifically providing for the manufacture and sale of sausage, and that the labels should state the proportion of the ingredients used. We hold a label 'sausage with cereal' upon packages sold to consumers is a compliance with the statute in labeling the mixture, * * * ."

As it is undoubtedly within the power of the legislature of Wisconsin to require a statement of the percentages of each ingredient in a mixture or compound, and as the legislature has in the case of syrups by sec. 4601—1a and in the case of maple syrup by sec. 4601—2a affirmatively exercised its discretion, the failure to make such a requirement in sec. 4601 would seem to

make applicable the language above quoted from the Michigan decision and gives strong support to the theory that the legislature did not intend that the percentages of ingredients should be stated on foods coming within the purview of sec. 4601, subd. (2).

It is therefore my opinion that under the provisions of sec. 4601 it cannot be required that percentages of the ingredients in a food compound or mixture be stated. In other words, the requirements of the statute that the label or brand or tag on food should "show their true character and composition" does not require that the percentages of the ingredients should be stated.

Public Officers—County Treasurer—County Clerk—Bonds—
Premium to be paid by county for surety bonds for county treasurer and county clerk under sec. 702 is not limited by sec. 1966—38, Stats.

November 9, 1918.

H. B. ROGERS,

District Attorney,

Portage, Wisconsin.

You call my attention to sec. 702, Wis. Stats., which provides as follows:

" * * * * The county board may, by resolution, duly adopted, require the county treasurer and county clerk to furnish as surety on their official bonds, surety companies; and pay such companies out of the general funds in the county treasury, the premium of such surety company or companies, for such security. The compensation to be paid to such company or companies shall be determined by agreement between them and the county board."

You ask whether this section is still in force and can be acted upon by the county board notwithstanding the provisions of sec. 1966—38 where the expense of such bond exceeds $\frac{1}{4}$ of 1% per annum. The latter section, 1966—38, reads as follows:

"The state, any county, town, village, city or school district may pay the cost of any official bond furnished by the officer thereof, pursuant to law or any rules or regulations requiring the same, if said officer shall furnish a bond with a surety company or companies authorized to do business in this state, said

cost not to exceed one-fourth of one per cent per annum on the amount of said bond or obligation by said surety executed. *

* * ."

Without looking at the history of these two sections, it would seem quite clear that the provisions quoted from sec. 702 were intended to apply in the particular cases specified therein, that is, as to the bonds of the county treasurer and county clerk; whereas sec. 1966—38 is a general provision applying in all cases not otherwise specifically provided for. True, there is some degree of conflict in these statutes, but the general rule is that the statutes must be read together; if possible, they must be made to harmonize, and that construction must be given to them, if possible, that will permit both statutes to stand and operate in their particular fields. I think it is clear that without looking at the history of the statutes at all, that would be the construction and sec. 702 would be held to stand and be operative in its particular field.

There is some doubt cast upon this interpretation possibly by reference to the history of the statutes. Both of these statutes were before the legislature for consideration at its session in 1905. At that session of the legislature chs. 204 and 205, respectively, amended both of these statutes. Sec. 702 by said ch. 204, laws of 1905, was made to read practically as it does now; while sec. 1966—38 was made to read by ch. 205, laws of 1905, practically as it does now, with the exception that then the rate which the cost could not exceed was made $\frac{1}{8}$ of 1%, which has since been changed to $\frac{1}{4}$ of 1%. But in addition to this, the amendment of 1905 had this provision, in addition to its present reading:

" * * * * The provisions of this section relating to the cost of such bond shall not apply to bonds furnished by county officers. In such cases the cost of the bond or bonds may be fixed by agreement between the county board and the surety company, and shall not be limited to one-eighth of one per centum of the amount of said bond."

It is clear, therefore, that by the two amendments, chs. 204 and 205, laws of 1905, these two statutes were made to harmonize, and no question as to the application of either could reasonably be raised. By these amendments sec. 702 was left to operate exclusively in its field, independent of and without regard to sec. 1966—38. The latter section, however, was amended by ch. 329,

laws of 1911, by changing the rate from $\frac{1}{8}$ to $\frac{1}{4}$ per cent, that is, increasing the authorized cost of the bond, and by eliminating from the statute the provision last quoted above, excepting from the provisions, as to the cost of bonds, bonds furnished by county officers.

It will be noticed that sec. 702, Stats., never applied to any cases except that of the bonds of the county treasurer and county clerk, while sec. 1966—38 applies to other county officers as well, and the provision in the amendment made by ch. 205, laws of 1905, not only excepted from the provisions of sec. 1966—38 the bonds of the county treasurer and county clerk, but also all other county officers' bonds. While the placing of the exception in the amendment of ch. 205, laws of 1905, and the dropping of that same provision from the later amendment of ch. 329, laws of 1911, raises some doubt possibly as to the interpretation that should be given to these two statutes, yet I am satisfied that the general rule must still prevail, that is, that sec. 702 must be interpreted to stand and be in full force and effect, if that can reasonably be done and made to harmonize with the provisions of sec. 1966—38, as they now read; and it seems to me that this can be done. The two statutes cover separate general fields. Sec. 702 applies only to the bonds of the county treasurer and county clerk. It contains also the special provision by which the county board may require absolutely the furnishing of a surety bond by those officers. There is probably special reason why a surety bond should be required in those two cases, and the power vested in the county board to require surety bonds in those two cases is accompanied in the statute by the reasonable provision that when so required the expense thereof shall be paid by the county.

The other statute, sec. 1966—38, covers the general field, and I am satisfied should be interpreted as so covering the general field in all cases not otherwise specially provided for. The case of the bond of the county treasurer and county clerk is otherwise specially provided for, and, therefore, sec. 1966—38 does not apply. This interpretation of the two statutes enables both of them to stand and operate within the field evidently intended by the legislature.

I therefore advise you that it is my opinion that sec. 702 is

still in force according to its terms and may be acted upon by the county board as to the offices of county treasurer and county clerk; and the rate to be paid for the bond under sec. 702 is not governed by the rate provided for in sec. 1966—38.

Indigent, Insane, etc.—Courts—Counties—County court has no authority to order superintendent of hospital for insane to produce patient for retrial on sanity issue.

Expenses of retrial to be borne by county.

November 10, 1918.

BOARD OF CONTROL.

In your letter of November 3 you submit the following:

"Occasionally the two hospitals for the insane are called upon to take a patient to a distant part of the state for rehearing or reëxamination as to their sanity.

"All the expenses in making these trips have heretofore been paid by the institution in which the patient was confined. We do not believe that the charges should be paid by the institution, or by the state.

"Will you please advise us whether these charges can be collected from the persons who make the application for the rehearing, or whether the officers of the institutions are obliged to take the patients in obedience to the orders of the courts until after the expenses have been paid?"

By sec. 585, Stats., jurisdiction of the insane patients is vested in the judge of the county court, or in his absence or disability, in the judge of any court of record for the county in which such supposed insane person is found.

Sec. 587, Stats., provides for a retrial or reëxamination upon the question of sanity, and outlines the procedure. When a petition pursuant to said statute is filed with the county judge, it is mandatory upon the judge to appoint the necessary physicians to make an examination. It is also mandatory that the judge fix a time and place of examination, and in the event that the person to be examined is detained in a hospital or asylum, to give reasonable notice to the superintendent thereof of the time and place of such examination. Said section further provides:

" * * *

"All persons who render services in such proceedings shall receive the same compensation as is allowed by law to persons

rendering similar services in a judicial inquiry as to the mental condition of a person alleged to be insane, and such services and all expenses of such proceedings shall be allowed and paid by the county in which the proceedings are had, in the same manner as the expense of a criminal prosecution in a justice's court are allowed and paid. If the person examined resided in any county in this state, at the time of the commitment, under which he is being detained, other than the county in which such proceedings are had, such county in which he so resided shall reimburse the county in which such proceedings are had, for all expenses incurred therein by said county."

The intent of the legislature seems to have been to give to persons rendering the service in the retrial on a question of sanity the same fees as are provided for persons rendering similar service when the question is tried in the first instance. The physician, therefore, upon retrial would receive the fees provided in sec. 585d; the witnesses would receive the same fees as are allowed by law in other courts of record, sec. 602; the sheriff, if one acts, is by sec. 602 entitled to the same fees as are allowed in other cases. For taking an insane patient to a hospital or removing one therefrom he is entitled to five dollars per day, railroad fare, and other actual expenses, and the actual expense for the support and transportation of such person.

As to whether the expenses of retrial can be collected from persons who make applications, you are advised that there is no provision whereby this can be charged to the persons making the application.

You are further advised that whatever expenses are necessarily incurred in the holding of a retrial are a charge against the county, and in any event no expense should fall to the hospital where the patient is detained.

On the question of whether the superintendent of the institution is obliged to produce the patient in obedience to the order of the court a serious question is raised. The statute is silent as far as any specific direction is concerned as to the form of order and to whom the order shall be issued by the court for the bringing up of the patient to the place of trial.

Sec. 587 merely provides that notice be served upon the superintendent, and also upon the guardian. I am inclined to believe that the object of this notice is to give to the superintendent and the guardian, or either of them, the right to appear and resist the application made by the patient or his friends on the

part of the state, and thus to protect the public, and that they are not compelled in every case to do so. The wording of the statute is they "may appear at such examination." The language is not mandatory.

Presumably in such cases, if the judge before whom the trial is being conducted wants the testimony of the superintendent or the guardian, he can bring them up as witnesses on a subpoena as any other witness. If, as is provided in sec. 587, the superintendent

"cannot attend such examination without danger of injury to his institution, his deposition may be taken and returned pursuant to the statute for taking and returning depositions, and the same shall be admissible testimony on the examination."

Nowhere in the statute is any authority given to the probate court to order the superintendent to bring up the patient for trial, and there is grave doubt as to his power to issue such order. The practice seems to have been followed in many of the counties of the state to serve the notice provided for in sec. 587 and to append thereto an order requiring the superintendent to produce the patient. I am unable to find authority for this practice in the statutes. It seems to me that a much better practice and one that seems to be contemplated in the statute and inferentially authorized is that the judge before whom the trial is to be held order the sheriff of the county in which the trial is to be had to bring up the patient for trial and keep him in his custody subject to the order of the court until the matter is finally disposed of. The notice provided for to be given to the superintendent of the institution in which the patient is detained puts the superintendent upon his notice that the patient is desired at the place of trial, and when the order of the court is presented to him by the sheriff a complete plan of operation is set in motion.

This chapter is replete with provisions indicating a legislative intent to have the sheriff transport insane patients. In sec. 597, entitled "Warrant for patient's removal," provision is made that the court, except when the patient is surrendered to a relative, issue a warrant to the sheriff of the county authorizing the sheriff to remove the patient as the occasion requires.

In sec. 601, entitled "Execution of commitment," provision is made that the commitment may be issued to a relative or

friend or to the sheriff, who shall receive such insane patient and convey him to the hospital or asylum, and provision is made for every female over ten years of age so committed to be accompanied by a competent female.

Sec. 602, Stats., contains the following language:

"The sheriff shall be allowed the following fees for services performed under this chapter: For arresting and bringing a person alleged to be insane before the judge * * *; *for taking an insane person to the hospital or removing one therefrom*, five dollars per day, * * * and other actual expenses *for the support and transportation of such person*, and three dollars per day, railroad fare and necessary expenses of such assistants as may be ordered by such judge, * * *."

Thus it will be noticed that nowhere in the statute is there any provision for the superintendent of a hospital having custody of the patient outside of the institution, nor is there any provision for an order or commitment to be issued to him by a county court or any provision for payment to be made to him for his services in bringing a patient to the place of trial; while, on the other hand, the sheriff, who is the ever ready executive arm of the county court, is by this chapter named as the proper person to transfer insane patients upon order of the court. Provision is made also for the compensation to the sheriff. The sheriff of a county has the proper equipment to hold the patient in custody pending the trial. He seems to have been in legislative contemplation the proper person to perform the work of bringing patients up for trial and retrial in the county court.

I feel, therefore, that inasmuch as no provision is made in the statute requiring the superintendent of an insane hospital to take a patient for hearing before a county court, and inasmuch as it seems to have been the legislative intent that the sheriff should transport insane patients whenever their transportation is required, there is no duty resting upon the superintendent to transport the patient to the place of trial.

The county court has jurisdiction of the insane patient, but it has no jurisdiction over the superintendent of the hospital for the insane. It has no authority to order the superintendent to leave his institution to transport a patient. It is true the superintendent must recognize the order of the court and receive the patient who is committed to his care at the institution, and must recognize and obey the order of the court to the extent of deliv-

ering the patient to be transported by the proper person in obedience to the order of the court. But this control of the superintendent is merely incidental to the authority that the court has over the patient. The court may authorize the superintendent to transport the patient to the place of trial, and the superintendent may do so, if he desires. But he is under no obligation so to do.

The proper practice and the one that was obviously in the legislative contemplation when the statute was written is for the court to order the sheriff of the county where the retrial is held to bring up the patient, retain him in custody during the trial, and return him to the institution after trial, or make such other disposition of him as the court may order.

Public Officers—County Board—County board is empowered to employ graduate trained nurse. This may be done by board direct or in pursuance of resolution or ordinance adopted by board.

November 12, 1918.

MRS. MARY P. MORGAN, *Chairman,*

Woman's Committee State Council of Defense.

You recently submitted to me a copy of ch. 93, Laws 1913, numbered 697—10m, Wis. Stats. 1917, and a form of resolution to be presented to the county board of Marquette county. You desire to know whether the resolution as drafted will legally accomplish the employment of a graduate trained nurse in said county.

I have examined said resolution, and you will note that I have made a penciled correction as to the description of the statute.

According to the law, the county board is "authorized and empowered to employ a graduate trained nurse."

Sec. 652, Stats., reads as follows:

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

In view of the above section, the county board is empowered to name the person to be employed to fill the position or may proceed by resolution or ordinance to authorize a committee of the county board or some officer of the county board to consummate

the employment. I would suggest that you add to the proposed resolution a further resolve reading about as follows:

"Resolved that the committee on _____ (or the chairman and _____) be authorized to employ a graduate trained nurse herein provided for."

Public Officers—County Superintendent—Salary—A raise in salary of a county superintendent by the county board is applicable to the new term beginning in the ensuing year but not to salary until then.

November 16, 1918.

HONORABLE C. P. CARY,

State Superintendent of Public Instruction.

In your communication of November 15 you state that a county superintendent who was elected for the term beginning July 1, 1917, and ending June 30, 1919, receives a salary of \$1,500, as fixed by the county board of supervisors; that this superintendent resigned from office, said resignation to take effect November 15, 1918; that in accordance with the authority conferred upon you you have appointed a person to fill the vacancy, the appointment to take effect November 15, 1918; that at the annual meeting of the county board of supervisors in November, 1918, the committee on education recommended to the county board that the salary of the county superintendent, after December 1, 1918, be \$2,000 a year, and that before accepting the appointment the appointee has asked you to answer the following questions:

"1. If the appointment is accepted from November 15, 1918, and the county board of supervisors decide to increase the salary of the county superintendent, said increase to take effect December 1, 1918, will said appointee be able to draw his salary according to the increased amount determined upon by the county board of supervisors?"

"2. If the county board of supervisors acts favorably upon the recommendation to increase the salary beginning December 1, 1918, and the appointee files his acceptance to take effect December 1, 1918, will said appointee be entitled to salary according to the increase authorized by the county board of supervisors?"

You have submitted these questions to me, with a request for an opinion.

The county board has no powers other than those expressly or impliedly granted by statute. It has no common law powers. *Frederick v. Douglas County*, 96 Wis. 411; *Crandon v. Forest County*, 91 Wis. 239. The statute granting to the county board the power to fix the salary of the county superintendent is contained in sec. 694, subd. (1), which in part reads as follows:

"The county board at its annual meeting shall fix the amount of annual 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 will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer's term. *

* * "

The newly appointed county superintendent to whom you refer in your letter comes but partially within the purview of this provision. The salary fixed by the county board as \$2,000 only applies to a superintendent who is elected in the ensuing year. This is not the case. The county board of supervisors has no power to raise the salary except as this statute authorizes the same. If the county superintendent who is appointed by you is reelected at the coming spring election and begins his new term on the first day of July, 1919, he will then be entitled to the raise in salary as fixed by the county board. The attempt to have the raise in salary take effect at a date previous to said time is unauthorized by statute, and the resolution to that extent is inoperative.

For the foregoing reasons both of your questions are answered in the negative.

Public Printing—Public Records—Records of the expenditures of the state council of defense are not confidential and may be published in the report of the secretary of state.

November 18, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of November 15 you inquire whether the provisions of sec. 17, ch. 82, Laws 1917, which you quote in your

letter, prohibit your publishing the disbursements of the council of defense, as required by subd. (14), sec. 14.30; and if I should hold that they do not so prohibit, whether said sec. 17 prohibits the giving out of any information regarding the expenses of the department to the public.

In an official opinion given to you under date of September 6, 1917, it was held that records pertaining to expenditures of the state council of defense in your office are not confidential. Vol. VI, Op. Atty. Gen., p. 614. In that opinion it was said:

" * * * I do not believe that it can be said that any facts that the records or vouchers may contain is information in your possession for said council, within contemplation of this statute. The public is entitled to know for what purposes their money is being expended, and I do not believe that this statute should have so liberal a construction as to exclude the public from this knowledge."

The conclusion arrived at in said opinion, if adhered to for all practical purposes, is decisive of the question submitted by you. I see no ground or reason for changing the ruling of this department. I believe that you are not prohibited from publishing in your biennial report the disbursements of the council of defense, and that those disbursements, so far as the records in your office show, are accessible to the public and the people are entitled to know for what purposes their money has been used.

Courts—Juvenile Courts—A judge performing juvenile court duties cannot receive additional compensation for such work.

November 19, 1918.

SAM BLUM,

District Attorney,

Monroe, Wisconsin.

In your letter of November 12 you submit the following:

"Is the one designated as judge of the juvenile court, under sec. 573—2, entitled to any additional compensation; and if so, how much, and who determines the amount?"

Sec. 573—2 provides that the judges of the several courts of record in each county shall designate one or more of their number whose duty it shall be to hear all cases coming under this

act. There is no provision in the statute authorizing and establishing juvenile courts for any additional compensation to the court that performs this work. Nor is there anywhere in the statute any provision for compensation to the court performing juvenile court duties. It is a general proposition of law that a public official's right to compensation is purely statutory. What the statute gives he receives, but no more. Mechem, *Public Offices*, secs. 855-856. It seems to have been the legislative intent that the work of caring for juvenile dependents and delinquents should be done by the regularly established courts sitting as juvenile courts, and inasmuch as the statute does not authorize any compensation you are advised that these additional duties imposed are *cum onere* and that no additional compensation was intended or can be allowed for the performance of such duties.

Loans from Trust Funds—School Districts—Resolution authorizing loan must specify amount proposed to be voted.

November 21, 1918.

HONORABLE WILLIAM H. BENNETT, *Chief Clerk,*
Commissioners of Public Lands.

Some time ago the application of joint school district number 7 of the towns of Buena Vista and Stockton in Portage county, for a loan of \$4,000 from the state trust funds, was submitted to this department for examination and approval.

The record shows that this application was authorized at a special meeting of the district called for and held on the 22d day of July, 1918, at eight o'clock, P. M. An examination of the notice discloses that the meeting was called for the purpose of making application

"for a loan of \$3,000 more or less, as may be decided by a vote."

At the meeting so held, the resolution authorized the district board to borrow the sum of \$4,000.

Sec. 40.08, subd. (4), par. (a), provides, among other things, the following:

" * * * No tax or loan or debt shall be voted at a special meeting unless three-fourths of the legal voters shall have been notified either personally or by a written notice left at their places of residence, stating the time, place and objects of the

meeting, and specifying the amount proposed to be voted, at least six days before the time appointed therefor, exclusive of the day on which the meeting is to be held."

The notice specified the amount proposed to be voted at "\$3,000 more or less." This language is not in conformity with the section quoted. The words "more or less" make the amount indefinite. If it were held that an application for a loan based upon a special meeting so noticed was legal, then it would be lawful for the officers of a school district to give notice that the amount to be voted be, say, \$1.00 more or less. It is very apparent that such language would not conform to the intent and spirit of the section quoted. An elector is entitled to a notice of a special meeting which specifies the amount proposed to be voted. This amount must not be uncertain or indefinite. Certain it is that the electors attending such a special meeting have no right to exceed the amount which the notice specifies.

It is my opinion, therefore, that this application should not be approved.

Ferries—Counties—Bonds—County may grant license for ferry over interstate waters.

Licensee's bond should conform to statute.

Bridges and Highways—Roads by User—Road built on Mississippi river bottom, by nonresident, does not become public by user.

November 21, 1918.

P. H. URNESS,

District Attorney,

Mondovi, Wisconsin.

In your letter of November 17, 1918, you state that James G. Lawrence, of Wabasha, Minnesota, has petitioned the Buffalo county board for a license to operate a ferry across the Mississippi river, and you ask to be advised whether the granting of such a license conflicts with any United States statute or interstate agreement. You say further that a ferry has been operated at the point in question for many years under a state charter which has now expired.

You refer to see. 1348, Stats., which provides:

"The several county boards may grant licenses for keeping ferries in their respective counties, to continue in force for a time therein specified, which shall not exceed ten years on the St. Croix and Mississippi rivers, * * *."

Here is a perfectly plain statutory authority conferred upon the county board, and one which has long existed and often been exercised. When a petition for a ferry is presented, it would hardly seem necessary for the county board to inquire whether the licensee in operating under his license will run counter to the federal statutes or regulations. That is not the concern of the county; it is for the licensee to look to that.

But this matter of ferries across interstate waters was considered at some length in an opinion given to the district attorney of Crawford county, April 28, 1916, Vol. V, Op. Atty. Gen., p. 341. It was then stated that the keeping of ferries on the Mississippi river may be licensed by border counties, and that congress has passed no law regulating the subject of ferries over boundary waters, and that the United States courts have not held that the laws of Wisconsin are inconsistent with the federal constitution.

You state further that a resident of Wabasha purchased a right of way and for years has maintained and now maintains a road or highway some four miles in length across the bottom lands of the Mississippi river, from at or near Nelson, in your county, to the river and in the direction of Wabasha. You wish to know whether or not the placing of signs upon this highway to the effect that it is a private road would be any defense in case an accident happened, and you wish to know further if it will become a public highway by user, stating that it is extensively used by people of Buffalo county in marketing their wheat at Wabasha.

That the place of accident is private and not public is certainly a defense to an action for injuries brought against a municipality, unless the municipality has estopped itself in some way from making such defense. The right to recover from a town for injuries upon a highway is purely statutory, and the statute (see. 1339) applies only to public highways. Your question as to user, it seems to me, is answered by the statute:

"2. All roads not recorded which shall have been or shall be used and *worked* as public highways ten years or more shall

be deemed public highways, except that roads and bridges built upon the bottoms and sloughs of the Mississippi river in this state by citizens or municipalities of any other state shall not become legal highways or a charge upon the town in which they are situated unless upon petition they are legally laid out by the supervisors of such town; * * * . Sec. 1294, Stats.

Your letter states that this private road was built and is maintained by a citizen of Minnesota. Therefore the above quoted exception to the user rule applies and will continue to apply at least as long as it is so maintained and is not laid out or adopted by the supervisors as a public highway. A reference to the Wisconsin decisions upon the subject of highways by user may be found in the Wisconsin Annotations to said section, should you care to pursue the subject further. As a warning to the traveling public and a precaution in behalf of the town, it would be entirely proper to erect at the point where this private road meets the public highway a conspicuous sign to the effect that the way in question is private, not public.

You have submitted for my consideration a form of bond to be given by the person to be licensed to keep a ferry. Your form also covers the matter of accidents on the private way, and names the town of Nelson and Buffalo county as obligees.

I think your bond for keeping a ferry should be confined to that subject and to the county as obligee. In other words, the bond should conform rather strictly to the requirements of the statute. The bond of a licensee and the conditions thereof are prescribed by sec. 1352, Stats. He must give a bond (1) to the county; (2) in such sum as the county board shall direct; (3) with sureties to be approved by the board; (4) conditioned that he will keep safe and good boats in good repair, adapted to the waters where they are to be used; and (5) attend the ferry with a suitable number of men during the hours and at the rates of ferriage ordered by the board. There is danger that any provisions in the bond in addition to those specified in the statute would be held to be a surplusage and might lead to litigation. If any other subject is thought to be proper for the giving of a bond, it should be by an entirely separate instrument.

I cannot see that sec. 1358, to which you refer, has any application whatever to the matter in hand.

Though you say nothing of it in your letter, you have transmitted what purports to be a copy of a county board resolution,

authorizing a committee to grant a ferry license. I am satisfied that the powers conferred upon the county board by ch. 53, Stats., and especially the granting of a ferry license, cannot be delegated. The approval of the bond, the hours when the ferry shall be operated, and the rates for ferriage are all to be determined by the county board. The better practice, it seems to me, would be to proceed by carefully drawn ordinance covering every statutory point or provision. In fact, it is probably commanded by subd. (10), sec. 670, Stats., that the county board exercise and carry out said powers by the enactment of ordinances. The subdivision just referred to further emphasizes the point that the powers cannot be delegated by the county board.

Elections—Special Elections—Public Officers—County Officer—Governor may direct that a special election be held to fill vacancy in county office; such vacancy may be filled by appointment.

November 21, 1918.

HONORABLE L. C. WHITTET,
Secretary to the Governor.

In your letter of November 20 you ask to be advised whether the governor shall fill by appointment or shall call a special election to fill a vacancy in a county office where the person elected dies between the date of election and prior to the taking of the office.

Under your statement of facts, a vacancy will exist in the county office in question at the commencement of the new term the first Monday in January, under sec. 17.02, which provides:

“Every office shall become vacant on the happening of either of the following events:

“ * * *

“(9) The death or declination in writing of any person elected or appointed to fill a vacancy or for a full term before he qualifies, or his death or such declination before the time when, by law, he should enter upon the duties of his office to which he was elected or appointed.”

See also *State ex rel. Finch v. Washburn*, 17 Wis. 658.

Sec. 698 enumerates the county offices, and sec. 699 provides:

"Whenever any vacancy shall happen in any of the offices enumerated in the preceding section it shall be filled by appointment for the residue of the term only. Whenever any person shall be appointed to any county office he shall enter on the duties thereof immediately after qualification."

Sec. 17.07 reads thus:

"Whenever there shall be a vacaney in either of the offices of sheriff, coroner, register of deeds or district attorney the governor may appoint a suitable person to such office until another shall be elected and qualified."

Sec. 712, referring to the county treasurer, reads thus:

"In case of vacaney 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. * * * ."

Sec. 707, referring to the county clerk, provides:

"In case of a vacaney in the office of such clerk 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. * * * ."

Sec. 767 provides:

"In case of vacaney the county board shall appoint a county surveyor to hold until the expiration of the term and until his successor shall be elected and qualified."

Under art. VII, sec. 12, Const., the judge of the circuit court is given power, in case of a vacaney, to appoint a clerk of the court, until the vacaney shall be filled by an election.

You do not designate the county office in which a vacaney occurs. From the above quoted statutes, it appears that the governor may appoint to fill a vacaney in the following county offices: sheriff, coroner, register of deeds, or district attorney, while a vacaney in the office of county treasurer, county clerk, or county surveyor is filled by an appointment made by the county board of supervisors, and the circuit judge has power to make an appointment to fill a vacaney in the office of clerk of the circuit court.

Concerning elections to fill vacancies, we have the following statutory provisions. Sec. 7.01 Stats., provides:

"In addition to the provisions of law for the filling of vacancies in public offices by appointment such vacancies may be filled by election as provided by this chapter."

It then enumerates a number of officers other than county officers.

The following section, 7.02, provides:

"Special elections in addition to those authorized by section 7.01 may be held in the following cases:

"(1) When there shall have been neglect or failure to choose, (a), at a general election a member of the congress or legislature aforesaid or any county officer, who by law should have been chosen at such election, or, (b), at the proper April election a superintendent of schools in any district in the state, who by law should have been chosen at such election.

"(2) When the right of office of a person elected to either of the offices mentioned in paragraph (1) shall cease before the commencement of the term of office for which he shall have been elected.

"(3) When the governor, in his discretion, directs such an election to fill any vacancy not provided for by this section and section 7.01."

Under this subd. (3), the governor is authorized in his discretion to direct a special election to be held, to fill the vacancy in a county office occurring under the statement of facts as presented by you. But this subdivision has no mandatory significance, the governor not being required to direct that an election shall be held, it being left to his discretion. If he so chooses, he may refrain from calling a special election, and the vacancy may then be filled by appointment. If the county office is one in which he may make an appointment, he can do so; otherwise, not. The county offices in which he may fill a vacancy by appointment have been enumerated above.

Public Officers—Register of Deeds—Elections—Special Elections—Where register of deeds was elected to succeed himself on Nov. 5, 1918, and on Nov. 10, died, a vacancy is created in the term ending the first Monday in January, 1919, and also a vacancy in the term beginning the first Monday in January, 1919.

The vacancy in the first term may be filled by appointment by the governor. The vacancy in the second term may be filled by appointment by the governor or by a special election directed by the governor.

November 23, 1918.

J. C. DAVIS,

District Attorney,

Hayward, Wisconsin.

In your letter of November 18 you submit the following:

"The register of deeds of Sawyer county died on Nov. 10th, 1918. At the general election on Nov. 5th he had been elected to succeed himself. The deceased had no deputy. I assume that the current term which will expire on the 1st Monday of January 1919 will be filled by appointment by the governor. What I especially wish your advice on is as to the method of filling the office beginning on the 1st Monday of January 1919 and continuing for two years from that date. Is the office for such term filled by appointment or special election? If by special election how should the same be called?"

Sec. 699 provides that whenever any vacancy shall happen it shall be filled by appointment for the residue of the term only.

Sec. 17.07 provides that whenever there shall be a vacancy in either of the offices of sheriff, coroner, register of deeds or district attorney the governor may appoint a suitable person to such office until another shall be elected and qualified.

The above statutes make clear the method of filling vacancies in the term ending on the first Monday in January, 1919.

As to whether or not there is a vacancy in the term beginning on the first Monday in January, 1919, your attention is called to sec. 17.02, which enumerates the ways in which vacancies are caused. Subd. (9) thereof provides:

"The death or declination in writing of any person elected or appointed to fill a vacancy or for a full term before he qualifies, or his death or such declination before the time when, by law, he should enter upon the duties of his office to which he was elected or appointed."

We therefore have, upon the death of the incumbent, not only a vacancy created in the current term, but a vacancy occurring in the term beginning on the first Monday in January, 1919. Whether this vacancy is to be filled by special election or by appointment is in the discretion of the appointing officer, the governor.

Ch. 7, entitled "Elections to fill vacancies," provides, in sec. 7.01:

"(1) In addition to the provisions of law for the filling of vacancies in public offices by appointment such vacancies *may* be filled by election as provided by this chapter."

Sec. 7.02 provides:

"Special elections in addition to those authorized by section 7.01 may be held in the following cases."

The question presented by your situation seems to be governed in subd. (3) thereof:

"When the governor, in his discretion, directs such an election to fill any vacancy not provided for by this section and section 7.01."

I conclude, therefore, that it is in the discretion of the governor to appoint or call a special election.

If a special election is called, it is by and under the direction of the governor.

Courts—Juvenile Courts—Public Officers—District Attorney
—Appearance of district attorney in juvenile court and other appearances by attorney considered.

November 25, 1918.

STANLEY G. DUNWIDDIE,

District Attorney,

Janesville, Wisconsin.

Your favor of November 18 is at hand. You inquire whether the complaining witness filing a petition against a boy or girl charged with being delinquent may appear by private attorney, and whether it is the duty of the district attorney to appear and prosecute or represent the county and state in such actions or proceedings in the juvenile court.

The statutes dealing with juvenile courts, secs. 573—1 to 573—

10, contain very few specific directions with reference to how the proceedings shall be conducted before the court, and this particular statute is silent as to the duties of the district attorney with reference hereto. Sec. 752, Stats., prescribes generally the duties of the district attorney, but it is difficult to point to any one particular provision of that section that can be said to apply specifically to the proceedings before the juvenile courts.

The object of the juvenile court act is to save the child from becoming a criminal or from continuing in a criminal career to end in mature years in confinement in the state prison. Its design is not punishment nor restraint by imprisonment. It is an exercise of the police power for the purpose of protecting the child, affording him the care and protection that his natural parent or guardian should render.

In *Marlowe v. Commonwealth*, 142 Ky. 106, 114, the court said:

"The object of the act is to give the court authority, acting for the best interests of the child, to place it in the care and custody of some one capable and willing to do for it that which its natural parents either are unable or unwilling to do. Such an act is in no wise a criminal proceeding; nor can any restraint imposed under the act for such a purpose be regarded as a punishment for a crime."

In *In re Parker*, 118 La. 471, 473, the court said:

"The powers conferred on the judge holding a session of juvenile court are by the very terms of the act intended to be 'clearly distinguished from the powers exercised in the administration of the criminal law.' *The care of dependent and neglected children is purely a civil matter.* Delinquent children within the purview of the act are not subject to be prosecuted, convicted, and sentenced for crime. It is true that such children may be committed to any institution for correction or reformation; but such a commitment is for the good of the child, and is not for the purpose of punishment, and is entirely within the discretion of the trial judge. * * *. The mere charge of the violation of any criminal law or ordinance gives the juvenile court jurisdiction, not to try, convict, and punish, but to inquire into the matter and to determine 'what order for the commitment and custody and care of the child, the child's own good and the best interest of the state may require.'

In the case of *Robison v. Wayne Circuit Judges*, (Mich.) 115 N. W. 682, the court said on pages 685-686:

"This brings us to a consideration of the most important question. Are the proceedings provided for by this act criminal proceedings in such sense as to entitle the accused delinquent child to a trial by a constitutional jury of 12? Were the *only judgment open upon the trial whether to commit the child to the custody of a probation officer, or to the Industrial School for Boys, or the Industrial School for Girls; as the case might be, there would be little difficulty in saying that this proceeding is not in a proper sense of the term a criminal proceeding.*" *

* We are satisfied that, so far as the law authorizes the determination of the status of the child, and authorizes the commitment of the child to the custody of a probation officer, or to the custody of the keeper of one of the Industrial schools for the purpose of education and reformation, the proceeding may be said not to be a criminal proceeding."

It seems clear, therefore, from the statute and the above authorities that the proceeding is civil and not criminal. By this proceeding the parent or natural guardian is deprived of the custody of the child, which custody otherwise actually or legally belongs to such parent or guardian. There can be no question, therefore, but that the parent or guardian of such child would have a right to be heard and that his interest may properly be protected. Such parent or guardian undoubtedly should be permitted to appear by attorney.

The petitioner or complaining witness who institutes the proceeding is presumptively interested in the welfare of the child and also in the general welfare of the state. That the matter may properly be presented to the court and both the state and the child's interest, from the standpoint of the petitioner, be properly presented, undoubtedly such petitioner should be permitted to appear by and have the assistance of an attorney in the matter. Such practice would assure a more orderly presentation of the matter to the court and a more thorough and orderly proceeding. No reason suggests itself to my mind why such petitioner should not be permitted to be represented by attorney.

As to the duties and powers of the district attorney in such a proceeding the question is not so clear. It will be noticed that subsec. 5, sec. 573—5 makes the county financially responsible for the expenses of the maintenance of such child, so that the county is directly interested in such proceedings in a material way, the financial burden falling upon it. In a broad sense the district attorney is the legal adviser of the county. He is the county's attorney. The county is his client, and while the stat-

ute prescribing his specific duties, sec. 752, may not directly point to any duty devolving upon him in such a proceeding, yet a liberal, comprehensive view of all the statutes governing his powers and duties naturally results in the conclusion that so far as may be necessary or advisable it would be the privilege and duty of the district attorney to see that the interests of the county in such matter, both from a financial standpoint and the broader interest of the welfare of the child and the general public, were properly taken care of and represented by him.

I conclude, therefore, that in case the juvenile court desired the services of the district attorney to assist in such juvenile hearing it would be the duty of the district attorney to render such assistance in such matter as he might be able, and in case the district attorney was of the opinion that the county might be improperly burdened with expense in such a matter, it would then be his duty to interest himself in such a proceeding and prevent such improper results, and also in case he thought that some child was being improperly taken from his parent or guardian, it would then be his duty, acting in the interests of the general public, to interest himself in such matter and prevent such undesirable results.

Criminal Law—Abandonment—The father of an illegitimate child is liable for its support and may be prosecuted under the abandonment statute if he fails to support same.

November 26, 1918.

CLARON A. MARHKAM,
District Attorney,
Beaver Dam, Wisconsin.

You state in your communication of November 23 that the mother of an illegitimate child married the supposed father a year or so after the child's birth, without any proceedings having been taken under the bastardy act; that he has never acknowledged in writing the paternity of the child nor has he done so in open court, as provided in sec. 2274, but that he has admitted it verbally.

You refer me to sec. 2339n—25 of the statutes, as enacted in 1917, which provides that where the father and mother of an illegitimate child intermarry,

"such child or children shall thereby become legitimated and enjoy all the rights and privileges of legitimacy as if they had been born during the wedlock of their parents; * * *."

You inquire whether the support of such child can lawfully be enforced against the father under the abandonment statute, the birth of the child and the marriage both having occurred prior to the passage of the 1917 law.

In answer to this question, permit me to say that the provisions of the above quoted statute are not the ones upon which we must rely in holding the father of an illegitimate child responsible for its support. Sec. 4587c, Stats., provides a penalty for a man's abandoning his illegitimate child, and makes it an offense punishable by imprisonment in the state prison. Subsec. 1 of said section also contains the following:

"* * * And it is hereby made the duty of the parent of any illegitimate child or children, under the age of sixteen years, to provide for the support and maintenance of such illegitimate child or children."

It will, of course, be necessary for you at the trial to prove that the defendant is in fact the father of the child.

Mother's Pensions — Public Officers — County Board — The county board is required annually to determine the sums to be charged to the several taxing districts to reimburse the county for moneys spent under sec. 573f, Stats.

November 29, 1918.

FRANK W. BUCKLIN,

District Attorney,

West Bend, Wisconsin.

Under date of November 26, 1918, you state that your county has abolished all distinction between town and county poor, and that inquiry has arisen as to whether or not such action in any way affects the matter of reimbursing the county for payments made under sec. 573f, Stats. (Mothers' Pension Act), and you submit the following question:

"In your opinion, would it be proper for the county, as a whole, to bear the expense of support given under this section, or is the county compelled to charge the several towns, cities and villages with the amount advanced by the county, as provided in paragraph eight of said section?"

To avoid any misunderstanding, I begin by calling your attention to the fact that subsec. 9, sec. 573f provides that the state shall reimburse the county for one-third of the amount which has been expended by the county under the Mothers' Pension Act, and that this department has heretofore ruled that the greatest amount which the county can charge to the political subdivisions thereof is two-thirds of the total sum expended by the county. Vol. IV, Op. Atty. Gen., p. 1019.

Said subsec. 8 provides that the county clerk shall lay before the county board at each annual meeting a detailed statement of the money advanced or paid by the county under the provisions of said section.

"* * * The county board at such meeting shall determine the amount to be raised and paid by each such town, village and city to reimburse the county for the money so advanced. Within ten days after such determination the county clerk of each county shall certify to the clerk of and charge to each such town, village and city the amount so advanced. Each such town, city and village shall levy a tax sufficient to reimburse the county for such advances to be collected as other taxes and paid into the county treasury. * * *"

It seems to me that this statute leaves the county board no alternative in the matter. The board is commanded to determine the sum which the several subdivisions of the county shall contribute, to the end that the county may be reimbursed. The imperative mood is used. I am of the opinion that the language is mandatory, not merely directory. So far as I am informed, the statute has been universally so construed in the several counties.

You speak of your county's having adopted the county system for support of the poor. This, of course, is done under the provisions of sec. 1519, which provides that the county board of any county may

"abolish all distinction between county poor and town poor in such county and have the expense of maintaining all the poor therein a county charge. * * *"

Heredofore it had been considered that the provisions of ch. 63, which deals with the relief and support of the poor, are separate and distinct from the provisions of ch. 45g, entitled "The state public school," in which last named chapter sec. 573f occurs. The first named chapter relates to paupers, whereas

sec. 573*f* relates to children who, in the interest of the public, should be granted aid. While your question is by no means free from doubt, I have come to the conclusion that the proper action of the county board, under subsec. 8, sec. 573*f*, in no wise depends upon the system in force in your county for the support of the poor.

Bonds—Taxation—Municipal Corporations—Ordinances — A municipal bond issue within the requirements of the law and a tax levy for payment of interest and principal, authorized and levied in 1918, are valid though the ordinance provides that the bonds are to be dated 1919.

December 2, 1918.

HONORABLE HERMAN C. SCHULTZ,
State Senator,

Milwaukee, Wisconsin.

In your letter of recent date you desired an opinion upon the following question:

“(a) Is a bond issue within the requirements of law and is the tax levy for payment of principal and interest valid if the ordinance (authorizing the issuance of the bonds and levying the tax) is passed this year (1918)?

“(b) If the ordinance provides that the bonds are to be dated next year (1919) and

“(c) If the ordinance provides that the tax levy for payment of principal and interest is to be made to commence this year (1918)?”

While I have no doubt it is the general policy of the law that taxes should be levied only for the immediate and reasonable necessities of a municipality, sound business and administrative policies in conducting the financial affairs of a large city may demand that certain taxes be levied a reasonable period in advance of the time when the funds are actually necessary to meet its obligations. *People ex rel. Stevenson v. A. T. & S. F. Ry. Co.*, 261 Ill. 33, 103 N. E. 614.

The city of Milwaukee, as I understand it, conducts its financial affairs under the budget system, as provided by sec. 925q—160 to 925q—165, and the tax levy is made at the time or times therein prescribed to meet the budget which is submitted by the board of estimates for the ensuing fiscal year and is based upon the estimates made and reported to said board by the heads of the several departments and administrative boards of the city through the city comptroller. By this system the

common council of the city of Milwaukee is required to levy a tax in the year 1918 for the entire estimated expenditures of the fiscal year beginning January 1, 1919. It is evident that the principal and interest which may become due on any bonds of said city during the year 1919 should be included in the budget and tax levy of 1918.

The system of providing a sinking fund for the extinguishment of municipal bonds when they mature is, it seems to me, an illustration of a financial policy by which funds are accumulated far in advance by annual taxation for the purpose of meeting bonds maturing some ten, fifteen or twenty years in the future. Sound business policy demands that a bond issue maturing twenty years from the date of the bond should not be raised at the tax levy time immediately preceding their maturity. The sinking fund method was therefore devised.

I have been unable to find any cases in which the exact question submitted by you has been determined by the courts, but an examination of a number of decisions leads me to the conclusion that if, in the sound discretion of the corporate authority of a municipality, it should be deemed good business or financial policy to provide by a tax levy a reasonable time in advance the amount necessary to meet the annual interest and installments of principal of an authorized bond issue, such discretion will not be interfered with by the courts. *Ricketts v. Spraker*, 77 Ind. 371; *Florer v. McAfee*, 135 Ind. 540, 35 N. E. 277; *People ex rel. Stevenson v. A. T. & S. F. Ry. Co.*, *supra*.

Where, of course, there is no reasonable certainty that an indebtedness will occur, or where the indebtedness is contingent upon the doing or not doing of some act, or the happening or not happening of some event, so that there may be no debt or obligation to defray by the levy of a tax, then the courts will interfere and may by injunction restrain the levy or collection of a tax to pay such an indebtedness, or to meet a bond issue contingent upon such indebtedness as was done in the case of *Keystone Lumber Co. v. Town of Bayfield*, 94 Wis. 491. Our supreme court, in its opinion on page 497, has expressly sanctioned the raising of money in advance by a municipal corporation to build a courthouse or construct public works, or provide for ordinary and necessary public uses. I infer that the same sanction will be given to bonds issued for such public uses, and that where bonds have been duly authorized for a

lawful purpose, and are certain of issue, a municipality may, in anticipation of their issue, levy and collect taxes a reasonable time in advance to meet the interest and to discharge installments of principal as they become due.

Within the limitations above stated it is, therefore, my opinion that the question submitted by you should be answered in the affirmative.

Municipal Corporations—Towns—When a town is divided into two or more towns by county board, proceeding must be taken under sec. 671.

When territory is added to or taken from a town, proceeding must be taken under sec. 670, subd. (1).

A fractional section may be one or more of the necessary 36 sections of a town.

December 3, 1918.

MARION F. REID,

District Attorney,

Hurley, Wisconsin.

In your communication of November 26 you state that your county board has under consideration certain proposed changes in the boundary lines of the towns in your county, and also the creation of a new town. You say that it is proposed that certain territory be taken from the town of Kimball, which will leave the town of Kimball with less than thirty-six sections and with less than fifty qualified voters; that it is doubtful in your mind if the town of Kimball would have twenty-five electors after detaching the territory proposed to be taken from it. You inquire whether the county board may make this change, under sec. 670, subd. (1), if the territory left in the town of Kimball is less than thirty-six sections and the number of electors left in the town less than twenty-five.

Sec. 671, Stats., contains the following provision:

"* * * And no town shall be divided or have any part detached therefrom so as to make its area less than thirty-six sections as aforesaid, except when a majority of the votes cast in one or both such subdivisions as aforesaid shall be in favor of such division."

This provision applies to the division of a town under sec. 671, and also the changing of the boundary of the same under sec. 670, subd. (1). See *State ex rel. Rosander v. Lippels*, 133 Wis. 211.

Sec. 670, subd. (1), contains the following:

"* * * And no county board, except in the counties of Ashland, Barron, Bayfield, Burnett, Douglas, Juneau, Marathon, Oconto, Polk, 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."

Your question must therefore be answered in the negative.

You also state that the territory proposed to be taken from the town of Kimball would be added to the town of Montreal; that it is proposed that a new town be created out of the territory in the town of Montreal, after making the above mentioned change in boundary. In other words, the territory comprising the town of Montreal, after making the change in boundary line between the towns of Kimball and Montreal, would be divided into two parts, one part being the town of Montreal, and the other part the new town. The new town would be less than thirty-six sections according to acreage, but more than thirty-six sections counting fractional sections as whole sections.

You inquire (1) whether the new town could be created, if composed of less than thirty-six sections; (2) whether fractional sections count as full sections in making up the total number of thirty-six sections; (3) whether this is not a division of the town which makes it necessary that the procedure outlined in sec. 671 be followed, rather than sec. 670, subd. (1).

In addition to the above quoted part of sec. 671, said section also contains the following:

"* * * But no town shall be divided so as to constitute or leave any town of less than thirty-six sections according to United States survey, unless each such town, after division, shall have real estate valued at the last preceding assessment at one hundred thousand dollars or more and fifty qualified voters resident therein at the time of division, * * *."

The division could not be made if this section were not complied with, and it would require, under the previously quoted part of this section, a majority vote in each subdivision of the town in favor of such division.

In view of the fact that the language in this section modifies the words "thirty-six sections" by the words "according to United States survey," fractional sections being included in the United States survey, I am of the opinion that the fractional sections would count in making up the total number of thirty-six sections for a town, in contemplation of this section of the statutes.

In answer to your third question I will say that I consider this a division of the town, and that the proceedings would have to be taken under sec. 671. See *State ex rel. Rosander v. Lippels, supra*. As I understand your statement of facts, part of the territory comprising the town of Kimball is first to be detached and then annexed to the town of Montreal. After this is accomplished, then the town of Montreal as so enlarged is to be divided. This would certainly be a division of the town of Montreal, and sec. 671 clearly applies.

Public Officers—District Attorney—Court Commissioner—
District attorney may not while in office hold office of court commissioner. The two offices are incompatible.

December 4, 1918.

FRANK W. CALKINS,
District Attorney Elect,

Grand Rapids, Wisconsin.

In your favor of December 3 you state that you have been elected district attorney for Wood county and expect to assume the duties of your office January 6, 1919. You also state that you are at present holding the office of United States commissioner for the western district of Wisconsin, having been appointed thereto in the early part of this year for a term of four years. You inquire whether you are eligible to continue as United States commissioner and also as district attorney, and you refer me to sec. 754, Wis. Stats., prohibiting a district attorney while in office from holding any judicial office.

There is little question but that the office of commissioner

held by you is a judicial one and therefore disqualifies you from holding that of district attorney under the above section.

Moreover, sec. 3, art. XIII of our constitution undoubtedly applies. This provision of the constitution reads as follows:

"No member of congress, nor any person holding any office of profit or trust under the United States (postmasters excepted) * * * shall be eligible to any office of trust, profit or honor in this state."

This constitutional provision undoubtedly applies, and if you continue to hold the office of commissioner after your term of district attorney begins, I have no doubt the office of district attorney would be thereby *ipso facto* vacated. See *State ex rel. Johnson v. Nye*, 148 Wis. 659; *State v. Jones*, 130 Wis. 572; *State ex rel. Knox v. Hadley*, 7 Wis. 700; Mechem on Public Officers, sec. 422.

If you expect to hold the office of district attorney to which you have been elected, I am satisfied it will be necessary for you to resign the office of commissioner before your term of office as district attorney begins.

Public Officers—Register of Deeds—Where the office of register of deeds has been put on a salary basis according to sec. 764b, no fee should be paid under sec. 1022—61.

December 4, 1918.

WILLIAM COOK,

District Attorney,

Green Bay, Wisconsin.

In your favor of December 2 you inquire whether the register of deeds is entitled to a fee of ten cents for filing and indexing certificates of births, deaths or marriages as provided for in subsec. 3, sec. 1022—61 in a case where the office of register of deeds has been put on a salary basis under sec. 764b, Wis. Stats.

In reply thereto I would say the fee provided for in sec. 1022—61, subsec. 3, is undoubtedly intended to apply in cases where the office of register of deeds is on a fee basis. Where the office has been changed from a fee basis to a salary basis under sec. 764b I am satisfied that the register of deeds is not

entitled to the fee provided for by said subsec. 3. Sec. 764b, after providing for a change to the salary basis from the fee basis, in the case of register of deeds, makes this provision in subsec. 3 thereof:

"* * * And the salaries of the register of deeds, his deputies, clerks and copyists so paid, shall be in lieu of all fees, per diem and compensation for services rendered by them."

This provision makes it clear, I think, that the register of deeds, where he has been placed upon the salary basis under said sec. 764b, is not entitled to the fee under sec. 1022—61. I do not think there is any conflict between these sections, as in my view the section providing for the fee is to apply where the office is on the fee basis, not having been changed to a salary basis under sec. 764b.

The other section to which you refer, sec. 694, covers the manner and time of fixing the salaries of county officers that are on a salary basis, and it is clear that it applies to other county officers besides that of register of deeds. Furthermore, there is nothing in that section in conflict with sec. 764b. In subd. (1), sec. 694, we find the following provisions:

"* * * The salaries so fixed and paid shall be in lieu of all fees, per diem and compensation for official services rendered by such officers except the compensation of the sheriff for keeping and maintaining prisoners in the county jail, except expenses actually and necessarily incurred in the performance of official duty by the sheriff of any county having a population of three hundred thousand or more, and except compensation for work done by the clerk of the circuit court or his deputies for the government of the United States or for congress."

Agriculture—Counties—County Agricultural Agent—Effect of reconsideration of resolution on maintaining a county agricultural agent.

December 4, 1918.

E. S. JEDNEY,

District Attorney,

Black River Falls, Wisconsin.

In your letter of November 29 you state that at the last session of the county board, on a certain day, the county board

voted by a vote of fourteen to thirteen to retain the system of maintaining an agricultural representative or county agent for the ensuing two years; that on said day it was also voted by a vote of fourteen to thirteen that one thousand dollars be levied and collected on the taxable property of Jackson county to defray the expenses and pay the salary of such county agent; that on the day following, upon reconsideration of the question of maintaining a county agent, the county board refused to maintain such county agricultural agent by a vote of fifteen to twelve; that on said second day no consideration whatever was given to the resolution passed the day previous authorizing the levy and collection of the one thousand dollars; and you ask if it is necessary to rescind the action appropriating the one thousand dollars in order to render null and void the action of the board in voting to retain the county agent. You also ask what the status of the entire matter is at this time.

If the matter had not been reconsidered after the close of the first day in question, it is clear that the board voted to retain the county agent plan and appropriated the county's portion of the money to defray the expense.

On the second day, however, at the proper time for reconsideration, the matter of retaining the county agent was rejected by a more decisive vote than the one by which it was approved on the day preceding. There can be no question but what the county board decided to, and did at the time of reconsideration, refuse to retain the county agent system. The only remaining question is as to the effect of the resolution appropriating one thousand dollars to maintain the county agent.

It is a rule of legislative construction well settled and established that the later action repeals the former acts in conflict with it. If the act appropriating money for a purpose which does not exist puts the appropriation act in conflict with the act rejecting the county agent system, then the appropriation act is null and void. As the purpose for which the money was voted ceases to exist, there is no occasion for the appropriation of the money so raised.

It is also well settled that a vote of the county board levying a tax is not a segregation of funds of the county and does not irrevocably commit a certain amount to a certain purpose. In other words, if the action of the board to levy a tax of one thousand dollars upon the property of Jackson county is not

rescinded, the tax can be levied and collected, but it stays in the general fund until it is used for some other purpose. It cannot be used for the maintenance of a county agent, because the board has by a decisive vote refused to continue that system. Furthermore, neither the county agricultural committee nor any other county authority can pay out money for the maintenance of a county agent so long as the action of the county board by which it refused to retain the county agent system remains unreversed.

Public Officers—County Board—Appropriations and Expenditures—County board has no power to appropriate money to pay for overcoats purchased for the state guard reserve.

December 4, 1918.

MARION F. REID,
District Attorney,
Hurley, Wisconsin.

In your letter of November 26 you state that it appears that the local company of the state guard reserve are in need of overcoats suitable for winter use and have asked the county board of your county to appropriate \$1,500 for the purchase of these coats; that all the members of the board appear to be satisfied that the amount asked for is reasonable and that there is a real need for the coats, but that you doubt the legality of appropriating any money for this purpose. You inquire whether there is any way in which the county may comply with the request and pay for the same.

The county board has only such powers as are expressly or impliedly given to it by statute. I know of no provision in the statutes, and you have referred me to none, from which I could conclude that the county board is empowered to appropriate money for the purpose in question.

In the absence of such statutory authority, I am constrained to hold that the county board has no power to purchase and pay for the overcoats out of the county funds.

Public Officers—Register of Deeds—Sec. 1022—61 is controlling in establishing the fee to be charged by a register of deeds who is on a fee basis.

The provision in sec. 764 on the same subject is repealed by implication.

December 7, 1918.

MARK S. CATLIN,

District Attorney,

Appleton, Wisconsin.

In your letter of December 3 you state that the question has been raised in your county as to the fee to be charged by the register of deeds for registering marriages, births and deaths. You refer me to sec. 764 and also to sec. 1022—61, and you inquire whether under the provisions of sec. 764 as to the registering of birth, death and marriage certificates, the fee of twenty-five cents now provided is a proper charge to be made by the register.

Said sec. 764, Stats., prescribes the fees to which the register of deeds is entitled. *Inter alia* it provides:

"(1) Except as otherwise provided by law every register of deeds shall receive the following fees, to wit:

"* * *

"For registering any marriage, birth or death, twenty-five cents, and for copy thereof certified to the secretary of state, ten cents, to be paid by the county in cases where the certificates or proof of such marriage, birth or death is presented for registration within one year after its occurrence; but otherwise to be paid by the party procuring the registration."

Sec. 1022—61 contains the following:

"1. Every register of deeds shall file and index all certificates of births, deaths or marriages, received by him from the state and local registrar and thereafter properly bind said certificates in book form. He shall also make all corrections or additions certified to him by the state registrar. The cost of all books furnished to each county by the state registrar shall be paid by the treasurer of such county upon the certificate of the state registrar.

"* * *

"3. Such register of deeds shall receive from the county a fee of ten cents for the filing, indexing and correcting of each certificate so filed and indexed by him."

The provisions of sec. 764 prescribed the proper charge when it was the duty of the register of deeds to register the marriages, births and deaths, as provided in sec. 1025, Stats. 1898. Said sec. 1025 was, however, repealed by ch. 469, laws of 1907. Sec. 1022—61 was enacted by ch. 188, laws of 1909. Sec. 1022—61 was the later enactment and, covering the same subject of fees, it would be controlling.

It is a cardinal rule of statutory construction that a later statute, the evident intent of which is to furnish the exclusive rule governing a certain case, repeals by implication an earlier law on the same subject. 26 Am. & Eng. Ency. of Law (2d ed.) 731. The later law was manifestly a substitute for the earlier act. The rule has often been applied by our court. See *Lewis v. Stout*, 22 Wis. 234; *Simmons v. Bradley*, 27 Wis. 689; *Oleson v. Green Bay, etc., R. Co.*, 36 Wis. 383; *Burlander v. Milwaukee, etc., R. Co.*, 26 Wis. 76; *State v. Campbell*, 44 Wis. 529, 538.

My conclusion, therefore, is that the provisions of sec. 764, respecting the fees for the registering of births, deaths and marriages, are repealed by implication by the provisions of sec. 1022—61 and that the fees provided for in the later enactment are the only ones that can be charged by the register of deeds when he is on a fee basis.

Public Officers—Legislature—Member of Legislature—Town Supervisor—The offices of town supervisor and member of the legislature are not incompatible and may be held by the same person.

December 11, 1918.

MARK S. CATLIN,

District Attorney,

Appleton, Wisconsin.

I have your letter of December 9, in which you inquire if it is possible for a supervisor of a town to hold such office and still be an assemblyman from the district in which he resides.

This question has been answered in the affirmative by my predecessor, in an opinion to E. P. Gorman, district attorney of Marathon county, dated November 15, 1912, and found in Vol. 1, Op. Atty. Gen., p. 485.

I do not know that I can add anything to what is there said upon the subject. Since that opinion was rendered there has been no decision of the court which would reverse it, neither has there been any legislation that expressly or by implication prevents a man from holding both positions. The offices of supervisor of a town and member of assembly do not appear to be incompatible in any respect.

Public Officers—Railroad Commission—Water Powers—Inspection fees under sec. 31.20 are payable during period of construction of dam as well as after its completion.

December 14, 1918.

RAILROAD COMMISSION OF WISCONSIN.

In your favor of December 9 you state that, pursuant to the requirements of sec. 31.20, you have computed the expense incurred in making inspections during the past year under said section and have submitted bills to the owners of dams and water powers; that in one case the dam is not yet constructed, but application has been made to the commission for authority to construct the same and a franchise has been granted, and that the commission has incurred expenses in connection with the inspection and surveys in said case that were necessary in acting on the application, amounting to \$194.83, which is less than ten cents per theoretical horse power that may be developed by this dam when constructed. You further state that you have submitted to the company said bill, but that it protests against paying the same on the ground that the statute permits the commission to collect such fees only after the dam is completed.

You ask whether the words in the statute, "heretofore or hereafter constructed," limit the commission to the collection of fees covering expenses to such inspections only as are made of completed dams.

The statute in question, sec. 31.20, provides in part as follows:

"Every owner, excepting municipalities, of a dam heretofore or hereafter constructed in or across navigable waters shall pay to the commission annually, on or before the first day of Feb-

ruary, for the purpose of defraying the actual expenses of the commission incurred in inspecting and supervising the construction or maintenance, or both, of such dam and equipment, an inspection fee of not to exceed ten cents per theoretical horse power capacity of such dam at an ordinary stage of water, said fee however, not to be less than twenty-five dollars in any case, if such actual expenses of the commission shall equal that amount."

You will notice that the statute uses the language,

"expenses of the commission incurred in inspecting and supervising the construction or maintenance, or both, of such dam and equipment."

I think this language makes it clear that inspection fees are to be paid during the period of construction, as well as after the dam is completed, and that they are to be paid annually during the period of construction. Cases might exist where the construction period would extend over several years. It can hardly be presumed that the intention from this language was that the commission must wait for the collection of its fees until after such a dam was completed, or that the inspection should not take place during the period of construction.

It is my opinion, therefore, that the fees should be paid annually during the period of construction as well as afterward.

Public Officers—District Attorney—Criminal Law—Assault and Battery—It is improper for a district attorney to defend a person in justice court charged with assault and battery.

December 17, 1918.

O. H. BRUEMMER,

District Attorney,

Kewaunee, Wisconsin.

In your communication of December 13 you inquire whether a district attorney may defend a person who is prosecuted for assault and battery before a justice of the peace, the complainant being represented by a private attorney, or whether it would be illegal or improper for him to do so.

The answer to your inquiry is that it would be improper for the district attorney to defend a person in justice court

charged with assault and battery, for the reason that under sec. 752, subd. (1), it is made the duty of the district attorney to prosecute or defend any action, civil or criminal, in the circuit court of his county, in which the state or county is interested or a party.

In an official opinion rendered by my predecessor, it was held that it is the duty of the district attorney to prosecute assault and battery cases in the circuit court under this provision of the statutes. Vol. I, Op. Atty. Gen., p. 472. It seems there can be no doubt as to the correctness of this opinion. By defending one in justice court for this offense the district attorney would disqualify himself to do his duty in the circuit court if an appeal should be taken.

Municipal Corporations—Cities—Bonds—Special street improvement bonds not a city liability.

December 17, 1918.

HONORABLE MARSHALL COUSINS,
Commissioner of Banking.

In the letter of your predecessor dated December 10, 1918, he inquires whether certain bonds of the city of Washburn, known as the West Bayfield Street Special Improvement Bonds, are an obligation of the city of Washburn, so as to be prohibited from being held by a bank in excess of the limit prescribed by sec. 2024—32, Wis. Stats.

This statute reads as follows:

"The total liabilities of any person, copartnership or corporation, to any bank, for money borrowed, including liabilities of the copartnership, the liabilities of the several members thereof, except special partners, shall at no time exceed thirty per cent, of the amount of capital and surplus of such bank," etc.

The bonds in question were issued under chs. 40a and 41, Stats. 1915. Each of the bonds contains this provision:

"Neither the city of Washburn nor any officer thereof shall in any event become or be liable for any part of this bond, either of principal or interest except for so much as has been collected, as before stated except to the legality of the proceed-

ing for the issuing of these bonds for the payment of such parts of the improvement for which this bond is issued."

The bonds in question are commonly known as street improvement bonds payable by special assessments upon the property benefited. Sec. 959—33, being a part of ch. 41, Stats. 1915, and governing the issue of these bonds provides, in part, as follows:

"* * * Neither the city nor any officer thereof shall become liable or holden for any part thereof, either principal or interest, excepting for so much as has been actually collected by the city treasurer for the payment of such part of the improvement for which such bonds have been issued," etc.

Furthermore, sec. 925—192, Stats. 1915, being part of ch. 40a, and also governing the issue of said bonds, reads, in part, as follows:

"* * * Said bonds shall be signed by the mayor and clerk, be sealed with the corporate seal of the city, and contain such recitals as may be necessary to show that they are chargeable only to particular property, specifying the same, and the number and amount of said bonds, and such other provisions as the council shall think proper to insert; such bonds shall in no event be a general city liability."

The language of the statutes above quoted under which these bonds were issued make it clear, I think, that these bonds are in no sense a general city liability. They are made by the statute a direct liability and lien against the property benefited and described therein by which the amount of the bond is to be collected from the private property owner by the city and turned over by the city when collected in payment of the bond, but the city has no direct liability on the bond. It can pay the bond only out of the money that it may collect from the private property owner on the special assessment.

True, our court in the case of *Fowler v. City of Superior*, 85 Wis. 411, in passing upon bonds issued by the city of Superior for similar purposes under the city charter of the city of Superior held the same to be city liabilities; and later, in the case of *Chase v. City of Superior*, 134 Wis. 225, the court, applying the rule of *stare decisis*, adhered to the rule of the former case as to those particular bonds. But the charter provisions of the city of Superior, under which the improvement

bonds in that case were issued, differed materially from the provisions of the statute under which the Washburn bonds in question were issued.

Furthermore, our court in the case of *Uncas National Bank v. City of Superior*, 115 Wis. 340, practically overrules the holding in the *Fowler* case. I am satisfied that there is no question that the city of Washburn bonds issued under chs. 40a and 41, Stats. 1915, are not a direct liability of the city of Washburn.

Minors—Courts—Juvenile Courts—A justice of the peace has power to sentence a boy under 16 to industrial school.

County in which no juvenile court has been designated should not proceed with criminal prosecution of child triable in juvenile court, but judge should designate a juvenile judge and then trial should be conducted in his court.

December 17, 1918.

CLIVE J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

In your communication of November 27 you state that there is no juvenile court in the county of Burnett; that at the present time arrests have been made of several boys charged with misdemeanors, in which some will probably not be able to pay a fine and will have to be given a jail sentence. You inquire whether you can proceed in the regular justice court, under the circumstances, and fine these boys and commit them to jail in case their fines are not paid; and if this is not the right procedure, what would be. You also inquire whether a justice of the peace may send a boy to the industrial school at Waukesha.

A justice of the peace has a right to sentence a boy under the age of sixteen years to the industrial school, under subsec. 1, sec. 4966. See, on this question, Vol. II, Op. Atty. Gen., p. 687.

You do not give the ages of the boys under arrest in your county. Under sec. 573—9, it is provided:

"No court or officer shall commit a child under fourteen years of age to a jail or police station, but if such child is unable to

give bond and there is probable reason to believe that a summons will be ineffectual, the child may be placed in the care of the sheriff, police officer, or probation officer, who shall deliver the child to some suitable place which shall be provided by the county outside of the building or inclosure of any jail or police station."

In subsec. 3 of said section, it is provided:

"When any child under sixteen years of age shall be confined in any institution in which adult convicts are held, it shall be unlawful to confine such child in the same room with such adult convicts, or to confine such child in the same yard or inclosure with such adult convicts, or to bring such child into any yard, hall or room in which such adult convicts may be present."

In view of the fact that there is no juvenile court in your county, I direct your attention to the provisions of sec. 573—2, subsec. 1:

"The judges of the several courts of record in each county of this state shall, within ninety days of the passage and publication of this act, and thereafter at intervals of not to exceed one year, designate one or more of their number, whose duty it shall be to hear at such places and times as he or they may set apart for such purposes, all cases coming under this act, and in case of the absence, sickness or other disability of such judge, he shall designate a judge of any court of record whose duty it shall be to act temporarily in his place."

The language here used has a mandatory significance, and the circuit court judge and the judges of the other courts of record of your county should immediately proceed to designate a juvenile judge in your county. If the age of these minors is such that they come within the jurisdiction of the juvenile court, they should not be brought before any court and tried, for the reason that there is no juvenile court. It will not take long for the judges to come to a conclusion in this matter, and I would therefore recommend to you that you call the circuit judge's attention to the fact that no juvenile judge has been designated and request him to take the initial steps to designate, in coöperation with the judges of the other courts of record, a juvenile judge in your county.

Criminal Law—Embezzlement—Facts stated do not constitute embezzlement.

December 21, 1918.

HENRY W. RUDOW,
District Attorney,
Menomonie, Wisconsin.

In your letter of December 19 you inquire as to whether the following facts constitute embezzlement:

"*A* rents his farm to *B* on shares; *A* to have $\frac{2}{3}$, *B* $\frac{1}{3}$; during the year *B* pays out considerable money for repairs, oil, veterinary, etc., understanding that *A* was to pay $\frac{2}{3}$ of the expense; *A* refuses to repay *B*, claiming that *B* was to pay all expenses.

"At the end of the year *B* sells stock off the place, and as *A*'s $\frac{2}{3}$ interest is not as much as he claims *A* owes him for expenses, refuses to pay *A* the $\frac{2}{3}$ of said sale.

"Their contract provides 'The checks and cash received from the sale of milk, stock or grain, to be left and divided at the *X* Bank.'

"There is no question of *B*'s good faith in the matter of the claim against *A*."

In sec. 4418, which is the statute defining embezzlement, we find *inter alia* the following:

"* * * 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 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 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," etc.

Under the above statement of facts, it would appear that *A* and *B* are the beneficial owners of the money in question, and this provision of the statute is applicable, provided it can be said that *B* embezzled or fraudulently converted to his own use the money belonging to *A*.

To constitute embezzlement, it is necessary that there should be a criminal intent. 15 Cyc. 491; 10 Am. & Eng. Ency. of Law (2d ed.) 996.

In note 2 on said page 996 of the Encyclopaedia of Law, we find the following:

"One is liable in a civil action for the conversion of another's property without regard to his intent, but it is different in a criminal prosecution. The statutes sometimes expressly require that the conversion shall have been with 'felonious' intent. Oftener they use the term 'fraudulently' and the term 'embezzle.' They are to be construed, not only in accordance with the common-law principle requiring a criminal intent, but also in the light of their purpose—to supplement the common law of larceny. Therefore, unless such a construction is clearly excluded, they are to be considered as requiring the same intent as is necessary to constitute larceny—a fraudulent intent to deprive the owner of his property."

Under your statement of facts, it seems there is an honest dispute between *A* and *B* as to the liability for certain items of expense. *B* is withholding the money from *A* for the purpose of reimbursing himself for money that he claims is due from *A*. He is doing this not for the purpose of depriving *A* of any money that is due him.

I am constrained to come to the conclusion that there is no fraudulent intent so as to constitute the crime of embezzlement. The dispute between *A* and *B* should be settled by civil action, and not by a criminal prosecution. If it were held that the facts stated are sufficient to constitute embezzlement, and in a civil suit it should subsequently be decided that *A* is liable for the expense and that he cannot therefore recover from *B*, we would have the anomalous condition of having found *B* guilty of embezzlement for retaining his own money.

It is our advice that no criminal prosecution should be instituted against *B*. You are advised that under the facts stated *B* is not guilty of embezzlement.

Constitutional Law—Amendments to Constitution—When a constitutional amendment is proposed by one legislature and by it referred to the next succeeding legislature, the secretary of state should bring it to the attention of such succeeding legislature.

It is proper to do this by submitting a duly certified copy of the proposed amendment to each house of such succeeding legislature.

Proposed amendments to the constitution of the U. S. should be brought to the attention of the legislature in the same manner.

December 23, 1918.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of December 20 you state that two joint resolutions proposing two amendments to the state constitution were passed at the last session of the legislature; that these have been duly published as required by sec. 1, art. XII, state constitution, and that now, under this same section, they must be referred to the coming session of the legislature. You ask if, in my judgment, you should wait until the legislature calls for these matters, or if you should certify them to the legislature in advance of any call.

Sec. 1, art. XII, Const., provides in part:

"Any amendment, or amendments to this constitution may be proposed in either house of the legislature, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election; * * *."

Sec. 2, art. VI, Const., provides among other things that the secretary of state shall perform such duties as shall be assigned him by law.

Subd. (5), sec. 14.29, Stats., provides that the secretary of state shall:

"Safely keep all enrolled laws and resolutions and not permit any of them to be taken out of his office or inspected except in his presence, unless by order of the governor or by resolution of one or both houses of the legislature. For any violation

of this subsection he shall forfeit the sum of one hundred dollars."

The secretary of state is the custodian of these resolutions passed by the legislature. The legislature that originally passed the two resolutions referred to will cease to exist when the new legislature begins its existence on the second Wednesday of January. As to all unfinished business the secretary of state is the conduit through which passes such business from one legislature to the other. He is the connecting link between the two. It might well happen as to some business of that sort, or as to some joint resolutions, that the second legislature would entirely overlook them if they were not called to its attention by the secretary of state. These resolutions proposing amendments are referred, by the legislature which originally passes them, to the succeeding legislature, and that contemplates that they shall be brought to the attention of such succeeding legislature in some manner. No specific method is provided by law, but it seems very clear to me that it is the duty of the secretary of state to lay these matters before such succeeding legislature without awaiting any action on their part, and I understand that that has been the custom in the past. Such practical construction by the officer charged with the administration of the law is entitled to great weight, and you are advised that the proper method is as I have indicated herein.

You also state that in order to make sure that the original, with the original proof of publication, is not lost, it is your present intention, if it meets with my approval, to make a certified copy of the joint resolution and of the proof of publication, and to submit these to the legislature rather than the original papers. You ask for my advice upon this.

Under the provisions of subd. (5), sec. 14.29, Stats., quoted above, you are to safely keep these resolutions and not permit them to be taken out of your office except by order of the governor or by resolution of one or both houses of the legislature, under penalty of the forfeiture of one hundred dollars. I understand the custom in the past has been to submit certified copies instead of the original, and in my opinion that is the course to pursue.

You further state that you have also received the proposed amendment to the federal constitution concerning prohibition;

that you have been unable to find any constitutional or statutory direction as to just how this matter should be brought before the coming legislature; that you are assuming that a similar certified copy should be presented to each house by your department, and that that will end your duty in the premises. You ask for my advice as to this.

Art. V, U. S. Const., provides in part:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, * * * which * * * shall be valid to all Intent and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, * * *."

This virtually provides for a reference to the several state legislatures by congress and such proposed amendments in very much the same way as, under our state constitution, one legislature refers proposed amendments to the succeeding legislature. As in the latter case the secretary of state is the proper conduit or connecting link by means of which the proposed amendments are passed to the legislature, so in my opinion, this proposed amendment to the federal constitution should be brought to the attention of the legislature in precisely the same manner as are the proposed amendments to our state constitution, that is, by the same method that you propose in your letter, and I understand that this is in accord with the custom that has been followed by your predecessors in office.

Tuberculosis Sanatoriums—In secs. 1421—12 and 1421—13 the word "residence," whenever used, should be construed "settlement."

The words in sec. 1421—14, subsec. 4, "who are nonresidents of the county," should be read as "who have no legal settlement in the county."

December 26, 1918.

HONORABLE M. J. TAPPINS, *Secretary,*
State Board of Control.

I have your communication of December 9, together with a letter from the register in probate of Rock county addressed to you. It appears that one L. L. Hilton has made application to

the county court of Milwaukee county for admission to Muirdale sanatorium as a county charge; that he was told that he is a resident of Rock county, and that he then made application to Judge Fifield, of Rock county, for permission to go to the Muirdale sanatorium as a county charge, and Judge Fifield decided that he was a legal resident of Milwaukee county. The facts testified to before Judge Fifield are contained in Mr. Nelson's letter to you, in which he has submitted to you the question as to the legal residence of this man. You submit his question to this department and also the question as to whether Mr. Hilton should be charged to Milwaukee county or to Rock county.

Mr. Hilton stated in his testimony:

"That he lived in Janesville 17 years, is married and has a wife and one child, a daughter, eight years of age;

"That on June 16th, 1918 he accepted a position in Milwaukee with Federal Rubber Company at Cudahy; that on August 5th he returned to Janesville and moved his family to Milwaukee with the intention of making that city his future and permanent home;

"That he registered and voted at both the primary and general election at Milwaukee, First Ward; Seventh precinct;

"That he was examined on September 5th and went to Muirdale on September 11th, and has been there ever since at a charge of \$10 per week, which is not paid;

"That he has never applied for charity or assistance in Milwaukee;

"That he has no real estate, no bonds, mortgages or cash or other property in any amount; that he has always been able to earn living and support his family up to present time; that he is not able to pay \$10 per week and none of his family are able to pay it;

"That he was told that he had not been a resident of Milwaukee County for one year so must go back to Rock County for aid in getting into a sanatorium as a county charge."

Judge Fifield of Rock county came to the conclusion that Mr. Hilton is a legal resident of Milwaukee county, and the facts testified to before him, as above quoted, leave no doubt in my mind that such is the case. Mr. Hilton went to Milwaukee with the intention of making it his permanent home. He secured a position in that city and moved his family there. He has voted there, and considers that his residence. But does the question as to whether Rock county or Milwaukee county is liable for his maintenance at the sanatorium depend upon his

legal residence, or is the county liable in which he has a legal settlement, and should the proceedings be brought before the county judge in the county in which he has a legal residence or a legal settlement?

While the above testimony proves that Mr. Hilton is a resident of Milwaukee county, it also proves that he has a legal settlement in Rock county. Under sec. 1500, subd. (4), it is provided that, in order to acquire a legal settlement, it is necessary for a person to be a legal resident in a place for one whole year, and in subd. (7) of the same section, we read:

"Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost."

Mr. Hilton had acquired a legal settlement in Rock county when he moved to Milwaukee. He has not resided in Milwaukee county one year. It follows that he has not acquired a legal settlement anywhere else, and therefore retains it in Rock county under these statutes. Muirdale sanatorium is a county institution, established under the provisions of secs. 1421—9 to 1421—16, Stats. We must therefore look to the provisions of these statutes for an answer to the question as to whether liability of the county depends upon a legal residence or upon a legal settlement of the inmate of the sanatorium. The provisions of the statutes here relevant are contained in the following sections:

"Section 1421—12. Any person suffering from tuberculosis, who shall have been a resident of the state for at least one year, and who is unable to pay for his or her maintenance, 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 has a legal residence* 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 *has a legal residence* shall make a thorough investigation of the case, and if in his judgment 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 im-

mediately forward to the superintendent of the institution a statement in writing that such person is unable to pay for his or her maintenance and is suffering from tuberculosis. Upon receipt of such certificate it shall be the duty of the superintendent of the institution to receive and care for such person until the superintendent shall recommend his discharge or removal."

"Section 1421—13. In all cases where persons desire to be admitted into the institution, at public expense, the *county judge of the county in which such person has a legal residence* shall, before issuing an order for his admission, cause such person to be examined by a regularly licensed physician who shall file a report with such judge, and if it is found by such judge from the report of such physician that such person is suffering from tuberculosis the order for the admission of such person shall be issued."

"Section 1421—14. * * *

"4. On the first day of July the trustees of any county operating such an institution shall also certify to the secretary of state the names of all persons *who are nonresidents of the county operating such institution* and who have been cared for at public expense in such institution, and said secretary of state shall further credit the county in whose sanatorium said nonresident patients are cared for, to the amount of the difference between the regular weekly charge at said sanatorium as determined by the board of trustees and the amount credited by the state under subsection (8) of section 20.17 for the care of such persons. The amount of the difference so credited shall be charged by the secretary of state to *the county in which such tubercular patients have a legal settlement* and charged thereto in the next tax levy after such certificate is received and approved by the state board of control of Wisconsin."

If the language used in the above statutes is to be given its ordinary meaning, then the application for admission to a county sanatorium must be made to the county judge of the county in which such person has a legal residence, and the order for admission must be made by the county judge of the same county. In said subsec. 4, sec. 1421—14 we, however, find that the trustees of any county operating a county sanatorium are required to certify to the secretary of state the names of all persons who are nonresidents of the county operating such institution, and who have been cared for at public expense in such institution, and in the latter part of said subsection it appears that the secretary of state is then required

to make the statutory charge for such maintenance to the county in which such tubercular patient has a legal settlement.

Under a literal interpretation of the language used, Milwaukee county could only receive credit for patients maintained in Muirdale sanatorium that have been committed thereto by a judge other than a judge of Milwaukee county, for only in such case will the patient be a nonresident of Milwaukee county; and the expense of maintenance can only then be charged to the county in which he has a legal settlement. In other words, the literal language leads to the absurd result that each county which maintains and supports a county institution is penalized to the extent that all patients committed to such institution by its county judge must be supported at the county's expense, while those counties which do not erect and maintain a county sanatorium may have their patients committed by their county judge to a sanatorium in another county and receive the statutory credit for such maintenance by the secretary of state; and the charge for the expense of such inmate is then borne by the county where the inmate has a legal settlement.

Inasmuch as Mr. Hilton is a resident of Milwaukee county, his application for admission to Muirdale sanatorium would have to be made in the county court of Milwaukee county, and as the statutory charge to the county in which he has a legal settlement can only be made for nonresidents, the expense for his maintenance would have to be borne by Milwaukee county, while every patient who has a residence in another county may be committed by the county judge of such county to said sanatorium, and then the proper charge can be made to the county in which the patient has a legal settlement. This is certainly an anomalous situation.

After a careful consideration of these provisions of the statutes and the history of these sections, I have come to the conclusion that, giving the words their literal meaning in the practical application of their provisions, they lead to such unreasonable and absurd results as to "involve the legislative purpose in obscurity," and we may therefore resort to construction so as to ascertain the legislative intent. Every rule that may throw light upon the purpose of the legislature may be considered. *In Pfingsten v. Pfingsten*, 164 Wis. 308, 313, our court used the following significant language, which is here apropos:

"* * * In such case, or when obscurity otherwise exists, the court may look to the history of the statute, to all the circumstances intended to be dealt with, to the evils to be remedied, to its reason and spirit, to every part of the enactment, and may reject words, or read words in place which seem to be there by necessary or reasonable inference, and substitute the right word for one clearly wrong, and so find the real legislative intent, though it be out of harmony with, or even contradict, the letter of the enactment."

An examination of the history of the provisions of these sections here involved clearly shows that where the words, "a legal residence" are used the legislature intended to use the words, "a legal settlement," and that the error was inadvertently made, and that we are justified in substituting the word "settlement" in every case where the word "residence" is used. Let us now examine the history of these sections.

In ch. 429, laws of 1915, secs. 1421—12 and 1421—13 were amended by substituting the words, "has a legal settlement" for the word "resides" in all cases where the word "resides" was used. Said ch. 429 was approved July 20, 1915. Later in the same session of the legislature, ch. 544 was enacted, which was approved August 16, 1915. In said ch. 544, secs. 1421—12, 1421—13, and 1421—14, subsec. 1, were amended, manifestly for the purpose of eliminating the words, "in the secondary and advanced stages," where those words follow the word "tuberculosis," wherever used in said sections. This is clearly indicated by the stars showing the omission of words, contained in said ch. 544 as printed in the laws of 1915. It will be noted, however, that otherwise the said sections were reenacted in exactly the same words as they were prior to the amendment made in ch. 429. In other words, where ch. 429 substituted the words, "has a legal settlement" for the word "resides," ch. 544 reenacted the said sections with the word "resides" in all places where the words "has a legal settlement" had been substituted. Evidently the person who drafted the bill, No. 263, S., which was finally enacted as ch. 544, laws of 1915, as they were worded prior to the amendment made in said ch. 429, overlooking the fact that the legislature had already amended said sections, substituted the words, "has a legal settlement," for the word "resides" in all cases where the word "resides" had been used.

An examination of the records in the office of the secretary

of state shows that bill No. 263, S., as introduced, did not comply as to form with joint rule No. 7, par. 8, as printed in the Senate Manual for 1917, nor with sec. 20.08, Stats. 1915. Said joint rule No. 7, par. 8, provided:

"All bills proposing amendments shall indicate the change desired by showing the matter to be stricken out with a line through the words or part to be omitted, and all new matter with underscoring or italicizing of the part inserted. The portions to be left unchanged shall be presented in ordinary type-writing or by Roman type, as required by section 20.08 of the statutes."

Said sec. 20.08 provided:

"* * * Any bill or resolution proposing an amendment to any existing statute or to the constitution shall have matter to be stricken out printed with a line drawn through the same and new matter printed in italics; provided, that either house may except from this provision revision bills proposed by the revisor. The provisions of this section shall govern the printing of amendments to bills, resolutions, joint resolutions and memorials, so far as applicable."

Sec. 35.08, Stats. 1917, now contains substantially the above provisions of sec. 20.08, Stats. 1915. This rule of the legislature and the provisions of the above quoted statute are manifestly for the purpose of apprising the individual legislator, by a cursory examination of the bills, of the exact amendments or changes to be made. The law makers will not have the time to make careful comparisons of the bill as introduced with the original statute which it is sought to amend. They will rely upon the changes indicated by a compliance with this statutory provision and said joint rule No. 7. The members of the legislature who voted for the amendments in ch. 544, laws of 1915, to said secs. 1421—12, 1421—13 and 1421—14, subsec. 1, apparently intended to eliminate the words, "in the secondary and advanced stages" following the word "tuberculosis" wherever the same appears in said sections, and did not intend to change or amend said sections in any other way. We are strengthened in this conclusion by the fact that these changes were made in the closing session of the legislature, when bills were rushed through and very little time given to making careful comparisons and examinations of the details of all the bills passed.

The reviser of the statutes has caused a number of bills to be introduced into the legislature and enacted into law for the purpose of correcting typographical and clerical errors, misprints, mistaken reference and other errors. The reviser evidently noticed the error which we have pointed out and in his bill No. 691, S., as enacted in ch. 635, laws of 1915, he made an attempt to correct said error. Sec. 2 of said bill and of said ch. 635 provides as follows:

"Sections 1421—12 and 1421—13 of the statutes, as amended by chapter 544 of the laws of 1915, are amended by striking therefrom the word 'resides,' wherever it appears, and by inserting in each place thereof the words 'has a legal residence.' "

This amendment, however, does not remove the difficulty, as the words, "has a legal residence," have the same legal import as the word "resides," and we would be at a loss to know why the reviser should change the wording, if his purpose was to correct an error, but fortunately we have the reviser's note as to the purpose he had in view in making the change. In his explanatory note immediately following sec. 2 of said bill, he states:

"Restores the amendments of these sections made by chapter 429 of the laws of 1915, there being no apparent intent to undo what had been done by the earlier chapter."

This note makes it clear that the reviser, in his attempt to correct the error of the legislature, inadvertently used the word "residence" when he intended to use the word "settlement," for he clearly states that his purpose was to restore the amendments of these sections which were made by said ch. 429, and there the word "settlement" was used. We therefore are forced to the conclusion that it was the intent of the legislature, by enacting sec. 2, ch. 635, laws of 1915, to amend secs. 1421—12 and 1421—13 of the statutes, as amended by ch. 544, laws of 1915, by striking therefrom the word "resides," wherever it appeared, and by inserting in such place the words, "has a legal settlement." We therefore contend that in order to carry out the intent of the legislature as it clearly appears from the history of these sections, the word "residence" in said sections is used as synonymous with "settlement," and that the word "settlement" should be substituted for the word "residence" in the interpretation placed upon these provisions.

The latent ambiguity which appears in these sections is thus made clear by resorting to construction so as to give effect to the manifest legislative intent.

In the case of *Pfingsten v. Pfingsten*, *supra*, 321—322, it is said:

“* * * As we have heretofore said, whatever is within the intent of the lawmakers and can, by rules for construction, be read out of the legislative language, is as much within the words of the law as if literally there expressed.”

As an illustration of the foregoing rule the case of *Neacy v. Milwaukee Co.*, 144 Wis. 210, was referred to, and the following quotation was made from the opinion in said case:

“* * * ‘Words necessary to be supplied should be deemed to be in place by necessary or reasonable implication, and words necessary to be displaced, so far as evidently inadvertently used, to bring out the sense manifestly intended should be regarded as surplusage, and words necessary to be transposed to that end should be given their proper place, all by familiar rules for judicial construction.’”

And the court also referred to the following quotation, which was approvingly made from a standard text-writer, in the case of *Neacy v. Milwaukee Co.*, *supra*:

“* * * ‘The judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention, and that his amendment probably does.’” (P. 322.)

In view of the foregoing, I have come to the conclusion that the words, “has a legal residence,” wherever they occur in secs. 1421—12 and 1421—13, must in each case be read as “has a legal settlement.” In other words, the word “settlement” should be substituted for “residence.”

There would be no doubt in my mind of the correct construction of the foregoing, if it were not for the fact that secs. 1421—12 and 1421—13 were reenacted with slight amendments by ch. 568, laws of 1917, and that subsec. 4 of said sec. 1421—14 was created at the same time by said ch. 568. But after careful consideration, I believe that the legislature used the word “resi-

dence" in said sections in the same sense in which the word was used in the statute, as enacted in the legislature of 1915, and that the words in said subsec. 4, sec. 1421—14, at the end of the second and the beginning of the third lines, reading "who are nonresidents of the county," should read, "who have no legal settlement in the county." By substituting these words, the obscurity is clarified, and the resultant meaning is such that the statute may be practically applied.

I believe it is absolutely necessary to make the substitution of these words in order to arrive at a reasonable construction of these statutes. Of course, there will be some doubt as to whether the court will come to the same conclusion, but I believe, until the court has passed upon the question, the foregoing is the construction that should be placed upon this statute by the administrative officers. I am informed that the reviser will recommend to the legislature amendments to these statutes, so that the language may express the result here arrived at by construction.

It follows that Mr. Hilton should make his application to the county court of Rock county, in which he has a legal settlement; that the order for admission should be made by said county court, and that under subsec. 4, sec. 1421—14, the trustees of the Muirdale sanatorium may certify to the secretary of state the name of Mr. Hilton, and that the charges in excess of the credit given to the county by the state for the maintenance of Mr. Hilton may be charged to Rock county, where Mr. Hilton has a legal settlement.

Charitable and Penal Institutions—Prisons—Religious services and religious instruction in state and county charitable, reformatory and penal institutions and state prison considered. Statutes mandatory.

December 26, 1918.

HONORABLE M. J. TAPPINS, *Secretary,
State Board of Control.*

I quote the following from your letter of December 20:

"The question has been raised as to what religious services are provided by statute for state or county institutions, that is, for institutions to which persons are committed, and whether the statutes are mandatory upon the subject,"

You request an opinion in this matter.

Sec. 4886 reads as follows:

"The officers of the prison shall consist of one warden, one deputy warden, one clerk, one chaplain, one gatekeeper, one turnkey, one matron for the female prison department, and such guards, overseers and laborers as may be necessary."

Sec. 4905 reads as follows:

"The chaplain shall hold divine service in the chapel once on each Sunday, instruct the prisoners in their moral and religious duties and visit the sick on suitable occasions. He shall also act as librarian and prepare and keep a list of the number and titles of the books in the library. He shall be in attendance at the prison daily during usual business hours, unless excused by the warden. He shall devote not less than three hours per day, once in each week, and oftener if the board of control shall consider it necessary, to instructing those prisoners who need such instruction in the common branches of English education; and with the consent of the warden may call to his assistance in such educational labors such persons as he may deem qualified from among the convicts of the prison. The chaplain shall make full report to the warden on the thirtieth day of September in each even-numbered year of all matters connected with his labors during the preceding term; the substance of which report shall be embodied in the report of the warden to the board, required by this chapter."

Sec. 4906 reads as follows:

"A Catholic clergyman may also be engaged by the warden to hold services once each month for the benefit of prisoners of that faith, at an expense not to exceed two hundred dollars per annum."

Sec. 4951 reads as follows:

"The keeper of each prison shall provide, at the expense of the county, for each prisoner under his charge, who may be able and desirous to read, a copy of the Bible or New Testament, to be used by such prisoner at proper seasons during his confinement; and any minister of the gospel or person duly delegated by any regularly organized Young Men's Christian Association or any other religious association or corporation within the county, disposed to aid in reforming the prisoners and instructing them in their moral and religious duties, shall have access to them at reasonable and proper times. All persons committed to any reform school, prison, parental school, industrial school, home for dependent children or other place

of confinement or commitment, shall be allowed spiritual advice and ministration from any recognized clergyman of the denomination or church to which they may respectively belong or did belong prior to their commitment or confinement, which advice and ministration shall be given within the place of confinement in such manner as will secure to such persons the free exercise of their religious belief and under such reasonable rules and regulations as the officers in charge of such place shall prescribe."

Secs. 4886, 4905 and 4906 apply specifically to the state prison at Waupun. These sections are mandatory in their terms.

The first sentence of sec. 4951 applies generally to county prisons, and, in my opinion, such prisons include county jails, workhouses and the house of correction of Milwaukee county.

The second sentence of sec. 4951 relates to persons

"committed to any reform school, prison, parental school, industrial school, home for dependent children or other place of confinement or commitment."

This language is broad enough to include all state and county institutions of a penal, charitable, reformatory, industrial or educational character in which persons are confined or to which they are committed.

The provisions of said sec. 4951 are in terms mandatory.

I am unable to find any other statutory provisions upon the subject referred to in your letter.

Taxation—Railroads—Agriculture—Noxious Weeds—Certified copy of claim of town weed commissioner for destroying weeds on railroad property held to be in due form.

It is the duty of the state treasurer to collect same against the company as other taxes are collected, one-half in May and one-half in November.

December 28, 1918.

HONORABLE HENRY JOHNSON,
State Treasurer.

With your letter of December 26 you have submitted to me a certified copy of the claim of the commissioner of noxious weeds to the board of supervisors of the town of Oak Creek,

in Milwaukee county, for work done in cutting noxious weeds from August 9 to 15, 1918, amounting to \$15, with the request that you add the amount to the sum due for taxes from the Chicago & North Western Ry. Co., and you request my opinion as to whether said statement is in legal form and complies with the statutes relating to such matters, and if so, whether you are authorized to add the said sum of \$15 to the taxes of said railroad company and collect the same on or before May 1, 1919, or only one-half of said \$15 at that time and the balance on or before November 1, 1919.

I have examined the statutes relating to noxious weeds, being secs. 1480 to 1481, both inclusive. A claim of this nature appears to be authorized by the provisions of sec. 1480b and 1480t—12. It is my opinion that the statement as prepared by the town board of Oak Creek is in due form and complies with the sections referred to.

Ch. 51, Stats., governs the proceedings for the taxation of railroad property in this state. Under said chapter it is the duty of the tax commission to annually assess the property of all railroad companies and compute and levy a tax on the property of each company. The tax roll, when completed, must be delivered to the state treasurer, whose duty it is to collect the taxes so extended upon the tax rolls. Of the taxes so levied and extended upon the tax rolls, railroad companies are required to pay one-half of the amount of such tax on or before the first day of May and one-half on or before the first day of November of the same year. See sec. 51.15.

Sec. 1480b above referred to provides, among other things:

"* * * A certified copy thereof [of the account of the weed commissioner] to be transmitted to the state treasurer, who shall add the amount designated therein to the sum due from the railroad company owning, occupying or controlling the land specified as the license fee thereof and he shall collect the same therefrom as prescribed in sections 1212 and 1213 and return the amount collected to the town, city or village from which such certificate was received," etc.

You will note that secs. 1212 and 1213, Stats. 1911, are now obsolete but that while they were in force they prescribed the manner in which railroad license fees were paid under the license system of taxation. Under said sections license fees were payable on the tenth of February and the tenth of August in each year.

Notwithstanding the fact that sec. 1480b has not been made to harmonize with present statutes relating to the collection of railroad taxes, it is my opinion that such taxes are collectible, and, according to the terms of sec. 51.15, are payable, one-half on or before the first day of May and one-half on or before the first day of November of the same year. If, however, it is more practical or convenient for all concerned, I see no harm in including the said special weed tax in and collecting the same with the taxes of said railroad company due on May first, next.

I suggest that the attention of the next legislature be called to this peculiar situation in order that legislation may be enacted to harmonize said sec. 1480b with the present statutes, or to prescribe a more satisfactory method of collecting taxes for the destruction of weeds.

Where the noxious weeds consist of Canada thistles, destroyed on railroad lands, it is provided by sec. 1480t—12 that the amount chargeable therefor shall be filed with the state treasurer, who shall add the amount designated to the sum due for taxes from the railroad company,

"and he shall collect the same therefrom as provided by law."

This section harmonizes with the present statutes but it may not be the most practical way of collecting such a tax.

Public Officers—Deputy Bank Commissioner—Appropriations and Expenditures—A deputy bank commissioner who is also a bank examiner and who resides at Black River Falls is not entitled to his expenses at Madison while attending to his duties.

January 3, 1919.

HONORABLE MARSHALL COUSINS,
Commissioner of Banking.

I have yours of December 30, in which you state that Mr. Richards, the deputy commissioner of banking, also acts as an examiner of banks; that nearly all his time is spent in examining banks and that only occasionally is he required to be in Madison; that his home is Black River Falls; that the law allows his expenses when out examining banks or performing any other official duty; that he makes no claim for expenses

when he is at Black River Falls or at Madison; that the state is divided into five examining districts and that two examiners are assigned to each district; that to save time and railroad fare they reside in or near the district to which they are assigned, and that examiners are allowed their expenses when away from the town where they reside.

Upon this statement of facts you request a ruling from me upon the question whether Mr. Richards should be allowed his expenses when business calls him to Madison.

This department, it seems, has rendered an adverse opinion upon a statement of facts substantially like the above, submitted by your predecessor. See Vol. I, Op. Atty. Gen., p. 440. Here the question is very thoroughly discussed. However, I have gone over the facts and the law very carefully, but I am unable to find any legislative action or court decision which modifies in any way said opinion. It is true that there are some equitable considerations in the case of your deputy but the law seems to make no exceptions. The general rule as laid down in that opinion has been followed, as far as I can discover, all these years, and is firmly fixed. Nothing but legislative action can change it. As the opinion above referred to is accessible to you and to your deputy, I have not attempted to quote any portion of the same herein.

Civil Service—Benefits of the law.

January 4, 1918.

WISCONSIN CIVIL SERVICE COMMISSION.

Your esteemed favor of January 3, asking me as attorney general of the state of Wisconsin to give you a statement of the operation of our civil service law in connection with this department, is at hand.

In reply thereto I would say one of the greatest benefits derived by this department through the civil service law is the selection of employes for the department because of merit only. It has uniformly furnished employes of ability and experience, capable of efficiently performing the services demanded of them.

Another benefit is that it retains in the service of the department those employes who have become familiar with the work

and more or less specialized in the line of work demanded of them, so that in time the corps of employes in the department is much better fitted to conduct the work of the department than would be any corps of assistants that probably could be gathered together by an incumbent of this office in the time he would have to select the same.

On the whole, I am satisfied that in this department the civil service law of the state of Wisconsin has proved very beneficial.

Mothers' Pensions—Where deceased husband left \$700 to \$1,000 in life insurance to widow or children as beneficiaries, aid may be granted in discretion of county judge.

January 4, 1919.

E. S. JEDNEY,

District Attorney,

Black River Falls, Wisconsin.

In your letter of December 18 you submit the following:

"In a case where the husband dies and leaves a widow and several children under fourteen years of age, and where the husband leaves about \$700 to \$1,000 in insurance money belonging to the estate and it is the desire and plan of the widow to build a home for herself and the surviving children by using such money, under such facts would the county judge be abusing his discretion vested in him by the law in granting aid for such children?"

"Also in case the widow should happen to be the beneficiary named in such life insurance policy, would the county judge be abusing his discretion in granting aid for the children, as dependents?"

A somewhat similar question was passed upon in an opinion to James H. Hill, district attorney at Baraboo, August 2, 1916, reported in Vol. V, Op. Atty. Gen., pp. 604-605. There were two cases presented and covered in that opinion. The first was where the children were all under fourteen years of age and had about \$300 apiece left in the hands of a guardian. I quote from the opinion as follows:

"The small sums in their guardian's hand would supply their needs for support and education only a short time, if

sole reliance were placed thereon. For if the mother is to devote herself to the care and education of the children, the allowance from their little estate must be sufficient for her support and theirs.

"This widowed mother is under legal obligation to support her minor children. If she must earn the support for the family, that will certainly take all or most of her strength and time and leave little, if any, of either for the nurture and education of her children."

The scope, underlying theory, and general purpose of the act in question is fully discussed in an opinion to Fred D. Merrill, assistant district attorney of Brown county, given November 30, 1915, and reported in Vol. IV, Op. Atty. Gen., p. 1039.

Quoting further from the opinion, Vol. V, 604, 605:

"It is my opinion that the juvenile court has power to grant aid in a case like this. It seems to me that the question is not one of law but a mixed question of law and fact, which must rest in the discretion of the court. It is left for the good sense of that court upon such investigation as he deems necessary, to determine whether aid shall be expended; and if it is to be expended, how much. * * * In most counties the judge of the juvenile court and of the county court is one and the same person. No one is so well situated to determine what is for the best interests of the children as he. Whether aid should be given under this law, to enable the little property of these children to be husbanded as a sort of insurance against disease and injury, or whether this property in hand should be first entirely consumed for the ordinary and current needs of the children, is to be determined by the court. Of course, in granting aid, the court would take into account the property in the hands of the guardian."

The second case covered in the same opinion was that of a woman who had a house and \$1,500 out at interest. She had three or four children under the age of fourteen. By working away from home, she could get along with very little, if any, reduction of the \$1,500 principal, which she was keeping for the education of the children, and the question was whether she was entitled to any benefit under this law. Quoting further from the opinion, 605—606,

"The woman mentioned, 'by unremitting work away from home,' is, as you say, rendered unable to personally give her

children the care and attention needed for proper rearing of children unless there is some one to take her place, which is unusual and difficult. Aid may be reasonably needed to save the children from neglect: * * *

"The law looks to the welfare of the children primarily; it is anxious that they shall receive a suitable education, using that term in its broadest sense. If the juvenile court is of the opinion that this aid is essential to the education of these particular children, it would be warranted in extending aid."

It was held that this was a proper case for aid to be granted, if in the discretion of the court administering the aid it was just and proper.

Upon the authority of the foregoing cited opinions I conclude that the case you submit falls within the intent and meaning of sec. 573f, Stats. The county court may, therefore, in the case you present, grant or refuse the aid within his discretion.

Public Officers—District Attorney—Elections—Special Elections—No special election can be held to fill vacancy in office of district attorney of Waukesha county, as same must be filled by appointment by governor.

January 4, 1919.

HONORABLE L. C. WHITTET,

Secretary to the Governor.

Since receiving your letter of January 3, relative to the appointment to fill the vacancy in the office of district attorney of Waukesha county, I will say that I have carefully considered again my opinion to you of November 21, 1918,* and I have come to the conclusion that said opinion should be modified, to the extent that the vacancy in the county office should be filled by appointment instead of by a special election.

I find that sec. 4, art. VI, Wis. Const., was amended in 1882, by adding the following sentence to said section, which relates to county officers:

"* * * All vacancies shall be filled by appointment and the person appointed to fill the vacancy shall hold only for the unexpired portion of the term to which he shall be appointed, and until his successor shall be elected and qualified."

* Page 621 of this volume.

It seems to me that this language is clear and unambiguous, and under its provisions, a vacancy in a county office can only be filled by appointment. That there is a vacancy in the office of district attorney in contemplation of law is evident from the provision of subd. (9), sec. 17.02, defining vacancy. Under sec. 17.07 the governor is authorized to fill the vacancy in the office of district attorney. Any provision in the statute which is in conflict with the above quoted provision of the constitution is of no effect and cannot give any authority for a special election.

You are therefore advised that it is my opinion that no special election can be held to fill the vacancy in the office of district attorney of Waukesha county and that the same must be filled by appointment.

Bridges and Highways—Limitations—Failure to give the notice provided by sec. 1339 is a bar to an action based on said section.

The 6-year statute of limitations applies to such action when the notice has been given.

January 6, 1919.

E. S. JEDNEY,

District Attorney,

Black River Falls, Wisconsin.

It appears from your letter of December 10, 1918, that a freshet in the city of Black River Falls caused much damage to private property and that the owners thereof are likely to make claim against the county for such damages, basing the same upon the contention that a sluiceway in the public highway was insufficient to care for the great volume of water and as a consequence thereof the injury resulted.

You further state that you believe the owners are barred from maintaining an action against the county under sec. 1339, Stats., because no notice was served as required by said section. You ask my opinion of the effect of failure to give such notice.

There is in your letter no sufficient statement of facts to enable one to pass upon the question of liability of the county. The statute under which the highway was constructed, the nature of the waters—whether surface waters or otherwise—

the character of the flood, as to being ordinary or extraordinary, are not stated and those facts would likely enter into the question of the county's liability.

The liability created by sec. 1339 is purely statutory. It did not exist at common law. *Morrison v. Eau Claire*, 115 Wis. 438. To recover under said statute its terms must be complied with and the giving of a notice of injury and of defects in the highway is essential. Failure to give the notice is a bar to a cause of action. See note to sec. 1339, Wisconsin Annotations.

Perhaps I should state further that it is my opinion, based upon the cases digested in said note and other authorities, that the liability created by sec. 1339, Stats., is confined to injuries resulting from defects in a highway as such and which relate to its use for travel. The liability created does not relate to abutting property or the owners thereof.

In performing the duty of building highways a county merely exercises

"a governmental function performed on behalf of the state at large, from which the municipality derives no pecuniary benefit. From such omission, but for express statute, arises no right of action in favor of one toward whom this mere governmental duty is owed, such as a traveler." *Morrison v. Eau Claire*, 115 Wis. 538, 542.

This same rule is applied in cases of injuries resulting from defects in the construction, maintenance or operation of schools. *Folk v. Milwaukee*, 108 Wis. 359; *Juul v. School District of City of Manitowoc*, 169 N. W. 309.

I believe the rule to be settled in Wisconsin that a municipality is not liable for failure to make suitable or sufficient provision for the passage of surface waters. *Peck v. Baraboo*, 141 Wis. 48; *Harvie v. Caledonia*, 161 Wis. 314 and the cases cited therein.

You ask further what statute of limitation applies, assuming that a cause of action was created by such damages. In my opinion, the six-year statute is applicable. Subd. (5), sec. 4222 limits to six years

"an action to recover damages for an injury to property real or personal," etc.

I am not aware of any other limitation that would apply to this situation.

Appropriations and Expenditures—The industrial commission may pay traveling and other expenses incurred by the advisory wage board appointed by it.

January 6, 1919.

HONORABLE E. E. WITTE, *Secretary,*
Industrial Commission.

Your letter of December 11, 1918, reads as follows:

"Sections 1728s—1 to 1728s—12, inclusive, of the Statutes of Wisconsin, charge the Industrial Commission with the administration of the Minimum Wage Law. Section 1729s—6 provides that this Commission shall appoint an Advisory Wage Board to assist it in making a determination of the 'living wage.'

"A petition was filed with this Commission on May 21, 1918, by the Wisconsin Federation of Labor, The Farmers League of Wisconsin, and the Central Council of Social Agencies, of Milwaukee, asking for a determination of the 'living wage' in accordance with the provisions of the Minimum Wage Law. On September 9, 1918, this Commission adopted a resolution to the effect that there is reasonable cause to believe that the wages paid to the majority of the females and minors whose names were set forth in the petition of May 21, 1918, are not a 'living wage' within the meaning of this term as used in the Minimum Wage Law.

"Pursuant to Section 1729s—6, the Commission has therefore now appointed an Advisory Wage Board, composed of representatives of the employers, employes, and the general public.

"The question has arisen whether this Commission can pay the traveling and other expenses incurred by members of the Advisory Wage Board when attending meetings necessary to discharge its duties on the Minimum Wage Law. We request that you kindly give us an opinion upon this matter."

Sec. 1729s—6 reads as follows:

"If, upon investigation, the commission finds that there is reasonable cause to believe that the wages paid to any female or minor employe are not a living-wage, it shall appoint an advisory wage board, selected so as fairly to represent employers, employes and the public, to assist in its investigations and determinations. The living-wage so determined upon shall be the living-wage for all female or minor employes, within the same class as established by the classification of the commission."

Sec. 20.73, subds., (1) and (2) read in part as follows:

"Except as expressly provided by law, the * * * industrial commission * * * are each authorized to appoint,—

subject to the civil service law in cases where the provisions thereof are intended to apply, and subject to the approval of such other officer or body as prescribed by law,—such deputies, assistants, experts, clerks, stenographers, or other employes as shall be necessary for the execution of their functions and to designate the titles, prescribe the duties, and fix the compensation of such subordinates.

"(2) The chief officers enumerated in subsection (1) and their appointees and employes shall each be reimbursed for actual and necessary traveling expenses incurred in the discharge of their duties."

The sections quoted are, in my opinion, a sufficient answer to your inquiry. I am satisfied that the industrial commission may pay the traveling and other expenses incurred by members of the advisory wage board when attending meetings necessary to discharge its duties under the Minimum Wage Law.

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