ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee..................from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee..........................from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva..................from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison..................from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point..................from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh..........................from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay..................from Jan. 2, 1860, to Oct. 7, 1861
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 E. FRISBY, West Bend..................from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc..................from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison..................from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau..................from Jan. 7, 1895, to Jan. 2, 1899
EMMETT R. HICKS, Oshkosh..................from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT, Neillsville..................from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison..................from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center..................from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock..................from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson..................from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel..................from Jan. 6, 1919, to Jan. 3, 1921
The regents or other governing officers of a state university act as agents in behalf of the state when they enter into a contract involving the expenditure of money of the state; and their authority to bind the state is limited to the amount of the legislative appropriations granted for such purpose.
The supreme court of Wisconsin has spoken upon the subject, in the case of *State v. Mills*, 55 Wis. 229, 245:

"It cannot be said too emphatically, or repeated too often, that the various boards of trustees and managers of the benevolent and penal institutions of the state have no power to contract debts beyond the appropriations made by the legislature for the support and operation of their respective institutions."

The question has been passed upon as well in other jurisdictions. In *Jewell Nursery Company v. State*, 56 N. W. (S. D.) 113, 114, it is said:

"* * * When an appropriation is made by the legislature for the coming year, that must be taken by such board and those dealing with it as an authoritative expression of the limit of the state's obligation to pay. If contracts are made in excess of such limit, the legislature, and not the courts, must be appealed to for relief."


In the more recent case of *Moscow Hardware Co. v. Regents of University of Idaho*, 19 Idaho 420, 113 Pac. 731, 734, it was said:

"* * * In entering into said contracts—that is, for the construction of the agricultural building and the foundation of the administration building—the Board of Regents had no authority to incur any indebtedness against the state which the Board of Regents had not the funds to pay. They have no authority whatever to incur any indebtedness against the state, directly or indirectly, in the erection of university buildings for which they have no funds to pay. They have no authority to erect a building with the hope or expectation of thereafter securing an appropriation from the Legislature or a recommendatory judgment from this court.""

*Ward v. Board of Regents*, 138 Fed. 372, 374, contains this language:

"* * * When a judgment is recovered against the board, it may lawfully apply to its discharge any funds in its hands not otherwise specifically appropriated, and, in case no fund exists for the purpose, it will be presumed that the Legislature will discharge its duty by providing a fund to meet any liability of the board that is thus judicially established."
Applying the principles of the foregoing authorities to the instant situation, we find it expressly provided by sec. 36.15, Stats.:

“All schools and colleges of the university shall, in their respective departments and class exercises, be open without distinction to students of both sexes; and all able-bodied male students in whatever college therein may receive instruction and discipline in military tactics, the requisite arms for which shall be furnished by the state.”

Sec. 20.39, subsec. (5), specifically provides:

“The university fund income shall be applied to the support of the university and the colleges and departments established, or which shall hereafter be established in or connected with the university; but the moneys from said fund shall be available only as expressly appropriated therefrom by the legislature.”

And as far as our investigation has extended, the only appropriation made for military affairs is that found in sec. 20.41, subsec. 1, subd. (e):

“All moneys received by each and every person as deposits or payments for breakage, consumption and wear of laboratory equipment, apparatus, and supplies, and for military suits, shall be paid within one week after receipt into the university fund income, and are appropriated therefrom as a revolving appropriation for the purchase, care, use and repairs of such equipment, apparatus, and supplies, or other purposes for which such deposits or payments are made.”

It seems clear, therefore, that the university is specifically authorized to provide for military instruction. It is within the general discretion of the board of regents to supply the necessary equipment for that purpose, obtaining the same by purchase or by rental, subject to the limitation, of course, that it could not contract for purchase or rental in the absence of an appropriation.

It is equally clear that they may receive personal property as a gratuitous bailee, which is the relationship created by the terms of the federal act (39 Stats. at Large 166), and to insure the discharge of the duty implied by law, may without doubt execute a bond, but such bond very clearly is valid in case of loss arising thereunder, only to the extent that the legislature has provided a fund for military expenditures.
The conclusion seems clear, therefore, that the execution of the bond in question by the board of regents would not operate to bind or obligate the state thereunder, except in so far as it would create a moral obligation, which under elementary rules would be a sufficient consideration for the appropriation of moneys by the legislature.

How far the sureties upon the bond are bound suggests an interesting question upon which you have not asked an opinion. The rule is laid down in text writers and cases:

"* * * That the principal is under a partial incapacity to contract does not ordinarily prevent his guarantor or surety from becoming bound. In fact the incompetency of the principal may be the very reason for requiring the undertaking of a guarantor or surety." Spencer on Suretyship, ch. III, p. 29.

A further question which you suggest, as to whether the board of regents become personally responsible upon the execution of such a contract, is ruled in the negative.

Mechem on Public Officers, secs. 805, 806, 807, and as stated in 816:

"* * * The true rule seems to be that the officer can only be held liable upon the contract itself in those cases in which he has used apt words to bind himself, or has expressly pledged his personal responsibility, or in which the credit was given to him personally."

While the questions involved are not entirely free from doubt, it would seem that under the circumstances the execution of the bond in question did not bind the state; that probably sureties are asked for by reason of that fact, as ordinarily it would be assumed that if the state were bound, its responsibility would be ample to cover any loss or damage arising and there would be no occasion for requesting the signatures of sureties. The freedom from personal liability seems, as stated, well settled.
In ascertaining minimum salary of county highway commissioner amount to be expended for trunk line construction should be included and maintenance expenditures should be excluded.

January 5, 1920.

Wisconsin Highway Commission.

Under date of December 31, 1919, you have submitted two questions relative to the minimum salary of a county highway commissioner:

1. Should expenditures for maintenance be considered as a basis for determining the minimum salary of a county highway commissioner?

2. Should expenditures to be made the ensuing year for new construction of the trunk highway system with federal aid be taken into account in any case in fixing his salary?

The statute provides:

"* * * The salary of the county highway commissioner, upon reelection, shall be fixed annually by the county board at not less than six hundred in counties doing less than fifteen thousand dollars worth of work the succeeding year; at not less than nine hundred in counties doing between fifteen thousand and fifty thousand dollars worth of work the succeeding year; and at not less than twelve hundred in counties doing more than fifty thousand dollars worth of work the succeeding year. The amount of work used as a basis for fixing minimum salary shall be the amount of actual new construction contemplated the following year." Sec. 1317m—6, subsec. 2, subd. (b).

It is quite evident that the first question must be answered in the negative. Nothing but new construction, strictly speaking, is to be taken into account in determining the minimum salary of that officer. The words of the statute make this as plain as possible.

The answer to the second question is by no means free from doubt, although it would hardly seem necessary to raise the question in view of the present high level of wages and salaries. It is not to be expected that a man competent to fully discharge the duties of a highway commissioner can be obtained at a salary less than $1,200 per year. However, I am of the opinion that the money which it has been decided to expend upon federal aid within the county during the ensuing year should be
taken into account. When such work has been decided upon, it is made the duty of the county board to provide the funds necessary to meet the county's share of the contemplated expenditure. Subsec. 5, sec. 1315. The work is to be done within the county. Funds so raised by the county fall literally within the language of the statute. They go to make up the fund needed to pay for the "actual new construction work contemplated the following year."

Bridges and Highways—Municipal Corporations—All cities and villages are required by law to maintain bridges in streets and highways. Exceptions may exist but none is known.

Wisconsin Highway Commission.

You ask to be advised what cities and villages of this state are required to maintain their own bridges within the meaning of subsec. 8, sec. 1319, Stats.

Said section gives to towns power to compel the county under stated conditions and circumstances to grant aid in the construction of highway bridges, and to levy a county tax to defray the county's share of the expense entailed by such construction. Subsec. 8 of said section contains an exception or reservation in favor of cities and villages as follows:

"Nothing herein contained shall authorize the levy of any tax upon the property in any city or incorporated village required by law to maintain its own bridges."

The general law for the incorporation and government of villages and the general city charter law require villages and cities to provide necessary highway bridges, and make them liable for damages which may result to any person or his property by reason of the insufficiency or want of repair of any bridge.

In Batiles v. Doll, 113 Wis. 257, the court, after reviewing the provisions of statute which indicate plainly that villages are required to build and maintain bridges, said, 362-363:

"* * * These several provisions seem quite clearly to thrust the obligation of building and of keeping up the bridges
within their limits upon villages generally, although there may be those acting under special charters who do not have to carry the burden."

What was there said as to villages applies equally to cities. I know of no exception to the rule which requires villages and cities to maintain the public streets and highways therein in passable condition. I very much doubt that there is any exception to the rule. If there be an exception, it is due to very unusual charter provision. It would require great labor to examine all of the special city and village charters. The practical way is to proceed according to the general rule until the question is raised of its applicability to some particular city or village. When the question is so raised, its answer will depend upon the provisions of the particular city or village charter involved.

Corporations—Ch. 681, Laws 1919, relating to nonpar value stock, not applicable to public service corporation.

Honorable Merlin Hull,
Secretary of State.

On January 3 you submitted to me a letter from Van Dyke, Shaw, Muskat & Van Dyke, a copy of a letter from the railroad commission, and a memorandum, all bearing on the question of whether or not ch. 681, laws of 1919, applies to the stock of public service corporations. You inquire, if in my opinion said chapter was intended to apply to stock of public service corporations.

Ch. 681, laws of 1919, is a general law authorizing corporations to issue shares of stock without any nominal or par value.

Secs. 1753—5 to 1753—22, both inclusive, relate to the stock of public service corporations only and is in the nature of a special provision relating to a special subject.

It is a rule of law that where there is in the same statute a particular enactment relating to a special subject and also a general one which in its most comprehensive sense would include what is embraced in the former, the particular enactment
must be operative and the general enactment must be taken to affect only such cases within its general language as written within the provisions of the particular enactment. Felt v. Felt, 19 Wis. 193; State v. Hobe, 106 Wis. 411.

It is also a rule of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. The earlier act remains in force unless it is manifestly inconsistent with or repugnant to the later one, or unless some express notice is taken of the former act in the later one which plainly indicates an intention to abrogate it, and where there are two affirmative statutes one will not repeal the other if both can stand together. State v. Public Land Commissioners, 106 Wis. 584; Janesville v. Markoe, 18 Wis. 350; State ex rel. v. Tomahawk Common Council, 96 Wis. 73; Attorney General ex rel. Taylor v. Brown, 1 Wis. 513; Attorney General v. Railroad Companies, 35 Wis. 425; Walworth County v. Whitewater, 17 Wis. 193; Mead v. Bagnall, 15 Wis. 156; Gymnastic Association v. Milwaukee, 129 Wis. 429.

Repeals or amendments by implication are not favored, and it is held that acts directed to a special subject are generally to be given effect rather than a general act. Chippewa & F. Improvement Co. v. Railroad Commission, 165 Wis. 105; Gymnastic Association v. Milwaukee, 129 Wis. 429.

Applying the rules of construction above set forth, it must be held that inasmuch as the law regulating the issuance of stock of public utilities can stand alone and since it has to do with the particular subject, I can come to no other conclusion than that ch. 681, laws of 1919, does not apply to the stock of public service corporations.

Public Officers—National Guard—Officer in national guard while guard is not in federal service, not a federal officer.

January 6, 1920.

O. J. Falge,
District Attorney,
Ladysmith, Wisconsin.

In your favor of January 2 you ask to be advised whether the agricultural agent for Rusk county can, while in the employ
of the county as such agent, legally accept and fulfill the duties of captain of a cavalry troop of the Wisconsin national guard.

Sec. 3, art. XIII, Wis. Const., provides:

"No member of congress, nor any person holding any office of profit or trust under the United States * * * shall be eligible to any office of trust, profit or honor in this state."

Under this provision a captain of cavalry troop of the Wisconsin national guard, while in the service of the United States, is not eligible to hold any office in the county.

However, if the national guard, of which the cavalry troop is a part, is not in the service of the United States then the captain of such troop is not a federal officer.

The act of June 3, 1916, 39 Stats. at Large 166, provides:

"* * * The Army of the United States shall consist of the Regular Army, the Voluntary Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States; and such other land forces as are now or may hereafter be authorized by law."

I do not understand that the cavalry troop to which you refer is now in the service of the United States and, in fact, the adjutant general of Wisconsin informs me that it is not.

Therefore the captain to whom you refer is eligible to the office of agricultural agent for Rusk county until such time as the national guard is called into the service of the United States.

A captain in the national guard is not a federal officer so long as he is not assigned to duty in the service of the United States, and he is not so assigned to duty in the service of the United States until the national guard of which he is a part is called into the service of the United States. People v. Duane, 121 N. Y. 367.

Criminal Law—Lotteries—Valuable consideration for right to guess necessary to constitute lottery scheme.

January 6, 1920.

Roman Heilman,
District Attorney,
Madison, Wisconsin.

I am in receipt of your favor of December 30, in which you enclose a letter from Attorney E. C. Smith of Seymour, Wis-
consin, with which he forwarded to you clipping from page 7 of some issue of the — — and a coupon.

I assume the only question involved is whether or not the coupon and advertisement contained in the — — constitute a lottery.

The coupon has on it four numbers under Series CCC and provides:

"The — — will give away absolutely free ten thousand dollars in cash to holders of the — — gift coupons. This coupon gives you four chances to win. All you have to do is to save this coupon and watch the — — for winning numbers. No work, no guessing—just be lucky."

On the reverse of the card it provides that each day certain numbers will be published in the — — and that the winning numbers will be chosen by prominent people; and should one of the numbers on the gift coupon be called for they ask that it should be brought to the office of the paper, where the person will be paid the cash value of the number.

It is expressly provided on the reverse side of the card as follows:

"If you cannot get a copy of the — — phone and ask for the circulation department, or you may see the — — files in the business office, ground floor, the — Building."

In the advertisement it is provided as follows:

"No work to do—just be lucky.
Not necessary to buy anything—not even a newspaper.
You can see winning numbers daily in the files of the — — business office or at the public library."

So far as the coupon is concerned, and the clipping from the newspaper and the letter of Mr. Smith, there is no intimation whatever that there is some valuable consideration to be given for the coupon, or that there is any valuable consideration paid for the chance to obtain a prize.

Mr. Smith does not state in what manner or by what process the coupons are distributed.

In the absence of some showing that there has been a valuable consideration given for the chance to obtain a prize the act of issuing the coupon or the publication does not constitute a lottery.
The advertisement even states that it is not necessary to buy a newspaper.

Therefore, if the holder of the coupon has not parted with some consideration, some money or other thing of value, the scheme does not constitute a lottery.

"A lottery is a species of gaming which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay a valuable consideration for the chance to obtain a prize." 25 Cyc. 1633, 1634, 1635 and cases therein cited.

If the coupon is obtained without money, without consideration or without the rendering of services, or some form of a valuable consideration, the scheme merely constitutes a method for the distribution of a gratuitous gift.

If there was a consideration here for the sale of the chance or for the receipt of the coupon, which constitutes evidence of a chance, a lottery perhaps might be shown.

If, in order to receive the coupon, it is necessary for one to purchase a newspaper, in such case it might be held a lottery scheme. Hall v. McWilliam, 85 L. T. Rep. 239.

In the absence of some such showing or showing of the passing of the consideration for the coupon, the scheme has not all the elements of a lottery.

Newspapers—Official Publications—Taxation—Tax Sales—Effect of change of name, of ownership and of language of newspaper upon its eligibility to publish tax sale notice, discussed.

A. N. Whiting,
District Attorney,
Antigo, Wisconsin.

On December 24, 1919, VIII Op. Atty. Gen. 869, you were furnished an opinion as to the eligibility of the Antigo Herald to publish the delinquent tax sale notice. You now submit additional facts and ask to be further advised in this matter. You say that it is important that a qualified newspaper be
designated because if one not eligible obtains this advertising
the sale may be attacked for want of proper publication of the
notice of sale. It is also important for the reason that an illegal
designation by the county treasurer subjects him to a heavy
forfeiture. The county treasurer is required, by sec. 1130, Stats.,
to make a list of lands delinquent for taxes and to publish the
same in connection with a notice that the land, or enough thereof,
will be sold to pay the delinquent taxes, interest and charges
thereon. Such list and notice must be

"published in a newspaper printed in his county, if there be
one, and if there be none, then in a newspaper printed in an
adjoining county, * * * once in each week for four suc-
cessive weeks prior to said second Tuesday in June; * * *
but it shall be unlawful for any county treasurer to publish such
statement and notice in any newspaper in his county that has
not been regularly and continuously published in such county
once in each calendar week for at least two years immediately
before the date of such notice, if there be a newspaper which
has been so published in such county; and any county treasurer
who shall violate the provisions of this section shall forfeit a
sum equal to the fees allowed by law for such publications, to
be sued for and recovered in a civil action * * *. And it
is hereby made the duty of the district attorney of the proper
county, on complaint being made, to prosecute such action."
Sec. 1130, Stats.

In addition to the facts first given, your letter of January
3, 1920, states that the present publishers of the Antigo Herald
are publishing under some agreement with Ed. Goebel which
permits them to use the name "Antigo Herold." Mr. Goebel,
the former publisher of the Antigo Herold, is now publishing
a paper under the name of "Antigo Banner," which last named
paper, I understand, is in the German language and goes to the
subscribers who were formerly receiving the paper he published
under the name of "Antigo Herold." You do not state which
of the two current newspapers enjoys the mailing privileges
under which the former "Antigo Herold" was distributed. Nor
do you state which one of the present publishers is carrying out
the contracts which existed at the time these changes took place.
At that time, undoubtedly, there were subscriptions paid in
advance and it is highly significant which of these present
publishers is supplying newspapers on those prepaid subscrip-
tions.
Has Mr. Goebel continued to mail his publication published under a new name to the same patrons that he mailed the Antigo Herold to? Did the publishers of the Antigo Herold take over Mr. Goebel's subscription list and his subscription contracts, and advertising contracts? And did they acquire his printing establishment? The exact agreement or contract between Goebel or the publishers of the Antigo Herold must be learned from the contract itself. It is apparent that many facts not before me enter into the determination of your question.

It is apparent, as you say, that the Antigo Herold and the Antigo Banner are two separate newspapers and are not both entitled to the benefit of the former publication of the Antigo Herold in qualifying as publisher of the delinquent tax sale notice. One of these publications is a new newspaper. In determining this question it is the newspaper and not the name which governs. The newspaper is the substantial thing; the name only serves to identify or designate it.

It was held in Reimer v. Newell, 49 N. W. 865, that the change in the name of the newspaper from "Daily Minnesota Tribune" to "Minneapolis Daily Tribune" without other change made in the paper was to be disregarded in the matter of its eligibility to publish legal notices, and that the paper continued to be the same publication notwithstanding such change in its name. The same ruling was made in Norton v. Duluth, 56 N. W. 80, where the name of the newspaper was changed from "Daily Short Line" to "The Commonwealth." In Wyman v. Baker et al., 86 N. W. 432, it was held that the eligibility of a newspaper to publish legal notices was not affected by a change of the publisher or proprietor. The publisher there in question went through bankruptcy and for a time the paper was published by a receiver and later by a new owner.

Looking at the substance rather than the form, it would seem, from the facts which have been submitted to me, that Mr. Goebel continues to publish the same newspaper that he formerly published and that the publishers of the "Antigo Herold" acquired nothing from him except the name "Herold" which they are using with modified spelling. Of course the word "Antigo" belongs to everyone with the right to use the same with entire freedom.

It is my opinion that the county treasurer, while not vested
with judicial power to determine absolutely the eligibility of a newspaper, has authority to inquire into the facts and is in duty bound to do so, and that his determination as to the eligibility of a newspaper could not be disturbed except it be clearly wrong. He has a wide discretion in the matter. In case of doubt he should declare a newspaper ineligible and thus protect himself personally and avoid any question as to the sufficiency of the notice of tax sale.


January 7, 1920.

Industrial Commission.

In your letter of December 31 you inquire:

"Does the child labor law apply to cities, villages, counties, etc. as employers?"

Your question is rather general in its nature, and the child labor law is rather a lengthy and detailed law, and, therefore, in the absence of some specific question, I shall not analyze the law, as that would involve perhaps an unnecessary amount of labor.

However, generally speaking, beg to advise, that the child labor law is applicable to cities, villages and counties.

Under sec. 1728—1 the term "employer" includes a corporation as well as "other person having control or custody of any employment or place of employment."

It is my opinion that a city, village and county is a corporation within the meaning of this statute. 1 Thompson on Corporations, sec. 1.

The child labor law was enacted under the police power of the legislature. The automobile licensing law was likewise enacted under the police power of the legislature. In an opinion rendered by my predecessor on January 31, 1918, VII Op. Atty. Gen. 71, it was held that the automobile licensing law applied to cities except as expressly exempted from the law, or some part thereof.
There is, therefore, every reason to hold that a city, village and county is subject generally to the child labor law on the same theory that a municipality is subject to other police regulations made by the legislature unless expressly excepted or exempted.

There is no reason to hold that a city, village or county engaged in an undertaking in a proprietary capacity should not be subject to the child labor law generally so far as the same may be applicable to specific cases.

Labor—Minors—Child Labor—Judge may not issue labor permit unless there is a person who is willing to give such child work.

Mothers' Pensions—Widow cannot receive mothers' pension and at same time receive aid from city in which she lives.

January 8, 1920.

Frank C. Meyer,
District Attorney,
Lancaster, Wisconsin.

In your letter of January 6 you state that a widow, with a daughter who will be fourteen in February, 1920, applied in December for aid under the widows' pension law; that the daughter in this case is attending school, being in the eighth grade of the Lancaster schools; that there is no opening for a girl of her age in your community; that the county judge desires an opinion from the attorney general whether, under said facts, aid can be granted, and, if granted, whether it can be continued after the daughter reaches the age of fourteen years.

Subsec. (5), sec. 573f as amended by ch. 308, laws of 1919, contains the following:

"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, one or more of whom shall be under the age of fourteen or between the ages of fourteen and sixteen and unable to secure a permit to work."


The girl in question is under fourteen years and therefore is within the age limit of the statute. The question confronts
us whether the fact that there is no work for her in your community is in compliance with the statute when it says that she must be "unable to secure a permit to work." You will note that sec. 1728a—3 gives the data which must be filed with the application for the permit before a permit can be granted. In par. (3), subsec. 2, it provides that one of the records or papers required to be filed with the application is:

"A letter written on such regular letterhead or other business paper used by the person, stating the intention of such person, firm or corporation to employ such child, and signed by such person, firm or corporation, or by some one duly authorized by them."

It thus clearly appears that if there is no work for her to secure she cannot comply with this provision of the statute and therefore cannot secure a permit to work. The daughter of this widow is therefore a child under fourteen years of age and unable to secure a permit to work. It is a case not only within the letter but also the spirit of the law. This is true after the daughter becomes fourteen years of age and before she is sixteen, and for that reason the same principle will apply until the daughter is sixteen years of age.

You also state that in another case a widow is seriously afflicted with cancer and has one daughter under the age of fourteen; that the widow has applied for aid, was under the widows' pension act, and was granted aid in the sum of $15.00 per month. That the question has been asked whether the city of Lancaster, primarily chargeable with the support of the widow, can give further aid to her without prejudice to the granting of aid under the widows' pension law.

In subsec. 6, sec. 573f, Wis. Stats. 1917 (sec. 48.33, subsec. (6), Stats.), which is part of the statute providing for the mothers' pension act, it is expressly provided:

"* * * Such aid shall be the only form of public assistance granted to the family and no aid shall continue longer than one year without reinvestigation.''

I see no escape from the conclusion that if aid is granted to this widow by the city of Lancaster, it would bar any further aid to the widow under the mothers' pension act, as the aid
under that act can only be granted if no other public aid is given to her.

Courts—Minors—Industrial School for Girls—Court of record has power to sentence female under age of 18 to industrial school for girls for vagrancy or incorrigibility and viciousness which require it.

January 8, 1920.

C. J. Smith,
District Attorney,
Viroqua, Wisconsin.

In your letter of January 7 you inquire whether a girl under the age of 18 years may be sent to the industrial school for girls on complaint and proof satisfying the court that she is a vagrant or so incorrigible and vicious that a due regard for the morals and welfare of such girl manifestly requires that she be committed to said school. You refer me to sec. 4966, Wis. Stats. 1917, and especially to subsecs. 2 and 3 thereof. The ambiguity that was present in said sec. 4966 has been removed by ch. 614, laws of 1919. See. 4966 has been renumbered and is now 48.15. Subsec. (2) thereof, as amended, reads as follows:

"The courts of record of this state may, in their discretion, commit to one of the industrial schools of this state any male child between the ages of eight and seventeen years, or any female child under the age of eighteen, having a legal residence in the county who, upon complaint and due proof, is found to be a vagrant or so incorrigible and vicious that a due regard for the morals and welfare of such child manifestly requires that it shall be committed to said school."

In view of this provision your question must be answered in the affirmative.

Public Officers—Real estate brokers’ board is an administrative body and must grant brokers’ license upon showing made by applicant.

January 9, 1920.

Wisconsin Real Estate Brokers’ Board.

I have your favor of January 5, in which you state you desire to be advised as to the interpretation of ch. 656, laws of 1919, with respect to two provisions thereof.

2—A. G.
First, as to whether or not your board can require a broker to maintain an office and have the same designated by a sign or otherwise.

It is my opinion that the board has no such power. The statute does not grant such power and the board, being a creature of the legislature, has only the powers expressly conferred upon it.

Under subsec. (11), par. (c), sec. 1636—225, Stats., a broker in his application for a license must give the place, or places of business, including a town, village or city, the street number and the county where the business is to be conducted, and the manner in which such place of business is designated.

This only means that he is to designate, in his application, the town, city or village, and the county where he intends to engage in business, and the street number and manner of designation of place of business, if any.

Scarcely any towns and few villages have their streets numbered, and many cities do not have their streets numbered, and many of such municipalities do not even have names for their streets, and clearly, the applicant cannot designate that which is not, and which may never be, particularly where he has no control thereof.

However, if an applicant has a designation for his place of business he should set forth the manner in which such place of business is designated in the application, but if he has no such designation there is nothing in the law that authorizes the board to compel him to name or number a street, or erect a sign or otherwise placard his place of business.

You also ask to be advised as to the interpretation of the following provision contained in subsec. (5) of said section: viz.,

"* * * Licenses shall be granted only to persons who are trustworthy and competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of the public, and only after satisfactory proof thereof has been presented to the board."

It is quite difficult to add clarity to this provision of the law.

The applicant for a license must set forth certain facts under subsec. (11). If upon the face of such application there is some fact which shows that the applicant is not trustworthy and competent to transact the business of a real estate broker or
salesman in a manner to safeguard the interests of the public, then the board should deny the license. If upon the face of such application there is a proper showing, then the board has no authority to deny a license.

The action of the board on each applicant will stand or fall according to the facts contained in the application. If there is nothing in the application to show that the applicant is not trustworthy or competent it is my opinion that the board has no authority to deny the applicant a license. It is true, however, that the board, under par. (e) of said subsec. (11), may require such information from the applicant as may be reasonably necessary for them to determine the trustworthiness of each applicant, as well as the competency of the applicant to transact the business of a real estate broker or salesman as to safeguard the interests of the public.

I find nothing in said ch. 656 which authorizes the board to go outside of the application and the record thus made up under said subsec. (11).

The power of the board to grant license is a ministerial duty, and if the application shows upon its face all the essential facts provided for in pars. (a), (b), (c), (d) and (e), subsec. (11), and if such application is verified as provided in subsec. (12), license should be granted as hereinafter stated.

The investigation provided for in said subsec. (12) is only the investigation with respect to such application and the word "investigation" does not refer to an investigation outside of the record so made up.

If the application shows all the essential facts as may be required by subsec. (11) and if it is verified as provided for in said subsec. (12), the only duty the board then has to perform is to issue the license if from such application it is found that the applicant is

"trustworthy and competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interests of the public."

Under par. (e), subsec. (11), the board can require the applicant to furnish such information as may be reasonable in order for the board to determine the trustworthiness and competency of the applicant, and such information is to be furnished by the applicant.
Hence it follows that the board cannot act arbitrarily or deny an applicant a license either from whim or from caprice, mistaken judgment, or for any other reason than that the applicant is not trustworthy and is not competent as shown by such application.

The trustworthiness and competency of an applicant is to be determined from facts as of the date of the application, or from facts having such proximity to such time as it may be reasonable to presume or as it may follow as a matter of course that such facts continue to exist to the date of the application affecting the trustworthiness and competency of the applicant.

Remote facts showing the unworthiness or incompetency of the applicant so far removed from the date of the application as to permit the indulgence of a presumption of regeneration of the applicant should not be taken into account, for it is very possible for men to have been redeemed, regenerated and reformed with respect to their worthiness and competency to engage in the real estate brokers' business.

I note that subsec. (24) provides that the action of the board in refusing to grant a license is subject to review by certiorari.

This clearly is not an exclusive remedy, and besides such a remedy would be futile and ineffectual and therefore the right to bring a mandamus action is not prohibited, and the remedy for a review of the board's action in refusing to grant a license to be potential must be by mandamus.

To review an order revoking a license, of course the form of action is certiorari. It is my opinion that subsec. (24) only recognizes the right of action which existed without such express recognition. State ex rel. Winchell v. Circuit Court, 116 Wis. 253.

Permit me also to suggest that the construction I have given with respect to the power of the board must be the construction that should prevail, else there is grave doubt in my mind of the constitutionality of the act.

The "due process of law" provision of the federal constitution protects every man in his property, his business and his calling, and I doubt very much if a law would be constitutional if it granted power to an administrative board to deny the pursuit of a lawful calling or occupation unless there is proper machinery
set up for the purpose of giving such person an opportunity to have his rights adjudicated, first by the quasi judicial body and then by judicial determination.

Ch. 656 affords no machinery to the applicant, and the board is not authorized to set up a form of procedure of their own making. Besides, it is a familiar rule of law that where administrative functions are granted to a board such board has no power of investigation and possesses no discretion and is required to act when a proper showing is made as expressly provided by law.

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Public Health — Maternity Homes — Public Officers — State board of health has no discretion in issuing license for maternity home if applicant complies with conditions of statute.

January 12, 1920.

State Board of Health.

I have your letter of December 31, in which you state that under the provisions of sec. 1542g, Stats. 1917, you have licensed the Orphan and Rescue Home Association of Green Bay to conduct a maternity hospital at 218 South Broadway, Green Bay, the license being issued in the name of Mrs. Matilda Franklin, who has charge of the maternity work, and that her application for a license for 1920 failed to have the approval of the health officer of Green Bay. You desire to be advised whether or not you are authorized to issue a license under the circumstances.

Beg to advise that sec. 1542g was amended by ch. 616, laws of 1919, and is now sec. 58.04 and provides that every individual, etc., owning, etc., an institution or home for the boarding or sheltering of children, etc., or

"maternity home or other place for the reception, care and treatment of pregnant women"

must obtain an annual license which shall be issued by your board without fee and is not transferable, and expires on December 31 next following the issuing thereof, and that your board may revoke any such license for a reasonable cause.

The applicant for such license must, in the application, state
the name and address of the licensee, the specific location of the building used, the number of inmates which may be boarded there at any one time, and the application "shall be approved by the local health officer."

The state board of health acting hereunder is an administrative body and possesses no other authority than that expressly provided by statute, and if the application sets forth all the information, and if it is approved by the local health officer, then the only duty your board has to perform is to grant the license, but if the application does not show all the facts required, and is not approved by the local health officer, the board should not grant the license.

In either case the board has no discretion either to refuse a license or grant a license, and its power is expressly limited by statute.

I need not go into the reasons for so holding inasmuch as this department has repeatedly held that where a function performed by the state officer is administrative the state official cannot exercise any discretion. This was recently held to be the rule with respect to detective agencies' licenses (VIII Op. Atty. Gen. 827) and real estate brokers' licenses.*

In the absence of the local health officer's approval of the application the license cannot be issued.

If the local health officer approves of the application, and it is otherwise regular, then the board should grant the license.

If the facts set forth in the correspondence submitted to me should continue to prevail after the issuing of a license, then the board has authority to revoke the license, or rather, it has authority to revoke a license "for a reasonable cause."

Military Service — Public Officers — Federal Officer — Officer in reserve corps not a federal officer under state constitution. Person so assigned is merely given status showing military rank and dignity, though called a major.

HONORABLE EDWARD NORDMAN, Director,
Division of Markets.

In your letter of January 9, received yesterday, you request to be informed whether or not an employe in your department

* Page 17 of this volume.
appointed under civil service may accept an appointment as major in the aviation section, signal officers' reserve corps of the United States army.

You submit therewith a "Memorandum of Information Concerning Officers' Reserve Corps" which purports to be a communication from P. C. Harris, the adjutant general of the United States army, dated January 2, 1920.

In the first paragraph of that communication I find this provision:

"The present policy governing the selection and appointment of members of the Officers' Reserve Corps contemplates the establishment of a competent Reserve Commissioned Personnel, the individual members of which will be qualified to perform fully the duties of their respective grades when ordered into active service in case of emergency."

The sixth paragraph thereof provides as follows:

"In time of actual or threatened hostilities the President may order a reserve corps officer to active duty with any of the military forces of the United States. They will not be called to active duty during the present emergency. In time of peace, they may be called to duty for fifteen days only in any calendar year, unless individual consent in advance for a longer period is obtained. Mileage at the prescribed rate and compensation at the rate for the corresponding grade in the Regular Army will be paid while on active duty. There is no provision for pay while on inactive status."

You are advised that sec. 3, art. XIII, Wis. Const., provides:

"No member of congress, nor any person holding any office of profit or trust under the United States shall be eligible to any office of trust, profit or honor in this state."

The question at the outset that presents itself is whether or not a person assigned to the officers' reserve corps with the rank of major is an officer under the United States.

In my opinion, a person assigned to the officers' reserve corps with the rank of major is not an officer within the meaning of our constitution.

The case of People v. Duane, 121 N. Y. 367, presents what in my opinion is a decisive rule with respect to the question at hand. In that case an officer in the Civil War, after reaching the age of sixty-four years, was retired from active service and
placed upon the retired list with the actual rank held by him at the date of his retirement, with pay. He was entitled to wear the uniform of his rank and his name was continued to be borne on the army register and subject to the rules and articles of war and to trial by general court martial, and even constituted a part of the army of the United States. The person under discussion in that case did hold an office under the United States prior to his retirement with the rank of brigadier general; that is, he was chief of engineers with the rank of brigadier general. The court held in effect that a person having the title of brigadier general without being assigned to some line of duty and occupying some position of authority which he might exercise in behalf of the government as such was not an officer. The designation of brigadier general was only descriptive of his military rank and dignity.

I find that under the act of June 3, 1916, ch. 134, 39 Stats. at Large 189, the officers' reserve corps is a part of the army of the United States.

The same is true in the Duane case, for the court states that the defendant Duane was a member of the army as constituted by the federal statutes and that he was subject to be assigned to duty by the president and congress. The court further states:

"* * * That may be so, and when such assignment is made he may then hold a federal office" (p. 375).

All that was said with respect to the Duane case might be said with respect to the question you present, and the final conclusion is that even though a person is appointed to the officers' reserve corps with the rank of major, nevertheless he is not a federal officer and the designation of the title major is only a designation of his military rank and dignity.

Clearly a person in the officers' reserve corps while not assigned to duty by the United States is not holding an office within the terms of our constitutional provision and he is only assigned to the army with the rank as may be designated.

You will note from that part of the adjutant general's communication which I have quoted that officers in the reserve corps will not be called to active duty during the present emergency and are only subject to the order for active duty by the president in time of actual or threatened hostilities, though in time of
peace they may be called to duty for fifteen days only in any one year.

However, there is nothing in the adjutant general's communication which suggests that even in peace time when called to duty such person will hold any position of office or trust. However, if, during such fifteen days or if by order of the president, called into the service and assigned to some office of profit or trust in the army, then such person would not be qualified to hold an office in this state.

But it must be noted that by reason of the mere calling into service, either for the fifteen days or in case of hostilities, until the person is assigned to an office, even though designated as a major, he will not be holding an office under the United States. I assume, however, that in case of actual or threatened hostilities, if an officer in the reserve corps is ordered to active duty, he then, no doubt, would be assigned to some office with the designated rank, and I also assume that in all probability in peace time, if called to duty for fifteen days, there might be no assignment to any office though, under the call, he may bear a title showing his rank.

My conclusion therefore is that if Mr. Reis, an employe in your department, chooses to enter the officers' reserve corps with the rank of major, he will continue to be eligible to hold his office in your department so long as he is not assigned to active duty in the United States army by the order of the president in time of actual or threatened hostilities, and in time of peace when called to duty, so long as he is not assigned to some position or office during the fifteen days' call; and that the selection and appointment of members of the officers' reserve corps does not contemplate the creation of a federal office but merely contemplates the establishment of a competent reserve commissioned personnel holding a military rank descriptive of "military rank and dignity."
Real Estate Licenses—Attorney engaged in real estate business not exempt under real estate license provisions.

January 14, 1920.

Roman Heilman,
District Attorney,
Madison, Wisconsin.

In your letter of January 8 you inquire whether or not ch. 656, laws of 1919, relating to brokers' licenses, applies to attorneys who now and then collect rentals and charge a commission for negotiating a loan or turn a real estate deal on a commission basis.

Subsec. (2), sec. 1636—225 in pars. (a), (b), and (c) defines a "real estate broker."

Under subsec. (3) of said section it is provided that the term "real estate broker" does not include those defined in pars. (a), (b), and (c) thereof.

An attorney who collects rents or negotiates a real estate transaction, or negotiates loans in the course of litigation or in connection with receivers, trustees, administrators, executors, guardians, or any other person appointed by or acting under the judgment or order of any court, or acting as attorney for a bank, trust company, building and loan association, or land mortgage or farm loan association when engaged in the transaction of business within the scope of their corporate powers, under a general retainer cannot be deemed to be a real estate broker under the terms of the act.

However, if the attorney engages for another and for commission money, or other thing of value, to do those things prescribed in pars. (a), (b), and (c), subsec. (2), independent of his retainer aforementioned, he must be held to be a "real estate broker" unless he comes within the exception contained in par. (3), which exception of course applies to all persons.

Answering your question, it is my opinion that an attorney who now and then collects rentals, charges a commission for negotiating a loan or turns a real estate deal on a commission basis, acting in that capacity apart from what I have above stated, is a "real estate broker," and there is nothing in the law exempting attorneys as such.
Automobiles—Manufacturers of and dealers in automobiles must make report of sales.

January 14, 1920.

Honorable Merlin Hull,
Secretary of State.

I have your letter of January 5, in which you ask for an interpretation of sec. 1636—48, Stats., relating to reports of sales from manufacturers, and distributors, and dealers.

Sec. 1636—48, subsec. 11, makes it

"the duty of every manufacturer of or dealer in motor vehicles in this state to make a monthly report to the secretary of state on blanks to be prescribed and furnished by the secretary of state, showing information, as follows: The date of the sale of each motor vehicle sold, date of delivery of same, the name and address of the party to whom sold, maker's name of motor vehicle, motor number, style of vehicle, motive power, horse power, new or second-hand motor vehicle."

Just why the legislature makes it the duty of the manufacturer of motor vehicles to make this report I do not understand. I can understand the theory of the requirement that the dealers report. If a dealer, selling an automobile to one who becomes the user thereof, makes the report, then it can be ascertained by your department from such report whether or not such purchaser has obtained a license for the operation of the automobile, and from such report cars can be traced by the police officers of the state in the event of theft more readily. A report from the manufacturer, however, would only mean duplication of the information.

Of course the provision clearly cannot apply to manufacturers outside of the state, nor to manufacturers within the state shipping automobiles outside of the state. However, the provision as clearly applies to manufacturers as it does to dealers in motor vehicles.
Constitutional Law — Intoxicating Liquors — Eighteenth Amendment is valid portion of constitution of U. S. It conferred power upon congress to enforce prohibition by appropriate legislation.

National prohibition act was appropriate legislation within meaning of amendment paramount to any state legislation; its definition is now definition of intoxicating liquor in Wisconsin.

January 16, 1920.

HONORABLE T. T. HAZELBERG,
Prohibition Commissioner.

Your letter of January 16, addressed to this department, asks:

"What is the definition of intoxicating liquor, under ch. 556, laws of 1919?"

You are advised that secs. 1569—2 and 1569—3, found in sec. 2, ch. 556, provide:

"Section 1569—2. This act shall be deemed to be an exercise of the power reserved by and granted to this state by Article 18 of the constitution of the United States.

"Section 1569—3. Intoxicating liquor, within the purview of said constitutional amendment and the provisions of this act shall be construed to be and include all liquors and drinks of whatsoever name or description, including patent or proprietary medicines, capable of being used as a beverage containing more than two and one-half per centum of alcohol by weight at sixty degrees Fahrenheit. But if the congress of the United States shall hereafter by a valid act which shall become the law of the land and be paramount to any state laws on the subject, define the words 'intoxicating liquors' as used in article 18 of the constitution of the United States, then such definition, from the time such act of congress becomes operative, shall be the definition thereof under this subdivision."

This department is of the opinion that the Eighteenth Amendment to the federal constitution (40 Stats. at Large 1050) was one competent for congress to propose, was regularly proposed by congress, adopted by the requisite number of states, and is now a valid portion of the constitution of the United States. By its express terms it conferred upon congress power to enforce its provisions by appropriate legislation.

The so-called Volstead act, or national prohibition act, Public, No. 66, 66th Congress, was appropriate legislation, enacted pur-
suant to the power conferred by the terms of the amendment. Within the express provisions of ch. 556, it is a valid act which has become the law of the land and is paramount to any state law on the subject. The said national prohibition act contains the following definition of intoxicating liquor, under title II, sec. 1, Public No. 66, 66th Congress:

"The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

This definition is, by the express terms of ch. 556, incorporated into and made the definition of intoxicating liquor thereunder.

Bridges and Highways—Road Machinery—Possession belongs to towns.

HELMUTH F. ARPS,
District Attorney,
Chilton, Wisconsin.

Replying to your favor of January 12, in which you inquire as to the ownership of road machinery, in view of the repeal of sec. 1223a by ch. 518, laws of 1919, beg to state that under sec. 1223a several road districts owned such road machinery.

By said section it was the duty of the town to provide suitable places for the storage and proper housing thereof, and it is presumed that all towns provided such places.

Under such presumption the towns had possession of such tools and machinery, and inasmuch as there is no road district in any town or will not be under the provisions of said ch. 518, the towns will continue to hold possession of the road machinery, and, having possession thereof, can sue for the recovery thereof and continue to possess the same.
January 19, 1920.

I have your favor of January 15, in which you state that notice has been served on you not to deliver the monthly bonus checks to a service man who is receiving and is entitled to receive the benefits under ch. 5, laws of the special session of 1919, that such notice was served on you by the guardian of the service man, and you ask whether or not it would be lawful for you to comply with the request of a guardian, or with the request received from the parents of any minor service man with regard to the benefits of said act.

Parents of minors are entitled to their custody and to their earnings, unless they have been emancipated. A general guardian, when appointed guardian of the person and property, is generally speaking entitled to direct the custody of the minor and to receive his earnings and property. These are mere general rules, and it might be said that they are subject to some exceptions. However, the benefits under said ch. 5 are a personal contribution by the state of Wisconsin, intended for the benefit of the service man only. In order for him to receive the benefits, he must be qualified to attend at an educational institution under the provisions of the act, and he may be transferred from one institution to another. He alone must make the application, and he alone is entitled to receive the $30 per month, "while in regular attendance as a student at any such institution."

If a guardian undertook to take him from the institution and place him in an unauthorized institution, he would of course lose the benefits of the act; but I doubt very much the authority of a guardian, in view of said ch. 5, to interfere with the student, though I do not pass on that question.

The checks are issued in the name of the person entitled thereto, and no one is authorized under the act to receive the bonus checks so issued except the student.

It is therefore my opinion that the benefits of the act are personal to the student and that the disability with respect to minors generally does not apply to minors receiving the benefits under said act.
Opinions of the Attorney-General

Appropriations and Expenditures—Public Officers—Board of Control Field Agent—Expenses payable out of general fund of state.

HONORABLE MERLIN HULL,
Secretary of State.

On January 6 you asked whether or not you have the right to audit the expense account of the field agent of the state board of control from the general funds, without charging them to the appropriation for the state board of control, in view of the provisions of sec. 2, ch. 499, Laws 1919.

Said section is as follows:

"The state board of control shall fix the salary to be paid to the said field agent, which shall be in addition to traveling expenses incurred by him. The traveling expenses shall be paid out of the general fund of the state upon the approval of the state board of control."

Sec. 20.17, subsec. (1), therefore, is the general appropriation to the state board of control for the execution of the functions of the board. Said sec. 2, ch. 499, so far as it provides for the payment of traveling expenses out of the general fund of the state, is a special act and special provision, and must control over general statutes.

This is the rule of construction, and under such rule said sec. 2, ch. 499 must be construed to the effect that the traveling expenses of the field agent are payable out of the general fund of the state treasury; and in the absence of any direction for the charging thereof to the appropriation for the state board of control, no such charge is permissible.

Had the legislature intended the traveling expenses to be paid out of the amount appropriated to the state board of control, it would have omitted all reference thereto, in view of the general statutes with respect to the payment of expenses.
Improvisations and Expenditures—Public Officers—Industrial Commission Advisory Committees—Appointees entitled to traveling expenses.

INDUSTRIAL COMMISSION.

In your letter of January 12 you state that, pursuant to the provisions of subsec. (1), sec. 2394—52, the commission has occasion to appoint from time to time members of advisory committees, in the execution of the duties of the commission, and said subsection authorizes the commission

"to appoint advisors who shall, without compensation, assist the industrial commission in the execution of its duties."

Subsec. (2), sec. 20.73 provides that the chief officers enumerated in subsec. (1) thereof, and their appointees and employes shall each be reimbursed for actual and necessary traveling expenses incurred in the discharge of their duties.

Subsec. (1), sec. 2394—52 authorizes the commission to appoint advisors without compensation.

Clearly, advisors are appointees of the commission to assist the industrial commission in the execution of its duties, and as such are entitled to the actual and necessary traveling expenses incurred in the discharge of their duties, under subsec. (2), sec. 20.73.

Appropriations and Expenditures—Claims—Public Officers—State treasurer custodian or trustee of securities deposited with him; need not go beyond audit of secretary of state as to propriety of claim.

Honorable Henry Johnson,
State Treasurer.

I have your favor of January 14, in which you submit two questions.

Under certain specific laws securities which are approved by the banking commissioner and the insurance commissioner are
deposited with you, and the same are, from time to time, delivered for exchange to the owners thereof.

Your first question is:

"By so ordering by said commissioners, the return of these securities, and should it turn out that said delivery of securities by the state treasurer was not according to statute, although he follows the instructions of the commissioners, is the state treasurer, and his bondsmen, held responsible for the delivery of said securities, or is the state treasurer merely a custodian of these securities?"

Answering the same, beg to state that the state treasurer is not responsible for securities deposited with him in exchange for other securities held by him, if such securities have been approved by the proper officials. That is, the state treasurer is not responsible as to the value or desirability of such securities. He is only responsible for the safekeeping as custodian or trustee.

Should there come a request for the delivery of any such securities, such delivery should not be made until other securities, properly approved, have been deposited with you, or until an order of a court having jurisdiction requires their delivery. I assume, however, that the state treasurer will not endeavor to construe a court order or pass upon the effectiveness thereof without submitting the question to the attorney general, and therefore I need not go into a discussion with respect to deliveries made on a court order. Each particular case must be decided upon the facts then prevailing. State ex rel. Sheldon v. Dahl, 150 Wis. 73.

Your second question is:

"If the head of a department certifies its pay roll to the secretary of state, and in this certification some employees have not rendered service either in whole for the month, or in part, and the secretary of state issues a warrant on the state treasurer, and the state treasurer pays the same, does the treasurer become responsible for the amount paid out, or does it rest with the head of the department to reimburse?"

Sec. 16.28 provides with respect to the certification of pay rolls and fixes the manner in which they must be certified by the civil service commission, and also fixes the responsibility of the heads of the several departments with respect to the sums paid contrary to the provisions of said section.
Sec. 14.31 provides for the auditing of claims by the secretary of state, and subsec. (2) thereof provides that the pay rolls entitled to be audited shall be certified by the proper officers.

Therefore, if pay rolls come to you certified, as provided in the two sections quoted, you are authorized to pay the claims for salaries so certified, and the state treasurer has neither the duty nor the power to go beyond the certificates so made by the heads of the several departments, commissions, and state institutions when certified by the civil service commission with respect to those matters under their jurisdiction, and when audited by the secretary of state.

The treasurer is not responsible if there has been an improper allowance for salary, except in those cases where salaries are paid out under an invalid or unconstitutional act.

Public Officers—County Board—Whenever ward boundaries are changed ward officers hold for balance of term same office in new or changed ward which they held in old ward.

In this connection supervisor is ward officer.

All offices left without occupants are to be filled in way vacancies are regularly filled.

S. G. Dunwiddie,
District Attorney,
Janesville, Wisconsin.

It appears from your letter of January 16, 1920, that the city of Beloit formerly had five wards, but has now been redistricted into nine wards. Such redistricting has had the effect of leaving every supervisor resident in a ward that is differently numbered from the one for which he was elected. The residences of the supervisor elected from the first ward and of the supervisor elected from the fifth ward are both situated in the new sixth ward.

Upon these facts you submit the following questions:
1. Which of the five supervisors elected in the city of Beloit remain members of the county board?
2. How should the situation in the sixth ward be handled in view of the fact that two of the supervisors reside therein?
While the office of supervisor under the general charter act may in some sense be deemed a city office, it is to be considered in this connection as a ward office. The supervisor is elected from the ward and by the ward and some of his duties are performed in the ward. In the statute relating to vacancies and appointments to office a supervisor is certainly a ward officer. Secs. 17.02 and 925—31, Stats. 1917; V Op. Atty. Gen. 607. If the office of supervisor be not a ward office, then I know of no office that is a ward office. It certainly is as much a ward office as is that of alderman, and the office of alderman is universally regarded as a ward office in cities under the general charter act.

The authority for redistricting the city and the effect of redistricting are found in sec. 925—14. It is manifest therefrom that the legislature intended that no ward officer should be legislated out of office by the creation, consolidation or alteration of wards. This is an important and, as I think, a controlling fact or element in the answer to your questions. To me it seems plain that all of the old supervisors remain members of the county board. The alteration of the wards of Beloit has had no effect upon their tenure of office.

It is to be observed that subsec. 1, sec. 925—14 authorizes the common council of any city to

"change the numbers and boundaries of its wards, create new wards, or consolidate old ones."

Subsec. 2 relates to compactness and population of wards. The third subsection, however, is really the one that controls the answers to your questions and reads thus:

"Whenever the boundaries of wards are altered or new wards created, every ward or precinct officer residing within the territory of a new or altered ward shall hold the same respective office therein for the remainder of his term; and all other vacancies shall be filled as provided by law for the filling of such vacancies."

The statute just quoted does not of course affect the ward officers in those wards which have not been changed, but the statute does affect the ward officers in every ward which has been altered or created by the redistricting ordinance. The statute covers the field completely. No exception is perceived.
"""* * * Every ward * * * officer residing within * * * a new or altered ward shall hold the same respective office therein for the remainder of his term.""

That is to say that a supervisor residing in a new or altered ward shall hold therein the office of supervisor, that an alderman residing in a new or altered ward shall hold therein the office of alderman, and that a constable or justice of the peace or election officer shall hold in the new or altered ward the offices of constable, justice of the peace or election officer respectively held by each at the time the change or creation occurred.

The clause of this subsection relative to vacancies supports the foregoing construction. After providing that ward officers shall hold the same office in the new ward which they held in the old ward, said third subsection provides that "all other vacancies shall be filled as provided by law for the filling of such vacancies.''

Where it chances that an alderman resides in a newly created ward he fills the office of alderman. That office is not vacant, but in case no supervisor is found resident in the newly created ward the office of supervisor is unoccupied. There is no supervisor for the ward, and the office of supervisor must be one of the vacancies intended to be provided for by the clause just quoted. I am of the opinion that all ward offices in newly created wards not filled by operation of statute from resident office holders are to be regarded as vacant and to be filled as other vacancies are filled. I think it follows logically from what has been said and by the plain meaning of the statute that whenever the residence of a ward officer falls within a new ward or when by change of boundaries of old wards his residence is no longer within the ward for which he was elected, the particular office to which he was elected is made vacant thereby, provided the ward which elected him remains in existence.

I conclude, therefore, that all of the five supervisors heretofore elected in the city of Beloit remain members of the county board. The fact that two of them reside within the newly created sixth ward at Beloit does not change the effect of the statute. Each one of them answers the test supplied by subsec. 3, sec. 925—14. Each of them was elected to a ward office and occupied such office. Each of them is now within a newly created ward and
by virtue of the statute holds in the same ward the same office he held in the old ward. To be sure, it is unusual to have two supervisors residing in the same ward, but it is not unconstitutional. There are two aldermen in each ward and the legislature could undoubtedly provide for two supervisors from each ward. The provision which the legislature has made for redistricting the cities has in this particular instance resulted in throwing two supervisors into the same ward. That is but a temporary condition and will be relieved on the 1st of May when the newly elected supervisors take their office. For the present the five supervisors elected in 1919 are as much entitled to seats in the county board as though no change had been made in the wards of the city of Beloit.

Appropriations and Expenditures—Claims payable out of state treasury must comply with general statutes before audit.

January 20, 1920.

HONORABLE B. A. KIEKHOFER, Secretary,
Board of Public Affairs.

I have your request for an opinion dated December 24, in which you call my attention to sec. 20.78, which provides generally that all appropriations made by law from state revenues for any department, board, commission, or institution of the state, or any society or association receiving state aid are made upon the express condition that such branch of the state government pay all moneys received by it into the state treasury and conform with the provisions of secs. 14.31, 14.32, and 20.77, Stats., both as to appropriations of its own receipts and as to appropriations made by the state from state revenues. Upon failure to comply with those conditions, the secretary of state has no warrant to audit the claim, until compliance is made with said conditions.

In passing you will note that sec. 20.785 provides that all moneys so paid into the state treasury and not required to be paid into the general fund previous to May 1, 1919, are reappropriated for the use of the several departments, societies, etc.

You ask for my interpretation with respect to the general provision of the law as contained in sec. 20.78.
You will note that by sec. 14.31 the secretary of state audits all claims against the state, and payment thereof out of the state treasury is authorized, and all the necessary conditions precedent to such audit are set forth in said sec. 14.31. In order that the secretary of state may perform his duty, the information required by said section must, of course, be furnished him by everyone seeking to obtain money out of the state treasury.

You will also note that sec. 14.32 is now included in said sec. 20.78, and said section sets forth some of the items which cannot be reimbursed from the state treasury; and the secretary of state's audit must be in conformity therewith.

It appears that the provisions of sec. 20.78 are so clear that a restatement thereof will hardly aid in the interpretation, and perhaps to restate the provisions of that section in different language might be confusing.

You call my attention also to sec. 20.80 and quote in full the provisions of said section. I need not repeat, therefore, the provisions thereof. Generally, however, said section provides that all money received by any state functionary receiving state aid from the income on the principal funds received by it from gifts, legacies, and devises, and from membership fees and sale of publications and duplicates

"shall be expended under the direction of the proper authorities and the audit of the secretary of state shall be for the sole purpose of ascertaining that such expenditures are lawfully made and authorized by the proper authorities of such institution, society or organization."

The question really is, as you suggest: Just what authority has the secretary of state with respect to the income set forth therein from gifts, legacies and devises, and from membership fees and sale of publications and duplicates?

I must again call attention to sec. 14.31, which specifies the manner in which claims must be presented, and one of the requirements is that such claim must "be approved by the proper officer." Subsec. (3), subd. (e).

You will note that sec. 20.80 provides that the expenditures shall be under the direction of the proper authorities. That would be the law, without such provision. Said section also provides that the secretary of state shall ascertain if the expendi-
tures are lawfully made. He would have to ascertain that fact, notwithstanding that provision before auditing the claim, and said section also provides that the audit is for the sole purpose of ascertaining that the claim has been authorized by the proper authorities. Such provision is a statement of the law, without its incorporation in said sec. 20.80.

The question, therefore, at once arises why sec. 20.80 was enacted by the legislature in 1919. In view of the statutes to which I have referred, it is my opinion that sec. 20.80 adds little, if anything, to what the law was before the enactment thereof. It does seem to treat specifically of the disbursement with respect to the income on certain funds and membership fees and sales of publications and duplicates; but, notwithstanding it treats specifically such items, it expressly provides that the audit of claims expended under the direction of the proper authorities is for the sole purpose of ascertaining the lawfulness of such expenditures and whether or not such expenditures have been authorized by the proper authorities.

That is exactly what the law has been, however, with respect to all moneys that are paid into the state treasury, and sec. 20.78 requires that all moneys received by any state functionary shall be paid into the state treasury by those associations and societies receiving state aid as a condition upon which they may receive the state aid; and then such funds are reappropriated to the use of such societies or associations.

Every department of government and every society, association, board, division or institution in the state, before they receive any money from the public treasury, must have an appropriation therefor, and the legislature has established the policy that all funds must be paid into the state treasury first. I find no exception in the statutes to that general rule. All of the state departments, boards, commissions, societies, etc., which I have mentioned, are granted certain powers under the statutes, and to carry out such powers and their functions, appropriations are made for such purpose.

Therefore, there is only one consideration which may obtain as a reason for the passage of sec. 20.80, and that is, where a society, organization or institution receiving state aid comes into possession of gifts, legacies or devises, and by the terms of such gifts, legacies and devises a portion of the funds derived
therefrom may be used for purposes other than those expressly provided for by law in defining the powers and functions of the several societies, organizations and institutions. And if there are any such gifts, legacies and devises authorizing expenditures not provided for in the statutes, it might have been in the mind of the legislature to permit the proper authorities receiving the same to disburse the same, within the terms and conditions of the gifts, legacies and devises, in which case then the secretary of state would audit claims so disbursed for the sole purpose of ascertaining if the expenditures made were made lawfully and according to the terms and conditions of such gifts, legacies or devises. In order for him to determine that fact, it would be necessary for the proper authorities to submit such proof as the secretary of state might require, from which he could ascertain whether or not the expenditures were made according to the conditions of the gifts, legacies and devises, if the expenditures were made from the income of the principal sum received therefrom.

After all, the audit by the secretary of state is very largely a perfunctory act and his authority is limited, generally speaking, to the provisions of secs. 14.31, 14.32, and 20.78, and of course he must ascertain whether or not the claims presented are in accordance with the appropriation made by law. But after all that may be said, the audit by the secretary of state is only for the purpose of ascertaining that expenditures are lawfully made and authorized by the proper authorities.

Counties—Indigent, Insane, etc.—Building, plans for which were not approved, may, if found suitable therefor, be used by county to house chronic insane; county is entitled to state aid if it cares for chronic insane in such building.

January 21, 1920.

State Board of Control.

It appears from your letter of January 8, 1920, that Clark county has acquired a site for a county asylum and is about to erect thereon suitable buildings in which to care for its insane. There is on this site, and was when acquired, a twenty-room dwelling house equipped with all modern conveniences, is steam
heated, has running water, bath, closets, and sewage disposal. Clark county desires to utilize this dwelling in caring for its chronic insane, at least until the new asylum is ready for occupancy, and that raises the question as to whether Clark county may receive compensation from the state for the maintenance of patients in that dwelling house, should it be used for the purpose mentioned.

It is my opinion that the county will be entitled to state aid under the circumstances stated, providing the board of control causes said building (the dwelling house) to be inspected, and approves said building as a place in which to care for the insane. Such an inspection and approval imply or include an approval of the plan of the building. Certainly the acceptance and approval of a completed structure necessarily approves the plan of the structure. It can not have been the intention of the legislature that a building in every way modern and suitable for the care of insane patients, for the simple and sole reason that the building plans were not approved before the structure was built, should now stand idle or be destroyed. The county authorities have no statutory right to erect a building for this purpose without first having the plans approved, but should the building be erected without such approval of the plans, it would not be necessary to leave the building idle or to wreck and reerect it after the plans had been O. K’d in order to permit its use. Plans may be approved after the building is erected, and they may be approved expressly or by necessary implication.

The statutes governing this matter have been revised of late. Counties are authorized by sec. 51.25, Stats. (sec. 34, ch. 347, laws of 1919, p. 445),

"to establish a county asylum for the chronic insane for the detention and care of persons charged or alleged to be insane,"

pursuant to sec. 46.17, Stats. (sec. 24, ch. 328, laws of 1919, p. 388). Said sec. 46.17 provides that the establishment of such an institution must be approved by the state board of control, and this includes the approval of a site, of the building plans, and of the structures. As before said, it does not necessitate the destruction or nonuse of a suitable building, if one chance to exist on the site when acquired. But the suitableness of the building must be passed on favorably to warrant its use:
"(4) Before the occupancy of any such building, and semi-
annually thereafter, the board shall cause such building to
be inspected with respect to its safety, sanitation, adequacy and
fitness, and report to the authorities conducting said institution
any deficiency found, stating the nature of the deficiency, in
whole or in part, and ordering the necessary work to correct
it or that a new building shall be provided." Sec. 46.17.

If upon such inspection the building is found to conform to
the standards required as a condition for use, it may then be
occupied as an asylum. Thereupon, and for the time being at
least, the building becomes a "county hospital or asylum for
the insane," and the county becomes entitled to compensation
from the state for each patient cared for therein. Subsec. 1,
sec. 51.08, Stats. (sec. 11, ch. 347, laws of 1919, p. 433).

Intoxicating Liquors—Non-intoxicating liquors defined.
Permits not permissible for so-called temperance drinks un-
less they contain alcohol.
Permit may be required for non-intoxicating drinks.
Permit must be required for sale of fermented malt or vinous
beverages.

January 21, 1920.

O. L. Olen,
District Attorney,
Clintonville, Wisconsin.

I am in receipt of your favor of January 19, in which you
ask four questions.

Beg to state that there appears to be considerable confusion
with respect to the status of intoxicating liquors, and for that
reason I am advising you generally, and from this opinion all
your questions will be fully answered.

You are advised that sec. 1569—3, found in ch. 556, laws of
1919, provides, generally speaking, that intoxicating liquors,
within the purview of art. XVIII of the federal constitution,
shall be construed to be and include all liquors and drinks, in-
cluding patent or proprietary medicines capable of being used
as a beverage containing more than two and one-half per cent
of alcohol by weight at 60 degrees Fahrenheit. Said section
also provides as follows:
But if the congress of the United States shall hereafter by a valid act which shall become the law of the land and be paramount to any state laws on the subject, define the words 'intoxicating liquors' as used in article 18 of the constitution of the United States, then such definition, from the time such act of congress becomes operative, shall be the definition thereof under this subdivision."

This department has held that the Eighteenth Amendment to the federal constitution (40 Stats. at Large 1050), is a valid portion of the constitution of the United States.*

After the ratification of art. XVIII of the federal constitution the congress of the United States, under the so-called Volstead act defines intoxicating liquors as follows:

"The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes.

Provided, That the foregoing definition shall not extend to deacalcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe." Title II, sec. 1, H. R. 6810, 66th Congress, first session, Public, No. 66.

In the administration of ch. 556 this department must presume that the so-called Volstead act was valid, and as such has become the law of the land, and is paramount under art. XVIII of the federal constitution to any state law on the subject, and therefore by express terms ch. 556 adopts as the definition of intoxicating liquors the definition contained in the Volstead act.

My predecessors have repeatedly held—and I have held—that any act passed by congress or by the legislature must be presumed to be a valid and constitutional act, unless such acts are so clearly invalid and unconstitutional that there can be no dis
pute with respect thereto, and in the administration of laws by this department that must necessarily be the continued practice, else we would have the spectacle of the law department of the state government overturning legislative acts on constitutional grounds upon a mere suggestion of their invalidity or unconstitutionality, and until such act or acts have been passed upon by the supreme court the attorney general would, in effect, suspend and defeat the purposes of the legislature. Therefore this department must assume that the Volstead act is a valid act and as such has become the law of the land paramount to any state law on the subject under the terms of art. XVIII of the federal constitution, and, of course, in holding that view it necessarily must follow that the definition of intoxicating liquors under ch. 556 is the definition contained in the Volstead act, above quoted.

Therefore the interpretation of sec. 1569—10, Wis. Stats., which permits the municipal authorities to pass ordinances fixing the terms and conditions under which places may be conducted and operated in which non-intoxicating beverages are sold, becomes simple.

The Mulberger act, or ch. 556, does not, in express terms, define non-intoxicating drinks or beverages, but repeatedly uses the following or like terms "non-intoxicating drinks or beverages as defined in section 1569—3 hereof."

It therefore becomes necessary by construction to define what constitutes non-intoxicating drinks or beverages. The Mulberger act having defined intoxicating drinks and beverages in the terms of the Volstead act, it necessarily follows that non-intoxicating drinks and beverages are the converse of intoxicating liquors and beverages as defined in the Volstead act, and therefore it is my opinion that the Mulberger act by implication defines non-intoxicating drinks and beverages as follows:

Non-intoxicating drinks or beverages shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids, and compounds whether medicated, proprietary, patented or not, and by whatever name called, containing alcohol in any degree less than one-half of one percentum by volume, except that no beverage containing alcohol in any degree may be sold under the name of beer, ale or porter.
In common parlance water and milk and other like liquids are "non-intoxicating" in fact, but "non-intoxicating liquors" cannot be defined as that term is commonly and ordinarily used or known, but must be defined in the sense in which it is used in the Mulberger act—"non-intoxicating liquors" have a specific and special meaning.

The Mulberger act is dealing with the question of certain named drinks and beverages containing alcohol, and those drinks and beverages set forth in the Volstead act, and which by express terms are included in the Mulberger act, must be construed as "intoxicating" or "non-intoxicating" with respect to whether or not they contain one-half of one per centum or more of alcohol or less than one-half of one per centum of alcohol by volume and contain alcohol in some degree.

Sec. 1569—9 bears out my construction of non-intoxicating drinks or beverages, for it will be noted that by said section standing bars and counters cannot be maintained in any place in which non-intoxicating drinks or beverages, as defined in section 1569—3 * * * at which any such drinks or beverages containing alcohol in any degree are permitted to be drank or consumed by the purchaser."

Therefore, in construing the Mulberger act the definition of non-intoxicating drinks and beverages, as I have herein set forth, should be understood to be the definition of non-intoxicating drinks or beverages wherever mentioned in the Mulberger act; and wherever I have referred to non-intoxicating liquors, drinks or beverages in this opinion, whether with reference to the Volstead act or the Mulberger act, it should be understood to mean the non-intoxicating drinks and beverages as hereinbefore defined.

I think the construction herein made of the Mulberger act with respect to intoxicating or non-intoxicating liquors, if properly applied, answers your four questions.

You will note that the authority mentioned extends to municipalities the right to regulate places "in which non-intoxicating * * * beverages, as defined in section 1569—3 * * * are sold."

However, it should be noted that sec. 1569—11 provides for local option with respect to beverages,
"defined in section 1569—3 of this act as non-intoxicating which contain any alcohol whatsoever."

So far as the act affects existing so-called dry territory the provisions of the act do not authorize the sale of "beverages containing alcohol" in any of the municipalities in this state where such sale is now illegal, until there has been a referendum under sec. 1569—11. In other words, so-called dry territory remains dry territory until the referendum election determines otherwise.

The reference to prohibition of the sale of beverages containing alcohol in the municipalities applies where such sale was illegal at the time of the adoption of ch. 556.

In your questions you refer to "temperance drinks," and among them you mention "near beer," "pop," "lemonade," and others have asked to be advised with respect to "sodas," "cocoa cola," "milk shakes," "phosphates," "malted milks," and other so-called "temperance drinks." All drinks designated by the names above mentioned cannot be said to be non-intoxicating drinks within the meaning of this law. If the so-called temperance drinks, by whatever name called, are used for beverage purposes, they are not prohibited unless they come within the definition of non-intoxicating liquors as defined in the Volstead act, and no permit can be required for the sale of such drinks, unless they contain alcohol in some degree within the definition of "non-intoxicating drinks and beverages" as they are defined in the Mulberger act under my construction.

Whether or not so-called temperance drinks—near beer, pop, lemonade, etc.—are intoxicating or non-intoxicating within the definition of the Volstead act involves a question of fact which this department does not undertake to decide.

You will also note that sec. 1569—21, ch. 556, provides that if at any time after the passage of said chapter the Eighteenth Amendment to the constitution of the United States becomes void, then from such date the Mulberger act becomes null and void, and the provisions of ch. 66, or the old chapter on intoxicating liquors, again becomes operative and of full force and effect.

You will also note that by sec. 3, ch. 556, the so-called Mulberger act is in force and effect on and after January 16, 1920, and continues in force and effect up to and including January 1, 1921, subject, of course, to the provision just above stated; and
by sec. 4 of said chapter, the so-called Mulberger act will continue in force and effect from and after January 1, 1921, unless the people by referendum, therein provided for, by a majority vote cast upon that question, refuse to approve of the act, and if at such referendum the people of the state vote against such act, then it ceases to become a law after January 1, 1921.

If the people at such referendum vote against such act, then ch. 66 of the statutes of Wisconsin for 1917 relating to "excise and the sale of intoxicating liquors," will be reinstated automatically as the law on the subject of intoxicating liquors after January 1, 1921, by reason of the provisions of sec. 1, ch. 556, in so far, of course, as said ch. 66, Stats., is applicable to the situation prevailing. I need not, and cannot now, anticipate what may be the situation regarding intoxicating liquors on January 1, 1921, and therefore do not undertake to interpret or construe any of the provisions of said ch. 66 if revived and reinstated by a vote of the people, nor do I, nor can I, undertake now to determine what may be the status of intoxicating liquors under ch. 66 if such chapter is revived.

I also call attention to ch. 685, laws of 1919, which, in effect, amends ch. 556, and which provides that no person shall sell, vend, or traffic in fermented malt or vinous non-intoxicating beverages, as defined in ch. 556, laws of 1919, without a permit, as provided in said act, and under the definition of "non-intoxicating" beverages, within the purview of the Mulberger act, fermented malt or vinous beverages containing alcohol cannot be sold without a permit, as provided in ch. 556, sec. 1569—10.

The new section—1569—23—added by said ch. 685 to ch. 556 bears out my previous definition of liquors so far as it relates to the classification of liquors as intoxicating or non-intoxicating, but it must be noted that the minimum fee for the permit for the sale of fermented malt or vinous beverages containing alcohol in some degree and less than one-half of one per centum by volume is $50.00.

Under sec. 1569—10 a municipality is permitted to charge a fee of not more than $100.00 per annum for a permit for the sale or manufacture of non-intoxicating beverages. That section permits the municipality to charge any minimum they may desire for the sale or manufacture of non-intoxicating beverages, as defined in the Mulberger act, and which, by express terms,
adopts the Volstead act definition of non-intoxicating beverages under the construction I have given to the act, and the Volstead act specifically sets forth many drinks by name.

The effect, therefore, of the new section—1569—23—has resulted in fixing a minimum fee of $50.00 for the sale of "fermented malt or vinous non-intoxicating beverages," containing alcohol in any degree, and less than one-half of one per centum by volume which are fit for beverage purposes, while the municipality may charge, under sec. 1569—10, a minimum fee as may be fixed by ordinance for the manufacture and sale of all other liquors and beverages specifically mentioned in the Volstead act, containing alcohol in some degree, but less than one-half of one per centum in volume.

I also call attention to the fact that subsec. 2, ch. 685 revives and continues certain sections repealed by ch. 556.

It does appear that said ch. 685 in a sense confuses the situation in making a special class of fermented malt or vinous beverages, for which a minimum fee of $50.00 must be paid for the sale, vending or trafficking therein. However, the provisions of ch. 685 are very clear, and so clear that they do not bear construction, and it must be held that the legislature intended to do exactly what it expressly provides in said ch. 685.

The net result of the provisions of ch. 685 is that if a person desires to sell fermented malt or vinous beverages, and which are non-intoxicating under the definition set forth herein, a minimum fee of $50.00 must be charged therefor by the respective municipalities, while if a person desires to sell non-intoxicating liquors as herein defined other than fermented malt or vinous beverages, municipal authorities under sec. 1569—10 may permit the sale thereof for a minimum fee of any amount, or the manufacture or sale thereof may be made without a permit unless the municipality passes an ordinance requiring the permit, and even in such case the permit may be granted by the municipality without the payment of any fee therefor, or on a fee of not more than $100.00 per annum.

Under sec. 1569—23, relating to the sale of fermented malt and vinous beverages, the minimum fee for the permit must be $50.00 and not more than $100.00, and said sec. 1569—23 is mandatory, and no permit can be granted for the sale of fermented malt or vinous beverages without the payment of at least a minimum fee.
Insurance—Life Fund—State treasurer, trustee, subject to general rules as to trustees.


Honorable Platt Whitman,
Commissioner of Insurance.

Some time ago you submitted a request for an opinion with respect to the crediting of interest on funds belonging to the life fund in the hands of the state treasurer.

Under sec. 1989m the state treasurer is made ex officio treasurer and custodian of the life fund.

The commissioner of insurance has charge of all other matters in relation to the life fund, and, of course, the state treasurer must at all times keep that life fund intact so that it may be drawn upon for the payment of benefits under the policies issued under state life insurance, as well as keep the fund in such shape that it may be loaned from time to time.

And the state treasurer shall cause the money in the life fund to be invested and reinvested in the securities authorized in sec. 1951, and the insurance commissioner has general direction with respect thereto.

Under sec. 14.49 the interest earned on state moneys in all depositories shall be apportioned by the state treasurer among, added to and become part of the several funds, and then following is detailed what funds are included, but the life fund is not one of said funds.

It perhaps can be said that the life fund is not state money.

However, the state treasurer is made the custodian and the agent of the state as trustee of the life fund.

It is therefore my opinion that the funds in the life fund belong to the policy holders under the state life insurance scheme, according to the conditions of the respective policies, and that the state is merely custodian of funds belonging to the state life insurance policy holders.

If this assumption is correct, and I believe it is, then it is my opinion that the state—and in turn the state treasurer, as the agent of the state—holds the relationship of trustee and is subject to the general rules relating to trustees and their liability in the absence of any direct statutory provision.

There is no statutory provision with respect to the interest on the life fund in the hands of the state treasurer.

4—A. G.
There are two rules applicable to the interest on funds held by trustees:

First, the custodian or trustee is charged with the duty of preserving the fund and is not charged with the duty to account for interest thereon, unless the machinery creating the relationship of trustee imposes such duty, generally speaking.

The other rule is that where a trustee has funds belonging to the _cestui que_ trust, and if the trustee invests such funds, then such trustee is obligated to give credit and add such interest to the original fund.

If my assumptions are correct, then, unless it is shown that the trustee of the life fund has actually received interest upon such fund, there is no responsibility resting upon the trustee to account for interest not received.

The communication to me does not indicate whether or not interest has actually been received upon funds deposited with the state treasurer in the life fund, and therefore it is impossible to advise more definitely than herein stated.

I prefer, however, to reserve an opinion with respect to this question, for the reason that another question will very soon arise with respect to the liability of the state concerning interest on moneys received for the sale of lands belonging to the normal school and the state school fund, title to which lands has failed as a result of a decision of the United States supreme court.

The question involved with respect to that matter vitally affects funds belonging to the state, and it is my opinion that the principles that prevail with respect thereto will be applicable to your situation.

_Insurance—State Insurance Fund_—Interest can only be credited as provided by statute.

_Honorable Platt Whitman,_

_Commissioner of Insurance._

You state that the state treasurer has failed to credit the state insurance fund with interest on the average amount in such fund for the period from January 1, 1917, to July 1, 1917, as provided for in sec. 1978d, subsec. 7, Stats.
You present a detailed statement of the condition of the fund for such period including the general fund, and you state that the general fund was repaid June 5, 1917, and your view of the statute is that the insurance fund is not to be charged interest on the amount due the general fund, as it was repaid before January 1, 1918, and that the state treasurer has not credited the fund with any interest during the period above stated. Your inquiry is as to whether or not it is his duty to credit the state insurance fund with interest from January 1, 1917, to July 1, 1917, and if so, upon what basis.

The state insurance fund is purely a state undertaking, whereby the state undertakes to create a state insurance fund for the purpose of paying for losses occasioned by fire. It is of statutory origin, and there are no rules applicable to the status or disposition of such fund, except as expressly provided by statute.

The statute expressly provides:

“Beginning January first, 1918; and annually thereafter, the state treasurer shall credit the insurance fund with interest on the average amount in such fund for the preceding twelve months at the average rate of interest earned by the state upon its bank deposits during that period.”

This provision of the statute was created by ch. 482, laws of 1917, and is a special provision relating to a special subject, and controls over general provisions of the statutes, if any there be contrary to such special provision.

It will be noted that sec. 14.49 treats of the interest received on certain funds, exclusive, however, of the state insurance fund, which is particularly provided for in subsec. 8, sec. 1978d.

I think the provisions of said subsec. 8 should be taken literally, and therefore interest can be charged only in the manner provided therein, either for or against the insurance fund, and January 1, 1918, is the first period when the provisions of said subsection begin to operate.

The method of computing the interest after January 1, 1918, is specifically set forth in said subsection.
Public Officers—Commissioners of Public Lands—Patents—
Commissioners possess no power to cancel patent; patent can
be canceled only by action in equity.

January 29, 1920.

HONORABLE W. H. BENNETT, Chief Clerk,
Commissioners of Public Lands.

The commissioners of public lands have asked me for an
opinion with respect to the right of the land commissioners to
cancel patents.

The question arises, by reason of the condition of a tract of
land in Price county, where it appears that the land was sold
on a certificate, and the grantee in such certificate assigned the
same to one Thorpe, that thereafter a patent was issued to said
Thorpe, and that the land has since been conveyed to other
parties.

It appears that an affidavit was not filed in compliance with
the statutes relating to the sale of public lands.

If the present owner is a bona fide holder for value and
without notice of the omission of the affidavit, the state is
estopped from defeating the title in the present grantee.

The land commissioners as such have no power to revoke a
patent. Neither can the state in equity cancel patents if the
proper officers issue the same and if they were issued under
authority of law, even though there were some condition pre-
cedent as a ministerial act which should have been or might
have been observed.

As between the state and the patentee, the state then might
bring an action to cancel or annul the patent, if it is issued
through mistake, fraud or on a false suggestion or by reason
of the failure to do some preliminary thing prior to the issue
of a patent, in which case the state would not be estopped.

These rules which I have mentioned are well known, and
there is a multiplicity of authority which I need not cite.

I merely call attention to 32 Cyc. 1093, 1094, 1095, 1096, and
1097, and the cases therein cited.
Appropriations and Expenditures—Bridges and Highways—
Public Officers—State highway commission has no power to purchase road material; no appropriation therefor.

January 29, 1920.

Wisconsin Highway Commission.
I have your favor of December 15, in which you request an opinion with respect to whether or not your commission has authority to purchase materials to be used in the construction of federal aid projects.

Sec. 1317m—2 provides:

"1. The commission shall have charge of all matters pertaining to the expenditure of state aid for the improvement of public roads and bridges in the state, and shall do all things necessary and expedient in the exercise of such supervision."

There is no appropriation made to the highway commission to purchase road material, and while the commission has general supervision of the work, and may do all things necessary and expedient in the exercise of the supervision of highway construction, it is limited in the exercise of its functions to those things expressly provided by statute, and the governing officers of the state cannot validly bind the state by contract involving the expenditure of money of the state to an amount different or greater than the legislative appropriations granted for a particular purpose.

There being no appropriation for the purchase of road building material, it follows that the commission lacks the authority to bind the state.

The same question relating to another governing body of the state has been discussed at length in an opinion rendered by this department to the board of regents of the university, dated January 2, 1920.*
Bonds—Bridges and Highways—Road Improvement—Public Officers—County Board—Power of county board to raise funds for highways discussed.

Fred V. Heinemann,
District Attorney,
Appleton, Wisconsin.

Under date of January 24, 1920, you submit this question: Can the county board at a special meeting which is to be held in February raise moneys for highway purposes and if so, under what limitations?

You say no further bond issue can be made upon the sole authority of the county board, as the limit which is permitted without referendum has nearly been reached.

It appears that a proposed county highway bond issue of $1,800,000 was recently submitted to the voters of Calumet county and by them rejected, and anticipating that the proposition would be approved and thereby make available by bond issue the funds needed this year for highway purposes, the county board failed or neglected to vote any tax or make other provision for highway moneys. The board is now confronted with the problem of how to obtain money for that purpose for this year.

There are several provisions of statute which authorize the county board to provide money for highway purposes by issuing bonds, secs. 697—67, Stats. 1917 (sec. 59.93, Stats.), 1311—1, and 1317m—12. The total amount of bonds outstanding at any one time issued by sole authority of the county board for highway purposes can never exceed 1 per cent of the assessed valuation of the county. I can find no other statute authorizing the county board to issue highway bonds, and if there is no other, then the county board must either submit a bonding resolution to the voters or have recourse to some means other than bonds for raising the needed funds.

Aside from borrowing on bonds, only one provision is known which authorizes the county board to borrow money for highway purposes. That is a general provision which would include highway expenditures.

"The county board of each county shall have the power at any legal meeting:"

* * *
"(11-a) In counties having less than two hundred thousand inhabitants, * * *, to borrow money after taxes have been levied in any year, to pay the current expenses of the county, in any sum not exceeding ten per cent of the amount of the last tax levy for county purposes, and issue orders therefor; provided, that no money shall be borrowed under this subsection except on the affirmative vote by ayes and nays of at least two-thirds of the members of the board." Sec. 669, Stats. 1917 (sec. 59.07, Stats.).

In my opinion it would be possible for the county board to vote taxes at the special meeting and thereafter borrow money under the authority given by the statute just quoted.

However, it seems to me that the best and really only practicable way out of the present difficulty would be to take the following course. A careful estimate of the actual needs of the county for highway construction and maintenance during the year 1920 should be made and a bonding resolution enacted in accordance with the provisions of secs. 1317m—12 and 1317m—12a, Stats., authorizing the issuance of bonds sufficient to raise the amount needed for this year. The bonds should be made payable April 1, 1921. The proposition could be submitted to the electors at the spring election which will be held April 6, a special election being called on that date for that purpose. Such submission would entail very little additional expense. Such a bonding proposition would really mean "pay as you go." The only difference between the plan thus proposed and the raising of needed moneys by tax voted at the last annual meeting would be that under this plan the money would be paid in the form of taxes at the end of the year in place of at the beginning. It would seem that such a bond issue would certainly carry, for it is hardly to be expected that the voters of the county intend to abandon even for a year the good roads project. Be that as it may, the bond proposition would result in putting the question squarely up to the voters of the county. If the electors wish Outagamie county to drop out of the procession for good roads, this bonding proposition will furnish them the opportunity for expressing their wish.

The bonding proposition which I have suggested, if approved by electors, would produce the needed funds in a strictly legal manner without danger of legal complications. Any other procedure might raise doubtful legal questions and result in litiga-
tion if it was attempted to raise such a sum as will be needed to carry on the highway work in your county in keeping with what has been done and is to be expected.

Since writing the above I have come upon subsec. 5, sec. 1315, Stats. The last half of that subsection gives the county board decidedly sweeping power for the purpose of providing funds for the county's share of the cost of constructing trunk line highways. It seems to me that the statute now referred to authorizes the county to raise any money that may be needed this year to meet the state and federal appropriations for trunk line construction.

Perhaps before closing I should call your attention to the fact that the county board may appropriate for highway purposes any funds in the county treasury which have not been raised for or appropriated to some other specific purpose. You will notice that the voting of taxes and the appropriation of public moneys are two separate and distinct acts. The first supplies the money and the second provides for its disbursement.

Members of vocational detachments in armed forces prior to Oct. 1, 1918, and thereafter in S. A. T. C.

Administrators and instructors in S. A. T. C. held not to be "taking training" therein.

February 3, 1920.

Service Recognition Board.

Some time ago you submitted to me a request in the words following:

"The service recognition board requests your opinion whether and to what extent men inducted into army service and sent for mechanical training to schools and universities whether before or after such schools were authorized to maintain units of the Student Army Training Corps are entitled to benefit under the provisions of ch. 667, laws of 1919 and ch. 5, laws of 1919, special session, soldier bonus acts."

In the report issued by the committee on education and special training, submitted by C. R. Mann, chairman, advisory board, C. E. S. T., the same being an authorized publication of the war department, p. 27 thereof, after reviewing the obstacles in the way of the committee on education and special training, it is said:

"Yet in spite of all obstacles and because of the cordial cooperation of the educational institutions, the impossible was accomplished and the Students Army Training Corps was formally mustered into service on October 1st."

From the same report, p. 28, I find the following:

"Since the students had to be divided into three groups according to age because of the requirements of the draft law, it was suggested that the time from October 1st to July 1st be divided into three periods of three months each."

Then follow the details for the groups. From the same report I quote as follows:
"The first payment under the government contract [referring to the contract with the educational institutions] will be made about two weeks after submission of the first voucher, which will cover the period from October 1st to 15th, 1918, with monthly payments thereafter."

Briefly reviewing the history of the S. A. T. C., beg to state that the committee on education and special training organized the original vocational detachments in the educational institutions, which were organized beginning on or about April 1, 1918, and each detachment received vocational training, and those operating on October 1, 1918, were made Section "B" of the S. A. T. C., and that prior to October 1 the vocational detachments were not classified as S. A. T. C.

The same committee, during the summer of 1918, organized summer camps, which were three in number and were opened at Fort Sheridan, Plattsburg and the Presidio on July 18, and they lasted sixty days.

The change in the federal act with respect to the draft ages, 40 U. S. Stats. at Large 955, brought about a change in the plans of the committee, and it was then proposed to organize at the colleges what is now familiarly known as the S. A. T. C., which in fact was the collegiate section of the S. A. T. C., and the inductions therein were made through the local draft boards on October 1, 1918. It also appears that there were organized in some of the colleges naval and marine units, which had the same status as the army units, and which were under the general administration of the army officers in charge of the S. A. T. C.

Quoting from page 83 of the report, I find the following to be a description of the two sections of the Students' Army Training Corps:

"The Corps is divided into two sections, the Collegiate or 'A' Section and the Vocational or 'B' Section. The units of the 'B' Section were formerly known as National Army Training Detachments. They aim to train soldiers for service as trade specialists in the Army. As the program for vocational training is now virtually completed, few, if any, new units of this type will for the present be added.

"The 'A', or Collegiate Section, which was inaugurated October 1st, is open to registrants who are members of some authorized college, university or professional school. Students of authorized institutions join the Students' Army Training Corps by voluntary induction into the service. They then be-
come members of the Army on active duty, receiving pay and subsistence, subject to military orders, and living in barracks under military discipline in exactly the same manner as any other soldier."

The collegiate section of the S. A. T. C. therefore was in existence from October 1, 1918, and continued to the early part of December, 1918, and by December 20, so far as students were concerned, such collegiate section was at an end. Therefore, so far as the collegiate section, designated as Section "A," is concerned, October 1, 1918, should be taken as the date of the commencement of members of such section as belonging to the S. A. T. C.

As to the status of those who were taking training in the vocational detachments prior to October 1 and as organized subsequent to October 1 as a unit (Section "B") of an S. A. T. C., it is my opinion that October 1, 1918, should be taken as the commencement of their training in an S. A. T. C., for the reason that the committee on education and special training entered the following order:

"As of October 1st, 1918, the United States Army Training Detachments established at educational institutions by the Committee on Education and Special Training are merged with the Students Army Training Corps as Section 'B' thereof." Par. 6, p. 138, Report of Committee on Education and Special Training.

Therefore, training in any National Army Training Detachment prior to October 1, 1918, should be counted in determining the length of a man's military service, but any service while taking training in the vocational detachments subsequent to October 1, 1918, should not be counted in determining the length of a man's military service under the act in question. It must, therefore, follow that any service in Section "B" of the Students' Army Training Corps does not come within the provisions of the bonus act as military service, assuming at all times that Section "B" was established as of the date, October 1, 1918.

You will note that in sec. 2, ch. 667, laws of 1919, it is provided:

"The benefit of this act shall not accrue to any person for time spent while taking training in any student army training camp."
Therefore men who were discharged as members of the S. A. T. C. but whose military service was in administering or instructing in an educational institution having an S. A. T. C. are not precluded from the benefits of the act during their term of administering or instructing in an educational institution in the S. A. T. C., for the reason that the act specifically precludes only those "taking training," and "taking training" must refer to those who were students rather than instructors or administrators in the S. A. T. C., even though they were commonly designated for the convenience of classification by the United States government as members of the S. A. T. C.

From the committee's report to which I have referred, I find that during the summer of 1918 the country was divided into three sections and students and faculty members of educational institutions were invited to a two-months' summer course at the camps in their respective sections, namely, at camps organized at Plattsburg, Fort Sheridan and at the Presidio. I find on page 23 of the report that certain institutions of collegiate grade were invited to send delegates from their student body and the faculty to these camps, and it was intended that the men so sent should return to their respective institutions to act as assistant instructors of military science and tactics in the Students' Army Training Corps. Therefore, the student body and faculty members at Plattsburg, Fort Sheridan and at the Presidio were not regarded by the war department as serving in the armed forces of the United States, and therefore in determining the benefits under the soldiers' bonus act, the time of attendance at said camps should not be counted. It cannot be said that those in attendance at said camps were serving in the armed forces of the United States, though they were preparing for such service under the status of a furlough without pay and without allowance until called to active duty, and it was the policy of the government not to call such members to active duty until they either completed their college course or reached draft age, whichever occurred earlier, and that on reaching draft age they were required to register with the local board and become subject to the selective service regulations.

I believe that with the foregoing you will be able to ascertain what persons are excluded under the bonus act, so far as your question relates to
You will observe that the legislature used the word "camp." The same word was used in the educational act and it is my opinion that the legislature meant "corps" and that the courts would so hold. There were only three camps organized in the United States to which I have referred as Fort Sheridan, Plattsburg and the Presidio, while the S. A. T. C. was organized as a "corps" and inasmuch as it must be held that those in attendance at the three camps to which I referred were not serving in the armed forces of the United States, it must be held that the legislature intended to exclude those who were commonly known as belonging to the organizations designated as the S. A. T. C. and which were organized at our university, private colleges and normal schools within the state as well as at other educational institutions in the United States.

Bridges and Highways—Public Officers—County Highway Commissioner—Cost of trunk line construction is included in fixing minimum salary of highway commissioner.

Where but part of monthly salary has been paid order should be issued for balance.

February 3, 1920.

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

Under date of January 26, 1920, you ask to be advised whether the cost of new construction work to be done on the trunk highway system within the county shall be taken into account in determining the minimum salary of the county highway commissioner. This question was answered in the affirmative in an opinion rendered the highway commission January 5, 1920. That opinion is adhered to.*

You ask further whether a county clerk should issue an order to the highway commissioner for the difference between the lawful salary due the commissioner and the amount which has
actually been paid him, and if not, how the matter should be handled. You are advised that the clerk in my opinion should issue an order to make up the deficiency in the payments of salary heretofore made if any there be. I think that mandamus would lie to compel the issuance of such an order if the clerk refused to issue it. This is said on the assumption that there was no dispute as to the sum due for salary.

Prisons—State Prison—Regular chaplain must be appointed at state prison under present statutes.  
February 4, 1920.

BOARD OF CONTROL.

In your communication of January 30 you state that for some months a vacancy has existed in the chaplaincy of the Wisconsin state prison; that the method used at the state prison at the present time is to employ visiting chaplains of the various religious denominations, who are given a Sunday each month for conducting religious services and for visiting the inmates and advising them on spiritual matters; and that Congregational, Methodist, Lutheran, Episcopal, Catholic, and Christian Science ministers are employed. You state that when a resident chaplain is employed, he naturally belongs to some particular denomination, and the inmates of other denominations have complained that the chaplain was discriminating against some particular church. The practice of admitting visiting chaplains has worked out more satisfactorily to the inmates of the prison and the management than the employment of a resident chaplain, and it is the opinion of the management of the prison that this practice should be continued.

The question has been raised as to whether the statutory provision that a chaplain should be employed, be followed, or whether the board and the management of the prison can arrange for the religious services of the institution without the employment of a resident chaplain. You ask for my opinion upon this question.

Sec. 4905, Stats. 1917 (renumbered sec. 53.06 and also amended by ch. 348, laws of 1919), reads thus:

"(1) The chaplain shall hold divine service in the chapel once on each Sunday, instruct the prisoners in their moral and re-
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; be in attendance
at the prison daily during usual business hours, unless excused
by the warden; 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 in-
struction in the common branches of English education; and
with the consent of the warden call to his assistance in such edu-
cational labors such convicts as he may deem qualified. He
shall make full report to the warden on the thirtieth day of June
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.

"(2) 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 exceeding two hundred
dollars per annum."

The plan suggested by you is so different from the one out-
lined in the statute that it is a matter that should be submitted
to the legislature, and the statute should be changed so as to
authorize the practice that you contend is more advantageous
to the inmates than the one outlined in the statute. You will
note that the chaplain has quite a number of duties besides the
duty of holding the divine service in the chapel on each Sunday.
I am of the opinion that the practice which you have temporarily
followed cannot be permanently established without a change
in the statutory provisions relative to this matter.

Public Officers—County board has no power to purchase shares
of stock in county agricultural association.

February 4, 1920.

F. W. Bucklin,
District Attorney,
West Bend, Wisconsin.

In your letter of January 24 you state that at the 1919 session
of the county board of your county, a resolution was passed
authorizing the clerk and treasurer to purchase, in behalf of the
county, 200 shares of nonprofit-sharing stock in the Washington
County Agricultural Association, at $25.00 per share, making
a total of $5,000. You state that at a recent special meeting of the board you were asked for an opinion as to the legality of this transaction and that you advised the board that in your opinion the board had no legal authority whatever to purchase this stock, even though it was merely intended thereby to make an appropriation to the association. You held that the county board, being a creature of the legislature, could exercise only such powers as are conferred by statute, or such as are clearly implied or merely incidental to such powers as are specifically conferred; that among the powers of the county board there is no such power as that sought to be exercised by the passage of the resolution referred to. You ask for my opinion in regard to this matter.

I agree with your conclusion and also with the grounds upon which it is founded. Unless the authority can be predicated upon some statutory law, the county board has no such power. I am also unable to find any provision in our statute from which I could conclude that the county board was given power such as that sought to be exercised in the passage of this resolution. Sec. 59.69 affords the only method for donations.

Appropriations and Expenditures—Claims—Public Officers—Taxation—Income assessor may be appointed to make reassessment on the board of review.

February 5, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

On December 8, 1919, your chief clerk in writing asked for an opinion as to the legality of the claims of Mr. George A. Bubar, the assessor of incomes for Douglas county, amounting to $387.50 covering 38 3/4 days' service as assessor for a reassessment of the village of Oliver, at the rate of $10.00 per day, and of Pearce Tompkins, the assessor of incomes for Ashland county, in the sum of $20.00, covering two days’ service while acting as a member of the board of review of the village of Oliver, in Douglas county, at the rate of $10.00 per day. The reassessment of the village of Oliver took place during the months of
August, September, and October, 1919, and was for the year 1918.

The state tax commission having ordered a reassessment of said village of Oliver, Mr. Babar was, pursuant to the provisions of sec. 1087—45, as amended by sec. 1, ch. 384, laws of 1919, duly appointed by said commission to reassess the said village. In the same order the tax commission designated Pearce Tompkins, of Ashland county, to serve as a member of the board for the correction and review of such reassessment. As both of these gentlemen had received their salaries as assessor of incomes for their respective districts during the months above stated, your department questions the legality of these claims, and asks for a ruling of this department before auditing the same and drawing a warrant upon the state treasurer for their payment.

If Mr. Babar did not file a complaint for reassessment, then the opinion of my predecessor, reported in I Op. Atty. Gen. 477, answers your inquiry, and according to that opinion the claim of Mr. Babar may be audited.

Under sec. 1087—47, in the order for the reassessment by the tax commission, they shall designate three persons to serve as a board for the correction and review of such reassessment.

It appears that Mr. Tompkins, who was and still is the assessor of incomes in the district composed of Ashland, Bayfield, and Iron counties, was appointed to the board of review, and, there being no authority by which the tax commission may order or direct an assessor of incomes to serve as a member of the board of review, it is my opinion that the opinion rendered by my predecessor heretofore cited is controlling and that such claim may be audited.

Whether or not the position of income assessor and that of member of a board of review are incompatible I need not determine, for the reason that if the two positions are incompatible, nevertheless Mr. Tompkins served as a de facto member of the board of review and he would be entitled to the compensation allowed by law.

It is true that the public is entitled to one competent person to serve as a reassessor, and three other competent persons to serve as members of the board of review whenever a reassessment is ordered by the tax commission.

5—A. G.
A reassessment of a tax district is a step in the process by which the state appropriates a portion of the citizens' property for public use, and whether assessors of incomes should be appointed to make reassessments and to membership on boards of review involves a question of public policy rather than a legal question. Inasmuch as assessments, generally speaking, with respect to these questions are largely under the jurisdiction of the tax commission, I feel that I should not discuss the question of public policy in rendering an official opinion to another department of the state government.

_Bonds—Counties—Public Officers_—County board legislates for county. Direct legislation in counties by electors not permitted by constitution.

Ordinance for building school house and issuing bonds therefore not subject to repeal by initiative.

February 5, 1920.

C. E. Lovett,

_District Attorney,_

Park Falls, Wisconsin.

By letter of January 30, 1920, you ask to be advised as to the validity or effect of that part of sec. 670w, Stats. 1917 (subsec. (2), sec. 59.02, Stats.), which in terms makes sec. 10.43, Stats., apply to counties. Your county board at its last annual meeting passed Ordinance 761, which provides for the establishment and maintenance of a county training school and the issuance of county bonds to provide funds for erecting a school house therefor. On the same date the county board by resolution ordered that sec. 4225a be made applicable to Price county, and that the proposed bonds and the proceedings preliminary to the issue thereof be submitted under the last named section to the attorney general as bond commissioner. The county board also passed a resolution creating a building committee and clothed the committee with necessary power to proceed to the erection of such school house. Some two weeks later there was filed with the county clerk the petition of voters, in number not less than fifteen per cent of the vote cast for governor at the last preceding general election in your county, requesting the
county board to enact without change or else submit to the voters a proposed ordinance repealing Ordinance 761 before mentioned. The county board rejected the petition and thereby, in effect, refused to adopt the proposed repealing ordinance.

Said petition and the action of the county board, you say, raise the question of whether the county clerk has any right or duty to submit to the electors the proposed repealing ordinance. The contention is made that the decision of *Meade v. Dane County*, 155 Wis. 632, is against such submission. That decision involved the validity of sec. 39j, Stats. 1913, which provided for a referendum of county and city ordinances. The court condemned such statute as far as it related to counties upon the ground that it was an unconstitutional attempt to confer legislative and judicial power upon the electors. The *Meade* case grew out of an effort to have submitted to the voters an ordinance providing for the purchase of an addition to the county poor farm. The support and care of the poor and the maintenance of schools were classed together by the court and affect the state at large. If the constitution does not permit direct legislation of the voters of the county on purchasing a poor farm, it does not permit such legislation on the subject of public schools. The distinction between direct legislation and option legislation is pointed out. The court said that it had no doubt of the invalidity of sec. 39j, Stats. 1913. It seems to me that the decision in the *Meade* case completely rules this question.

Sec. 670m, Stats., 1917, provides that county ordinances may be adopted "in the special manner provided for cities by section 10.43, which section shall be applicable to counties."

Sec. 10.43 provides for direct legislation by the voters in cities. This section was created by sec. 14, ch. 385, laws of 1915, as was also sec. 670m, by revising and renumbering secs. 39i, 39k, and 39l, Stats. 1913. In form the older sections provided for a referendum, while the new section provides the initiative. The purpose of the old and the new sections is the same. The scope note of sec. 10.43 is "Direct legislation," and unquestionably its purpose is to give the voters of cities and of counties the right to initiate legislation and to pass upon ordinances and resolutions which have been enacted by county boards and city councils. The *Meade* case was an effort to kill, a resolution by having it referred to the electors. This case is an effort to defeat
an ordinance by enacting a repealing ordinance. If one is legislation, so is the other, and legislation by direct action of the electors of counties is declared to be prohibited by the constitution and beyond the power of the legislature to confer.

It is my opinion that the petition has no force or effect in law, and therefore that the county clerk should not submit the proposed repealing ordinance to the voters.

Furthermore, as matters now stand, he would not be authorized to submit the same to electors until further action was had by the county board. By reading sec. 670m and subsec. (4), sec. 10.43 together, we find that a proposed ordinance shall either be passed unaltered by the county board or it shall be submitted without alteration by the county board to the electors at the next regular election, if one be held within ninety days; otherwise at a special election to be called by the county board. The submission would have to be ordered by the county board, and if the regular election did not occur, a special one would have to be called by the county board. However, I am clearly of the opinion that the legislature by ch. 385, laws of 1915, re-enacted substantially what the court said in the Meade case was an invalid and an impossible statute.

Real Estate Brokers—Parties selling interest in oil leases are real estate brokers under ch. 656, Laws 1919.

February 5, 1920.

Wisconsin Real Estate Brokers' Board.

In your favor of January 30 you ask to be advised whether a person acting as a fiscal agent in soliciting orders for oil lots or oil shares of stock and handled by a real estate broker comes within the provisions of the real estate licensing law.

Under the statement of facts submitted by you it is quite impossible to fully advise you.

Under ch. 656, laws of 1919, sec. 1636—225, Stats., it is provided that a real estate broker is one who sells, exchanges, buys or offers or attempts to negotiate a sale, exchange or purchase of an estate in real estate.

Therefore, if the party solicits orders for oil lots or oil leases or the share of an oil lease or any other aliquot part of a lease

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Real Estate Brokers—Parties selling interest in oil leases are real estate brokers under ch. 656, Laws 1919.
or the sale of any interest in any real estate, whether in the form of a lease or an aliquot part of a lease, he will be a real estate broker within the provisions of said ch. 656, laws of 1919.

Indigent, Insane, etc. — Dead Bodies — Superintendent of county asylum should comply with sec. 51.28. Sec. 1437 not applicable.

February 6, 1920.

STATE BOARD OF CONTROL.

I am in receipt of your favor of February 5, in which you ask to be advised as to whether the superintendents of county asylums should comply with sec. 51.28 or sec. 1437.

Sec. 51.28 is a renumbering of an old section by ch. 347, laws of 1919, as well as an amending of the old section, said section having reference specifically to patients in any county asylum for the insane whose maintenance is chargeable to the state or to any county.

Sec. 1437 is a general statute relating to the duty of every public officer located and residing in the western United States judicial district, having charge of the body of a deceased person.

It is a well known rule that the provisions of an act applying to a specific question prevail over general laws.

You are therefore advised that the superintendents of county asylums should comply with sec. 51.28 and disregard entirely the provisions of sec. 1437.

Bridges and Highways—City must maintain its bridges if not on trunk system, even where county aided in construction thereof.

February 6, 1920.

A. L. STENGEL,
District Attorney,
Fort Atkinson, Wisconsin.

By letter dated February 3, 1920, you ask whether it is the duty of Jefferson county or of the city of Jefferson to maintain a bridge constructed in the city in 1914 under the state aid law. The bridge is not on the trunk highway system.
The general rule on the subject of highway bridges requires cities to build and maintain the same within their boundaries. *Battles v. Doll*, 113 Wis. 357; subsecs. (30) to (34), sec. 925—52; secs. 925—133, 925—154, 925—172 to 925—196, and 925—240 to 925—242, Stats.

Do the facts stated bring this bridge within any exception to that rule? I have not been able to find any such exception. This bridge is not on a state highway, nor does it form part of the county system of prospective state highways. When the bridge was constructed the state aid law authorized state and county aid to improve streets in cities of the fourth class having a population less than five thousand where such streets "directly connect" highways of the county system of prospective state highways. Sec. 1317m—5, subsec. 1a, Stats. 1913. But that provision was repealed in 1915 (ch. 533, Laws 1915) and has not since been reenacted. The state aid law does not now apply to cities. Sec. 1319 does not apply, nor does any succeeding bridge section apply. The state aid law does not now affect any city. Though the bridge was built with state aid, the bridge was never a part of a state highway and the repeal of the provision under which state aid was given leaves the city of Jefferson as to this bridge precisely as it would be had the state not contributed to the cost of construction.

Where state highways fall within village limits the villages are required to maintain the same. Subsec. 9, sec. 1317m—7. The liability of the county seems expressly negatived by the provisions of par. (f, subsec. 1, and subsec. 1f, sec. 1317m—5, to the effect that any road or street in any city heretofore or hereafter built or constructed under the provisions of the state aid law shall be maintained by and entirely at the expense of the city. This would seem to settle the matter. The county in my opinion has no duty in the premises. The obligation to maintain the bridge rests with the city.

It may be added that sec. 1317, Stats., for maintenance of trunk highways, does not apply for the reason that this bridge is not on and forms no part of the state trunk highway system.
Insurance—Life Insurance—Annuity contracts which in case of lapse grant "a paid up annuity" in proportion to number of premiums paid, involve discrimination contrary to provisions of sec. 19550.

Form of such contracts subject to approval of commissioner of insurance.

February 1, 1920.

Honorable Platt Whitman,
Insurance Commissioner.

Your communication of January 3, with sample policy and correspondence enclosed, presents for consideration the question whether an annuity contract containing the provision:

"If any premium after the second year shall not be paid on or before the date when due, the contract will remain in force for a paid-up annuity value for such proportionate part of the above stated annuity as the number of full years' premiums paid bears to the total number required hereunder, or upon surrender hereof the Company will issue a contract for the amount of paid-up annuity so determined; but this contract may be reinstated at any time upon payment of overdue premiums with interest at the rate of five and one-half per centum per annum,"

violates the provisions of sec. 19550, Stats., which provisions are as follows:

"No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged or in any return of premium, dividends or other advantages."

Preliminary to any consideration of this proposition, we are advised by Mr. Anderson, the actuary of your department, that as a matter of fact the accumulated reserve under a policy from year to year would never coincide with the proportionate part of the annuity to which the insured would become entitled if the full term of contract were carried out. As an elementary actuarial proposition, therefore, a person insured whose contract lapsed would receive benefits of greater or less mathematical value than the reserve value of the policy maintained in force by another person of the same age, insured for the same amount.
Obviously, if he received less than the full mathematical value, those who continued their insurance would profit at his expense; if he received more than such amount, he would profit at their expense.

Not merely this, but policy holders whose contracts lapsed in successive years would receive returns whose ratio to the reserve value of their policies would differ with each year, thus violating the principle of equivalence of advantage evidently contemplated by the statute. Whether the apparent discrimination in a given case was for or against the individual in question, under the reciprocal relation existing between him and the remaining mass of policy holders, necessarily discrimination would result in favor or against them, as the case might be; so that in either event very clearly, within the plain language of the statute, there would be a "distinction or discrimination in favor of individuals" in the return of "advantages" under the policy.

This construction of the statute is clearly confirmed by the language of *Clappenhack v. N. Y. Life Ins. Co.*, 136 Wis. 626. The policy there involved gave the assured an election to commute his policy for $164 of paid-up life insurance on written request made within six months after default in premiums, barring which his policy would automatically have been continued for six years and four months for $1,000. The court referred to the law of New York, p. 630:

"** * * The statutes of New York, when this policy was written, forbid all discrimination between policy-holders of the same class, and required that paid-up insurance be accorded to the full amount that the existing reserve would purchase at the established rates."

Adding:

"** * * Whether such foreign statute was properly before the court or not, the general policy thereby expressed is part of the law of this state. See. 19550, Stats. (1898). This contract, as construed by defendant and by the trial court, would be in defiance of the policy of these statutes. It would give to one who declared his election before the six months had expired less insurance than to another, similarly situated, who withheld such declaration till the end of that period. It would give to the former less insurance than his reserves would purchase at established rates, if $164 was the correct amount purchasable by the reserves at the end of six months."
This case clearly indicates the view of the court that within the meaning of the statute "insurants of the same class" is a term used to indicate a status acquired by individuals at the time of their entrance upon the contract of insurance, rather than as descriptive of the incidents attending upon their termination of that contract. In other words, the mere fact that all parties who elected to terminate their insurance upon the same day were treated alike would not constitute them a separate class between whom there was no distinction or discrimination. That such is the sense in which the term "class" is employed in the statute is borne out by the decision of the court in the case of Miller v. New York Life Ins. Co., 200 S. W. 482, where the court adopted the language of the chancellor's opinion below, saying, p. 484:

"'Whilst there appear to be many bases of classification of life insurance policies, in its primary and ordinary meaning "a class" of policies signifies those policies issued (a) in the same calendar year, (b) upon the lives of persons of the same age, and (c) on the same plan of insurance.'"


It follows therefore that this policy would permit

"'distinction or discrimination * * between insurants of the same class and equal expectation of life,'"

within the terms of sec. 1955o.

Your letter suggests the further question: Discrimination or distinction being assumed to exist, are annuity contracts subject to the restrictions laid down in sec. 1955o, Wis. Stats., and is the approval of such contracts within the jurisdiction of the insurance commissioner, under the provisions of sec. 1948f?

A correlation of the pertinent provisions of the statute seems to make it plain that this question must be answered in the affirmative. Sec. 1955o provides that "'no life insurance company doing business in this state'" shall do any of the things prohibited in the body of the statute. If the issuance of annuity contracts is the doing of business by life insurance companies in this state, then very clearly they are subject to the provisions of this section.
Sec. 1897 provides:

"An insurance corporation may be formed for the following purposes: [Then follows in parentheses the following provision] (The mention of several subjects or risks of insurance in any subsection indicates that any one or more or all may be included.)"

"(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."

Very clearly, therefore, within the purview of the statute, "to grant, purchase or dispose of annuities" is considered and treated as the doing of life insurance business. The section which confers jurisdiction upon the commissioner to approve policies, could anything do so, makes this even clearer, because the terms of sec. 1948j specifically provide:

"* * * No policy of life or disability insurance as defined in subsections 3 and 4 of section 1897, shall be issued or delivered in this state until the same has been approved by the commissioner of insurance, or until there has been filed with him at least thirty days: * * *"

Subsec. (c) sets forth:

"In case of life insurance, a separate statement on the basis of one thousand dollars of insurance for each age at which policies are to be issued, stating in dollars and cents, for each year."

Subd. (2), subsec. (c) refers to the reserve to be included in such statement, and contains the proviso:

"* * * That the reserve for annuity provisions contained in continuous income or supervisorship contracts need not be filed."

This emphasizes and confirms the foregoing construction as correct, because in the mind of the legislature providing the form of statement to be filed in the case of life insurance, it was deemed necessary to specifically except therefrom annuity contracts in this respect. Annuity contracts, therefore, are very clearly subject to the approval of the commissioner of insurance by the plain terms of the statutes upon the subject, except that no statement of the reserve for annuity provisions
contained in continuous income or survivorship contracts need be filed.

Your final question as to whether the fact that nothing but paid-up values are granted has any effect on the rule against discrimination is answered in the negative. The fact that but a single option is provided, that of a paid-up annuity, would seem to heighten the nature and degree of the discrimination.

Corporations—Insurance—Under sec. 1896m notice of proposed amendment of articles of organization of mutual fire insurance company must contain exact copy of proposed amendment, otherwise such amendment cannot legally be acted upon.

February 11, 1920.

Honorable F. W. Kubasta,
Deputy Commissioner of Insurance.

I have examined and return herewith the proposed amendment to articles of organization of the — Company of Juneau, Wisconsin.

The certificate as to the adoption of the amendment seems to be in proper form, but there is also among the papers a copy of the notice that apparently in fact was given to the members of the company. This notice does not contain a copy of the resolution that was adopted. Under sec. 1896m, subsec. 1, the amendment can be made only

"after the proposed amendment has been filed with the secretary of the company and with the commissioner of insurance, and a copy thereof, with notice of the time and place of meeting, has been mailed to each member at least thirty days prior to such meeting."

The notice that was sent does not mention the amendment of the articles specifically, nor, as pointed out above, does it contain a copy of the proposed amendment. It does state that the meeting will be held for the purpose, among other things, of "adding insurance against loss by theft to the insurance," but this is not a copy of the proposed amendment. The distinction made may seem to be very technical, but in the matter of organization of corporations and amendment of the articles our
supreme court has virtually held that the statute must be literally complied with. It has not been in this case, and for that reason I cannot approve this amendment.

Appropriations and Expenditures — Education — Normal Schools—Contingent appropriation for normal schools is available for expenses of summer sessions of those schools, other conditions of statute being complied with.

February 12, 1920.

HONORABLE EDWARD A. FITZPATRICK, Secretary,
State Board of Education.

Ch. 445, laws of 1919, appropriates:

"For any or all of the normal schools under the supervision of the state board of normal school regents, to be distributed as the said board may direct:

"* * *

"(f) On July 1, 1919, fifty thousand dollars, and in [on] July 1, 1920, fifty thousand dollars, as contingent appropriations, no part of which shall be expended unless the state board of normal regents shall report to the state board of education that the increase in attendance at a particular institution or institutions, necessitates additional help. Thereupon the state board of education shall pass upon such needs, and allow so much of said appropriation as it shall deem necessary."

You inquire whether any part of this fifty thousand dollars would be available to the normal schools for summer school sessions, based on an increased enrollment of students in such session over the session of a year ago.

It is the judgment of this department that the contingent appropriation of $50,000 for July 1, 1920, is available for and may be applied to the operation of summer school sessions, other conditions of the statute being complied with.

This conclusion rests upon the following considerations. Historically, we are advised that the summer sessions of the normal schools were first instituted by the board of normal regents about ten years ago, without direct legislative authority specifically authorizing the establishment of such schools. It was assumed that the board of normal regents possessed the unquestioned power to establish such sessions as incident to their general
power and authority of administration. Initially these sessions were a modification of the old time teachers' institute. Due to gradual expansions they came to assume a position coordinate in extent and importance with the regular sessions of the school, so that in substance and effect the normal school year was practically divided into four quarters.

This assumption of power to establish these schools was never challenged by the legislature and never subjected to test in court. That it was properly assumed by the board we think is given express recognition by legislative act appearing as sec. 20.38, subsec. (13), which contains the proviso:

"Summer schools for teachers shall be limited to six weeks in each year,'"

the result of which is merely to curtail and restrict the length of the summer session, but does not at all draw into question the power of the board to establish such schools, but rather recognizes that power. So that, in the absence of other indications of legislative purpose, it might well be assumed that the same rules for the expenditure of funds would apply to summer sessions as to other sessions, except that they might not be extended beyond six weeks.

The legislature, however, has not left this to mere inference or conjecture. The numbering 20.38, was adopted by ch. 14, laws of 1917, the appropriation statute. This we find provided specifically:

"On July 1, 1915, six thousand six hundred fifty dollars, and annually beginning July 1, 1916, six thousand seven hundred fifty dollars, for institutes for the instruction of teachers pursuant to section 407, for summer schools for teachers, and for conducting a state teachers' and a state young people's reading circle organized by the Wisconsin Teachers' Association."

Ch. 447, laws of 1917, amended this statute, and in lieu thereof made the provision which now appears:

"Summer schools for teachers shall be limited to six weeks in each year. For all fiscal purposes, the entire summer session shall be considered as occurring in the fiscal year in which the major part thereof occurs, and all expenditures therefor shall be charged to the appropriation for such fiscal year."

Language could scarcely indicate more plainly the legislative judgment that the summer session stood in all respects upon a
coordinate footing, and that the same rules should apply to
the administration of its finances as for the remaining sessions,
it being stated that

"for all fiscal purposes," it "shall be considered as occurring in
the fiscal year in which the major part thereof occurs."

Municipal Corporations—Public Officers—Plumbing Examin-
ers—Only journeyman plumber within definition of statute is
eligible to position on committee of examiners, where vacancy is
that of journeyman plumber.

February 12, 1920.

DR. C. A. HARPER, Secretary,
State Board of Health.

In your letter of February 10 you state that there is a vacancy
on the board of plumbing examiners to be filled, and that the
vacancy is the position of a journeyman examiner. You state
that some of the applicants are plumbing inspectors in the cities
of this state who are not engaged in the practical installation of
plumbing, although they do hold journeyman licenses, and be-
fore taking up the inspection work were engaged in the practical
installation of plumbing as their principal occupation; and that
the other applicants are journeyman plumbers whose principal
occupation is the practical installation of plumbing.

Your question, therefore, is whether under the definition of
a journeyman plumber, an inspector who is not engaged in the
practical installation of plumbing is eligible to an appointment
as a journeyman plumber on the committee of examiners.

Sec. 959—53, subsec. 1, subd. (a), defines a journeyman
plumber

"to be any person other than a master plumber, who, as his
principal occupation, is engaged in the practical installation of
plumbing."

Sec. 959—55 provides for the appointment of three plumbing
examiners, one of whom "shall be a journeyman plumber," one
shall be a "master plumber," and one shall be a member or
an employee of the state board of health, which three persons are known

"as the committee of examiners for the examining of journeyman and master plumbers as to their qualifications and fitness to be entitled to licenses to engage in the work of master plumbers and journeyman plumbers."

Said sec. 959—55, subsec. 1, specifically provides the qualifications for each member of the committee.

The vacancy that you now have being that of the journeyman plumber, the only person eligible under the law to fill such position is a journeyman plumber, and inasmuch as a journeyman plumber is defined in the statutes which I have quoted in connection with the subject relating to licenses to plumbers, it must be held that "journeyman plumber" means a plumber within the definition thereof, and therefore only a person other than a master plumber who as his principal occupation is engaged in the practical installation of plumbing is eligible to fill the position.

I think this conclusion is only a restatement of what the law clearly provides, and it must therefore be held that a person who is not presently engaged in the practical installation of plumbing as his principal occupation is not eligible for the position. I can very well comprehend how a plumbing inspector in a city might be engaged in the practical installation of plumbing as his principal occupation and his plumbing inspection would be only incidental, and so the test must be whether or not the person is engaged in the practical installation of plumbing as his principal occupation. If he is not, then of course, in the plain terms of the statute, he is not eligible, even though he holds a journeyman plumber's license, for it is very clear that a man may obtain a journeyman plumber's license and then cease to be engaged in the practical installation of plumbing as his principal occupation.
Appropriations and Expenditures—Armories—Appropriation effective July 1, 1919, for armories thereafter approved.

February 12, 1920.

HONORABLE ORLANDO HOLWAY,  
Adjutant General.

You request in your favor of February 10 my opinion as to whether the provisions of ch. 324, laws of 1919, are applicable to the appropriation made to the Wisconsin national guard for the fiscal year July 1, 1918, to June 30, 1919.

In my opinion the appropriation available for the purposes specified in said ch. 324 has no reference to the appropriation made to the Wisconsin national guard for the fiscal year from July 1, 1918, to June 30, 1919, for the reason that the appropriation made for the purposes set forth in ch. 324 was not available until after July 1, 1919, as provided in sec. 5, ch. 273, laws of 1919.

The authority to aid in the purchase and construction of armories was not granted until June 12, 1919, by ch. 324, and it was quite impossible for the armory board to obligate the state until there was an appropriation for that purpose. Such appropriation did not take effect until July 1, 1919, and the fifteen per centum of the total sum annually appropriated to aid in the purchase and construction of armories has reference to the fiscal year beginning July 1, 1919.

Elections—Nomination Papers—Presidential Preference Primary—Statute governing filing of nomination papers at presidential primary which adopted by reference certain provisions of statute providing for September primary is to be construed as law stood at time of their adoption; subsequent amendments are to be disregarded.

February 12, 1920.

HONORABLE MERLIN HULL, 
Secretary of State.

You call attention to the fact that secs. 5.22, subsec. (6), and 5.23 require candidates for president, vice-president, and national delegates to file nomination papers in your office in the
manner provided in secs. 5.05 and 5.07 for the September primary; and in view of the further fact that the last legislature (ch. 352, Laws 1919) changed the wording of sec. 5.05 as to the date of filing from “at least thirty days prior to such primary” to “not later than the last Tuesday of July,” you state there seems to be some uncertainty in the minds of candidates as to the last day for filing nomination papers for the so-called “presidential preference primary” and national delegate election to be held April 6, 1920. You request to be advised in the matter.

You are advised that the situation is ruled by principles of law too well settled to admit of debate. The legislation in question is an illustration of a frequent legislative practice to adopt by reference the provisions of some other statute. The rule controlling under such circumstances has been well stated by the supreme court of the United States, in the early case of *Kendall v. United States*, 12 Peters 524, where it was said, p. 625:

“* * * Such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption. No other rule would furnish any certainty as to what was the law; and would be adopting prospectively, all changes that might be made in the law.”

The supreme court of Wisconsin, in *Flanders v. Town of Merrimack*, 48 Wis. 567, construing two sections of a statute, one of which made reference to a preceding one that was subsequently repealed, answered the argument that resort might not be had to such statute, as follows (p. 576):

“* * * The point is not well taken. Although section 1210a is not a law and has no longer the form of a law, it was not annihilated by its repeal, and a reference to it in the following section is just as effectual as ever it was to determine the cases to which the latter section is applicable.”

The general rule is stated in 36 Cyc. 1152—1153:

“* * * As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and therefore is not affected by any subsequent modification or repeal of the statute adopted.”

The text is well sustained. *Postal Tel. Cable Co. v. Southern Ry. Co.*, 89 Fed. 190, 194; *Culver v. People*, 161 Ill. 89, 43 N. 6—A. G.
E. 812, 814; Sutherland on Statutory Construction, sec. 257; 
State v. Junkin, 128 N. W. 630, 631; Hutlo v. Walker Co., 64 
So. 313, h. n. 2.

The antecedent of sec. 5.23 as it now appears, so far as the 
reference to the prior statute is concerned, was first enacted by 
ch. 22, laws of the special session of 1912, which amended the 
law as it previously stood and provided for nominations

"by nomination papers, in the manner provided by sections 11— 
5 and 11—6 of the statutes," etc.

Secs. 11—5 and 11—6, Stats. 1911, contained the provision for 
filling nomination papers "at least thirty days prior to such 
primary." To paraphrase the language with which the court 
concludes its opinion in Flanders v. Merrimack,

"* * * That section (5.23) has the same force and effect 
as it would have were the words, 'at least thirty days prior to 
such primary a nomination paper shall have been filed,' in-
serted therein, instead of the words 'in the manner provided by 
section 5.05.'"

It is clear, therefore, that nominations for candidates for 
president and vice-president and for delegates shall be made 
by nomination papers to be filed at least thirty days prior to 
the so-called "presidential preference primary," to be held 
April 6, 1920.

Public Officers—State Treasurer—Statutes do not impose upon 
state treasurer duty of personally signing drafts; this, being 
mere ministerial act, may be delegated by him to subordinate.

February 17, 1920.

Honorable Henry Johnson, 
State Treasurer.

The fact that approximately 150,000 drafts will need to be 
issued by your department during the next six weeks raises the 
question, as you suggest in your communication of this date, 
whether you have authority to appoint a former bookkeeper in 
your office to sign your name to drafts, adding his initial, and 
likewise to have the assistant treasurer sign your name, adding 
his initial.
You are advised that sec. 14.42, Stats., which prescribes the duties of the treasurer, although enumerating under fourteen separate headings what those duties shall consist of, nowhere includes among them any provision directing the issuance of drafts by you. On the contrary, subd. (4) contemplates that such payments may be made in currency.

Subd. (12) provides that the state treasurer shall

"Cause to be plainly printed or stamped upon all checks and drafts issued by him, the words ‘Void if not presented for payment within two years.’"

In this respect, the duties of the treasurer are entirely distinct from those of the secretary of state.

Sec. 14.35 specifically provides:

"The secretary of state shall draw his warrant on the state treasurer payable to the claimant for the amount allowed by him upon every claim audited under section 14.31, specifying from what fund to be paid, the particular law which authorizes the same to be paid out of the state treasury, and the post-office address of the payee; and he shall not credit the treasurer for any sum of money paid out by him otherwise than upon such warrants."

The section stood in substantially the same form when an opinion was rendered by Attorney General Gilbert (see Op. Atty. Gen. for 1908, 704, 711), holding that the secretary of state could not authorize the signature of warrants by one other than himself unless he was unable to write. Much reliance was placed in this case upon subd. (19), sec. 4791, Stats., which reads:

"The words ‘written’ and ‘in writing’ may be construed to include printing, engraving, lithographing and any other mode of representing words and letters; but 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 at his request and in his presence."

And the reasoning of the opinion was that the statute clearly contemplated that the warrant should be signed by the secretary of state personally.

Pursuant to this opinion, doubtless, sec. 14.36, Stats., was enacted, providing:
Whenever it is impracticable for the secretary of state to personally sign warrants issued on the state treasury, his name may be signed thereto by one or more persons in his department designated by him.

It should be borne in mind that the signature of the secretary of state to a warrant comes as the last step in the audit of claims, and to that extent finally fixes and determines the liability of the state to make payment. The state treasurer discharges no such functions. He has no discretion.

Sec. 14.42, subd. (4), provides that the treasurer shall pay out of the treasury, on demand, upon the warrants of the secretary of state and not otherwise such sums only as are authorized by law to be so paid.

Here there is no discretion. The payment of money pursuant to a warrant of the secretary of state is a mere ministerial duty, susceptible of enforcement by mandamus. He merely exercises an optional method of paying funds for whose safe-keeping he is personally liable. Very clearly he could delegate to anyone that he saw fit the duty of going to the safe in his office and taking therefrom specie and making payment of a warrant personally. Obviously, his signature to a check or draft stands upon the same footing. It comes within the rule laid down in Mechem on Public Officers, sec. 568:

Where, however, the question arises in regard to an act which is of a purely mechanical, ministerial or executive nature, a different rule applies. It can ordinarily make no difference to any one by whom the mere physical act is performed when its performance has been guided by the judgment or discretion of the person chosen. The rule, therefore, is that the performance of duties of this nature may, unless expressly prohibited, be properly delegated to another.

See also Throop, Public Officers, sec. 569.

A case wholly in point is that of The People v. Bank of North America, 75 N. Y. 547. That action involved in substance the converse of the present situation, in that the question was as to the power and authority of a clerk in the office of the state treasurer to make endorsements of drafts received by him and deposit the same. The court said, p. 556:

The placing his name upon the drafts for collection involved the exercise of no judgment or discretion. It was a
mere formal, routine act, which anyone could be authorized by
the treasurer to perform. The banks had been designated, the
drafts had been received and accepted. They were to be placed
in the banks for collection. As to these matters, there was no
further discretion or judgment to be exercised. And there was
no more discretion to be used in placing the name of the treasurer
upon them and depositing them in the bank than there was in
receiving a package of money and depositing that. The power
to indorse and deposit the drafts was no greater or higher than
the power to deposit money, and the one power could be in-
trusted to a clerk with just as much safety as the other, unless
it so happened that larger sums came into the office in drafts
than in money. It would be just as easy for a clerk to steal
the money as the drafts. These drafts and the indorsements
upon them were not official documents, which the treasurer,
as a public officer, was required to sign or certify. Hence the
rule that an agent, public or private, cannot delegate his author-
ity, in cases requiring the exercise of judgment or discretion,
does not apply: (Commercial Bank v. Norton, 1 Hill, 501; New-
ton v. Bronson, 13 N. Y., 587.)"

See also 29 Cyc. 1433.

The language in the case of People v. Bank of North America,
with slight paraphrase, might be applied here. The power to
sign drafts is not greater or higher than the power to pay out
money in specie.

In reliance upon this decision, we find that the attorney
general of New York (Report of Attorney General, N. Y., 1895,
66), having been asked for a ruling as to

"whether a county treasurer has the right to authorize a person
other than a deputy to sign checks,"
said:

"The act of placing the name of the treasurer to the cheek
is a mere ministerial act which the treasurer might authorize
anyone to do after he had determined that it was proper to make
the check."

Ring v. County of Johnson, 6 Iowa 265, involved the validity
of certain promissory notes of a county, not signed by the county
judge, who was designated to act in that capacity. The court
said, p. 272:

"Many of his powers he could not delegate to another, such
as his judicial authority, and such would be his official judgment
and discretion. But no objection is perceived to another's performing a ministerial act, under his order and direction. Of this character, is the act of the clerk in signing the notes, by order of the county judge. The clerk could not determine whether the stock should be taken, nor whether the bond and coupons should be given; but the objections to his signing these instruments, upon the order of the judge, is not very apparent."

In *Montgomery v. Township of St. Mary's*, 43 Fed. 362, 363, the court puts this question:

"Can a public officer delegate to another, not the exercise of official discretion, but simply the performance of a ministerial act, such as signing his name in his presence, and under his order?"

and by its decision answers the same in the affirmative.

*Porter v. Boyd Paving & Construction Co.*, 112 S. W. 235, headnote 1:

"The general rule is that, when a document is required by the common law or by statute to be signed by any person, a signature of his name in his own handwriting is not required, but he may request another to sign his name for him."

*State v. Reber*, 126 S. W. 397, headnote 3:

"An officer, to whom a discretion is intrusted by law, cannot delegate to another the exercise thereof, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act, such as signing instruments, to evidence the result of his own exercise of the discretion."

It therefore seems clear that you may authorize the signature of your name as you have done.

You likewise desire an opinion as to whether you may use a facsimile signature, or a rubber stamp. You are advised that under date of July 26, 1918, VII Op. Atty. Gen. 419, Mr. Haven, then attorney general, rendered an opinion that a "county chairman may countersign his county orders by stamping his name with a rubber stamp thereon."

In that opinion reliance was placed upon the opinion of the attorney general of the United States, rendered to the secretary of the treasury, in which 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." 1 Op. U. S. Attys. Gen. 670.

This seems a clear statement of the law.

Registered Nurses—A nurse who is not a registered nurse may nevertheless advertise as a practical nurse.

February 18, 1920.

Board of Control.

In your letter of February 12 you state that at the present time you have a school for nurses at the Wisconsin state hospital for the insane, in which a two years' course is given; that you have a letter from Superintendent Drake of that institution in which he proposes to offer in connection with the school for nurses a practical course of training to cover a period of one year; that the work will embrace, besides instruction, taking temperatures, keeping charts, administering medicines, giving baths and packs, and the practical application of the principles of asepsis, etc.; that as qualifications to enter the institution to take this course, applicants will be required to have a graded school education; that upon completion of the course a certificate will be issued by the state board of control.

You inquire whether the graduates of this course could advertise themselves as practical nurses after the course has been given. You state also that you feel certain that this arrangement would not conflict with any of the Wisconsin statutes establishing training schools for nurses, but before you proceed in the matter you desire the opinion of this department as to whether these graduates could advertise themselves as practical nurses.

Your question must be answered in the affirmative. The only prohibition which I find in the statute against advertising as a nurse is found in sec. 1435c—4. Said section reads as follows:

"It shall be unlawful hereafter for any person to practice, or attempt to practice, in the state as a registered nurse with-
out a certificate from the Wisconsin state board of medical examiners. Any person who has received such certificate shall be styled and known as a 'registered nurse,' and shall be entitled to append the letters 'R.N.' to the name of such person. No other person shall assume or use such title, or the abbreviation 'R.N.,' or any other words, letters or figures to indicate that such person is a registered nurse.'

While these nurses are not authorized to hold themselves out or advertise as registered nurses, I see no objections to their advertising as practical nurses. No statute of the state would be violated and I see no objection to the practice.

Public Officers—Judgments—State Employe—Lien given to judgment creditor against earnings of state employe under sec. 3716a is rendered void under sec. 67, par. f of bankruptcy act when such employe is adjudicated a bankrupt within four months after obtaining such lien.

February 19, 1920.

Honorable Merlin Hull,
Secretary of State.

In your letter of February 11 you state that on January 17, 1920, there was filed in your department, under the provisions of sec. 3716a, Stats., a certified transcript of a judgment in favor of G— and B— against X—, amounting to $125.26; that when the highway commission pay roll was presented for payment the latter part of January, it was certified that there was due Mr. X— the sum of $145. It appearing that he was a married man, you allowed him $60.00 as exempt, and the balance of $85.00 is being held in your office for the benefit of the judgment creditor.

In accordance with that portion of the statute which allows to the judgment debtor thirty days from the date of filing of the certified copy of judgment, in which to file an affidavit of an intention to appeal, you have not paid the said sum of $85.00 over to the judgment creditors. You state that according to your calculations, the said sum was payable to them on the 16th day of February, but that on the date of your letter you received a notice from Charles A. Wilson, referee in bankruptcy at
Superior, Wisconsin, to the effect that Mr. X— was adjudged a bankrupt on the 7th day of February. On account of the conflicting claims you have requested my opinion as to the construction of the section above referred to.

Sec. 3716a received the construction of the supreme court in the case of Jefferson Transfer Co. v. Hull, 166 Wis. 438. I quote the following from the decision of the court found on page 441:

"2. The right given by this statute is that of a lien on the fund, not ownership thereof. It is closely analogous to the right of a judgment creditor to goods of the debtor seized upon execution; in fact the proceeding may rightly be called an equitable execution. It is plainly a lien obtained through legal proceedings; hence, so far as it affects wages or salary due at the time of the filing of the petition in bankruptcy, it is rendered 'null and void' by the express terms of sec. 67 f of the national bankruptcy act. The judgment itself is not affected by the section named, only the lien which has been created under it (1 Remington, Bankr. (2d ed.) sec. 682 and cases cited) * * *

From the foregoing it is clear that the lien which sec. 3716a gave to the judgment creditors, G— and B—, was lost when Mr. X— was adjudicated a bankrupt in the federal court on the 7th day of February, 1920. Sec. 67, par. f, of the national bankruptcy law of 1898 declares null and void all levies, judgments and other liens obtained through judicial proceedings within four months prior to the filing of the petition in bankruptcy. As the $85.00 earned by X— during January, 1920, is still in your possession, it is, under the decision of our court, not subject to the judgment creditors' lien, but whether or not the trustee in bankruptcy is entitled thereto is a question which we reserve until the trustee has made demand therefor.

Whether the judgment creditors will have any claim on the earnings of X— subsequent to February 7, 1920, depends upon his being discharged from said judgment by the bankruptcy court.
Criminal Law—Gambling—Selling postal cards with chance of buyer’s drawing one out of bunch fastened together which has lucky number that draws candy box is gambling.

February 20, 1920.

GEORGE W. LIPPERT,
District Attorney,
Wausau, Wisconsin.

In your letter of February 16 you say that in your county a man has a block of postal cards which are fastened together on the outer edge by pasting a paper on them, and that these postal cards are sold at five cents apiece. However, should anyone draw a card that has on it a lucky number, he gets a box of candy. There are some cards which do not have any numbers on them and there are others which have the so-called lucky numbers. You inquire whether, in my opinion, this is gambling.

Under the statement of facts, every purchaser is presumed to get his money’s worth, but there is the additional chance of gaining a lucky number, on the chance of the card having a certain number on it. Under the principle laid down in the opinion by one of my predecessors, which you will find in Op. Atty. Gen. for 1908, 286, and also in Op. Atty. Gen. for 1910, 850, this is gambling and in violation of our statute.

Public Officers—County Board—Chairman of county board is elected at first meeting after regular election of members; he is elected for balance of his term as supervisor. Hence when term of supervisors is one year chairman of board is elected annually, but where term is three years election of chairman is triennial.

February 20, 1920.

ARCHIBALD MCKAY,
District Attorney,
Superior, Wisconsin.

You ask to be advised whether the Douglas county board at its first meeting after the coming spring election should choose a chairman. It appears from your letter of February 13, 1920, that the county board acting under sec. 663, Stats. 1917, by resolution provided that the term of supervisors thereafter to
be elected should be three years, that the term of the members of the board is three years, and that no supervisors are to be elected in your county next April.

It is my opinion that the chairman elected by the county board last April will hold for the balance of his term as supervisor, and that no election of a chairman is called for by the statutes until after there shall have been an election of supervisors for a full term.

As you say, the statutes relating to counties and county boards were revised, renumbered, and somewhat amended by ch. 695, laws of 1919. Sec. 667, Stats. 1917, provided:

"The county board, at the first meeting after their election, shall elect one of their number chairman, who shall continue to occupy such position * * * until the county board elected for the succeeding year shall elect his successor."

The words "elected for the succeeding year" are ambiguous. Sec. 667 was interpreted in an opinion to the district attorney, March 4, 1919. (VIII Op. Atty. Gen. 134.) It was then in effect held that the chairman was to be elected annually. While there may be doubt as to the correctness of that ruling, it is adhered to. Has the law upon the subject since been changed? In my opinion, it has.

The provisions of secs. 667 and 667a, Stats. 1917, were consolidated and revised to read:

"The county board, at the first meeting after each regular election at which members thereof are elected for full terms, shall elect one of their number chairman. A person so elected shall perform all duties required of the chairman until the county board elects his successor." Sec. 59.05, Stats. (sec. 19, ch. 695, laws of 1919).

Confessedly the meeting which will be held by your county board after the April election will not be the "first meeting after their election" (sec. 667, Stats. 1917) nor the "first meeting after * * * [a] regular election at which members thereof were elected for a full term" (sec. 59.05, Stats). The mandate of the statute to elect a chairman, however, relates only to meetings so held. The command related to the meeting held last April and it was obeyed. That action exhausted the power of the board, in the premises, till such time as the command of
the statute is again applicable. As already stated, the statute as it now reads is addressed to the county board at the first meeting following the election of the members thereof. That will not occur in your county till another regular election of supervisors is held.

I am of the opinion that there will be no vacancy in the office of chairman following the April election. But right or wrong, no injury or harm can result to the public interest by the present chairman continuing in that office, even though a successor should be but is not elected. If one is not elected, the incumbent is required and authorized to discharge the duties of the office "until the county board elects his successor."

Railroads—In cases where an increase of utility rates is contemplated, statute contemplates proceeding by application and notice and hearing thereon.

February 20, 1920.

Railroad Commission of Wisconsin.

Sec. 1797m—31, after referring to the filing of schedules by public utility companies, provides:

"No change shall thereafter be made in any schedule, including schedules of joint rates, except upon ten days' notice to the commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof ten days prior to the time the same are to take effect; provided, that the commission, upon application of any public utility, may prescribe a less time within which a reduction may be made."

Sec. 1797m—105 prescribes:

"Any public utility desiring to advance or discontinue any such rate or rates may make application to the commission," and thereupon hearing and investigation are to be had.

Your communication of February 19 makes inquiry as to which of these sections establishes the procedure to be followed in a case where the utility proposes to increase the service connection charge to new consumers, thus making a change in the amount which a prospective consumer must pay for the con-
nection. Your letter suggests that the commission has heretofore considered that sec. 1797m—31, above quoted, merely applied to changes in schedules not involved in increase in cost to the consumer, and that in the case specified the latter section, 1797m—105, would control.

It is the judgment of this department that your position is correct. You advert to the general rule stated in Black on Interpretation of Laws, p. 326:

"* * * It is a general rule that where different parts or sections of the same statute are found to be in irreconcilable conflict, the latest in order of position or arrangement will prevail."

We would suggest in addition to schedules which do not affect an increase in cost of service to the consumer, that sec. 1797m—31 applies to cases involving reductions in cost to the consumer. Indeed, it is possible that the statute might be so construed as applying primarily to such reductions. In any event, it does not apply to the case you have in mind, and sec. 1797m—105 does apply.

Appropriations and Expenditures—Public Officers—Field Inspector for Adult Blind—Secretary of state has no authority to allow claim of office building company for office room provided for field inspector for adult blind while stationed in city of Milwaukee. Neither such field inspector nor board of control may enter into such a contract and bind state.

February 24, 1920.

Honorable Merlin Hull,
Secretary of State.

I have your letter of February 16, in which you state that there has been presented to you for payment the claim of the — Company of Milwaukee for office rental for Miss —, a field agent for the board of control; that about the same time Miss —'s expense account was presented covering expenses while in the city of Madison; that you returned both accounts to the board of control, stating that you could find no authority for allowing the claim of the — Company, and that the expense
account of Miss — could only be allowed when the necessity for her being located somewhere else was shown.

With your letter you submitted a copy of a letter written by you January 6 to the state board of control and the reply of the state board of control dated February 14. You are satisfied from the reply of the state board of control that for reasons of economy and efficiency Miss — was stationed at the city of Milwaukee and that she was therefore entitled to her expenses at Madison when called there for temporary services, but you are in doubt as to the claim of the — Company and desire my opinion as to whether any authority exists for paying said item from the state treasury.

As I understand it, Miss — was appointed by the state board of control as a field agent for the adult blind of the state, pursuant to the provisions of ch. 499, laws of 1919. The duties of such a field agent are set forth in detail in sec. 1 of said chapter. Under sec. 2 of said chapter the state board of control is authorized to fix the salary to be paid to said field agent, which shall be "in addition to traveling expenses incurred." There is nothing in said chapter nor in any other law of this state in which authority is given to such field agent or to the state board of control to enter into a contract for office rental in the city of Milwaukee. Neither can such authority be reasonably implied.

It is therefore my opinion that you were right in disallowing the claim of the — Company.

Public Officers—Railroad Commission—Public Printing—Reports—Statutes provide for biennial report covering two years preceding July 1 of even-numbered years, same to be made within sixty days after expiration of that period and to contain statement in full and in detail of all receipts and disbursements and such other information as commission may think proper.

February 24, 1920.

Railroad Commission of Wisconsin.

The railroad commission is required by existing statutes to make a biennial report,

"which shall cover the two years next preceding the first day of July of each even-numbered year."
Such report is to be

"filed with the governor within sixty days next following the period covered."

This report

"shall set forth all receipts and disbursements in full and in detail." Sec. 35.26, Stats.

What it shall contain in addition thereto is apparently entirely discretionary with the railroad commission itself.

This conclusion is arrived at after full consideration of the antecedent legislative provisions upon the subject, coupled with the history of the practice pursuant thereto, and is asserted to be the legislative intent with as much confidence as anything can be asserted, predicated upon the somewhat confused and sometimes contradictory and inconsistent acts that the legislature has passed from time to time for the guidance of the railroad commission and its predecessor, the railroad commissioner, in the matter of making reports.

The direct legislative antecedent of the present statutes, relative to the general subject of railroad and utility regulation and the powers and duties of the railroad commission thereunder, was ch. 273, laws of 1874. This act provided for the appointment of "three railroad commissioners," to be appointed by the governor. It was followed by ch. 57, laws of 1876, which amended the previous act, and by sec. 12 conferred "all the powers, duties and privileges" of the commissioners on the railroad commissioner. Neither of these two acts made any provision for a report to the governor. Sec. 12 of the earlier act provided for a return to the state treasurer of certain information therein set forth.

Notwithstanding the absence of any provision, reports were in fact made, first by the railroad commissioners and then continued by the railroad commissioner, beginning with January, 1875, and continuing annually to 1883, there being nine successive reports so made. Sec. 1795, Rev. Stats. 1878, contained this express provision:

"* * * The commissioner, shall, on or before the second Monday of January in each year, make a report to the governor of the transactions of his office for the preceding year, and con-
taining such information, suggestions or recommendations in respect to the matters under his charge, as he may deem proper.'"

The net result thereof was merely to impart legal sanction to what had been done in the absence of the statute. This law remained upon the statute books without variation or suggestion of change until the enactment of ch. 320, laws of 1883. Sec. 1 of this act provided:

"The biennial fiscal term of this state shall end on the thirtieth day of September, in the year 1884, and each even numbered year thereafter, and the succeeding term shall begin on the day following, and the reports of all state officers and institutions shall be biennial, and cover the period thus indicated, except the report of railroad commissioner, which shall cover the period of two years ending June thirtieth, 1884, and the term ending each even numbered year thereafter;" etc.

The second section thereof provided that such report should not exceed two hundred pages. Sec. 6 provided that two hundred copies should be bound for the use of the railroad commissioner, and sec. 12 expressly provided:

"* * * All acts or parts of acts conflicting with the provisions of this act are hereby repealed."

Sec. 1 of this chapter appeared in the statutes of 1889 as sec. 335a, was continued under the same number in the statutes of 1898, by the statutes of 1911 was renumbered as 20.24, and so appeared in the statutes of 1913 and 1915. The legislature of 1917 gave the section its present number, 35.26, and it so appeared in the statutes of that year. The entire subject matter of the fiscal year and the making of reports having been thus covered by the laws of 1883, a situation was therefore presented for the application of the rule "that where the legislative intent to make the general act controlling is apparent it will be given that effect." Chippewa & F. Imp. Co. v. Railroad Com., 164 Wis. 105, 118; Ward v. Smith, 166 Wis. 342, 344, and cases cited.

The policy of biennial reports thus adopted by the legislature in 1883 followed as a natural consequence of the adoption of the policy of biennial legislative sessions, which had been declared by ch. 153, laws of 1882, amending sec. 99, Rev. Stats. 1878 so as to read:
"Section 99. The regular session of the legislature shall commence at 12 o'clock M. on the second Wednesday of January of the year 1883, and biennially thereafter upon the same day and month."

The policy of the legislature having been thus clearly declared, henceforth, so long as the office of the railroad commissioner continued to exist, biennial reports were made in conformity therewith.

Very clearly, we think, no change in legislative policy was contemplated or effectuated prior to the legislative session of 1907. This assertion does not leave out of account the continuous presence of sec. 1795 upon the statute books from 1878 until renumbered by ch. 679, sec. 83, laws of 1919. Its history in the interim is briefly this: The revisors in 1889 caused to be inserted in brackets the word "alternate" before the word "year," thus making that portion of the section read:

"...* * * The commissioner, shall, on or before the second Monday of January in each [alternate] year, make a report," etc.

In the statutes of 1898 the revisors caused the same to read:

"...* * * The commissioner shall, on or before the first Monday in December in each odd-numbered year, make a report," etc.

The legislature in 1899, by ch. 308, laws of that year, provided for its amendment

"by striking out the word 'oddnumber' where it occurs in the twenty-fourth line of subdivision four (4) of said section and inserting in lieu thereof the word even numbered."

As thus amended it was continued in each successive revision of the statutes down to and including that of 1917. The legislature of 1919 provided, by ch. 679, sec. 83:

"Section 1795 of the statutes is renumbered to be section 1797—36 and is amended by striking out the third word, namely, the word 'commissioner' and by inserting in place of said word, the word 'commission.'"

This section, throughout its history prior to 1907, may be construed as entirely consistent with the provisions of the general statute upon the subject of biennial reports and the printing
of the same. Prior to the enactment of ch. 657, laws of 1911, the printing statute—then 20.24, now 35.26—made no provision as to the time within which reports should be filed with the governor. The provision for filing within sixty days “following the period covered” was then added.

In this view of the matter, it is unnecessary to consider whether sec. 1795, which had clearly been repealed so far as it regulated the matter of making reports, was reënacted by the revision of 1889 and that of 1898 and the law of 1899, each purporting to amend it, or not. The view, we think, sustained by the weight of authority, is that any enactment purporting to amend a statute previously repealed does not result in reviving the repealed statute. Schamblin v. Means, 91 Pac. 1020 (Cal.); State v. Wheeler, 89 N. E. 1, 172 Ind. 578; Shutt v. State, 89 N. E. 6 (Ind.); Kramer v. Beebe, 115 N. E. 83; State v. Cognevich, 50 So. 439, 124 L. A. 414; Louisville & N. R. Co. v. East St. Louis, 134 Ill. 657, 25 N. E. 962; Howlett v. Cheetham, 50 Pac. 522, 17 Wash. 626; Lampkin v. Pike, 42 S. E. 213 (Ga.); Stingle v. Nevel, 9 Ore. 62; Leatherwood v. Hill, 85 Pac. 405.

We are not leaving out of account in this view of the matter the decision of our court in the case of Golombieski v. State, 101 Wis. 333. That case, we think, is to be clearly limited as a precedent only to sustain the proposition that where the repealed act is purported to be amended by a subsequent act which recites that it shall “read as quoted,” then it may stand as a complete legislative enactment by itself. The section as retained, in our judgment, accomplished nothing more than to prescribe the time when the report should be filed. Its effect apart from that was merely declaratory of and consistent with the object required by the general statute upon the subject of reports. Read literally, it has provided since 1889 for annual reports in alternate years, the requirement being for a report in each odd-numbered year in the statutes of 1898, and subsequently for each even-numbered year. This, we think, is peculiarly a case for the application of the rule that “to effectuate the legislative intent, words in a statute may be modified, altered or supplied so as to obviate any inconsistency.” Very clearly, the legislature would not contemplate such an absurd result as a report every other year only, and the section is to be read as if it provided in every case for a report for the preceding two
years, thus conforming with the general legislative policy. *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 9-11; *State ex rel. Hust- ing v. Board of Canvassers*, 159 Wis. 216; *Price v. State*, 168 Wis. 603, 616; *Neacy v. Supervisors of Milwaukee Co.*, 144 Wis. 210, 216-217.

It is our opinion, therefore, confirmed by the uniform practice of the successive railroad commissioners, that at the time of the adoption of the present railroad commission act by ch. 362, laws of 1905, the statutes contemplated a biennial report for a period ending June thirtieth of each even-numbered year. The original act, ch. 362, laws of 1905, made no provision for reports at all, but sec. 36 provided:

"All powers, duties and privileges imposed and conferred upon the railroad commissioner of this state under existing laws are hereby imposed and conferred upon the commission created under the provisions of this act;" etc.,

imposing whatever duty in the way of making reports that had rested with the railroad commissioner upon the railroad com- mission, which succeeded him. The railroad commission itself so intei-preted the provisions of the act, because we find that their first report was denominated a "first biennial report from the organization of the commission to June 30, 1906."

Perhaps it is not very important whether the rule governing the matter of reports was prescribed by sec. 335a, Stats. 1898, or by sec. 1795, Stats. 1898. In either event, the legislature of 1907 declared the rule henceforth to obtain, modifying and amending whichever section had theretofore controlled. Ch. 499 of the laws of that year contained the provision enacting sec. 1797m—19, which provided:

"1. The commission shall publish annual reports showing its proceedings and showing in tabular form the details per unit as provided in section 1797m—18 for all the public utilities of each kind in the state, and such monthly or occasional reports as it may deem advisable.

"2. The commission shall also publish in its annual reports the value of all the property actually used and useful for the convenience of the public and the value of the physical property actually used and useful for the convenience of the public, of every public utility as to whose rates, charges, service or regulations any hearing has been held by the commission under section 1797m—45 and 1797m—46 or the value of whose property has been ascertained by it under section 1797m—5."
The policy of biennial reports was therefore abandoned and that of annual reports substituted.

The legislation of that session, however, did not stop with the enactment of sec. 1797m—19, but ch. 582 enacted sec. 1797—37n, which provided:

"Said railroad commission is hereby authorized to print and publish for distribution in bound volumes of convenient size, its opinions and decisions, which shall be suitably indexed, for convenient reference to the subjects treated therein. Not to exceed twenty-five hundred copies of any volume shall be so published. Said commission is likewise authorized to print for distribution in pamphlet form a suitable number of its opinions and decisions as the same are from time to time announced. The commission shall, on or before the first Monday in December, in each year, make a report to the governor for the preceding year containing such information, suggestions or recommendations as they may deem proper."

This section was doubtless enacted pursuant to the recommendation of the railroad commission, found in their first biennial report, where we find under suggested changes in the law the following:

"If the opinions and decisions of the Commission made in formal matters are considered of sufficient public interest to warrant the expense of publishing the same in a volume separate and distinct from the Biennial Report of the Commission, legislative sanction for such publication should be given." First Biennial Report of the Railroad Commission, 1906, p. 16.

The situation then presented was that there were two affirmative acts upon the same subject. The question arises as to whether both acts could be construed as in force, or whether the general rule that the later act overruled the provisions of
the earlier one must govern. We think the later act was intended to prescribe the general rule. There may be justification for classifying the first section, 1797m—19, Stats. 1911, as relating to public utilities only, but there is none for treating the second sections as referring exclusively to railroad matters. While the matter is not entirely free from doubt, it would seem that this is a situation where "the last statute is so broad in its terms, and so clear and explicit in its words, as to show that it was intended to cover the whole subject, and therefore to displace the prior statute." State ex rel. Marinette, T. & W. R. Co. v. Tomahawk Com. Council, 96 Wis. 73, 86; Ward v. Smith, 166 Wis. 342, 344.

In other words, sec. 1797—37n prescribed the rule to be followed in the matter of printing for the railroad commission, taken in conjunction, of course, with the provisions of 335a, Stats. 1898, sec. 20.24, Stats. 1911. This section provides for the printing of decisions of the commission, a subject not covered by sec. 1797m—19. It likewise prescribes the time on or before which such reports should be made, and finally it provides for the publication of "such information, suggestions, or recommendations as they may deem proper."

The language of State Public Utilities Commission v. C., C., C. & St. L. Ry. Co., 119 N. E. 310, is peculiarly apposite. Another matter was there under consideration, but the court said, p. 312:

"* * * The one act leaves nothing to the judgment or discretion of the commission, and the other commits everything to its discretion; so that the two are irreconcilable, and both cannot be in effect as to the same subject-matter."

In Hurt v. Yazoo & M. V. R. Co., 205 S. W. 437, the court said, p. 440:

"* * * The act under consideration gives to the board of county commissioners 'full power and authority to regulate the crossing of county roads by steam railroads.' Under this act they can provide such crossings as they may deem proper, and such safeguards for the public as their judgment approves. We think this wholly inconsistent with the provisions of the Code requiring a sign to be erected by a particular official, and specifying the words that shall be placed on it, and the public officials that shall pay the expenses of the sign. * * *

"* * * Where the two statutes prescribe different and inconsistent rules of action about the same thing, and are in conflict, the later statute must prevail."
And as said again in *Appeal of Young*, 103 Atl. 639:

"* * * Whatever limitations or exceptions to this rule there may be, there are none which in any manner qualify the proposition that, if two statutes are expressly contrary, the later one is the law."

An act which prescribes specifically the information which a report should contain is clearly not to be reconciled with one which commits the entire matter of the contents of such report to the discretion of the commission. The language of the later section is general in its terms and there is nothing to indicate that two separate reports are contemplated. As practically construed by the commission itself from the first, matters other than those relating to the railroads or to public utilities were included. Matters relating to water powers, to the issuance of stocks and bonds and the licensing of the sale of securities under the blue sky law, have all been included in the reports, and yet if the construction were to be adopted that one section provided for utility information and the other for railroad information only, no authority for publishing this information could be found.

The very session of the legislature that enacted these two statutes amended sec. 335c (ch. 519, Laws 1907), which, prior to that time, had provided for the publication of 1,000 copies of the report of the railroad commissioner, so as to provide for the publication of copies of reports therein specified, "Railroad commission * * * 2,500." Sec. 20.25, Stats. 1911, contained the language, "[Report] of the railroad commission, exclusive of its decisions, 2,500," and sec. 20.29 provided for binding "report of state railroad commission." This and similar language as found in the successive editions of the statutes, thus confirming the construction that but one report by the railroad commission was contemplated, and the authority for the publication of this report was construed as broad enough to warrant the inclusion of information already specified.

If it be true that all provisions upon the subject of reports by the railroad commission were thus finally merged in sec. 1797—37n, upon the repeal of that statute the situation is controlled by the principle enunciated in *Smith v. Hoyt*, 14 Wis. 252, headnote 4:

"* * * Where a statute merely excepts a particular class"
of cases from the provisions of a previously existing general law which continues to be in force, the repeal of the excepting statute operates to bring such cases again under the general law.”

See also: Sutherland on Statutory Construction, sec. 275; City of Santa Barbara v. Eldred, 30 Pac. 562; Brodhead v. Milwaukee, 19 Wis. 624, 660; State v. Sawell, 107 Wis. 300, 302; 26 Am. & Eng. Ency. of Law 760; Pepin Twp. v. Sage, 129 Fed. 657.

In connection with the repeal of sec. 1797—37n (ch. 604, Laws 1915), the revisor said:

“This section provides for the printing required by the railroad commission. The revision of all the printing laws in ch. 20 of the statutes supersedes this section.” See note to sec. 34, Bill No. 639, S., Senate Bills 1915.

This statement might perhaps be criticized, for it is the repeal of the section rather than the revision of the printing laws that makes the general rule as to reports applicable. In other words, with the repeal of the special provisions governing the matter of report and printing for the railroad commission, the general statute upon the subject of printing and reports would prescribe the rule. Since 1915, therefore, sec. 20.24, now sec. 35.26, has governed.

Nor has the action of the legislature by the enactment of sec. 83, ch. 679, Laws 1919, already noted, in any manner changed the rule. Prior to the passage of that act sec. 1795 had ceased to be applicable to the subject of making reports to the governor. The result of amending it by striking out “commissioner” and inserting the word “commission,” and changing the number of the section, did not in any way revive or reenact the section. Even though the legislature may have erroneously considered that it was still in force, the authorities already cited control, and it does not come within the exception of Golonbieszki v. State, supra.

This conclusion is the more readily arrived at by reason of the fact that it results in bringing the practice and procedure as to the reports of the railroad commission in line with the general legislative policy expressed upon the subject. One of the primary purposes, if not the primary purpose, in the sub-
mission of reports by all of the various departments and boards is for the advice and guidance of the legislature, and this purpose will be as fully and effectually served by reports made biennially as by a partial report made annually and a report as to other matters made biennially.

**Prisons—Convicts**—Earnings to credit of deceased convict as well as other personal property and effects are subject to administration proceedings. Prison authorities or board of control may not appropriate such earnings for burial expenses and may not deliver such personal property to relatives.

February 24, 1920.

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

I have your letter of February 18, stating that when a convict dies in the state prison and his body is claimed by relatives, it has been the custom of the prison to allow the regular undertaker's bill of $35.00 and, in addition, one railroad fare from Waupun to the place of burial, if within the state of Wisconsin; that usually when the remains are sent away the undertaker is put to certain additional expenses, and if they are shipped by express the carrier charges are twice the amount of the usual railroad fare; that it sometimes happens that there is to the credit of the deceased on the books of the institution amounts ranging from $10.00 to $35.00, which in some cases would be sufficient to defray such additional or extra expenses.

You raise the question whether the prison authorities may legally use said money for paying such additional or extra burial expenses.

You also state that it frequently happens that the deceased has a watch, ring, or other similar property, usually not of much value, which the relatives often ask for, and you wish to be advised whether such items of property may legally be delivered to the relatives of the deceased.

I find nothing in the statutes which authorizes the prison officials or the state board of control to appropriate for burial or funeral expenses or for any other purpose any of the funds to the credit of a convict after his decease.
Neither is there anything in the statutes which authorizes the prison officials or the state board of control to appropriate or assign or distribute any of the moneys, property or personal effects of a deceased convict to his relatives or other persons.

When a convict dies, his property and estate is subject to administration by the proper county court of the county of which he was an inhabitant at the time of his death, and it is only the executor or administrator who may legally demand possession of the funds to the credit of a deceased convict or of the personal property left by him. In due course of administration the county court will order the assets in the hands of the executor or administrator, after paying the necessary expenses of the administration, to be distributed according to the provisions of ch. 169, Stats. 1917, as amended by ch. 411, laws of 1919. It is only by administration proceedings that the funds to the credit of the deceased convict or that his personal property and other effects may be legally used to the payment of his debts and may be legally distributed to his heirs.
Appropriations and Expenditures—University—Secretary of state has no authority to audit claim of chairman of athletic council for theatre tickets purchased for football team while in Chicago en route to Madison.

March 2, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

I have your letter of February 21, to the effect that Mr. T. E. Jones, chairman of the athletic council of the university of Wisconsin, filed a claim in your office for reimbursement for money expended by him in transporting the football team to Evanston, Illinois; that among the items on this claim was one for theatre tickets for the team at the Woods Theatre in Chicago; that you refused payment of this item, under the provisions of sec. 14.32, Stats.

You submit a letter signed by Mr. Jones, addressed to H. J. Thorkelson, business manager of the university, to the effect that coaches of athletic teams consider it very important after the strenuous activities of an athletic contest to keep the team together under their supervision, and that an entertainment at a theatre affords needed rest and relaxation, and that there is no better way in which a team may be taken care of during a four or five hours' stay in the city of Chicago. Mr. Thorkelson, in a letter dated February 20, addressed to your department, expresses himself as being

"convinced of the wisdom of this expenditure as consistent with the uniform practice of intercollegiate games when visiting other cities during the training season"

and gives it as his opinion that the account should be audited.

Sec. 20.41, subd. (5), par. (c), provides that all moneys to the credit of the athletic council of the university

"are appropriated therefrom for the purposes of such athletic council, * * * for carrying out its powers, duties and functions."
According to sec. 14.31, it is the duty of the secretary of state to audit all claims against the state "when payment thereof out of the state treasury is authorized by law."

Sec. 14.32, referred to in your letter, reads in part as follows:

"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; * * *

I am unable to find any specific authority in the statutes which will warrant the secretary of state to audit a claim such as the above. Indeed, the unmistakable inference from the language of sec. 14.32 is that the secretary of state is forbidden to audit claims for the reimbursement of any state officer or employe for money expended by him for theatre tickets while traveling through Chicago or elsewhere. The letters of T. E. Jones and of H. J. Thorkelson set forth no reasons which could not be urged in behalf of an allowance of such a claim in favor of any state officer or employe while in or outside of the city of Madison "in the performance of duties required by the public service." I am clearly of the opinion that you were right in refusing to audit the item in question, there being no authority in law for such audit.

Public Officers—Town Officers—Vacancies in town offices may be filled by appointment until next town election, when vacancy is filled by election.


C. M. Davison,
District Attorney,
Beaver Dam, Wisconsin.

I am in receipt of your favor of March 1, in which you state that last September the chairman of the town of Clyman died and his place was filled, and that the former chairman’s term of office would not expire until April, 1921, and you inquire whether or not the appointee is entitled to hold the office until 1921, or whether there should be a new chairman elected this spring.

You do not state whether or not your county board had, by
resolution, prior to the election of the chairman who is deceased, provided for the three-year term, under the provisions of sec. 663, subsec. 2, Stats. 1917. I therefore assume that your county had acted under said subsec. 2.

Sec. 811, Stats. 1917, provides for the term of office of town officers. That section has been amended and is now sec. 60.22 (sec. 11, ch. 551, laws of 1919), and is substantially the same as far as your question is concerned as sec. 811, except where the term has been changed by sec. 663, which is now sec. 59.03, subsec. (2).

Sec. 818 has been amended and is now sec. 17.25. Said section was amended by ch. 362 and ch. 671, laws of 1919. Sec. 17.25 provides the manner of filling vacancies in town offices and provides as follows:

"* * * Persons appointed under the provisions of this subsection to fill vacancies shall hold office for the residue of the unexpired term, except persons appointed to fill vacancies in the office of town supervisor in towns wherein the term of such office is three years * * * which persons shall hold office only until their successors are elected and qualified and such successors shall be elected at the annual town meeting next after the vacancy occurs if such vacancy occurs twelve days or more prior to such meeting," etc.

Therefore the vacancy to which you refer should be filled at the election in April.

Corporations—Trade-marks—Whether a trade-mark may be registered is to be determined from application to register it.

HONORABLE MERLIN HULL,
Secretary of State.

The Goodyear Tire and Rubber Company of Akron, Ohio, has applied to you, under sec. 17470, Stats., to register the word "Goodyear" as its trade-mark.

The application conforms strictly to the statute and on its face is entirely sufficient, but you question the applicant’s right to make such registration, and you do so on the ground that another foreign corporation, licensed to do business in Wisconsin, has "Goodyear" as part of its corporate name.

You are advised that such fact affords no reason for rejecting this application or refusing to register such trade-mark. Your action in this matter is purely ministerial. You do not act as a magistrate or court and cannot adjudicate as to the ownership of the trade-mark or as to who has or has not the right to use it. In case of dispute on that subject, the courts alone can determine the matter.

Where an application to register a trade-mark is in every respect fair and itself discloses no ground for denying registration, such application should be received and the trade-mark registered.

Public Officers—County judge whose salary is fixed by county board cannot receive fees when acting as court commissioner or when performing any duties or powers conferred upon him as county judge.

March 5, 1920.

George F. Merrill,
District Attorney,
Ashland, Wisconsin.

Replying to your favor of February 23, beg to state that in every case where the county judge may exercise any powers or perform any duties as such and is paid a salary as fixed by the county board under sec. 59.15, then the salary so fixed shall be in lieu of all fees, per diem, and compensation for official services as such county judge in all such cases.

Under such general rule, it is my opinion that the per diem provided for in subsec. 4, sec. 2447 must be turned in to the county treasury.

Under sec. 2448, Stats., the county court is a court of record, and the county judge is the judge thereof.

Juvenile courts established under sec. 48.01 may consist of a court of record or a county court, if the county court is so designated, in counties where there is more than one judge, and of course wherever there is only one judge, or the judge of a county court, then the county court is the juvenile court and has imposed upon it additional duties, powers, and jurisdiction.

However, under ch. 618, laws of 1919, a new subsection is
added to sec. 59.08, or subsec. (6) thereof, which authorizes the county board to

"appropriate annually for the benefit of, and pay over to any judge of a juvenile court, appointed or designated in pursuance of the provisions of subsection (1) of section 4801, a sum of money as compensation for the additional services rendered by such juvenile judge."

This is a special provision of the statutes, referring to a special matter, and prevails over the general statutes, and therefore the county board has authority to grant additional compensation to the county judge when he is constituted a judge of the juvenile court, for the additional service rendered by the juvenile judge.

In an opinion rendered by a predecessor, found in Op. Atty. Gen. for 1910, 662, 663, it was said:

"* * * County judges are not court commissioners in fact. They have been given the powers of court commissioners and while exercising these powers they are doing so as county judges," etc.

Such power is conferred upon county judges by sec. 113.16, Stats. (sec. 2435, Stats. 1911). I think a reading of said section clearly indicates that the powers and duties of the court commissioner are conferred upon the county judge, and it is therefore my opinion that the former opinion is correct, and I adhere thereto.

I call attention, however, to sec. 4052c, Stats., which authorizes the county judge to appoint a reporter:

"* * * Every person so appointed shall be deemed an officer of the court, and shall discharge such duties as the court or judge thereof shall require * * * ."

Therefore, when the county judge is exercising the powers of a court commissioner in the taking of depositions, as such judge he may require the reporter, whether specially appointed by him or the regular official reporter, to take the deposition.

The amount per folio for the taking of the deposition, of course, is payable to the county treasurer. However, the reporter is compensated under sec. 4052d, Stats., and such reporter is entitled to charge for the typewritten transcript furnished the parties interested, under sec. 4052e.
Public Officers—Secretary of State—Forest Reserve Fund—

Moneys to credit of forest reserve fund, except such as are car-
rried under subtitle "Government reforestation," may be and
should properly be transferred to general fund of which it is
part.

March 6, 1920.

Honorable Merlin Hull,
Secretary of State.

Some time ago I received a letter from your department to
the effect that there is credited on your books and on the books
of the state treasurer a fund which is known as the forest re-
serve fund; that on July 28, 1919, the balance to the credit of
said fund was $28,712.59; that said fund is the result of income
from two different sources, one of which is from the proceeds
of the sale of lands which have been granted to the state for
reforestation purposes by the federal government; and this por-
tion is carried on your books under the subtitle of government
reforestation, and on the date mentioned amounted to $2,630.86.

You call attention to the report of Judge Samuel D. Hastings,
the special referee appointed by the supreme court in the so-
called Forestry Case, in which reference is made to the division
of the forest reserve fund, and you ask my opinion if you may
make a transfer of that portion of the forest reserve fund which
is a nontrust fund to the general fund, and if it is not your duty
to do so in view of the order of the supreme court confirming
the report of said referee.

As I understand it, the amount to the credit of that portion
of the forest reserve fund which was not derived from the federal
government has not been added to or increased, except by in-
terest items, since the decision in the case of State ex rel. Owen
v. Donald, 160 Wis. 21, known as the Forestry Case, the decision
in which was filed October 7, 1915.

As I understand it, this portion of the fund was derived from
annual appropriations of $50,000, pursuant to the provisions of
ch. 639, laws of 1911, but that act was repealed by chs. 598 and
604 (sec. 25), laws of 1915, and from the proceeds of the sale
of wood, timber, minerals and other products and from the sale
of state forest reserve lands and from penalties for trespass
thereon, authorized by sec. 1494—61, Stats. 1915, since repealed
by sec. 9, ch. 282, laws of 1917. These repealing acts left that
portion of the forest reserve fund without any financial support. In the meantime the supreme court, by its decision in the *Forestry Case*, practically declared all the forestry legislation unconstitutional. The court appointed Judge Hastings referee to make an accounting between the trust funds and the general funds of the state, which funds had been unconstitutionally dealt with by the legislature and by public officers under its direction.

I quote the following from the report of the referee in *State ex rel. Owen v. Donald*, 162 Wis. 609, 648:

"* * * Only such lands and moneys as have been given to the state in trust for a forest reserve are held in trust. The trust is created by the terms of the grants. It is in no sense a constitutional trust. All other moneys, lands, or other property in the forest reserve fund belong to the state as property in the general fund not fettered by any constitutional or other trust. Any claim that a constitutional trust fund has for its property diverted to the forest reserve fund is a claim against the general fund. The order and judgment mentions no indebtedness from any fund except the general fund. While I have in separate schedules kept separate the items belonging to the normal school fund paid into the forest reserve fund, I have treated the amounts as creating indebtedness against the general fund."

This report was confirmed by the order of the supreme court on April 15, 1916.

The moneys to the credit of the so-called forest reserve fund, not derived from the sale of lands granted to the state for reforestation purposes are, according to the said report and order of the supreme court, not trust funds. They belong to the general fund of the state. Due to the decision of the court and to the legislation above referred to, these funds were left, to use the words of Judge Hastings "in a separate purse or pocket of the state," which purse or pocket has since become useless for the purposes for which it was originally created. While the money may be said to be still in said purse or pocket of the general fund, all occasion for keeping it there has ceased and is without any purpose.

All indebtedness to and all claims of the trust funds which arose out of the state forestry legislation were by the supreme court charged to the general fund. Ch. 95, laws of 1919, provided a method of adjusting all said indebtedness and all said
claims. The terms of said account have been carried out and the whole matter has been closed.

The only section of the statutes which still makes reference to the forest reserve fund is sec. 20.205. It reads in part as follows:

"All moneys, except fines, accruing to the state by reason of any provision of chapter 29 of the statutes, or otherwise received or collected by each and every person for or in behalf of the state conservation commission, if not payable into the forest reserve fund, shall constitute the 'Conservation Fund' and shall be paid, within one week after receipt, into the state treasury and credited to said fund."

The words "forest reserve fund" as here used, have reference, it seems to me, to the income from state forest lands which were granted to the state by act of congress entitled "An act granting lands to the state of Wisconsin for forestry purposes," approved June 27, 1906 (34 U. S. Stats. at Large 517); and all lands granted to the state by an act of congress entitled "An act granting unsurveyed and unattached islands to the state of Wisconsin for forestry purposes," approved August 22, 1912 (37 U. S. Stats. at Large 324); and all lands heretofore granted or conveyed to the state by the Nebagamon Lumber Company for forestry purposes. See ch. 28, Stats. 1917.

I take it that the funds credited on your books under the title "Government reforestation" are funds which have been received from the state forests as defined by sec. 28.01. Under the present statutes, these are the only moneys which should, in my opinion, be credited to the forest reserve fund, and all moneys now to the credit of said forest reserve fund which are not derived from the state forests may legally and should properly be transferred to the general fund, in the state treasury.

Banks and Banking—Corporations—Foreign Corporations—National bank domiciled outside of state may not be licensed to transact business in this state pursuant to sec. 1770; may not receive permit for sale of securities whose sale is subject to regulation under terms of blue sky law. March 9, 1920.

Railroad Commission of Wisconsin.

Can a national bank whose place of business is located outside of the state of Wisconsin be licensed to do business in the state

8—A. G.
of Wisconsin, pursuant to the terms of sec. 1770b, relating to
the matter of authorizing foreign corporations to do business
in this state, and the provisions of the so-called "blue sky" law
(secs. 1753–48 to 1753–68), which regulates the matter of the
sale of securities in this state?

An opinion rendered by this department on October 11, 1919,
to the secretary of state, VIII Op. Att'y. Gen. 750, to which
you refer, ruled that sec. 2024–50 forbade the doing of busi-
ness in this state by any foreign banks, for the reason that the
same were not subject to supervision and examination by the
commissioner of banking, that act forbidding in effect such cor-
porations from transacting business in this state. This restric-
tion obviously would not be controlling in the case of a foreign
national bank, because domestic national banks are "not subject
to supervision and examination of the commissioner of banking,"
etc. So far as the banking law of this state is concerned, there-
fore, it does not employ apt words to work prohibition upon the
transaction of business in this state by foreign national banks.
Other considerations make it unnecessary to inquire whether
within permissible rules of statutory construction some theory
may be evolved to bring such banks within the purview of sec.
2024–50.

The rule seems to be reasonably well established that a national
bank located outside of a state, so far as doing business therein
is concerned, is to be treated as a foreign corporation within the
meaning of sec. 1770b and similar statutes. This proposition is
sustained by the National Bank of Fairhaven v. Phoenix Ware-
housing Co., 6 Hun (13 N. Y. Supreme Court Reports) 71. It
was there said, p. 73:

"* * * Section 2 of article 1, title 4, chapter 8, part 3 of
the Revised Statutes (2 R. S., 458), provides that where by the
laws of this State any act is forbidden to be done by any corpora-
tion of this State, without express authority of law, and such
act is done by a foreign corporation, it shall not be authorized to
maintain any action founded upon such act, or upon any liability
or obligation, express or implied, arising out of, or entered into
in consideration of such act. The provisions of these statutes
are still in force, and we see no reason why they are not as ap-
licable to the national banks located and doing business in other
States, as to any other class of foreign corporations."

This decision has whatever sanction that inheres in its citation
in the Digest of Decisions Relating to National Banks, compiled
under the direction of the comptroller of the currency, published in 1914 (see p. 481).

* Cooke v. State National Bank, 50 Barb. (N. Y.) 339, affirmed in 52 N. Y. 96, lays down the rule:

"A national bank is a foreign corporation, within the meaning of section 227 of the Code of Procedure, authorizing the issuing of an attachment against the property of a corporation ‘created by or under the laws of any other state,’ etc.” (Syllabus.)


A national bank would not be authorized to transact business inside the state of Wisconsin without a license, except that, as provided in sec. 17706:

"* * * Any foreign corporation, including any bank or trust company, may, in its corporate name, and without being licensed to do business in this state, advance and loan money therein, and take, acquire, hold and enforce notes, bonds, mortgages or trust deeds given to represent or secure money so loaned or advanced * * *.

It is further expressly provided:

"* * * Nothing herein contained shall be construed as authorizing any foreign corporation to transact in this state the business of a bank or trust company, or otherwise to exempt any foreign corporation * * * from the provisions of this section or other statutes of this state."

The question cannot be answered, however, with regard to state legislation only. The activities of a national bank are primarily a matter of federal concern. Considered from the standpoint of the power conferred upon such banks by the national banking act itself, two phases are presented: first, as to the right of a national bank to transact business in a state other than that of its domicile; and second, the right of a national bank to engage in such business as would subject it to regulation by the railroad commission under the provisions of the “blue sky” law, already noted.

That it is not contemplated that a national bank should engage in business other than in the state of its location seems to be indicated by the provisions of the national banking act. Sec. 5134, Vol. 6, Fed. Stats. Ann. p. 653, provides that in the articles of organization a bank shall specifically state:
"The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village." 9659 U. S. Comp. Stats. 1916.

Sec. 5190 reads:

"The usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate." Id., p. 740, 9744 U. S. Comp. Stats. 1916.

7 C. J. 762.

At least one decision of a federal court passing upon the matter confirms this view. In *St. Louis National Bank v. Allen*, 5 Fed. 551, 554, it was said:

"** For all practical purposes they exercise their functions only within the limits of the state in which they are located, and should one of them attempt to carry on business outside of those limits, it would find itself completely without authority."

Reason and authority, therefore, indicate that a national bank is not authorized to conduct banking operations outside of the state of its domicile. By this it is not intended to argue that a bank may not indulge in occasional and isolated transactions within the state. Such transactions, however, under elementary rules, would not be held to constitute doing business in the state. See Annotations, Wisconsin Statutes, sec. 1770b, p. 604. The restrictions upon the powers of national banks, implied from the terms of their authority, must logically coincide with the similar restrictions by the state upon their power to do business within the state. In other words, the repetition of transactions by a national bank domiciled in another state to such an extent as might properly be characterized as doing business in Wisconsin, within the meaning of sec. 1770b, would so far violate the prohibitions implied from the federal statutes themselves.

The second question relates to the power and authority of a national bank to engage in business falling under the regulation of the commission, irrespective of the location of its operations. The rule is laid down by Bolles in *The National Bank Act Annotated*, p. 44:

"** A national bank cannot deal in the bonds and stocks of counties, cities, towns, or other municipalities or corporations, either as agent or for investment."
Numerous cases are cited to support this view. In *Farmers' & Merchants' Bank v. Smith*, 77 Fed. 129, 137, it was said:

"* * * The national bank act does not, in terms, or by necessary implication, authorize national banks to act as brokers in negotiating the sale of securities, and it is generally agreed that they cannot lawfully engage in such business."


Turning to the provisions of the law "relating to the prevention of fraud in the issuance, sale and disposition of stocks, bonds or other securities," ch. 674, Laws 1919, we find that securities are specifically defined by sec. 1753—48, subd. (c), Stats., as follows:

"'Security' or 'securities' means and includes any bonds, stocks, notes or other obligations or evidences of indebtedness or of title which constitutes evidence of, or is secured by, title to, interest in, or lien upon any or all of the property or profits of such company."

Subd. (d) defines "broker" to include

"every person, firm or corporation * * *, who in this state engages either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security," etc.

Sec. 1753—49, subsec. 1, subd. (j), indicates the same exemption previously expressed by sec. 1753—48, subd. (c), Stats. 1917, that "dealer"

"shall not include corporations, associations or individuals buying securities for the purpose of investment, or selling, offering for sale, or negotiating for the sale of securities bought or held by the seller for investment,"

for this subsection provides that there shall be exempted

"(j) The sale of any securities by the owner thereof for the owner's account, exclusively, such sale not being made in the course of continued or repeated transactions of a similar nature by the owner thereof and such owner not being the underwriter of such securities."

Sec. 1753—49 specifically exempts from the operation of this law a list of securities embraced in subds. (a) to (o), inclusive, among which, in addition to subd. (j) already noted, subd. (e) exempts "securities issued by * * any national bank."
It must be assumed that the bank which has made inquiry as to what is necessary to enable it to sell securities in Wisconsin must have in mind the sale of such securities as have not been purchased by it for investment—that is, the sale of securities "by the owner thereof for the owner's account exclusively;" and further, that the same are not exempted by the other terms of sec. 1753—49. Construing the provisions of these two sections in connection with the declared limitations upon the powers of national banks, as outlined by decided cases, it is difficult to conceive how there could be any business which a national bank might conduct in the state of Wisconsin as a matter of federal right which came within the terms of the law so as to require a license therefor from the railroad commission. In other words, there is a prohibition upon national banks, preventing them from doing business in the sense which would require a license therefor under sec. 1770b, in a state outside of their domicile, and such banks are without power to make sales of the class of securities regulated by the railroad commission, irrespective of their domicile.

It is doubtless true, as stated by many authorities, that "if a national bank disregards the prohibition, the validity of its conduct cannot be questioned by private parties; only by the government." Bolles, National Bank Act Annotated, p. 45.

The state, however, does not occupy the status of a private individual. While there is no affirmative statute in Wisconsin expressly prohibiting the licensing of a foreign national bank, nevertheless, as a matter of public policy, a state may not properly undertake to grant a license to a federal agency to do a thing prohibited by the government which authorized that agency. *Butterick Pub. Co. v. Rose,* 141 Wis. 533, 538–539:

"* * * The constitution and all laws made in pursuance thereof constitute the supreme law of the land. Art. VI, Const. of U. S. * * * This state could pass no law which materially abridged any right conferred * * * by a federal law * * * ."

The converse of this proposition likewise holds. A state cannot affirmatively license the doing of a thing prohibited by the federal government. To paraphrase the language of the supreme court of the United States, in *License Tax Cases,* 5 Wall. 462, 472:
If the licenses were regarded as giving authority then there would be a direct conflict between National and State legislation on a subject which the Constitution places under the exclusive control," in this instance, of the nation.

That court has recently said upon another subject, in Penn. R. Co. v. Public Service Commission, 250 U. S. 566, 568:

"But whatever powers a State may deny to its commissions it cannot give them power to do what the laws of the United States forbid, whether they call their action administrative or judicial."

The language is equally applicable to national banks, whether foreign or domestic. This being so, the granting of a license by a state purporting to confer authority to do business or to sell securities where such activity is prohibited by the national government, would constitute an idle ceremony. If the issuance of such license were sought to be compelled by mandamus, such a writ would be denied, because the same would be, as said in State ex rel. Treat v. Hammel, 134 Wis. 61, 67, "a mere idle act, fruitless in its effects."

From the foregoing, it follows that the transaction of the business contemplated is not forbidden by the laws of this state. As a matter of sound public policy, this state should not undertake to give affirmative sanction to the doing of what is not authorized by the government which has created this national bank.

Agriculture—Agricultural Associations—Counties—County Fair Grounds—County board may not appropriate more than $10,000 in any one year for purpose of improving fair grounds owned by county.

County board may not convey its county-owned fair grounds to fair association with understanding that said association shall immediately raise $30,000 with which to improve grounds and reconvey same to county when debt so incurred has been paid out of annual appropriations by county board.

March 9, 1920.

W. B. Surplice, Assistant District Attorney, Green Bay, Wisconsin.

In your letter of February 12 you state that the Brown County Agricultural & Fair Association, which conducts the annual
county fair in your county, is in need of more funds for improve-
ments than it has been possible for the county board to provide
under subsec. (9), sec. 669, Stats. 1917, as amended by ch. 86
and ch. 641, laws of 1919; that according to the secretary of
said association, it will require from $25,000 to $30,000 to make
the improvements which are absolutely necessary in order to
place the buildings and grounds in condition to meet the demands
of the public and in order to promote and produce a fair which
will satisfactorily show up the agricultural achievements of the
people of Brown county; that it has been suggested that the
county board should deed the land owned by Brown county and
used for fair purposes to the Brown County Agricultural & Fair
Association for the purpose of allowing said association to secure
a loan for the purpose of making the proposed improvements
thereon, said land to be deeded back to Brown county when the
loan so made has been paid out of the annual appropriations of
$10,000 to be made by the county board, under the law above
referred to; that the legality of this proposition was submitted
to your office for an opinion and that you held, under the author-
ity of a ruling made by former Attorney General Owen to the
district attorney of Fond du Lac county, under date of June
14, 1917, VI Op. Atty. Gen. 429, that this could not be legally
done; that the county board desires my opinion as to whether
the money necessary to make the proposed improvements to the
fair grounds can be legally raised in the manner suggested.

In an opinion by former Attorney General Owen in IV Op.
669, Stats. 1915, it was held:

"This provision is both a grant of power and a limitation
upon such power. Without such express provision of the statute
the county board would have no power to vote money for such
purposes. The legislature in conferring power upon the county
board to appropriate money for the aid of agricultural societies
in the very same sentence limits the amount of money that may
so be appropriated to $2,500 in any one year. I do not see how
the legislative intent that only $2,500 should be so appropriated
could be made plainer."

Believing that it had not been made clear to the former at-
torney general that Fond du Lac county was the owner of the
fair grounds and buildings, the question was resubmitted to him
in June, 1917, and in an opinion found in VI Op. Atty. Gen. 429,
he adhered to his former ruling and held that the sum of $2,500 was an absolute limitation upon the authority of the county board of Fond du Lac county and that it could appropriate no more than that sum in any one year for the improvement of the fair-grounds.

While chs. 86 and 641, and sec. 168, ch. 695, laws of 1919, have increased the amount which a county board may appropriate from $2,500 to $10,000, they have made no other changes in the original law.

It is my opinion that you are right in holding that the arrangement suggested would be going farther than the statute authorizes and that it would be an attempt to raise money in excess of the amount expressly limited by statute, by attempting to delegate to the fair association the power to raise money for fair purposes which the county itself could not raise or appropriate.

Your attention was called to the provisions of subsec. (14), sec. 670, Stats. 1917 (sec. 59.07, subsec. [2]), relating to special powers of the county board, which reads as follows:

"(14) To make such leases, contracts or other conveyances in relation to lands acquired for public purposes as in their discretion are in the interest of the public welfare."

This language cannot be held to modify the power given to county boards to appropriate money for fairs and exhibitions of an agricultural character, and wherein the legislature has specifically limited the amount to be appropriated for that purpose. It seems to me that the arrangement proposed would also be contrary to the provisions of sec. 653, Stats. 1917, sec. 59.67, subsec. (2), Stats., which reads in part as follows:

"* * * The county board may, by resolution or ordinance, direct the county clerk to sell and convey any real estate of the county not donated and required to be held for a special purpose * * * ."

Lands acquired by the county under the provisions of subsec. (9), sec. 669, Stats. 1917, are acquired

"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."

Such lands are, under this section "required to be held for a special purpose." An attempt to convey the same to the Brown
County Agricultural & Fair Association would, in my opinion, be contrary to law and would entitle any taxpayer or any other society similar to the Brown County Agricultural & Fair Association to proceed by injunction or other appropriate action to prevent such a conveyance.

It has been repeatedly held that a county or other municipal organization may not do indirectly what the statute says it may not do directly.

Public Officers—Power of Board to Organize—Board of conciliation has power to organize by electing one of its members chairman; majority of board constitutes quorum for transaction of business.

Honorable H. M. Warner,

Board of Conciliation.

Ch. 530, laws of 1919, is entitled:

"An act to create a board of conciliation, prescribe its duties, define its powers, making an appropriation, and providing a penalty."

No provision is made therein for the appointment of a chairman or secretary. You make inquiry as to the power of the board to organize by the election of such officials, and generally as to the manner in which the board shall proceed.

This department is of opinion that the board possesses the inherent and unquestioned power, as a matter essential to the orderly discharge of its functions, to provide for one of its number to preside over its meetings, and to call the same together and to discharge such other functions as are not inconsistent with the terms of the statute.

It is said in State v. Hackman, 207 S. W. 64, 65:

"* * * It is also well-settled, if not fundamental, law that, whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual is conferred by implication."

This interpretation is confirmed by the action of other state boards which may be called to your attention. No specific provision is made for the election of a chairman of the industrial
commission. The same is true of the state highway commission. Both of these commissions, however, have exercised the power of designating one of their number as chairman. No specific provision for the appointment of a secretary of the industrial commission is made, although duties for such secretary are prescribed. It is to be borne in mind, of course, that the creation of one of your number as chairman does not endow him with greater power than the other members of the board, except as sanctioned by the ordinary laws of parliamentary usage and procedure. The whole question we deem to be primarily a parliamentary rather than a legal one.

So far as a secretary is concerned, sec. 3 of this chapter gives specific authority to employ

"such clerks and stenographers as may be necessary to perform the clerical work of the board."

Whether the individual employed be denominated a secretary or a clerk, we deem quite immaterial.

As to the activities of the board, the rule has been very comprehensively stated by Chief Justice Shaw, in language quoted in Mechem on Public Officers sec. 573, p. 376:

"'Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law if so prescribed, or by the rules and regulations of the body itself if there be any, otherwise if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend if there be a quorum.'"

Our own court has given repeated adherence to this rule. Walker v. Rogan, 1 Wis. 597; Soens v. Racine, 10 Wis. 271; Town of Beaver Dam v. Frings, 17 Wis. 398; State v. Goodwin, 24 Wis. 286.


See also 29 Cyc. 1433.
The statute itself contemplates action by a majority of the board. Sec. 4 of the act provides: "* * * The board may issue subpoenas." Sec. 5 provides that in case of investigation by one other than a member of the board, he "shall first produce his authority therefor, signed by the board or a majority thereof."

We trust this sufficiently answers the question presented by you.

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**Education—Vocational Education—Words and Phrases**—
Local vocational board must be composed of two employes and two employers.

"Employes" and "employers" defined.

March 12, 1920.

_Honorable John Callahan, Secretary,_

_State Board of Vocational Education._

I have your favor of March 9, enclosing copy of letter written to your office by Mr. John S. Evarts, acting secretary of the Racine Trades and Labor Council, which letter gives the names of the four appointive members of the industrial board of education for the city of Racine, one of whom is an official of the Western Printing Company, another an official of the Badger Foundry, a third a foreman and stockholder of the Freemen Shops, and the fourth, a business man. It is stated in Mr. Evarts' letter that no one of these is an employe, and that all are employers.

Your question relates to the interpretation of subsec. (2), sec. 41.15, Stats., which reads as follows:

"Such board shall consist of the city superintendent of schools ex officio or the principal of the high school ex officio, if there be no city superintendent, or the president or chairman of the local board charged with the supervision of the schools in case there be neither of the above-mentioned officers, and four other members, two employers and two employes, who shall be appointed by the local board charged with the supervision of the schools and shall serve without pay."

You ask me to give you the interpretation of this department of the words "employers" and "employes," as contained in the above section.
By secs. 41.13 to 41.21 a state board of vocational education is provided for, and the manner of organization of the local boards of industrial education in certain towns, cities and villages where vocational schools "for instruction in trades and industries, commerce and household arts" are maintained. The whole scheme of the law is to provide for industrial and vocational training. The general scheme of the law is also to provide for the conduct of those schools by a board made up locally of those directly interested and affected by industrial and vocational training. That being the general scheme of the law, the words "employers" and "employees" must be interpreted with respect to the purpose of the act.

"Employer" is a term that embraces many, many persons who engage other people to work for them for hire, and the word "employee" likewise includes many, many persons who are engaged in the service of another for hire. But the words thus broadly used cannot be so interpreted with respect to the vocational educational law. The intent and spirit of the law requires that two members of the local board be employers, and in my opinion they should be employers in the vocational and industrial establishments in the locality, and not employers generally.

It is likewise my opinion that the two employees of the local board should be employees who are engaged in practical employment in the vocational or industrial institutions of the locality, and not employees generally. The word "employees" as used in the vocational law, if not according to the strict letter of the law, at least according to the spirit of the law, excludes officers, superintendents, and responsible directors of vocational or industrial establishments from a position on the local board.

A person who is cashier of a bank is, in a broad sense, an employee, but he is not that kind of an employee who is eligible to the position on the local board, for the reason that his employment has nothing to do with either the vocational or industrial institutions of the locality. A foreman and stockholder of an industrial plant might likewise, in the broad sense, be an employee, but he is not an employee under the terms of this act with respect to the vocational and industrial institutions. Neither is an officer of a company nor the responsible manager of a copartnership an employee within the terms of the vocational act. An employee within the terms of that act refers to a man who is en-
gaged in the practical work in the vocational or industrial institutions of the locality where the school is established.

If time would permit a review of the establishment of industrial and vocational schools, my conclusion with respect to the interpretation of the words "employers" and "employees" would be well fortified by historic facts and economic necessities.

Just how the several school boards can be compelled to comply with the intent and spirit of the law raises a very great question. I call attention to sec. 20.33, which makes an appropriation from the general fund of the state to the state board of vocational education as state aid for vocational schools "established and maintained pursuant to subsection (1) of section 41.15." Ordinarily the state is not interested in the organization of local boards performing duties concerning local matters only, but the local vocational boards are more than mere local boards, and they in part represent the state, and therefore the state is interested to the extent at least of the appropriation made to aid vocational schools as well as in the proper conduct of said schools.

Under sec. 20.33, subsec. (2), par. (b), it is provided that if the report made by the local board shows that the local school has been

"maintained pursuant to law, in a manner satisfactory to the state board of vocational education, the said board shall certify to the secretary of state, in favor of the several local boards of industrial education, amounts equal to one-half the amount actually expended, respectively, for maintenance of such school or schools and salaries for instruction and supervision; *

Under sec. 3, ch. 673, laws of 1919, it is provided:

"Before any expenditures are authorized or incurred under the appropriation made by subsection (3) of section 20.33 of the statutes, the same shall have the approval and authorization of the state board of education."

It will thus appear that the state board of vocational education has specific authority over the local boards. The question may arise, therefore, whether or not the state board of vocational education should certify to the secretary of state in favor of any local board of industrial education any amount for the maintenance of a local school, unless the local board conforms to the provisions of the law.
This question I do not decide, and the question need not arise, for the reason that the local boards can and should, without unreasonable delay, arrange for the reorganization of the local board by having appointed thereto two employers and two employees to come within the definition of "employers" and "employees" herein set forth.

In conclusion, permit me to suggest that when the legislature enacts laws organizing the extraordinary or unusual institutions and designates the qualifications for membership on the boards having control of such institutions, the legislation must be construed with respect to the particular subject covered, rather than with respect to the usual or ordinary meaning of the terms used in such legislation.

Insurance—State Life Fund—Officials in charge of state life fund are without authority to procure contracts or reinsurance upon insurance policies issued by state.

March 17, 1920.

Honorable Platt Whitman,
Commissioner of Insurance.

Subsec. 14, sec. 1989m, ch. 90m, Stats., devoted to state life insurance, contains the provision that follows:

"Policies of life insurance may be issued upon being approved by the commissioner of insurance and the state board of health; but no policy or policies shall be issued contrary to section 1898, nor upon the same risk in excess of one thousand dollars until the number of insurants shall exceed one thousand, nor in excess of two thousand dollars until the number of insurants shall exceed three thousand, nor at any time in excess of three thousand dollars."

Sec. 1898, referred to, contains the provision:

"1. (a) Except as otherwise provided by law, the maximum single risk shall be ten per centum of the admitted assets."

Subd. (b) defines the restrictions upon mutual companies relative to the issuance of policies. Subd. (c) declares the restriction upon stock companies. Obviously, these subdivisions can have no application to the state life fund.

Subsec. 2, sec. 1898 provides:

"Any reinsurance taking effect simultaneously with the policy shall be deducted in determining such maximum single risk."
The question raised is whether the statement in subsec. 14, sec. 1989m, that "no policy or policies shall be issued contrary to section 1898," by implication grants authority to the officers in charge of the state life fund to procure contracts of reinsurance to cover policies written by the state.

You are advised that it is the judgment of this department that no such authority is conferred, either by implication or otherwise. This opinion is based primarily upon the fact that nowhere in ch. 90m is there any affirmative grant of power to procure the reinsurance of policies issued by the state life fund. The language of subsec. 14 contains words merely of negation, so far as the reference to sec. 1898 is concerned. It is in form a limitation upon, not a grant of, power.

The rule is well stated in Mechem on Public Officers, sec. 511:

"Express grants of power to public officers are usually subjected to a strict interpretation, and will be construed as conferring those powers only which are expressly imposed or necessarily implied."

This principle is not in conflict with the rule set forth in State v. Hackmann, 207 S. W. 64, 65:

"* * * It is also well-settled, if not fundamental, law that, whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual is conferred by implication."

Duties are imposed and powers conferred upon the state officials charged with the administration of the state life fund, as stated in sec. 1989m, subsec. 1, "for the purpose of granting life insurance and annuities." The question presented, then, is whether under the rule most liberally stated, it is necessary, in order to make the purpose so expressed fully efficacious or to render the performance of the duties imposed effectual, authority to procure contracts of reinsurance is of necessity to be implied. Clearly not. Reinsurance is resorted to primarily from the standpoint of building up a successful insurance agency or brokerage business. It is an outgrowth of the desire of an agent who represents one or more companies and succeeds in procuring a client for insurance in excess of what
his company or companies may permissibly issue, to place such additional insurance to the satisfaction of the client so obtained, and thus to retain his good will.

The state, at least in the absence of express provision therefore, is not to be presumed to be interested from a similar standpoint. It can have no object in building up a large volume of business in excess of that which it is in a position to care for. Ordinarily, we are advised, reinsurance is effected at a loss to the company procuring it. At best, there is no gain therefrom. Clearly, therefore, the possession of such authority would not operate greatly to the advantage of the state fund. Irrespective of this consideration, however, it is to be borne in mind that the business upon which the state of Wisconsin has embarked is the life insurance business, and not the insurance agency or brokerage business.

Nor does this construction result in destroying the force or meaning of the reference to sec. 1898, in subsec. 14, sec. 1989m. The limitation expressed in subsec. 1, par. (a), limiting risks to ten per cent of the admitted assets, would be applicable in terms, although the express limitation upon risks to $1,000, $2,000, and $3,000 may now operate to render this restriction obsolete.

In addition to what has been said permit us to call attention to sec. 2, art. VIII, Wis. Const., which provides:

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

It is of course obvious that reinsurance cannot be obtained by the state life fund, any more than by private life insurance companies, except by paying money to be derived from some source for the premiums for such insurance. Inasmuch as all moneys are paid to the state treasurer as ex officio treasurer and custodian of the life fund, it is perfectly apparent that the payment when so made must be paid out of the treasury of the state.

We are thus brought to an examination of what provision has been made upon the subject of appropriations for the department of insurance. The appropriation statute controlling is 20.55, subds. (1) to (6). An examination of these provisions discloses that none of them is sufficiently broad in its
terms to authorize the payment out of the treasury of reinsurance premiums. Ch. 90m, which creates the state life fund, contains subsec. 13, sec. 1989m, relative to expenses and fees. This subsection is divided into three separate parts, none of which, however, covers the matter of premium payments. Had the legislature designed or intended that moneys that had been paid into the fund might be applied to procure reinsurance, it is plain that some provision would have been made to the effect that all premiums received upon policies issued in excess of the amount which the state life fund was authorized to issue, were appropriated for the payment of reinsurance premiums. In the absence of some such provision no authority would exist for the payment of money for that purpose.

The element of practical construction is not wanting. The provision for state life insurance was first made by ch. 577, laws of 1911, approved July 6, 1911. The fact that the state life fund has thus been in operation for over eight and a half years and no reinsurance of policies has ever been undertaken adds the persuasive factor of practical construction by the department itself as to the scope of the power conferred by the law. To this the court would give considerable weight.

As one of the local insurance corporations has experienced, a contract of reinsurance does not necessarily preclude the possibility of loss. We are advised that in the instance we have in mind, most of the loss which originally appeared to amount to five or six thousand dollars has been recouped, but the fact remains that there is an element of hazard in case of reinsurance. And if the state life fund be conducted, laying wholly out of account the element of profit, then in case of such loss the same must be covered from some source.

Sec. 1989m expressly provides that the fund is

"to be administered by the state without liability beyond the amount of the fund."

Clearly, losses resulting from imprudent reinsurance must needs be taken from the general fund, as the accumulations in the life fund would scarcely be made upon the theory that such loss was to occur, and nowhere is any provision made for taking money from that source. This consideration embodies the want of legislative intention that such reinsurance should not
be affected because of the complete absence of any provision appropriating money for the payment of premiums.

Under all the circumstances, we reiterate the conviction that if the administrators of the state life fund deem this power essential to the successful prosecution of the enterprise entrusted to their care, application should be made to the state legislature and specific authority obtained.

Counties — Courts — Indigent, Insane, etc. — Limitation of Actions — Claim of county for support of insane man outlaws in six years under sec. 4222.

March 18, 1920.

M. J. Paul,
District Attorney,
Berlin, Wisconsin.

In your communication of March 16 you inquire whether a claim of the county for the support of an insane man outlaws, and if not, what keeps the claim from outlawing at the end of six years. You say you refer to a case where support has been furnished in one of the asylums and paid for by the county for the past twenty years, and nothing has been paid on the account. The insane man is still alive, and has property.

Under sec. 4222, Stats., an action upon a liability created by statute, other than a penalty or forfeiture, will outlaw in six years, when a different limitation is not prescribed by law. The same rule is applicable to express and implied contracts, except those mentioned in the two preceding sections.

This certainly covers the liability of an insane man for support to the county. I know of no statute or rule of law to the contrary which is applicable.
Taxation—Refund—Action to recover excess taxes must be commenced within a year after payment; no claim filed under sec. 1164 should be acted on after claim is barred.

March 18, 1920.

Marion F. Reid,
District Attorney,
Hurley, Wisconsin.

The Odanah Iron Company paid, under protest, on January 26, 1918, the income tax assessed against it, amounting to $2,397.18, to the treasurer of the town of Carey, and at that time filed a claim for refund, under sec. 1164, Stats. In March, 1918, you advised the town board to disallow the claim and were informed that such action had been taken, but it now appears that the claim was never acted upon by the town board. The town board failed to allow such claim.

Such failure gave the claimant the right to maintain an action against the town, but such right is now barred by lapse of time.

"* * * Every such claim shall be filed; and every action to recover any money so paid shall be brought within one year after such payment and not thereafter." Sec. 1164.

You ask whether or not the claim should now be disallowed. If any action is taken upon it, that should be the action. The right of action being barred, it is probable that the claim is thereby extinguished and the town board divested of all jurisdiction over the same. Allowance of the claim would probably be invalid or void. In fact, I can see no reason now why the town board should take any action whatever. It may continue to fail to act. The claimant cannot compel action by the town board. The claimant's only remedy for inaction by the town board was to institute a suit within the time permitted by statute. Failing to do that, the claim and cause of action are now barred, and no further notice need be taken of the matter by the town authorities.
Bridges and Highways—Any voluntary resolution of county board for construction of any highway may be rescinded prior to any action being taken under such resolution; but road committee may not disregard or annul such resolution.

Contracts may be let for road construction prior to actual sale of bonds already authorized under sec. 1317m—12.

State aid work must be done by contract unless highway commission and county road committee agree some other method is advisable.

A. L. Stengel,
District Attorney,
Fort Atkinson, Wisconsin.

March 18, 1920.

May 28, 1918, the Jefferson county board voted a two million dollar bond issue for the improvement of portions of the state trunk highway system and the county system of prospective state highways. At the last annual session the county board resolved to improve designated portions of the trunk system and directed the "county chairman and the State Road and Bridge Committee * * * to sell $500,000 worth of bonds, or as much as they may deem necessary for the construction of these roads," and further provided for assessments of special benefit to certain subdivisions of the county. Resolution No. 19.

You state that because of the extremely high cost of construction this year the following questions have arisen upon which you wish to be advised:

"1. Can the Jefferson County Board of Supervisors by resolution act to prohibit the building of any of these concrete roads for the year 1920?"

This question is answered in the affirmative, but it must be understood that the answer assumes that these concrete roads mean highways which the county board have decided to improve under the state aid law and that they do not include any highways which the state highway commission has heretofore decided should be improved during this year under the federal aid law (sec. 1312 to 1317, Stats., inclusive). The time and place and manner of construction of a trunk system with fed
eral aid is under the control of the state highway commission (subsecs. 4, 5 and 6, sec. 1315, and sec. 1316, Stats.).

"2. Can the State Road and Bridge Committee determine to do none of the work provided for * * * or must they carry out Resolution No. 19 unless the County Board of Supervisors repeals these instructions?"

The general rule is that a committee of the county board must execute the commands of the board. That is the object of the creation of a committee and I believe this is no exception to the rule. It is hard to understand how this question would arise, for naturally a committee would be very slow to exercise, to say nothing of assuming, the power to disregard and in effect to annul a resolution of the county board. The matter is one of great importance to the entire county and should have the judgment of the whole board if the resolution is not to be executed.

The county board is the general governing body. Its committees have no authority beyond that conferred upon the committee either by the board or by statute. Power expressly given to the board cannot be exercised by this committee. That is, the board that has the power of designating when improvements shall be made under state aid passes upon applications of various municipalities for such aid. No power in this respect is conferred upon the state road and bridge committee (sec. 1317m—5).

"3. Is it possible to secure bids for contracts on this work without first selling the bonds authorized to be sold under Resolution No. 19?"

Yes, it is legal to do so. In fact the statute plainly contemplates that such may be the procedure. The legislative scheme is to have funds lying idle as little as possible.

"* * * Bonds may be sold from time to time as ordered by resolutions of the county boards, and as the necessity for providing funds for construction arises." (Subsec. 2, sec. 1317m—12.)

"4. Can the State Road and Bridge Committee and the County Board * * * or either of them upon receipt of bids for the construction of these concrete roads determine that the bids were excessive and reject them?"
This question is answered in the affirmative. Should the committee deem the bids excessive, it not only may but it should reject them. The general rule is that bids for public construction may always be rejected if the public interest in the judgment of the officer or body authorized to pass upon the bids requires their rejection. The bidders have no vested right until the bid has been accepted.

Perhaps this question has been suggested by the confusing provisions of statute upon the subject of whether construction shall be done under contract or by day labor.

The state road and bridge committee is authorized by subd. (3), subsec. 8, sec. 1317m—5, Stats.

"(b) To determine whether each piece of state road and bridge construction * * * shall be let by contract, or whether it shall be done by day labor;

"(c) To enter into such contracts, in the name of the county, and to make such arrangements as may be necessary for the proper prosecution of such construction and maintenance of highways and bridges as is provided for by the county board."

But subsec. 3, sec. 1317m—7 provides:

"3. (a) All highways and bridges for which state aid is granted shall be constructed and improved by contract unless the county committee and the state highway commission shall agree that some other method is more advisable. The manner of advertising for proposals, the forms of proposals, contract, and bond shall be uniform as fixed by the state highway commission. All contracts shall be between the county board and the contractor, and no contract shall be awarded without the written approval of the state highway commission and the county committee."

And subsec. 4, sec. 1317m—7 further provides:

"4. If for any reason it is inadvisable to let a contract for the construction of any highway or bridge for which state aid is granted, the county committee may, with the approval of the state highway commission direct the county highway commissioner to construct the highway or bridge under his own supervision."

As I read these provisions of statute they require all construction work to be done under contract unless "some other method is more advisable" in the judgment of the committee and the commission. As a rule, this will necessitate inviting
bids. That is the practical way of determining what can be done by contract and departure from procedure by contract can only be had when the committee and the commission agree that such departure is advisable. If either thinks it best that the work be done by contract, that is decisive, and day labor cannot be resorted to. Either the commission or the committee can block the other in the effort to proceed with construction by day labor. In other words, the power given by par. (b) to the committee to determine whether the work shall be by contract or by day labor is to be understood as limited by other provisions hereinbefore quoted.

Bonds—Contracts—On purchase of machinery by state sec. 3327a, Stats., does not apply.

March 19, 1920.

DEPARTMENT OF ENGINEERING.

It appears from Mr. White's letter of March 17, 1920, that the state is about to purchase a steam-electric generating set and an air compressor for the state prison at Waupun. The purchase price is $16,600. The state is to prepare the foundations, place the machinery, and make all connections. The other party to the agreement is to supervise the setting up of the machinery and the final adjustments preparatory to starting the machinery. Such supervision and adjustment will entail an expense upon the manufacturer not to exceed $500. On these facts two questions are submitted:

"(1) Must we, under the law, require a bond in the full amount of the contract?

"(2) May we make two contracts, one for the machinery and one for the work of installation, the former covering the delivery of the machinery and without bond, and the latter covering the work of installation and bonded for the full value of that part of the work?"

It is my opinion that no bond whatever need be required in this transaction. The bonding statute you have in mind is sec. 3327a, Stats., and is part of the chapter entitled "Liens." That section was enacted to supply to labor and material that enter into the construction of public buildings and works the equiva-
lent of the lien security which such labor and material would have if done and performed for a private owner. The bond under that section affords no protection to the state but is required for the sole protection of certain creditors of principal construction contractors. No such protection is needed under the present contract and that fact is some reason for holding that the legislature did not intend this statute to apply in a case like this. This instance is not within the spirit or purpose of that law and I do not think within its letter when rightly read.

It is rather a misnomer to call the other party to this agreement a contractor. That party is a manufacturer, a vendor, a seller, and the state is a buyer or purchaser. The agreement in the large is a sale of personal property. It is a sales contract and not a construction contract. It comes within that branch of the law of contracts commonly denominated "sales" and is governed by our uniform sales act. (Ch. 78t, Stats.) The parties are seller and buyer, vendor and purchaser; they are not contractor and owner. The stipulation in the contract for supervision of assembling, adjusting and starting machinery is a mere incident of the sales contract and does not change the essential character of the agreement. It is a very common incident in the sale of machinery. Such a stipulation or condition might be found in a contract for the sale of heavy articles of furniture and movable fixtures such as filing cabinets, bookcases, safes.

I feel quite safe in advising you that you may in this matter entirely disregard sec. 3327a.

Bonds—Commerce—Corporations—Trade Regulations—Collection Agencies—Detective Agencies—Organization advertising as one in question and also desiring to do collection business subject to both secs. 1747—150 and 1636—12m, Stats.

March 24, 1920.

HONORABLE W. B. NAYLOR,
Assistant Secretary of State.

In your letter of March 10 you submit correspondence between your department and the Commercial Service Bureau of La Crosse, and you ask what form of license said concern should have under the state law.
I have before me the letterhead upon which the concern in question addressed a letter to you on March 9, 1920. This letterhead contains the words "Department of National Detective Agency" and in large type conspicuously placed in the center of the top of the sheet are the initials "N. D. A. Commercial Service Bureau." I presume it is fair to assume that the letters "N. D. A." refer to National Detective Agency, so that the large central figure and design most conspicuously placed upon the letterhead would convey the meaning "National Detective Agency Commercial Service Bureau." This I think no one would contend could be construed as anything but an advertisement of a detective agency. That is the impression that one gets from reading the letterhead. This in itself constitutes advertising a detective agency within the meaning of ch. 444, laws of 1919, which provides in part:

"No person, copartnership, or corporation shall act as a private detective for hire or reward or engage in the business of private detective for hire or reward, or advertise such business to be that of private detective or that of conducting a detective agency, without having first obtained a license so to do, as hereinafter provided, from the secretary of state of the state of Wisconsin."

I am convinced that if the concern in question desires to act in the capacity mentioned on the letterhead, or continue to advertise by use of these or similar letterheads, it must obtain a license as a detective agency as provided in ch. 444, laws of 1919.

With reference to being bonded as a collection agency, I understand from the correspondence that it is the intention of the concern to do a collecting business.

Sec. 1747—150, Stats., provides:

"No person, firm, association or corporation shall conduct a collection agency, collection bureau or collection office in this state, or engage in this state in the business of collecting or receiving payment for others of any account, bill or other indebtedness, or engage in this state in the business of soliciting the right to collect or receive payment for another of any account, bill or other indebtedness, or advertise for or solicit in print the right to collect or receive payment for another of any account, bill or other indebtedness, unless, at the time of conducting such collection agency, collection bureau, collection office or collection business, or of doing such advertising or soliciting, such person, partnership, association or corporation
shall have on file with the secretary of state a good and sufficient bond as hereinafter specified."

The principal purpose of this last section is to secure creditors against possible losses by insolvent collection agencies. The section above quoted is very broad in its application and reaches all individuals or associations that do a collecting business or advertise as collectors or solicit collections.

If I interpret the correspondence of the concern in question correctly, it desires to do a collection business. This also appears from the letterheads used by them in their correspondence with your department. If this be true that they intend to do a collection business, they must comply with the provisions of sec. 1747—150 and must furnish a bond and file it with your department.

You are therefore advised that upon the advertising and representations made by the concern itself in correspondence with you they bring themselves within the provisions of both secs. 1747—150 and 1636—12m, Stats. The concern should furnish a bond under sec. 1747—150 and obtain a license under sec. 1636—12m.

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Public Officers—Sheriff who was appointed to fill vacancy is not ineligible to succeed himself in that office.

March 25, 1920.

H. N. B. Caradine,
District Attorney,
Monroe, Wisconsin.

In your communication of March 18 you inquire whether your present sheriff, M, is eligible for reelection this coming fall. You state that M was appointed sheriff by the governor about ten months ago, to fill out the unexpired term of Sheriff Solbraa, deceased.

Sec. 4, art. VI, Wis. Const., contains the following:

"Sheriffs, coroners, registers of deeds, district attorneys, and all other county officers except judicial officers, shall be chosen by the electors of the respective counties once in every two years. Sheriffs shall hold no other office, and be ineligible for two years next succeeding the termination of their offices; * * *."
In 35 Cyc. 1490–1491 we find the following:

"In some states the constitutions provide that the same person shall be ineligible for the office of sheriff for more than a certain number of years within a prescribed larger period of time; but a limitation of this character is upon the person and has no such relation to the tenure as to permit the computation, as against a pro tempore incumbent appointed to fill an unexpired term, of the time his predecessor had occupied the office. In other states the constitutions forbid the same person holding the office of sheriff for two successive terms; but such provisions are held to apply only to full terms, and not to render a person who has served the unexpired portion of a term under an appointment or election to fill a vacancy, or who has been elected sheriff of a newly created county for a statutory term less than the full constitutional term and running until the next general election, ineligible to reelection for the succeeding full term."

In the case of Bozeman v. Laird, 91 Miss. 719, 720, 45 So. 722, it appears that the constitution of Mississippi contained the following provision:

"There shall be a sheriff, coroner, treasurer, assessor and surveyor for each county, to be selected as elsewhere provided herein, who shall hold their offices for four years. The sheriff and treasurer shall be ineligible to immediately succeed themselves or each other in office."

This provision is very similar to that of our constitution. The court said, p. 721:

"The only question presented in this case of any consequence is whether Laird was ineligible to succeed himself as sheriff of Jefferson Davis county, because he had served the full statutory term of the first sheriff of the county; that being, however, only one and one-half years, which was the length of the term of the first sheriff for this new county. We think it can make no difference that this was the term of the first sheriff of the county, made eighteen months by statute. It is true it is the full length of the first term, so fixed by law; but the office of sheriff is a constitutional office, and their terms are fixed by sec. 135 of our state constitution at four years. The reason why this term was only one and one-half years was because it was just the length of time to the general election for sheriffs. We are of the opinion that he was not ineligible to immediately succeed himself on these facts. We do not think that sec. 135 of our state constitution applies to a sheriff who has served a mere fragment of a full term, whether that fragment be a statutory term, as here, or some unexpired term. There are some difficulties in this
view; but we do not think the purpose and reason underlying sec. 135 can be reconciled with the opposite view.”

In Black v. Pate, 130 Ala. 514, the same question was considered by the court. The court said, pp. 529–530:

"The constitution declares: 'A sheriff shall be elected in each county by the qualified electors thereof, who shall hold his office for the term of four years unless sooner removed, and shall be ineligible to such office as his own successor.'—Const., art. V, sec. 26. Here the person made ineligible is designated by the pronoun ‘who,’ which can have relation to no other than the person previously mentioned, viz., the sheriff elected by the qualified electors for the term of four years. Without an unwarranted extension of its terms this provision cannot be made to include or to render ineligible to succeed himself, one who has held the sheriff’s office only by appointment for a fractional term."

See also State v. Dirdex, 211 Mo. 568, and Gorrell v. Bier, 15 W. V. 311.

In State v. Giles, 2 Finn. 166, our court held that the provision in our constitution or the territorial law in force prior to its adoption, did not make a sheriff who was in office at the time when the constitution went into effect and the territory of Wisconsin became a state, ineligible to the office of sheriff to succeed himself. The court said, p. 170:

"It remains to be seen whether the inhibition of the re-election of sheriffs, contained in the constitution itself, applies to those persons who happened to hold that office at the time of its adoption, or only such as should be elected under it. I think it applicable to the latter only; that it has reference to its own officers, and not to the territorial incumbents. The constitution did not perpetuate or modify any of the political rights of the inhabitants of the territory, for, properly speaking, they had none; but it created those rights for the citizens of the state—for all citizens—without preference or exclusion. All were alike its framers, and were equally enfranchised by it; and it seems to me harsh and invidious to say that some five-and-twenty of its citizens should be excluded from any of its privileges by the circumstance of their happening to hold, at the time of its adoption, a particular office under the expiring government."

Said sec. 4, art. VI, Wis. Const., also contains the following:

"* * * All vacancies shall be filled by appointment, and the person appointed to fill a 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."

It is significant that there is no provision in the constitution to the effect that a person elected to the office of sheriff for two years shall hold until his successor shall be elected and qualified. It is only a sheriff who is appointed to fill a vacancy who is authorized to hold over after the portion of the term for which he was appointed has expired until his successor shall be not only elected but also qualified.

If M should become a candidate and receive the highest number of votes cast for sheriff in his county, and if it were held that he could not begin his term of office because of the above provision of our constitution making him ineligible to succeed himself in office, then he would still be authorized, under the same section of the constitution, to hold over until his successor was elected and qualified. Under a well-established rule in this state, the man receiving the next highest number of votes would not be the elected sheriff, by reason of the fact that the one receiving the highest number of votes was ineligible and disqualified to take the office. This would not be the case if the sheriff who had had a full term were elected to succeed himself and it were decided that he would be ineligible. He is not authorized to hold over until his successor is qualified, and there would be a vacancy.

It seems to me that it was not in the mind of the framers of our constitution to prevent a sheriff who was simply appointed to fill a vacancy from succeeding himself. I think that provision of our constitution applies, in view of the unanimous decision of all the authorities, only to sheriffs who have had a full term of office.

I am strengthened in my view of this matter by the peculiar results that might follow if a contrary view were held to be the law. Suppose after a sheriff has been elected in November and before the first Monday in January, the sheriff should die and it should be necessary to appoint a successor. It would be impossible to appoint the newly elected sheriff, for by accepting the appointment he would disqualify himself for the office for the term for which he was elected. I am, therefore, of the
opinion that $M$ is not ineligible to the office of sheriff to succeed himself.

While this is my opinion, I recognize the fact that until our court has passed upon this question, there will be some doubt in regard to this matter, and $M$, if he desires to run for the office of sheriff to succeed himself, must do so with the realization that the law is not definitely settled in this state and that he may be required to defend his title to the office in the courts, should anyone desire to test the question.

Criminal Law—Gambling—Punch board operated so that person for consideration by chance may win prize is gambling device.

March 25, 1920.

Charles E. Lovett,
District Attorney,
Park Falls, Wisconsin.

In your communication of March 22, you state that a complaint has been made to your office that certain business places in the county are permitting to be operated what is commonly known as a "punch board;" that an offer for the sale of postal cards at ten cents each is made and the purchaser is entitled to one punch on the board; that there are no blank numbers and, of course, various prizes are won. You state you are not entirely clear whether devices such as these come within the provisions of our statute, particularly sec. 4537. You ask my opinion in relation to this matter.

Under your statement of facts, a consideration is paid for the privilege of giving a punch on a board, and the one who has expended this money receives not only the card, but has the chance of winning various prizes of varying valuations. This department has held that a certain cigar machine, where the person who puts a nickle into the machine, receiving probably his money's worth by getting a cigar, but where he has a chance of getting additional cigars, is a gambling device, and that while the purchaser had a chance of obtaining additional cigars, the proprietor was running the chance of losing them, and this was

I enclose a copy of a recent opinion rendered by this department on the question of gambling, which will also be instructive.*

In view of this principle, there can be no question but that the punch board operated as you state in your letter would be in violation of our gambling laws.

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*Page 9 of this volume.
"A child so adopted shall be deemed, for the purposes of inheritance and succession by such child, custody of the person and right to obedience of such parents by adoption, and all other legal consequences and incidents of the natural relation of parents and children the same to all intents and purposes as if the child had been born in lawful wedlock of such parents by adoption, excepting that such child shall not be capable of taking property expressly limited to the heirs of the body of such parents. The natural parents of such child shall be deprived, by such order of adoption, of all legal rights whatsoever respecting such child and such child shall be freed from all legal obligations of maintenance and obedience to such natural parents, except that where the adopted parent of such child shall be married to one of the natural parents of such child then the relation of such child toward such natural parent so married to the adopted parent shall be in no way altered by such adoption, and the mutual rights and obligations of such natural and adopted parent toward such child shall be the same as if such child were the natural child of both the natural parent and the adopted parent."

Under this provision of the statute, the said G— G— has by her adoption the same rights to attend the Wisconsin school for the blind as she would have if she were the natural child of Mr. and Mrs. H— B—. The residence of a child follows that of its parents, and in this case her residence is at Fort Atkinson, where her adopted parents are residing.

Education—Public Schools—School Districts—Consolidation—By its order consolidating two common school districts town board may not determine kind of school to be maintained; where words "high school and grades" were included in order, same should be disregarded.

March 26, 1920.

Honorable C. P. Cary,
Superintendent of Public Instruction.

I have your letter of February 6, to the effect that the town board of supervisors of the town of Rockland in Brown county, for the purpose of consolidating several ordinary common school districts, made an order which reads as follows:

"It is hereby ordered and determined that the following territory (describing same) shall hereafter constitute a school dis-
district to be known as Consolidated High School and Grades Dist. No. 1 of the town of Rockland."

You state that the statute assumes that when two or more districts are united by an order, the enlarged district is to proceed in its organization as if it were a newly created district, and that in the creation of such a new district your department has prescribed the following form of order:

"It is hereby ordered and determined that (here describe the territory to be comprised in the district, by sections and parts of sections) shall hereafter constitute a school district, to be known as school district No. ——, of the town of ———."

You state further in your letter that the statute does not give a town board authority to designate the kind of school, that is, high school, grade school, one-room school, etc., that shall be maintained in any district, and that therefore the words "high school and grades" as they occur in the order of the town board of said town of Rockland are placed therein without authority, and you give the opinion that the said words are therefore superfluous and harmless. You desire an opinion as to the force of the above quoted words in the said order and the effect that they have upon the validity of said order.

Subsec. (1), sec. 40.02, as amended by chs. 166 and 622, laws of 1919, reads in part as follows:

"* * * If two or more districts are united wholly the number of each such district shall be specified and also the number of the enlarged district, with the names of the town or towns and the county or counties interested."

There is nothing in said section nor in any other section of ch. 40 relating to the formation of school districts which empowers the town board to designate the kind of school which is to be maintained in the school districts consolidated by its order. Sec. 40.43, Stats., prescribes how a free high school may be established. It may be done only with the advice and consent of the state superintendent, after the question of establishing such high school has been submitted by the school district board to the legal qualified voters of the district. Sec. 40.41, Stats., prescribes the manner in which a state graded school may be maintained. No graded school is entitled to be placed upon the list of state graded schools and to receive the special
state aid until the same has been inspected by the state superintendent and by him found to fully comply with the conditions of said section.

You are therefore correct in your statement that the statute does not give a town board of supervisors the authority to designate the kind of school that shall be maintained in a consolidated school district. The town board of the town of Rockland fully performed its duty when it ordered and determined that the two common school districts should be united and consolidated and be known as Consolidated School District No. 1 of the town of Rockland. In adding after the word “Consolidated” the words “High School and Grades” it usurped an authority which the legislature, by the sections above referred to, has lodged elsewhere. The town board, in attempting to declare the kind of school to be maintained in said consolidated district, acted entirely without jurisdiction and its designation as to the kind of school to be maintained in said consolidated district is therefore unauthorized and illegal. There is not even a semblance of authority therefor. Its determination in that respect did not conclude anyone and may be wholly disregarded. The action of the town board in this respect was so entirely beyond its jurisdiction as to be innocuous and the supreme court has held that under such circumstances no court should issue a writ of certiorari for the purpose of declaring the invalidity of such an act. See State ex rel. Schaefer v. Schroff, 123 Wis. 98; State ex rel. Anderson v. Timme, 70 Wis. 627; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468.

I am therefore of the opinion that the words “High School and Grades” in the order of said town board consolidating the school districts referred to, may be disregarded, as without force, and the presence of these words does not in any way affect the validity of said order.
Bridges and Highways—The rights and liabilities of town and county in matter of maintenance and construction of bridge on state trunk highway system, discussed.

March 30, 1920.

ELMER E. BARLOW,
District Attorney,
Arcadia, Wisconsin.

In a letter dated March 6, 1920, you say:

"I respectfully request your opinion upon the following state of facts. The McCleary Bridge was a part of Trunk Highway No. 11. The bridge extended over Beaver Creek just north of Galesville. The bridge was originally built by the town of Gale with county aid under sec. 1319, Wis. Stats., in the year 1903. The bridge was entirely destroyed by flood during the month of March, 1919. A temporary bridge was immediately built to enable the public to cross the stream about two rods south of where the McCleary bridge originally stood.

"A special town meeting was called for the town of Gale during the summer of 1919, for the purpose of voting on the question of raising funds to build this bridge and the voters refused to vote funds. Is it the duty of Trempealeau county to build this bridge and pay the cost of construction or is it the duty of the town of Gale to provide funds for the construction of this bridge?"

The question cannot be answered in a word. The powers and duties of the county are first considered. No. 11 is part of the state trunk highway system. I assume that the portion thereof which embraces the bridge never became nor was accepted as a state highway within the meaning of subsec. 3, sec. 1317m—3 or subsec. 8, sec. 1317m—7, though I am inclined to think that would make no difference since this highway is now part of the federal aid trunk system. Secs. 1312 to 1317, Stats., deal directly with that system. Under the trunk system "highways" includes all culverts and bridges therein. Sec. 1312a.

It is the duty of the county to

"adequately maintain the whole of the trunk system in accordance with the directions made by the commission.

"(b) Said maintenance shall include the portion of the trunk system improved under the state aid or federal aid laws, as well as of those portions as yet unimproved under either law."
"(c) The counties shall not be required to extensively reconstruct unimproved highways pending their construction or reconstruction under the provisions of either the state aid or federal aid laws, but they shall be maintained in reasonably good condition considering their condition as to grading, drainage and surfacing at the time they were included in the trunk system." Sec. 1317, Stats.

This is the extent of the county's duty. It is required to keep the highway passable but need not undertake permanent or costly construction or reconstruction work. That indicates the extent to which the county must go. How far it has the power to go is a different question and one that is not asked. It may be said in passing that the county has authority to construct or aid in constructing any bridge in the county—1317m—5, subsec. 1, subd. (a)—and it may with state aid construct any portion of the prospective system of state highways, but it cannot be coerced in the matter. As to the state trunk highway system, the initiative in the matter of actual permanent improvement or construction, with federal aid, rests with the highway commission. It notifies counties when such construction work is to be done. Subsec. 4, sec. 1315.

The conclusion therefore is that the county is not obliged to do more than keep this highway open for travel,

"pending construction or reconstruction under the * * * state aid or federal aid laws."

The highway burden beyond that is upon the town. The general rule has always been that towns are obliged to construct and maintain the highways. Sec. 1223. There are now, as we have seen, important exceptions to that rule, but still the general rule remains. The town cannot force the county to construct a permanent structure, but can compel the county to contribute to the cost under sec. 1319. A bridge was once built under that section, and that section may be resorted to again.

Further consideration of the subject has led to the conclusion that the character of highway or class in which the piece of road belongs is material upon the question of liability of the town. Of course this office cannot and does not pass upon disputed questions of fact. Opinions are confined to the legal questions which arise upon either assumed or agreed facts.
The county may have expended funds upon this highway without making the highway a county or a state highway. We are to distinguish sharply between roads which are, in law and in fact, state highways, on the one hand, and roads which have merely received county help but not under the state aid statutes. The reason for making such distinction is this: Sec. 1317 requires the counties to adequately maintain the entire state trunk highway system. Special reference is there made to "unimproved highways." The highways so referred to include all portions of the county system of prospective state highways which have never been adopted as or become state highways.

There are two provisions under which a town highway may become a state highway: First, the county board may adopt any part of the prospective system

"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." Subsec. 3, sec. 1317m—3.

Second, the construction of a highway or bridge thereon for which state aid has been granted, provided the construction work is according to the plans and has been accepted by the state highway commission, notice of which acceptance shall have been given to the town clerk and the county highway commissioner in writing, makes a state highway.

"* * * 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." Subsec. 8, sec. 1317m—7.

Whether or not a bridge in a public road is part of a state highway is a fact which should be easily determined from the public records. If it is part of a state highway the town in which it is situated is relieved from further direct liability for its reconstruction or maintenance.

"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, and the county board shall make adequate provision therefor, * * * ." Sec. 1317m—7.
The view that the responsibility for maintenance in every sense, of the highway, when it becomes a state highway, shifts from the town to the county, is strongly supported by a recent amendment to sec. 1339, Stats. (ch. 142, Laws 1913). This section provides for recovery for injuries resulting from defects in the highways. Formerly the section applied only to towns. The amendment referred to changed that old general rule and the statute now provides:

"...If such damage 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."

This liability of the county covers roads which have become state highways under the provisions of the state aid law.

Liability for damages on account of defects in the highway is probably an important consideration here.

If the bridge forms part of a state highway and reconstruction is to be made in advance of

"reconstruction under the provisions of either the state aid or federal aid laws,"

such construction must be at the expense of the county. If a bridge is not a part of a state highway, extensive reconstruction work is not required of the county. In the last named event, permanent reconstruction work would have to be made by the town, unless the county consents to do it, though there is no provision of law by which the town can be compelled to rebuild this bridge.
Courts—Statute of Limitations—Education—Public Officers—
County superintendent of schools may be allowed reasonable and just expenses; it is for county board to decide whether he should have board and lodging expenses when attending to official business away from home, at county seat.
Statute of limitations is six years in such case.

March 30, 1920.

WINFRED G. HADDOW,
District Attorney,
Ellsworth, Wisconsin.

In your letter of March 11 you refer to the opinion of this department given to Gad Jones, district attorney, dated October 20, 1919, VIII Op. Atty. Gen. 767. You say you understand said opinion to hold that the supervising teacher and the county superintendent as well may charge for all expenses necessarily incurred for board and lodging except when in the immediate vicinity of the place of residence; in other words, even though the county superintendent’s office is in a particular city or village and he is there during probably from one-half to three-fourths of the time and makes his headquarters there, he can charge for his expenses for board and lodging merely because his home and family happen to be in another town.

You state that your county superintendent is a man about thirty years old, single, and before he was elected to the office he resided with his brother in a town about ten miles from Ellsworth; that his office in the courthouse (where the county superintendent has always had an office) is furnished and provided for the purpose and that he spends over one-half of the time in said office in your village, the county seat; that he nearly always goes out to his brother’s, which he calls home, on Saturday nights, but while he is in Ellsworth he pays for his board and lodging; that he votes in Ellsworth, but he says that he considers his home in the town of Martell, at his brother’s; and that he asked you if, under our ruling, he could charge for board and lodging while at Ellsworth.

You state that the supervising teacher is a young lady about twenty-five years of age and her parents live about fifteen miles from the county seat; that she has always charged for items of expense incurred while away from Ellsworth, but has never
charged for board and lodging which she pays in the village of Ellsworth; that she goes to her parents’ home quite often on week ends and sometimes stays there when out visiting and in that vicinity. You say that she contends that she can charge for board and lodging while at Ellsworth, under the ruling of this department.

The opinion of this department, to which you refer, was intended to settle the question as to the right of supervising teachers to recover for expenses of board and lodging when away from home and it was held that they were entitled to the same even though it be in the county seat, away from home, when working in the county superintendent’s office. It was not intended in that opinion to settle the question as to whether the county superintendent could recover for board and lodging when he was engaged in his work at his office in the county seat.

The provision of law concerning the expenses to be paid to the superintendent of schools is somewhat different from that applicable to the supervising teacher. Subsec. (4), sec. 39.04, contains the following:

"All county and district superintendents shall be allowed in addition to their salary such actual and necessary expenses incurred in the proper discharge of their duties as may be reasonable and just, and shall be allowed all stationery, postage, and printing necessary for the proper discharge of the duties of their office as may be reasonable and just. The county or district superintendent shall make and present itemized statements of his accounts for expenses, printing, stationery, and postage to the county clerk prior to the November meeting of the county board of supervisors, and they shall be audited at the annual meeting of the county board of supervisors and paid as allowed. The county board of supervisors are authorized to make provision for the quarterly payment of such expenses."

You will note that the county superintendent is allowed "such actual and necessary expenses * * * as may be reasonable and just."

What is reasonable and just is a matter to be decided by the county board under the peculiar facts and circumstances of each case.

There is no statute which requires the county superintendent of schools to have his office in the courthouse or in the county seat. A great part of his work is supposed to be done outside
of any office, and he would not be violating any law if he would have his office in his own home in any part of the county. If, however, for the benefit of the people of the county, and especially the teachers in the public schools, he has his office at the county seat and is therefore required to pay board and lodging when at such county seat, it would not be an abuse of discretion if the county board should decide to allow him such expenses. No difficulties will arise which the county board cannot remedy by refusing to pay the bill. If the county superintendent purposely establish a home in a part of the county in order to compel the county to reimburse him for board and expenses unnecessarily, the county board can refuse to pay such expenses, as not being reasonable and just.

You also inquire whether, if it is held that the county superintendent and the supervising teacher are entitled to these expenses, they can recover for expenses previously incurred, and if so, for how long a time. In answer to this question, I will say that I am of the opinion that they are entitled to expenses previously incurred, and I know of no statute of limitation that would apply except the six-year statute, sec. 4222. This question, however, may not be entirely free from doubt, but as it was a mutual mistake of law by all parties and the question involved being that of reimbursement of a public officer, I am of the opinion that the previous expenses may be recovered.

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Public Officers—District attorney is not disqualified to hold preliminary examination in case where he has conducted civil action for complaining witness in matter growing out of same transaction out of which criminal action arose.

Henry W. Rudow,  
District Attorney,  
Menomonie, Wisconsin.  

In your letter dated March 25 you state that a certain man was charged with a crime and upon preliminary hearing was bound over to the circuit court for trial, where he was arraigned and pleaded not guilty; that the defendant’s attorney then moved to put the case over the term, for the reason that a ma-
terial witness could not be found, upon which the district attor
ney agreed to admit the testimony defendant claimed could be
given by the absent witness; that the court overruled the
motion and ordered the case for trial; that the defendant then
moved to put the case over the term, on the ground that one
attorney was ill and could not attend trial, which motion was
granted; that subsequently, upon the case being called for trial,
defendant moved to bar the district attorney from prosecuting
the action for the reason that he had been an attorney for the
complaining witness in a civil action brought by the complaining
witness against the defendant, on facts out of which grew the
criminal prosecution; that the court granted the motion and ap
pointed a special prosecuting attorney; that the defendant again
procured an adjournment on the ground that one of the de
fendant's attorneys was otherwise engaged and could not be at
the trial of the case; that the court granted the motion and the
case again came up for trial, when the defendant moved to dis
miss the case entirely, for the reason that the district attorney
had conducted the preliminary examination given the defendant,
which motion is now pending.

You ask to be advised whether or not the defendant has a
valid objection to the case as it now stands, for the reason that
the district attorney acted in the preliminary examination.

In answer, I would say that I see no reason why the defendant
should be prejudiced on the ground that the district attorney
had conducted the preliminary examination. If it appeared
that the district attorney had appeared for the defendant in an
action involving the same set of facts, it might be argued with
success that he is thereby disqualified from prosecuting the de
fendant. The district attorney simply appeared as an attorney
for a person who is now a complaining witness against the de
fendant. Under our statute the district attorney is permitted to
practice law outside of the duties that devolve upon him as dis
trict attorney. If the district attorney were disqualified from
prosecuting any man against whom he had conducted a civil ac
tion, it might well be argued that the district attorney should not
practice law at all. I am not aware of any case that lays down a
rule or principle of law by which it could be said that the dis
trict attorney is disqualified and that the motion in question
should be granted.
Term of office of assessors limited to first appointments.

March 30, 1920.

TAX COMMISSION.

In your letter of March 22 you refer me to sec. 1087m—8, subsec. 2, where it is provided that the tax commission shall divide the state into assessment districts.

Sec. 1087m—8 provides that the state shall be divided into assessment districts by the state tax commission, and in subsec. 2 provides as follows:

"Not less than thirty days prior to the first of March, 1912, there shall be selected and appointed by the state tax commission an assessor of incomes for each assessment district in the state, who shall hold office for a term of three years."

There is no provision in the statutes, so far as I have been able to find, expressly authorizing the appointment of income tax assessors by the tax commission thereafter.

You inquire whether the three-year period spoken of in this statute is to be applied only to the first appointees, and whether the term of income tax assessors appointed subsequent to the expiration of the three-year limitation is indeterminate, under the general civil service laws, as such assessors of income are appointed from the list furnished by the civil service commission after an examination.

The wording of this statute is certainly peculiar. It is true that the income tax assessors are neither county, town, village or city officers, under the decision of our court in the Income Tax Cases, 148 Wis. 456, and if it is held that they have terms of office, they being paid out of the state treasury, their compensation could not be increased during the term of office, under the provisions of art. IV, sec. 26, Const.

I believe it is a reasonable interpretation to hold that the three-year term applies only to the first appointee, and that subsequent thereto the appointees will hold for an indeterminate term. I realize that the question is not free from doubt, but the lawmakers probably had in mind that the commission should have the right to remove the first appointees after three years without being compelled to give reasons for the removal, as required by the civil service law, but that subsequent thereto, after
a sufficient number of income tax appointees had been found qualified, and the tax commission was able to determine what kind of qualification such officials needed, that thereafter the appointment should be made for an indeterminate period of time. Such a ruling will settle all difficulties as to raising salaries and it will not be necessary for you to remove an efficient man and pay an inexperienced new appointee more than you were authorized to pay the experienced official.

Agriculture—Inspection of Apiaries—Shipment by mail permitted under federal law; state law not applicable.

Private funds may pay inspectors of apiaries.

County and town boards have no authority to appropriate money for bee inspection.

Contagious or infectious diseases of bees must be in bee products, etc., before exposure of products is prohibited.

March 31, 1920.

S. B. Fracker,
Acting State Entomologist.

I have your letter of March 23, in which you ask four questions.

Under the first statement of fact, after quoting subd. (b), subsec. 8, sec. 1494/, Stats., your question is whether or not postmasters are permitted to accept shipments of bees, combs or beekeeping applications, for interstate transportation, bearing the affidavit only, and whether or not they can deliver such packages, if originating outside of the state. Beg to state that the postmaster is acting as agent for the federal government in the handling of the mails and is therefore required only to conform to the rules initiated by the postmaster general or laid down by federal law, and the state has no power, under the circumstances, to determine how or in what manner mail may be handled by the federal government. However, if any of the articles prohibited are sent by mail without complying with the state law and your inspector or deputy can find the same in the hands of a private individual, I see no reason why such prohibited articles cannot be seized and the person making the
shipment punished, unless such articles have affixed the permit or certificate.

Your second question is whether or not the cost of inspection may be paid by means of funds donated by private individuals. Beg to state that such funds may be voluntarily raised and paid by private individuals to pay part of the inspection expenses. However, there is no provision by which such funds may be paid into the state treasury and then withdrawn, and if private funds are raised, arrangements should be made with the department for the payment of an inspector through the department other than from the appropriation.

Answering your third question, beg to state that town and county boards have no other authority than that expressly granted by them by law, and therefore they have no authority to appropriate money toward bee inspection, without specific statutory authorization.

Answering your fourth question, beg to state that under sub-sec. 9 of the section under discussion, it is provided as follows:

"No person shall expose in any place to which bees have access, any bee product, hive, or other apiary appliance in such manner that contagious or infectious diseases of bees could be disseminated therefrom."

This provision presupposes the existence of contagious or infectious diseases of bees in the bee product, hive, or apiary appliances, so that the territory in which disease is prevalent has no reference to the manner in which contagious or infectious diseases of bees may be disseminated. The word "therefrom" refers to "bee product, hive, or other apiary appliance" and not to the word "place."
Opinions of the Attorney-General

Education—Textbooks—Secs. 40.31 to 40.34, relating to uniform textbooks in counties, and sec. 40.355, relating to textbooks in school districts, construed and harmonized.

April 1, 1920.

Honorable C. P. Cary,
State Superintendent,
Department of Public Instruction.

In your letter of March 8 you request my interpretation as to the present status of secs. 40.31 to 40.34, inclusive, commonly known as "the county uniform textbook law." In your letter you give a concise history of said sections and refer to an opinion of this department regarding same, all of which I will quote without change:

"Chapter 561, laws of 1907, created secs. 553m—1 to 553m—25, inclusive, said sections providing the method whereby counties desiring to do so might adopt uniform textbooks for use in the districts of the county, subject to the provisions of the sections referred to. With slight changes made by subsequent legislatures, this law continued in effect up to 1917. Ch. 499, laws of 1917, added four sections (553m—109 to 553m—112, inclusive) to the statutes, said sections relating to the adoption of textbooks by school boards or boards of education and certain other features involved in the handling of textbooks. Sec. 3 of the above chapter provides as follows:

"'All acts or parts of acts inconsistent with the provisions of this act or in conflict with it are hereby repealed.' This chapter was approved and took effect June 26, 1917. Soon thereafter question was raised as to whether or not the provisions of ch. 499, laws of 1917, rendered secs. 553m—1 to 553m—25 inoperative. In response to a request from the state superintendent the attorney general under date of October 24, 1917, rendered an opinion in which he held that ch. 499, laws of 1917, did render inoperative secs. 553m—1 to 553m—112. By action of the 1917 legislature the above named sections were renumbered so as to be designated secs. 40.31 to 40.34, inclusive, and the sections created by ch. 499, laws of 1917, were renumbered to be sec. 40.355. Ch. 490, laws of 1919, added to the statutes subsec. (6), sec. 40.355, to read:
"Section 40.355 (6). Nothing in this section shall be construed to repeal or in any way affect the provisions of sections 40.31 to 40.34, inclusive, of the statutes:

This chapter was approved July 3, 1919. Ch. 500, laws of 1919, amended subsecs. (1) and (3), sec. 40.31 and subsec. (1), sec. 40.32, thereby placing the county uniformity on the basis of five-year adoptions and harmonizing some slight discrepancy which had previously existed in the law."

You desire an answer to the following question:

"Did the enactment of ch. 490, laws of 1919, restore secs. 40.31 to 40.34, inclusive, and are said sections as amended by ch. 500, laws of 1919, in full force and effect?"

Secs. 40.31 to 40.34 as amended by ch. 500, laws of 1919, relate to uniform textbooks in common schools and authorize the county or superintendent district school board convention to adopt uniform textbooks throughout the county or the superintendent district and to elect a county board of education composed of five members whose duties in respect to the selection of school textbooks are defined therein.

As stated by you, these sections were originally created by ch. 561, laws of 1907.

Sec. 40.355 as amended by ch. 490, laws of 1919, made it the duty of school district boards and boards of education to adopt for their respective schools from the list of school textbooks on file with the state superintendent of public instruction all the school textbooks necessary for use in the schools under their charge, and such school textbooks when so adopted are not to be changed for five years. Sec. 3, ch. 499, laws of 1917, reads as stated in your letter. In my opinion said sec. 3 did not effect a repeal of secs. 553m—1 to 553m—25, the sections in question, as numbered in the statutes of 1915. Indeed, the legislature by ch. 490, laws of 1919, expressly declared that the amendment of sec. 40.355, Stats. 1917, shall not "be construed to repeal or in any way affect the provisions of sections 40.31 to 40.34, inclusive, of the statutes."

The legislature by ch. 500, laws of 1919, expressly recognized the existence of secs. 40.31 and 40.32 by amending the same. These acts of the legislature clearly indicate an intention that secs. 40.31 to 40.34 and sec. 40.355 should all stand together and be operative.
I call attention to some of the elementary rules of statutory construction which are applicable to the situation presented.

The repeal of a statute by implication is not favored, and a general repealing clause does not repeal other acts relating to the same general subject unless there is actual conflict between the statutes. *Milwaukee County v. Halsey*, 149 Wis. 82, 88.

Repeals and changes of existing laws by implication are not favored. Therefore, if two laws conflict and the earlier will admit of a reasonable construction leaving the later in force, such construction will be adopted, otherwise the later law will prevail. *State ex rel. Hayden v. Arnold*, 151 Wis. 19, 29.

"* * * Where there are two affirmative statutes on the same subject, one will not repeal the other if both can stand together." *State ex rel. Boddenhagen v. C., M. & St. P. R. Co.*, 164 Wis. 304, 307.

Recognition by the legislature that a law is in force, although not conclusive, is evidence tending to show that such law has not been repealed. *Milwaukee County v. Halsey*, supra.

In view of these rules, I am clearly of the opinion that secs. 40.31 to 40.34, inclusive, have not been repealed or suspended but have at all times been in full force and operation notwithstanding the language of sec. 3, ch. 499, laws of 1917, above quoted, and notwithstanding the opinion of my predecessor, found in VI Op. Atty. Gen, 683, to which reference is made in your letter. If the operation of said secs. 40.31 to 40.34, inclusive, was suspended by the opinion referred to, the legislature by the enactment of chs. 490 and 500, laws of 1919, revived, restored and recognized them as in full force and effect.

The provisions of secs. 40.31 to 40.34, inclusive, have been in effect since 1907, but their operation in any county or superintendent district depends upon the favorable vote of the county school board convention annually held therein. In other words, these sections may be said to constitute a county option statute as to uniform textbooks. Prior to the enactment of ch. 499, laws of 1917 (now sec. 40.355), if a county or superintendent district school board convention refused to adopt the law, then there would be no textbook law of any kind in force in such county or superintendent district. With the adoption of ch. 499, laws of 1917 (now sec. 40.355), it became mandatory for a school district board in a county wherein the uniform county or
superintendent textbook law was not in force to adopt for the district school a list of textbooks as in said chapter provided and such school textbooks when so adopted could not be changed for five years.

In counties and in superintendent districts where the school district boards have complied with the provisions of sec. 40.355, the county or superintendent district school board convention may nevertheless adopt the uniform textbook law as provided in secs. 40.31 to 40.34 and when so adopted and in operation the county or superintendent district board of education must select and adopt a uniform series of textbooks for the county or superintendent district as in sec. 40.32 provided. The action of the county or superintendent district board of education in such event supersedes the adoption of school textbooks made by the local school district boards. This was clearly the intent and scheme of the legislature. The lesser unit of school government, the common school district, must yield to the determination of the greater unit of school government, the county or superintendent district.

Any other construction nullifies a legislative act and convicts that body of a grotesque inconsistency in its school textbook legislation.

I believe the foregoing fully answers your direct question and places you in a position to properly advise county superintendents and others who, as you state, are making inquiry as to the interpretation to be given to the sections mentioned.

Fish and Game—Public Officers—Conservation commission has no authority to adopt rule forbidding presence of person with gun in his possession "in the woods" in counties where hunting of deer is permitted by law, within 10 days immediately preceding opening of hunting season.

Conservation Commission.

We are in receipt of your communication of March 24, 1920, which encloses a form of petition addressed to your honorable body, requesting in effect that you

"provide by rule that the presence of any person with a gun in his possession in the woods in counties where the hunting of
deer is permitted by law at any time within ten days immediately preceding the opening of the hunting season in any year shall be contrary to law."

You request an opinion as to the authority of the conservation commission to put in force such a regulation.

You are advised that in the opinion of this department, the conservation commission has no power to make a regulation of the character specified. The powers of that body are specified with particularity

"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 wild life."

Sec. 29.21, subsec. (1).

It is further provided that such orders providing protection or additional protection are not to be issued except upon petition. In the case of petitions, it will be noted by subsec. (2), that they are to be signed by

"ten or more persons of any township or twenty-five or more persons of any county,"

and the action to follow thereon, as provided by subsec. (3), is to be effective "within such territory." So that the petition presented is plainly not in accord with the statutes in this respect, in that it is broader in its prayer than any proceeding authorized by the statutes. The statute contemplates petitions by separate towns or counties, and for actions in the specific town or county from which the petition emanates.

The objection, however, is more fundamental than this, as the power of the commission to issue an order is definitely stated to be:

"* * * The commission shall issue an order prohibiting or regulating during the open season therefor, the taking of any or all species of fish, birds or mammals within such territory."

Subsec. (3), sec. 29.21.

In other words, the commission may adopt more stringent regulations to apply during the open season for hunting deer, but it may not under this provision of the statute make regulations in any other respect.
Automobiles—Auto trucks duly licensed in Illinois may run into Wisconsin without having Wisconsin license.

Honorable Merlin Hull,
Secretary of State.

In yours of March 18, you ask whether the International Harvester Company of Chicago, which is contemplating the use of experimental motor trucks, for hauling freight between Chicago and Milwaukee, must have the trucks licensed under the Wisconsin law as well as being licensed in the state of Illinois; in other words, whether or not a motor truck duly licensed in the state of Illinois and running through a portion of Illinois and to points in Wisconsin must also bear a Wisconsin license.

Sec. 1636—53, Stats., provides, in part:

"The provisions of section 1636—47 [which is the registry section] 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. * * *

I can see no reason why the motor trucks in question should not be treated in the same manner as are cars of other types. In the language of the section just quoted, if the vehicle is an "automobile or other similar motor vehicle," these nonresident privileges attach. I am of the opinion that motor vehicles of this type should be included within the phrase "automobile or other similar motor vehicle."

In an opinion rendered by this department to Mark Catlin, district attorney, Appleton, Wisconsin, on January 28, 1916, V Op. Atty. Gen. 77, it was held:

"* * * 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 'automobile' 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 pur-
poses and to which these statutes were undoubtedly intended to apply."

You are therefore advised that if the trucks in question bear the Illinois license it is not necessary that they also bear the Wisconsin license.

Automobiles—General distinguishing automobile number of dealer does not protect subdealer who demonstrates with car owned by himself.

April 2, 1920.

GAD JONES,
District Attorney,
Wantoma, Wisconsin.

In yours of March 17 you state that an authorized dealer in automobiles has applied for registration for all cars owned by him and temporarily within his control and a general distinguishing number has been issued to him; that he has employed a salesman who has exclusive right to sell automobiles on commission in a portion of the territory, the agent to receive commissions on all automobiles sold in such territory regardless of who sells them. This agent or salesman owns an automobile which is used for demonstration purposes. Under his contract, he may sell this car and take another one from the stock of the dealer, and you ask whether the car owned by the salesman and so used for demonstration purposes may legally be operated under the general distinguishing number issued to the dealer.

I assume from your statement of facts that the subdealer is the owner of this car in question and that while he is using it for demonstration purposes, it is no part of the property of the dealer to whom has been issued a distinguishing mark. The language of the statute, sec. 2, ch. 450, laws of 1919, is:

"* * * And every motor car, motor truck or other motor vehicle owned by such applicant or temporarily in his custody, if designated by a number corresponding to the registration number issued to such manufacturer, dealer, distributor or subdealer, shall be regarded as registered under, and having assigned to it such general distinguishing number or mark until sold or let for hire, * * *".

While this section gives the right of the dealer to have subagents and subdealers and extends to them the right to operate
cars owned by said dealer for demonstration purposes, under the general distinguishing mark, it does not protect the sub-dealer or agent when operating his own cars, privately owned by him, regardless of the purpose for which he operates them. You are therefore advised that the car in question cannot be operated under a general distinguishing number issued to the dealer.

I would refer you for corroborating opinions by this department upon this general issue to an opinion given to Honorable Merlin Hull, secretary of state, August 17, 1917, VI Op. Atty. Gen. 583; also opinion to Honorable Merlin Hull, secretary of state, December 31, 1919, VIII id. 877.

Corporations—Foreign Corporations—As a condition precedent to doing business in state, foreign corporation must pay license fee based on proportion of authorized capital stock employed in this state; where all its property is located within state fee must be calculated upon total authorized capital stock.

April 5, 1920.

Honorable Merlin Hull,
Secretary of State.

Has the adoption of ch. 485, laws of 1919, which amends sec. 1770b, subsec. (7), subd. (e), resulted in changing the rule with reference to the computation of fees as required to be paid by foreign corporations as a condition precedent to doing business in this state?

This question arises out of the ruling of your department made with reference to a Delaware corporation with an authorized capital stock of five million dollars, which has issued capital stock to the extent of $250,000, all of which is represented by property located in the state of Wisconsin. The company has sought to comply with the requirements of sec. 1770b by paying a fee of $250. It is contended that it transacted no business in Wisconsin or elsewhere during the year 1919, as it began the construction of its plant in the latter part of the year.

Your contention is that the statute contemplates the payment of fees on the basis of the authorized capital stock, while the
attorney for the corporation takes the position that fees should only be paid to the extent of capital stock actually issued and outstanding. He urges this,

"because the capital stock cannot be represented by property located in Wisconsin to any amount in excess of the amount legally issued."

This argument is reinforced by various references to the decision of the supreme court in State ex rel. Standard Oil Company v. Hull, 168 Wis. 269, especially those where the court emphasizes the intent of the legislature to refer to actualities rather than potentialities. Counsel further urges that

"in making the change in sub-section '7—e' which the legislature made in 1919, by inserting the word 'authorized' before the word 'capital;' it is submitted the legislature made no change whatever in the law, because it retained in the statutes such wording as compelled construction confined to actualities and excluded potentialities, because of the retention of the words 'represented in the state of Wisconsin by its property located, etc.'"

You are advised that it is the opinion of this department that your construction of the law is correct; that having industriously written into sec. 1770b, subsec. (7), subd. (e), by ch. 485, laws of 1919, the word "authorized," immediately prior to the words "capital stock," wherever they occur, the legislature plainly manifested its intention that henceforth the fees of foreign corporations should be computed upon the basis of such authorized capital stock, and not upon the basis set forth in Standard Oil Co. v. Hull, supra. The references to other sections of the statute, found in that case, are all made by the court in the endeavor to arrive at the meaning attributable to the section in question. When the words "authorized" capital stock are employed, there is no longer any occasion for reference to any source for interpreting the meaning thus plainly expressed.

Nor is this any the less clear because the legislature has retained in the statutes the gross value of actual business and actual property in the state as factors for determining the proportion of the capital stock so employed. We must keep in mind that what is sought to be determined is the proportion of "authorized" capital stock represented in Wisconsin. The mere fact that this is arrived at with reference to the actual property lo-
cated and business done within and without the state does not affect the situation.

The obvious legislative purpose was to place foreign corporations upon the same basis as domestic corporations. Under the provisions of sec. 1772, a domestic corporation is required to pay a fee of $1.00 for each $1,000 of its "authorized" capital stock in excess of $25,000. This fee must be paid, irrespective of the amount of property actually owned or the volume of business actually transacted within the state. Had the present corporation been incorporated within the state of Wisconsin to do exactly the business that it has done, it would have been called to pay the fee which your ruling requires it to pay. The legislature undoubtedly felt that justice required it to do so. Otherwise, a group of Wisconsin citizens may evade the policy of the state with reference to corporations by resorting to the same expedient that was employed here—that is, of incorporating the business outside the state. If incorporated within the state they would have been called upon to pay $5,000. Apparently they seek by incorporating without the state to gain a discrimination in their favor amounting to $4,750.

No detailed consideration has been given to any question as to the constitutionality of the law. The court expressly refrained from considering the constitutional phase in the Standard Oil case. This department feels that it must presume the law to be constitutional, in the absence of conviction that it is clearly otherwise.

Bridges and Highways—Municipal Corporations—Towns—Taxation—Highway tax for towns; amount assessable.

April 9, 1920.

William Cook,
District Attorney,
Green Bay, Wisconsin.

Replying to your recent favor, beg to state that under sec. 1239, Stats., being ch. 518, laws of 1919, the supervisors of each town shall meet within eighteen days after the annual town meeting and shall then, or at some subsequent meeting before the second Monday of May, assess the highway taxes for the ensuing year.

Under sec. 1240 the supervisors assess highway taxes to an
amount of not less than one or more than seven mills and may as-

and excluding the amount levied and voted under secs. 1317m—1 to 1317m—15. It is also provided that no town

exclusive of the first authorized, that is, the one of seven mills, and exclusive of that authorized under secs. 1317m—1 to 1317m—15.

Sec. 1244 (see ch. 518, laws of 1919) provides that whenever

Under subsec. 2 of said section, an additional tax may be pro-

amount of not less than one or more than seven mills and may as-

and excluding the amount levied by the supervisors''

and excluding the amount levied and voted under secs. 1317m—1 to 1317m—15. It is also provided that no town

exclusive of the first authorized, that is, the one of seven mills, and exclusive of that authorized under secs. 1317m—1 to 1317m—15.

It appears to me that this slight restatement of the law carries

There seem to be two classifications made, on the basis of inhab-

exclusive of that first authorized herein’’ and the quoted phrase

must refer to the tax ‘’of not less than one nor more than seven

mills on the dollar,’’ that being the first tax authorized. If the

electors authorize an additional amount, such additional amount

shall be ‘’not exceeding in all ten mills on the dollar.’’

Sec. 1244 (see ch. 518, laws of 1919) provides that whenever

the amount of highway taxes assessed by the supervisors (and

thi’s must refer to the assessment above discussed) is deemed

insufficient ‘’to keep the highways in repair,’’ then, upon the

written application of the superintendent, they can assess an

additional tax not to exceed seven mills on the dollar on the val-

uation.

Under subsec. 2 of said section, an additional tax may be pro-

vided for for the purpose of opening or repairing highways

therein, under certain conditions, but such tax cannot be levied

unless all the supervisors agree thereto, nor shall it exceed $600
in any year, nor shall there be more than one such tax in any year, but the limitations contained in sec. 1240 obtain.

It is my opinion that sec. 1318 permits the supervisors to levy an additional tax for bridges and that the amount levied under the provisions first above mentioned can be applied for highway purposes exclusive of bridges.

The levy that may be made under sec. 1250, Stats., is in addition to the levy that is made under secs. 1239 and 1240.

Appropriations and Expenditures—Municipal Corporations—Commercial and Industrial Development—Legislature may not constitutionally authorize cities to grant direct financial subsidy to private manufacturing, industrial and commercial plants; so far as sec. 959—810, Stats., purports to authorize doing so it is unconstitutional.

April 9, 1920.

Otto L. Olsen,  
District Attorney,  
Clintonville, Wisconsin.

Sec. 959—810, enacted by ch. 276, laws of 1915, provides:

"The council of any city, however organized, which shall have adopted the provisions of this section, as provided in section 959—81p of the statutes, shall annually appropriate in cities of the first class not more than four thousand dollars, in cities of the second class not more than three thousand dollars, and in cities of the third and fourth classes not more than two thousand dollars, for the purpose of aiding and encouraging the location of manufacturing, industrial and commercial plants therein, and for other purposes designed to increase the population, taxable property and business prosperity of such city, and for the purpose of defraying the necessary incidental expenses incurred in relation thereto. Moneys so appropriated shall be expended by the council for such purposes."

You are advised that this department is of the opinion that, in so far as the said statute contemplates or purports to sanction aid or encouragement to manufacturing, industrial, and commercial plants, by direct financial subsidy, the same is unconstitutional and void. In a prior opinion rendered during the administration of Attorney General Owen (VI Op. Atty. Gen. 402), it was said with reference to a proposal to appro-
private $500 to a private industry to assist it in paying for a side track to its factory:

""* * * From the authorities referred to, it seems clear that it would be illegal, statute or no statute. Such a statute would not be law; it would be a statute only in form."

The same principle is applicable here.

The enactment of this statute in its present form seems somewhat singular, in view of the striking similarity between its provisions and those which came before the supreme court of the United States in the leading case upon the subject. The statute there involved is set forth in that case, Loan Association v. Topeka, 20 Wall. 655, 657:

""Section 76. The council shall have power to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city, either by direct appropriation from the general fund or by the issuance of bonds of such city in such amounts as the council may determine."

Bonds were issued pursuant to this statute, as stated, p. 656,

""as a donation (and so it was stated in the declaration), to encourage that company in its design of establishing a manufactory of iron bridges in that city."

The court, after reviewing decisions which confirm the long-standing and well-established principle

""that there can be no lawful tax which is not laid for a public purpose"" (p. 664),

said, p. 665:

""* * * In the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.""
It will be noted that reliance was placed by the supreme court of the United States upon the cases of Curtis v. Whipple, 24 Wis. 350, and Whiting v. The Sheboygan & Fond du Lac R. R. Co., 25 Wis. 167. The first of these cases involved an appropriation to a private educational institution, in which the town had no interest or power of control, and the court used this language, pp. 354–355:

"* * * If we turn to the cases where taxation has been sustained as in pursuance of the power, we shall find in every one of them that there was some direct advantage accruing to the public from the outlay, either by its being the owner or part owner of the property or thing to be created or obtained with the money, or the party immediately interested in and benefited by the work to be performed, the same being matters of public concern; or because the proceeds of the tax were to be expended in defraying the legitimate expenses of government, and in promoting the peace, good order and welfare of society. Any direct public benefit or interest of this nature, no matter how slight, as distinguished from those public benefits or interests incidentally arising from the employment or business of private individuals or corporations, will undoubtedly sustain a tax."

In Whiting v. The Sheboygan & Fond du Lac R. R. Co., the court, discussing the propriety of appropriations made for the construction of a railroad, said, p. 187:

"* * * For, if such incidental public benefits or advantages alone will support a tax for a donation of money to persons or corporations engaged in one kind of private business, then they certainly must in another, and if it should be shown, as it undoubtedly can in numerous towns and places, that the establishment of mills and manufactories would be greatly beneficial to the inhabitants, far more so, perhaps, than the building of a railroad, then it would follow that the people of such towns and places could be taxed for the purpose of giving the money to persons or corporations proposing to build such mills or manufactories. This last is a proposition upon which no one will insist."

The principle thus laid down in these early Wisconsin cases has never been departed from, but has been frequently reiterated and reaffirmed. Among such cases are State ex rel. Garrett v. Froehlich, 118 Wis. 129.

The conclusion here stated does not lay out of account the distinctly more liberal tendencies manifested by courts within
recent times. Among such notable decisions are *Jones v. City of Portland*, 245 U. S. 217, sustaining a statute of the state of Maine authorizing cities to establish and maintain wood, coal, and fuel yards; *Scott v. Frazier*, 258 Fed. 669, which contains a well reasoned opinion by Judge Amidon, and the still more recent case of *Green v. Frazier*, 176 N. W. 11. These last two cases involved the validity of the extremely liberal constitutional and statutory provisions of the state of North Dakota, which have probably gone farther than the statutes of any other state in the direction of sustaining the broadest possible rule in the matter of taxation. None of these three decisions would, in our judgment, sanction taxation for the use specified.

Judge Amidon (*Scott v. Frazier, supra*, 676), said:

"The only cases in the federal courts in which laws have been condemned are those in which bonds or public funds were given as a mere gratuity to a *privately owned manufacturing enterprise* to encourage its establishment within the city. Such are the cases cited by counsel for plaintiff. *Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Cole v. City of La Grange*, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896; *Dodge v. Mission Township*, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242."

The supreme court of North Dakota, in *Green v. Frazier*, likewise emphasized the distinction that arises between appropriation to a private corporation and the entrance of the state itself into business ordinarily classed as private. The court said, pp. 17–18:

"Having thus drawn the distinction between what constitutes private business and what a public purpose, it is next in order to determine whether the proceeds of the bonds issued or proposed to be issued are to be used for promoting and conducting a private business for the benefit of certain individuals, associations, or private corporations, or are the proceeds to be used for a public purpose by the sovereign power, the state, for the promotion of the general welfare of all the people of the state. If the industries to be established and which are established are owned and operated by the state in order to promote the general welfare of all the people, and the net profits derived from the operation of such industries become public funds of the state of North Dakota, and payable as such into its treasury for the use and benefit of the state and inhabitants and residents thereof in like manner as other public funds, then it must follow that the purpose, business, and industries are public."
How far a city may expend public funds for that type of publicity carried on by chambers of commerce and commercial associations, we have considered it unnecessary to discuss, because we assume that in practice the case most likely to arise is the direct appropriation of moneys to privately owned enterprises, with the expectation that such appropriation shall result in a general stimulus to and increase of prosperity. This, we understand from prior correspondence with this office, is the identical proposition involved in your case.

Corporations—Cooperative Associations—Shareholder in cooperative association may vote by proxy upon matter of increase of capital stock if by-laws of association so provide.

Alvin C. Reis, Counsel, Division of Markets.

You inquire by letter dated March 11, 1920, whether a shareholder in a cooperative association may vote by proxy upon the matter of increase of capital stock.

You are advised that this department is of opinion that the subject matter of your inquiry is ruled by the provisions of sec. 1760, Stats., which provide in general language:

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

That this section is applicable to cooperative associations is apparent, we think, from the following considerations. The provisions as to cooperative associations are found in the chapter entitled "Corporations." Sec. 1786—3 provides for filing "the original articles of incorporation of corporations organized under sections 1786—1 to 1786—17, inclusive."

This construction is borne out by the fact that the cooperative association law in its present form was adopted by ch. 368, laws of 1911. As originally adopted, the word "corporation" did
not appear in sec. 1786e—3. By ch. 532, laws of 1911, the legislature adopted an affirmative declaration upon the subject of proxies and votes by shares of stock, adding the words at the beginning of such section:

"Unless a provision to the contrary is inserted in the articles of incorporation and recited in each certificate for any share of stock issued by the corporation," etc.

Having so declared or confirmed the rule, sec. 57, ch. 664, laws of 1911, provided for

"inserting after the word 'incorporation' in the first line of section 1786e—3 the words, 'of corporations.'"

The original act had used the word "corporations" in the same relation in sec. 1786e—4.

Very plainly, therefore, cooperative associations are corporations, and the general provision as to proxies found in sec. 1760 would apply. This conclusion is confirmed by the fact that sec. 1786e—9 provides for subscription to stock in other associations pursuant to authority granted at a meeting

"at which at least a majority of all its stockholders shall be present, or represented," and such authority be granted "by a majority vote of the stockholders present or represented."

Further confirmation is found in the fact that the legislature deemed it necessary, by ch. 389, laws of 1907, to enact sec. 1760m to prohibit the use of proxies in mutual life insurance companies.

The answer to your question, therefore, is that members of a cooperative association may vote by proxy at every election of officers,

"and by proxy at other meetings when so provided by the by-laws of the corporation."

That by-laws are contemplated for cooperative associations is apparent from the provisions of sec. 1786e—5, where provision is made for election and term of office "as the by-laws may prescribe."

We appreciate that the question is not altogether free from doubt, by reason of the fact that the statutes, in accordance with the original common law rule, provide that

"no stockholder in any such association shall * * * be entitled to more than one vote." Sec. 1786e—8.
Possibly the effect of this provision would be somewhat nullified by permitting the stockholder to cast an additional vote by reason of the possession of the proxy of another stockholder. There have been a number of decisions which have held void by-laws which sought to restrict the giving of proxies to non-stockholders in a corporation. We do not think that the legislature could have intended to sanction a policy that strangers were alone intended to hold proxies in such an association. Sec. 1786e—12 provides for voting by mail, and it may be argued that this was a species of representation contemplated by sec. 1786e—9, already referred to.

The general policy authorizing the use of proxies in meetings of corporations had been settled long prior to the adoption of these statutes, and the rule to be applied was stated in State v. Smith, 85 S. E. 958, 960:

"* * * Every enactment is to be interpreted in harmony with the written law and as superseding it only to the extent required by its express terms or necessary operation."

So construed, there is nothing in the statutes, either by "express terms or necessary operation" taking these associations out of the general rule.

Intoxicating Liquors—Volstead Act—Sec. 22 merely makes it optional with court and with district attorney whether the one shall institute or the other entertain actions for abatement of nuisance thereunder.

George F. Merrill,
District Attorney,
Ashland, Wisconsin.

This department has heretofore given extended consideration to the interpretation to be placed upon sec. 22 of the so-called Volstead act, Public, No. 66, 66th Congress, which provides:

"An action to enjoin any nuisance defined in this title may be brought in the name of the United States by * * * any prosecuting attorney of any state * * *. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases."

April 10, 1920.
So far as our search has extended, there is relatively little precedent to aid in arriving at a conclusion as to the intention of congress in the enactment of this statute, as to whether it intended that actions of the character described should be brought in state courts, and if so, whether it had constitutional power to impose a duty or confer authority upon the courts of a state. The language, of course, is general, referring to "any court having jurisdiction to hear and determine equity cases."

Art. XVIII, U. S. Const. (40 Stats. at Large 1050), merely provides:

"The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

It is suggested that this language in no way operates to enlarge the power that congress would have possessed in the absence of the clause, so far as imposing duties upon tribunals of the state is concerned. Its power in that respect is conditioned and limited exactly as if no reference to the several states had been contained in the amendment at all. In this situation, the language employed by the supreme court of the United States in *Prigg v. Commonwealth*, 41 U. S. (16 Peters) 539, 615, is pertinent:

"* * * The clause is found in the national constitution, and not in that of any State. It does not point out any state functionaries, or any state action to carry its provisions into effect. The States cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the States are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution. On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution."

Willoughby on the Constitution, p. 92, states this rule in a footnote:

"It has indeed been held that the United States may permit or even request a state official to perform a federal service, but there is no constitutional means by which such state official may, without the consent of his State, be compelled to do so."
A leading illustration of an attempt by Congress to confer authority or impose duties upon state courts is to be found in the law and practice upon the subject of naturalization. As to this power it was said in Beavins’ Petition, 33 N. H. 89, 95:

"* * * - It would have been competent and constitutional for the State to have prohibited them [its courts] from acting in that capacity."

Gilroy, Petitioner, 88 Me. 199, 51 Am. St. Rep. 392, 393, says:

"* * * This is a naked power, and imposes no legal obligations on the courts to assume and exercise them, and such exercise is not within their official duty."


In People v. Witzeman, 191 Ill. App. 277, 282, it is said:

"* * * Congress possesses no power to compel a State court to entertain proceedings for the enforcement of Federal statutes such as this."

See also State ex rel. Rushworth v. Judges, 32 Atl. 743, headnote 2; Van Dyne on Naturalization, p. 17; 1 R. C. L. 853; Hampton Co. v. Morris, Ann. Cas. 1912A 815.

The very broadest statement of the rule that can be made under existing decisions is found in Holmgren v. United States, 217 U. S. 509, 517, where it was said:

"* * * Unless prohibited by state legislation, state courts and magistrates may exercise the powers conferred by Congress under such laws."

This, we think, is the situation as it now exists, both as to the courts of this state and as to the district attorneys of this state. It is entirely optional with the district attorney whether he undertakes a prosecution of this character, and it is likewise optional with the courts of this state whether they will entertain jurisdiction of such an action if instituted. There is, of course, no state law upon the subject such as was before the court in Holmgren v. United States, supra, noted at p. 517, which expressly confers authority upon such officials.

You will note that the section specifically provides that the bond to be given in case the premises are occupied with sureties
to be approved by the court shall be "payable to the United States."

You are of course aware that our own statute, sec. 1569—16, found in the so-called Mulberger law, ch. 556, laws of 1919, provides for a similar action for the abatement of a nuisance, to be brought in the name of the state on complaint of any citizen. In this situation, it would seem that ordinarily the public policy of the state, as distinguished from that of the federal government, would be adequately served by causing the proceeding to be instituted in a state court in the name of the state, which is the sovereignty whose laws it is the primary duty of the district attorney to cause to be enforced.

Taxation—Where credits under sec. 1087—57 exceed tax for current year, treasurer cannot pay difference to creditor taxpayer.

But such net credit for excessive tax exactions, paid under protest, may be recovered under sec. 1164, Stats.

April 12, 1920.

TAX COMMISSION.

The treasurer of the town of Oakland (formerly South Range, Douglas county) has inquired of you as to his power and duty and that of the town board in the matter of the refund of taxes in connection with the several reassessments of that town which are involved in State v. Erickson, 174 N. W. 919, and you have passed that inquiry on to this department.

Those reassessments were for the years 1915, 1916, 1917 and 1918 and were disregarded in making the tax rolls for those years. But the inequalities disclosed by the reassessments, following the decision of the supreme court, were equalized by debits and credits in the 1919 tax roll and the taxes computed accordingly. The result was that, owing to overvaluation by the original assessments for those four years, the credits on account thereof upon the 1919 tax roll exceeded, in some cases, the taxes for the last named year. In other words, the tax roll of 1919 shows a net credit in favor of some taxpayers. The treasurer submits these questions upon the foregoing state of facts:

1. Where the total credits of any taxpayer, as those credits
are entered on the 1919 roll, exceed the 1919 tax levied against him, is the treasurer authorized or required to pay or refund the net credit balance?

2. If the treasurer is not authorized or required to make such refund or repayment, in the absence of a direction from the town board to make it, then is the town board authorized or required to allow such taxpayer refund for said net excess credit upon the taxpayer filing a claim for the same?

I am of the opinion that the first question should be answered in the negative. The treasurer has no authority as a tax collector to make any such disbursement of the public moneys. His chief business is to replenish the town treasury, not deplete it, and there is nothing in sec. 1087—57 which furnishes an exception to that rule. The inequalities resulting from irregular original assessments are compensated under the last named section only to the extent that the excessive exactions may be repaid by the giving of credits. The credits on the tax roll are not warrants on the treasury and are not to be treated as such.

Where a taxpayer has paid taxes in excess of those legally levied against him, he is entitled to have the illegal exaction refunded, but to obtain such refund he must bring himself within the provisions of sec. 1164. I understand that the credits entered in the 1919 tax roll equal the debits therein, and in the event that those debits are all collected there is in the town treasury a fund from which the net credits we are considering could be paid. However, the remedy afforded by sec. 1164 to a person who has paid an unlawful tax must be invoked within one year of the payment of the unlawful tax. If a claim is filed within a year for such net credit, the town board is authorized to and should allow the claim, and in case of disallowance, action, if brought within a year, could be maintained for its recovery. While the statute itself is silent on the question of how the payment must have been made, I understand that our supreme court has decided that voluntary payments of unlawful taxes cannot be recovered. Babcock v. Fond du Lac, 58 Wis. 230; A. H. Stange Co. v. Merritt, 134 Wis. 514, 519; State ex rel. Marshall & Ilsley Bank v. Leach, 155 Wis. 499.

Referring to the second question, I am of the opinion that those taxpayers who have a credit balance have a valid claim against the town for a refund, provided those taxpayers bring themselves within the provisions of sec. 1164. To do that they
must have paid taxes under protest and must present their claim therefor or bring their action within one year after payment was made. The illegal exaction was not by or upon the tax roll of 1919. The unlawful taxes paid were exacted pursuant to earlier tax rolls. The lapse of time and the failure to make protest will probably be a bar in most cases.

Indians—Dog Licenses—Ch. 527, Laws 1919, as applicable to Indians on reservations discussed.

April 13, 1920.

George E. O'Connor,
District Attorney,
Eagle River, Wisconsin.

In your letter of March 17 you inquire as to the enforcement of ch. 527, laws of 1919, on the Lac du Flambeau Indian Reservation.

This office has held that Indians maintaining their tribal relations, not allottees and not having received a certificate of competency from the government, are wards of the federal government, to whom the criminal laws of the state have no application.

We have also held that Indians not maintaining a tribal relation, who are allottees, having certificates of competency, and holding complete title to lands, are subject to the laws, both civil and criminal, of this state.

We have also made a distinction in some cases between allottees under the Dawes act and others not so allotted. IV Op. Atty Gen. 731.

Whether ch. 527, laws of 1919, relating to the licensing of dogs, applies to Indians on a reservation depends upon the status of the particular Indian in question.

This law was passed for the purpose of protecting and stimulating the sheep industry in Wisconsin. The administration of the law, however, like many other state laws, will no doubt be complicated and confused on Indian reservations where some of the owners of dogs are not subject to the laws of the state but are wards of the federal government. No doubt many unreasonable discriminations, viewed from the standpoint of the
protection of the sheep industry, will of necessity be made, if this law be strictly enforced.

The law controlling the situation, however, is practically all reviewed or referred to in the opinion above cited. It is impracticable for me to restate the law with reference to each Indian in each possible civil status. Because of the great diversity of conditions among the individuals on the reservation, the most practical way will be to decide each individual case upon its own facts as occasion demands.

Bonds—Bridges and Highways—County road bonds cannot be sold below par. Bid for purchase thereof at par with condition that on acceptance of bid purchaser shall be made allowance out of treasury necessitates rejection of bid.

April 14, 1920.

Albert W. Grady,
District Attorney,
Port Washington, Wisconsin.

By letter of April 12, 1920, you transmitted a copy of the bid of Halsey, Stuart & Co., of Chicago, for $115,000 of Ozaukee county highway bonds, and have asked to be advised of my opinion as to whether or not your county can accept said bid, in view of the law.

The bid is for the par value of the bonds with reservations or conditions, and among them the following:

"This bid is strictly subject to our being made an allowance out of the general funds of the county at the time of the delivery of the bonds to us in the amount of $1,640—Sixteen Hundred & Forty Dollars—representing the expense of obtaining a legal opinion, printing the bonds, etc."

I am quite firmly of the opinion that this condition or stipulation makes it legally impossible for the county board or its committee to accept the bid. The allowance of county funds to the bidder of $1,640 is, in practical and I think in legal effect, a discount on the bonds, however such allowance may be disguised or named. The county would realize on such sale less than par, and a sale for less than par is not allowed. "Such bonds are not to be sold at less than par." See. 1317m—12, sub-
sec. 1. Were the county to receive the face value of the bonds and at the same time pay from any county fund $1,640, the result would be a sale at less than par. It would be tantamount to paying a commission or a bonus. In short, it would be selling the bonds at a discount. It would be a palpable evasion and violation of the statute. I express no opinion as to whether a commission may in any case be allowed by the county on a sale of highway bonds, but it is certain that no commission can be allowed which would result in the county's realizing less than par for the bonds.

The county cannot even pay for a legal opinion rendered to the county board as to the validity of its bonds; much less can it pay the fees of an attorney of a prospective purchaser concerning the legality of the bonds. The district attorney is the legal adviser of the county and his salary is compensation for all services rendered the county and the county board. That officer and his assistant, in case he has one, are the county's lawyers, and when a county has such legal assistance it can hire none other. Prior to the enactment of sec. 750a, Supp. 1906, the county board had no power to hire an assistant to the district attorney. Frederick v. Douglas County, 96 Wis. 411. Sec. 750a followed as a result of the decision in the Frederick case. The county being without power to expend money for a legal opinion rendered to the county, it necessarily follows that it cannot expend public moneys to pay an attorney for rendering an opinion to a bonding house. If bonds cannot be sold at par, the statute intends that they shall not be negotiated at all.

With reference to the expense of printing the bonds, it is to be noted that the statute makes express provision for such printing:

"* * * Bonds are to be in the form approved by the state highway commission, and the blank bonds ready for signing shall be printed under the direction of said commission and shall be furnished to the county at cost and paid for out of the county road and bridge fund."

Sec. 1317m—12, subsec. 1.

The cost of printing cannot be lumped with other items of expense. The printing and the cost thereof is all provided for by statute. The bond purchasers have nothing to do with the printing. That is a matter which is supposed to have been attended to prior to the sale of the bonds or the offer of sale.
Sec. 4225a is very significant in this connection. It points the county board where it shall go for an opinion as to the legality of a bond issue in the event that any opinion in addition to that of the district attorney is desired. That section makes the attorney general the bond commissioner of the state. His opinion can be had for the asking and his opinion has one important merit which no other opinion, short of a court decision, can have. This section furnishes a short statute of limitation: thirty days after the state bond commissioner has indorsed his approval of a bond issue on any public bond, and certified to its legality, such opinion becomes a binding decision, the equivalent of a judgment of a court of competent jurisdiction, in favor of the validity of the bond, as to all matters except the five per cent limitation of indebtedness.

Thus you will see that the statutes have furnished abundant legal services to the counties in the matter of bond issues. If a county can allow to a bond purchaser and pay out of any public funds a sum equal to one per cent of the par value of bonds sold, it logically follows that it can allow ten per cent, or fifty per cent, thereof. If your county can make the allowance of $1,640 stipulated for, it could make an allowance of $16,400. Conceding that power would be to concede that the county may nullify the statute which prohibits a sale at less than par.

It may be well to state here the meaning of the word "par." The word "par" as used in this statute and generally, with reference to bonds, means the face value of the instrument and includes the accrued interest, if any, as well as the principal. In order to be sold at par, in case the sale is later than the date of the bond, the price must include the accrued interest. Village of Fort Edward v. Fish, 50 N. E. 973; Diefenderfer v. State, 80 Pac. 667; Smith v. State ex rel. McNeil, 56 So. 179; Evans v. Tillman, 17 S. E. 49.

Village of Fort Edward v. Fish, supra, was a case where the public officials agreed to sell the defendant fifty bonds of $1,000 each and accrued interest amounting to $444.44, for $50,000. The statute provided that the bonds might not be sold at less than par. The court held that the par or face value of those bonds included accrued interest, and amounted to $50,444.44, whereas the contract price was but $50,000. The executory contract,
therefore, provided for a sale of bonds 'at less than the par
value thereof,' in violation of the statute, and was absolutely
void, because it was expressly prohibited by law. Neither party
was bound thereby, and it could not be the subject of a valid
claim by either against the other" (p. 975).

Agriculture—Babcock Test—In prosecution under sec. 1494ac
for falsely manipulating, overreading, underreading or deter-
mining value of cream by Babcock test or other contrivance, in-
tent is not necessary element of offense.

April 14, 1920.

J. R. Pfieffner,
District Attorney,
Stevens Point, Wisconsin.

I have your letter of March 20, regarding my construction
of sec. 1494ac, relating to the wrongful use of the Babcock test.
The purpose of this law is to protect that branch of the dairy
industry wherein the quality and value of the dairy product is
measured by the use of the Babcock testing machine and other
testing contrivances. The law is seeking to prevent discrimi-
ination among patrons, and unjust and unfair competition based
upon false determinations of butter fat value in dairy prod-
ucts and such other abuses as can be corrected by a proper, fair,
and honest use of the Babcock testing machine. The law ren-
ders unlawful four distinct acts:
(1) Falsely manipulating the Babcock or other testing con-
trivance;
(2) Underreading the Babcock or other testing contrivance;
(3) Overreading the Babcock or other testing contrivance;
(4) Making any false determination by the Babcock or other
testing contrivance.

From my examination of the law, I conclude that intent is
not an element of any one of the offenses set out in sec. 1494ac,
for the following reasons:
(1) The words "falsely" and "false" appear in the section.
The word "false" has two distinct and well recognized mean-
ings. It signifies, first, "intentionally" or "knowingly" or
"negligently" untrue; and second, untrue by mistake, acci-
dent, or honesty after the exercise of reasonable care. U. S. v.
99 Diamonds, 139 Fed. 961, 2 L. R. A. (N. S.) 185, 2 Words & Phrases, Second Series, 442. The words "false" and "falsely" appearing in this section should properly be given the second of the two meanings above stated, to wit: "untrue" without the element of intent.

(2) If the legislature desired to make intent an element of the offense, some word, such as "knowingly" or "intentionally," would have been used in the section. No such language appearing, it would argue that it was not the legislative purpose to insert intent as an element in the offenses.

(3) The statute reads:

"* * * Falsely manipulate or underread or overread or make any false determination."

If the legislature intended the word "falsely" to modify "underread" and "overread," they would have constructed it as follows: "falsely manipulate, underread, overread, or determine by the Babcock test," etc. The conjunction "or," preceding both "underread" and "overread," without the word "falsely," indicates very clearly that "underread" and "overread" are complete in themselves—that is to say, an underreading or an overreading, whether falsely, fraudulently, or by a mistake, honestly, is immaterial in this statute. The offense is complete if there is an "overreading" or an "underreading."

Now, it is plain that the words "manipulate" and "determination" used in the section, which enter into the first and fourth offenses contained in the section, do not of themselves imply any incorrectness. Therefore, each of these words is preceded by the word "false" or "falsely." the words "underread" and "overread" each in and of itself implies incorrectness. Therefore, the words "false" or "falsely" do not appear as modifying either one of these—all of which argues very strongly that the legislature did not mean to make intent an element in any of the offenses, and the use of the words "false" or "falsely" in connection with the words "manipulate" and "determination" merely add to the first and fourth offenses the element contained in the second and third, to wit, incorrectness, and not intentional wrongdoing.

(4) The statute provides:

"It shall be unlawful for any person, by himself, his servant or agent * * * to falsely manipulate * * *"
The fact that the offense can be committed by an agent, thus rendering the principal liable, indicates very clearly that the legislature did not mean to include intent as an element in the offense.

You speak of there being some difficulty in convincing a court or jury that there could be an intentional false overreading of the test of a patron's cream. This can be met by the situation which prevails in many communities in this state. Where a patron sends some of his cream to one place and a part to another, it is quite frequently the practice for the unscrupulous concern to overtest the patron's cream, and if necessary compensate it by underweighing, thus attempting to give the patron the impression that he is getting a better test at one competitive point than another.

The practice also prevails, among some unscrupulous buyers, of overreading and then putting in excessive salt and moisture. This also may be a temporary makeshift for the purpose of making a better showing with certain patrons. In fact, I am informed that defendant has overread for the purpose of making a showing for competition. There have been several convictions of overreading the Babcock test, but none of them has gone to the supreme court.

I think your contention is correct, that if for any reason or by any cause whatever an overreading or underreading or false determination is ultimately made, even in the absence of any wrongful intent, it constitutes an offense under the statute.

Bridges and Highways—Bridge on state trunk highway system when destroyed by flood to be restored pursuant to sub-
sec. 8, sec. 1317.
Municipality in which bridge is situated not obliged to re-
build it.
Sec. 1319 not available to cities or villages; they are liable for other classes of bridge tax.

April 15, 1920.

Orrin H. Larrabee,
District Attorney,
Chippewa Falls, Wisconsin.

You say in a letter dated April 13, 1920, that a bridge wholly within the village of Cornell was wrecked by the flood waters
of the Chippewa River on March 26, 1920. This village was incorporated out of territory of the towns of Holcombe and Cleveland, and the bridge was built prior thereto, at the expense of said towns and the county, under sec. 1319. When constructed, the bridge connected the two towns.

This bridge is part of a highway which was incorporated into the state trunk highway system, under the authority of sec. 1313, subsec. 16 (ch. 313, laws of 1919). Such incorporation was effected during the year 1919 and the statutes provide that this highway

"shall be maintained, marked, constructed, and administered commencing April 1, 1920, in the same manner as is the portion of said system first laid out." Sec. 1313, subsec. 16, par. (a).

This bridge must be rebuilt. You ask to be advised under what authority and at whose expense the work is to be done.

It is my opinion that this work must be done pursuant to the provisions of the federal aid law and as part of the emergency construction on the state trunk highway system. The fact that the flood occurred four days prior to the time when the obligation of maintenance by the county came into active existence is immaterial. The work is construction rather than maintenance, and this highway was part of the trunk system when the bridge was destroyed. It had been incorporated by the highway commission into that system prior to the date of destruction, although the county’s obligation to maintain this highway began on April 1. The matter must now be dealt with as though the highway formed part of the original state trunk highway system.

Subsec. 8, sec. 1317 makes provision for emergencies like this. The bridge is to be restored according to the provisions of that subsection and other highway statutes not in conflict with said subsection.

This bridge is on the trunk system and has been damaged by flood and requires immediate reconstruction with the least possible delay. If funds are not available they may be borrowed by the committee, up to the specified limit (b), and if the amount that can be borrowed, with what is on hand, is not sufficient, the committee may call a meeting of the county board (c). The state must bear forty per cent of the cost, but not in excess of one-half of the total allowed by the state to the county next
year, and the county may assess upon the village a portion of
the cost, not exceeding forty per cent of the county's share or
contribution (d). Subsec. 8, sec. 1317, Stats.

The county is required by par. (a), subsec. 1, sec. 1317m—5,
to expend

"fifty per cent of the money allotted to the county under the
provisions of section 1317m—8, * * * together with the
necessary county funds and the local funds, if any are assessed
by the county board, in construction on the state trunk highway
system."

The state aid here referred to is available for this work unless
it has been otherwise appropriated or expended. The restora-
tion of this bridge is "construction on the state trunk highway
system."

The foregoing, I believe, substantially answers your main
question. With reference to other questions submitted, you are
advised that exemption from a county bridge tax is found in
sec. 1319, and this exemption applies only to bridges constructed
under that section. County taxes which result from the erection
of bridges under the state aid or federal aid acts follow the
general rule and are to be levied on all the taxable property of
the county. The expense of the restoration of this bridge, under
the statutes before pointed out, so far as the county is con-
cerned, is to be borne by the villages and cities as well as by
the towns in the county. Unless the bridge is reconstructed
under the provisions of sec. 1319, the county tax for any con-
tribution by the county will be spread over the entire county,
but this bridge cannot be built under that section, for the very
plain reason that said section is available only to towns. Cities
and villages may not avail themselves of its provisions.

The reconstruction of this bridge will not have the effect of
rendering the village of Cornell liable to taxation to aid in the
construction of bridges in the various towns, pursuant to sec.
1319. It is true that this particular bridge will have been con-
structed with county and state aid and will be a bridge within
the village, which the village is not required to maintain, but
this bridge will be an exception to the general rule, which will
still remain to the effect that under its charter the village must
maintain its streets and bridges. Subch. XXI, ch. 645b, Stats.

Answering your secondary questions more directly, I am of
the opinion that (1) the village of Cornell cannot be required
to build this bridge; (2) the county may be required to aid in its construction; (3) and the state is also required to aid in such construction.

Agriculture—Commerce—Commercial Fertilizers—Interstate Commerce—State may not levy license on interstate shipment of fertilizer; sec. 1494c merely provides for inspection fee.

April 16, 1920.

DEPARTMENT OF AGRICULTURE.

Attention Mr. W. H. Stroud.

Under a long line of decisions going back almost to the beginning of the last century, the supreme court of the United States has laid down the rule that no state may place any burden upon interstate commerce. So far as any state sought to exact a license fee for the sale of fertilizers, or sought to levy a certain tax per ton upon all fertilizers sold, such license fee or tax would be invalid. This, however, does not prevent the charge of a reasonable fee for inspection of articles of commerce by the separate states pursuant to the police power. This rule has been applied specifically to the subject of fertilizers in the case of Patapsco Co. v. N. Carolina, 171 U. S. 345.

In Standard Oil Co. v. Graves, 249 U. S. 389, 39 Sup. Ct. 320, decided April 14, 1919, the court held the oil inspection law of the state of Washington void, because

"the inspection fees which must be paid before the importer can sell being, as shown by the revenue yielded, grossly in excess of cost of inspection" (Syllabus 320),

and a long list of cases are cited to sustain this conclusion.

See also Wofford Oil Co. v. Smith, 263 Fed. 396.

The law as to which you make inquiry was first enacted as ch. 87, laws of 1895. At that time it nowhere provided for any fee for the analysis of fertilizers. Sec. 4 of the act provided for payment annually

"for each brand of fertilizer sold within the state a fee of twenty-five dollars, and upon fulfilling the requirements laid upon him by this act, shall for each brand receive * * * a certificate of compliance with this act, which certificate shall be a license permitting the sale of the same within the state."
We find, however, that sec. 2 of the act provided:

"* * * Additional brands may be offered for sale during the year; provided, samples and affidavits are filed as above directed at least one month before such brands of fertilizers are offered for sale, in which case an analysis fee of double the usual amount must be paid."

Except for transferring the administration of the law from the agricultural experiment station to the department of agriculture, these provisions are continued to the present time. No analysis fee is anywhere provided for, and we must assume, therefore, that the fee of $25, which must be paid preliminary to the issuance of a license, is intended as the analysis fee referred to. This conclusion is confirmed by inquiry from chemists, who agree that $25 would be a reasonable fee to charge for the analysis in question. The law, therefore, we think, might be sustained as a legitimate exercise of the police power, upon the theory that it provided merely for a reasonable fee for inspection or analysis.

The question suggests itself, however, as to whether the law was intended to have any application to interstate commerce at all, as we find sec. 1494c specifically restricted to "'every person who shall, in this state, sell or expose for sale," etc. Sec. 1494d, subsec. 1, refers to "'each brand thereof sold within this state.'" Again, subsec. 2 thereof provides for the payment of fee before it is "'offered for sale or distribution in the state of Wisconsin.'"

The supreme court of North Carolina, in Stokes v. Department of Agriculture, 106 N. C. 439, 442, said:

"* * * It must be observed that the inhibition of this provision is clearly expressed in plain terms, and extends only to the sale of such fertilizers and the offering them for sale in this state, without first having obtained a license so to do as prescribed. It does not extend to the use of them in this State, or the purchase of them in another State to be used for fertilizing purposes by the purchaser himself in this State. The terms employed in the section of the statute recited above and in every section of the chapter, pertinent of which it is a part, unmistakably imply and refer to the sale of such fertilizer, and in the offering of them for sale in this State. Nothing appears by terms or by reasonable implication in the statute that at all forbids the mere use of them, or the purchase of them in another State to be used by the purchaser himself."
In answer to your second question, inasmuch as a state by no possibility possesses the power of collecting tonnage taxes or license fees as such, no action of congress would take away a power which they never possessed. So far as the validity of inspection fees, or fees for analysis such as we think are contemplated by this law are concerned, it is our judgment that the mere fact that congress had provided for the inspection of fertilizers would not prevent the continuance of inspection thereof by the state, subject always to the limitation that the fees or charges must be reasonable in amount and not in excess of what is actually necessary to procure efficient inspection. So far as the regulation of sales wholly within the state is concerned, the state, under the authority of Weigle v. Curtice Bros. Co., 248 U. S. 285, and many decisions preceding, of course may continue to

"exercise its independent judgment and prohibit what Congress did not see fit to forbid,"

in the matter of dealing with the constituents and make-up of fertilizers to be sold within the state.

Counts—Public Officers—Assessor of Incomes—County has no authority to pay for office equipment of assessor of incomes.

E. S. Jedney,
District Attorney,
Black River Falls, Wisconsin.

I have your favor of April 8, in which you inquire if the assessor of incomes may be supplied at county expense with the necessary office equipment, consisting of adding machines, filing cases, etc., amounting about to $600.

Sec. 1087m—9, to which you refer, expressly provides as follows:

"The salaries of the assessors of incomes and their deputies and assistants shall be fixed by the state tax commission, but such salaries, together with the expenses of such assessors and their deputies and assistants, shall not in any year exceed in amount five cents for every thousand dollars of the valuation of all property as fixed by the tax commission in the state assessment of the preceding year. The assessor shall be furnished all
necessary printing, stationery, postage and office equipment, and he and his deputies shall be entitled to receive their actual necessary expenses incurred in the performance of their duties. The salaries of the assessor and his assistants, and all such expenditures shall be audited and paid out of the state treasury in the same manner as other similar salaries and state expenses are audited and paid.'

This clearly provides that the salaries and all expenditures are paid out of the state treasury, and by subsec. 2 of said section, the only duty or power the county has is to provide

"at the expense of the county a suitable room or rooms in the courthouse or other convenient building at the county seat for the use of such assessor."

In my opinion the provisions of this section are so clear that I do not believe there can be any doubt about the construction you have placed upon the section, and I concur in your construction.

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Public Printing—Newspapers—Taxation—Tax Sales—Eligibility of Antigo Herald to publish delinquent tax sale notice discussed.

April 16, 1920.

A. N. Whiting,
District Attorney,
Antigo, Wisconsin.

On December 24, 1919, VIII Op. Atty. Gen, 869, and January 6, 1920,* you were furnished opinions relative to the eligibility of the Antigo Herald to publish the delinquent tax sale notice. In the second opinion this was said:

"It is apparent that many facts not before me enter into the determination of your question" (p. 13).

I am now furnished with a statement by Mr. Burr W. Jones of Madison, in behalf of the editor and manager of the Antigo Herald, and am requested to render you a supplemental opinion, based upon this statement of facts. It seems to me that this request should be acceded to.

The following documents were handed to me by Mr. Jones:

*Page 11 of this volume.

13—A. G.
1. A copy of a letter dated December 3, 1919, of the third assistant postmaster general to the editor of the Antigo Herald, relative to mailing privileges.

2. A copy of the contract of sale of the Antigo Herold by Ed Goebel to W. C. Brawley.

3. A letter dated April 8, 1920, from attorney John W. Latta of Antigo to Mr. Jones, at the foot of which letter occurs the following, over the signatures of said Goebel and William C. Brawley:

"We the undersigned have read the above letter to Mr. Jones, that the same is true to our best knowledge and belief."

4. A copy of the first issue of the Antigo Herald "formerly printed in the German language."

It appears from these papers:

1. That the sale by Goebel to Brawley was of

"all the right, title and interest in and to the Antigo Herold, a weekly newspaper printed in the city of Antigo, Langlade County, Wisconsin, together with the nameplate and all the legal rights pertaining thereto."

2. That the subscription list of the vendor was furnished to the purchaser and is now used by him as part of the mailing list of the Antigo Herald.

3. That this newspaper has been published many years and that there has been no interruption in the regular weekly publication thereof.

4. That in the issue of December 1, 1919, the name of this newspaper appeared changed from Herold to Herald, and the language to English, and said issue is designated "Vol. XXXII No. 15;" and has ever since continued to be issued weekly as so changed, with current number and volume designations.

5. That the mailing privilege of the Herold abides with the Herald; and that the Antigo Banner, Goebel's new paper, is mailed under a new and separate contract with the United States, and that his new paper began with "No. 1, Vol. 1."

6. That all persons who, at the date of the transfer under said bill of sale, had prepaid unexpired subscriptions to the Herold have been and are being regularly furnished and mailed weekly copies of the Herald and will continue to receive the last named newspaper without additional cost or charge to them until their said subscriptions shall have expired.
7. That the bill of sale was intended to and did cover the type and machinery then being used in the printing of the Antigo Herald.

8. That the Antigo Herald has a present bona fide circulation of about fifteen hundred copies.

You are advised that it is my opinion that the statement of facts as submitted to me and herein recited, if true, establishes the conclusion that the Antigo Herald is eligible as a newspaper to publish the delinquent tax sale notice of your county. In other words it is a newspaper that has

"been regularly and continuously published in such county once in each calendar week for at least two years immediately before the date of such notice." Sec. 1130, Stats.

Of course, it is understood by all that in this opinion, as in all others, I do not pass upon the truth or falsity of any statement. The facts on which the opinion is based are assumed to be true. The opinion goes merely as to the law or the legal effect of a given or assumed statement of facts. No finding of facts is intended or proper and no intimation is made as to where the truth lies.

Agriculture—Standard Grades of Apples—Appropriations and Expenditures—Public Officers—Division of markets may not make inspections until expiration of six months after regulations have been promulgated.

Having established no standards, it may not pay for expenses incurred in enforcing provisions of law.

April 17, 1920.

Honorable Edward Nordman, Director,
Division of Markets.

Sec. 1668m, Stats. 1917, relating to standard grades for apples, contains this provision, in subsec. 11:

"The enforcement of the provisions of this section shall be vested in the commissioner of agriculture, and his officers, employees and agents are authorized to enter upon the premises of any person within this state for the purpose of inspecting packages of apples and securing evidence of violation of this section."

Sec. 20.60, Stats. 1917, makes an appropriation of $50,000 for the administration of the department of agriculture. It is provided:
Of this there is allotted:

(b) To the agents, deputies, engineers, veterinarians, entomologists, plant pathologists, accountants, inspectors, clerks, stenographers, and other employees appointed by the commissioner of agriculture such compensation as shall be fixed by him with the approval of the governor.

Construing these two provisions of the statutes together leads to the conclusion that the administration of the apple grading law was committed to the commissioner of agriculture, and that an appropriation was made therefor.

Ch. 670, laws of 1919, which created the division of markets, confers upon the director power to

"promulgate standards for the grade and other classification of * * * farm products."

Sec. 1495—15, subsec. 1, however, specifically provides:

"* * * No standard established or requirements for marketing prescribed under this section shall become effective until the expiration of six months after it shall have been promulgated."

The next sentence reads:

"* * * The standard grades provided by law for apples shall continue to be and remain standard grades for that product until other standard grades therefor are established as provided in this section."

Having thus provided definitely that standards fixed by the department should not become effective until the expiration of six months, sec. 1495—23 provides:

"The director may make or cause to be made inspections and classifications of farm products in accordance with standards which have become effective under the provisions of sections 1495—1 to 1495—37, inclusive."

Having thus been careful to define the functions of the division of markets, it becomes apparent that until after the expiration of six months from the time that any standard is established by the division of markets, such division is wholly without authority or jurisdiction to cause inspections or classifications to be made.

It is very clear that the preexisting standard grades for apples do not become effective under the provisions of secs. 1495—1 to
1495—31, inclusive. Those sections do not purport to make them effective; they merely provide that they

"shall continue to be and remain standard grades * * * until other standard grades therefor are established as provided in this section,"

i.e., become effective under the provisions of this section.

We are advised that no steps have been taken by the division of markets relative to fixing standards or grades for apples. Consequently, it follows that such division now is and during the months of August, September, and October was wholly without power and authority in the premises. Its appropriation is specified:

"Division of Markets.—On July 1, 1919, fifty thousand dollars; on July 1, 1920, and annually thereafter, sixty thousand dollars, for carrying out the provisions of sections 1495—1 to 1495—37, inclusive." Sec. 20.60, subd. (14).

It follows, therefore, that no appropriation has been made to the division of markets for the discharge of this function; that the same, until standards are fixed by the division of markets, will continue to be a function of the commissioner of agriculture, for the discharge of which an appropriation has been made to him, as already noted.

The answer to your query, therefore, is that the division of markets may not pay for expenses incurred by the department of agriculture in enforcing the provisions of the apple grading law (sec. 1668m) during August, September, and October, 1919.

Automobiles—Tractors not required to be licensed.

April 17, 1920.

Lucien T. Reid,
District Attorney,
La Crosse, Wisconsin.

I am in receipt of your favor of April 14, enclosing a copy of a letter written by the La Crosse Tractor Company April 1, to the secretary of state, and I also have a letter dated April 9 from the city attorney of the city of La Crosse with respect to the same matter.
The question really is whether or not the tractor described in the correspondence is a motor vehicle within the terms of sec. 1636—47.

Before discussing that question, permit me to suggest that secs. 1636—57a to 1636—57n, inclusive, Stats., regulate motor trucks, tractors, trailers and wagons and you will find the provisions therein in ch. 493, laws of 1919, and therefore I will not go into the details thereof.

Sec. 1636—47, subsec. 1, refers to

"automobile, motorcycle or other similar motor vehicle" which is contemplated to be "operated, ridden or driven along or upon any public highway of the state."

Subsec. 5, par. (a), appears to classify motor vehicles quite differently than the classifications contained in subsec. 1, as said subsec. 5 refers to "motor truck," "motor delivery wagon" and "passenger automobile bus." If the registration of the tractor described in the correspondence comes within any of the classifications with respect to the fee for a license, then it must be that the fee provided for in sec. 5 applies.

The question is not entirely free from doubt. When the legislature first enacted sec. 1636—47 it was well known to the legislature that there were certain self-propelled vehicles traveling the highways, and among them were steam engines or steam tractors and possibly gas tractors. At least gas tractors were either then used upon the highways or soon thereafter. It certainly was not the intent of the legislature to require licenses for tractors used upon the highways and which might be used for drawing wagons or farm machinery. That is the ordinary farm tractor, and there has been no attempt on the part of the administrative officers of the state to require licenses for such tractors. I understand that it has been the practice to advise that licenses for such tractors are not authorized by the statutes and I am of the opinion that such practice has been correct.

Certainly a tractor is not a "similar motor vehicle" to an automobile or motorcycle as the terms are generally understood.

A "motor truck" "motor delivery wagon," and "passenger automobile bus" are distinctive self-propelled vehicles well known to members of the legislature, and had the legislature intended to include tractors they would have done so and there-
fore, it having been the practice not to require licenses for tractors and that practice having been followed for many years, under the rule of practical construction it must be said at least that tractors are not included within the provisions of sec. 1636—47, Stats.

However, the tractor referred to in the correspondence appears to be of a different and quite original design. The correspondence does not advise whether or not it is a two-, three- or four-wheel vehicle.

Assuming that the tractor referred to is a two-wheel vehicle equipped with solid rubber tires permitting to be attached thereto a wagon, bus, trailer or train of wagons, may it not then be said to be a "motor truck"? I am inclined to the opinion that if the said tractor is of the design above assumed and is used substantially exclusively upon the highways so that it, together with the attached vehicle, constitutes a motor vehicle similar in design and for similar purposes to those of a motor truck, then such tractor is included within the provisions of subsec. 5 of said section. This is drawing a very fine distinction and may be entirely incorrect.

My conclusion therefore is that if the tractors to which reference is made in the correspondence are adapted for the usual farm purposes to which machinery may be attached and for that matter wagons or trailers, then such tractor is not within the terms of the provisions of sec. 1636—47.

The question is too important to the agricultural and manufacturing interests to broaden the meaning of the motor vehicles set forth in said section by construction so as to include tractors and even the tractors described in the correspondence as coming within the terms of said section.

The automobile regulation laws contain penal provisions and therefore construction should limit rather than broaden the scope thereof under the rules of statutory construction.

It is therefore my opinion that, until the legislature otherwise acts, the present automobile statutes do not include tractors within the terms thereof and I am very doubtful even if such laws include the tractors described in the correspondence.
May a going concern in Wisconsin increase its capital stock and take stock subscriptions from its own stockholders for such additional stock and not be subject to the provisions of ch. 674, laws of 1919, if the expenses including commission on sale of such securities incident to such increase of stock and the sale thereof do not exceed $2,000?

This question is answered in the negative. This department bases its conclusion upon the reasoning set forth in an opinion rendered by the railroad commission of Wisconsin under date of January 29, 1920.

The commission therein state that they have interpreted subd. (o), subsec. 1, sec. 1753—49, to refer only to corporations organized since August 1, 1919, the date as of which the new securities law took effect, the basis for their interpretation being that the exemption specified in that subdivision, to wit,

"The original sale of its securities by any Wisconsin corporation, the organization expenses of which including commissions on the sale of such securities do not exceed two thousand dollars,"

is made to depend upon the amount of organization expense. It could hardly have been the intention of the legislature that the commission was to go into the matter of the organization expenses of a corporation organized many years ago and determine whether such expenses exceed $2,000. Moreover, the question of whether such expenses exceeded $2,000 or not would have little or no bearing on the value of the securities today. Under the ordinary rules of construction, an interpretation should be placed upon the section which makes it reasonable rather than unreasonable, and limited to new corporations the provision would be reasonable.
Furthermore, the act specifically exempts (subd. [i]) the
distribution by a corporation of increased capital stock as a
stock dividend paid out of surplus.

"* * * If every issue or sale of stock in which the selling
expense did not exceed $2,000 was exempt, then there would be no
reason for subdivision (i) for manifestly there could be no selling
expense in the distribution of stock as a stock dividend. The
legislature must have regarded subdivision (o) as not sufficient
to exempt stock dividends, otherwise they would have not in-
cluded the specific provision.

"There is reason also for making a distinction between the
sale of the stock of a new corporation and the sale of the un-
issued stock or the increased capital stock of an old corporation.
An older corporation has a list of stockholders, and even though
it be a fraudulent corporation it is much easier to dispose of its
stock with little or no expenditure of money than it is in selling
the stock of a new corporation. It has only to write to its own
stockholders, giving glowing accounts of the tremendous success
the corporation is making, and such stockholders are pretty likely
to be easy victims. It would be practically impossible for a new
corporation to float its stock in this manner."

The foregoing suggestions of the commission appeal to this
department as a sound statement of the law and the considera-
tions of public policy that apply, and the same are hereby ex-
pressly adopted as the opinion of this department.

Contracts—National Guard—Leases—Public Officers—Armory
Board—Quartermaster General—Armory board and state quar-
tertermaster general have no power to enter into lease for quar-
ters to be occupied by local company of Wisconsin national
guard and no power to take assignment and pay rent under ex-
sting lease entered into for such quarters.

April 21, 1920.

HONORABLE ORLANDO HOLWAY,
Adjutant General.

A company of the Wisconsin national guard in possession of
a lease entered into to provide it with armory quarters was
mustered into the federal service. During its absence, the lease
has been kept alive in the name of the original organization or
the custodian of its property. It is now proposed to create a
new organization located in the same city, but pursuant to what
your department conceives to be the more business-like policy
of having all leases for armories executed in the name of the
quartermaster general or armory board, it is desired to have the
existing lease transferred to the quartermaster general. An
opinion is desired as to the legality of such arrangement.

The question thus presented is purely one of legislative policy
as to the scope of powers conferred upon the quartermaster gen-
eral or armory board, and not at all one of administrative policy.
You are advised that it is the opinion of this department that
neither the armory board nor the quartermaster general has
power to enter directly into a lease to provide quarters for a
local company of the national guard. The considerations which
lead to this conclusion may be stated as follows:

In cases involving the expenditure of public funds, appropria-
tion is necessarily the measure of official power. As the su-
preme court of this state said in the case of *State v. Mills*, 55
Wis. 229, 245:

"It cannot be said too emphatically, or repeated too often,
that the various boards of trustees and managers of the benevo-
lent and penal institutions of the state have no power to con-
tract debts beyond the appropriations made by the legislature
for the support and operation of their respective institutions."

Bearing this rule in mind, we find that sec. 21.615, Stats.,
which specifies the powers of the armory board, provides:

"(2) The armory board is authorized to construct and ac-
quire armories and to spend therefor each year not exceeding
fifteen per centum of the sum appropriated for said year for the
Wisconsin national guard, * * *.""

The appropriation statute, sec. 20.03, subsec. (1), par. (m),
Stats., reads:

"For the purchase and construction of armories, subject to
the approval of the armory board, as provided by law, not to
exceed fifteen per centum of the total sum annually appropriated
for the uses and purposes of the Wisconsin national guard."

No appropriation is therefore made to the armory board for the
purpose of leasing quarters or paying rentals therefor.

The evidence of legislative intent, however, is not of a purely
negative character. Sec. 20.03, subsec. 1, par (i), makes specific
provision for allotments to various types of military companies, of which it is said specifically:

"* * * The said allotments to be full compensation for armory rent and all other expenses not otherwise expressly provided for by statutes."

It is again provided that such allotments shall not be paid "unless each company, troop, battery or sanitary detachment shall provide at its own expense a suitable room or building for an armory,

thus clearly indicating the legislative policy of making direct appropriation for the payment of rentals to companies which have made leases at their "own expense."

Sec. 21.615 recognizes and sanctions this as a continuing policy. Subsec. (7) provides, in case armories have been constructed locally:

"No rental allowance shall be made or paid from state funds on account of a company or companies occupying any such armory * * * ."

It is apparent, therefore, that the legislature has seen fit to centralize authority as to the matter of the purchase and construction of armories, but has left the matter of acquiring leasehold interests to the separate companies of the national guard, which by sec. 21.42 are expressly constituted "a corporate body" possessing

"all the powers necessary and convenient to accomplish the objects and perform the duties prescribed by law."

Subsec. (3) grants each such company power to "take by purchase devise, gift, or otherwise * * * any property real or personal."

The local company, therefore, has power to lease quarters for armory purposes. The armory board and the quartermaster general have not.
Opinions of the Attorney-General

Contracts—Normal Schools—Public Officers—Board of normal regents may ratify acts of president of normal school and of president of board in providing for course of instruction extending beyond regular school session and in employing teachers therefor.

April 21, 1920.

Honorable William Kittle, Secretary,

Board of Regents of Normal Schools.

I quote the following from your letter of March 16, 1920:

"Resolved, That the sum of $30 be paid M— for instruction given to a class in engineering mathematics August 4-16, 1919, same to be paid from the unexpended balance in account 66; that the sum of $27.50 be paid to R— for instruction given to a class in English, August 4-16, 1919, same to be paid from unexpended balance in account 66; that the sum of $57 be paid to G— for instruction given to a class in chemistry, August 2-15, 1919, same to be paid from the unexpended balance in account 66; that the sum of $13.75 be paid to S— for instruction given to a class in French, June 6-20, 1919, same to be paid from account 631; that the sum of $60 be paid to T— for instruction given to a class in mechanical drawing and co-ordination work, July 31, August 16, 1919, same to be paid from account 631, Milwaukee normal school. Approved by the educational committee if found legal."

From said letter and from correspondence thereto attached and submitted to me, the following facts appear, which caused the board of regents to adopt the resolution above quoted:

In arranging a course for engineering students at the Milwaukee state normal school it was urgently planned to give them instruction during a school year of forty-eight weeks; that the funds available for that purpose were not adequate to permit this to be done; that some twenty engineering students entered upon the course at the beginning of the school year of 1918–1919; that in order to complete the year’s work it was necessary that they should have instruction for a time after the close of the regular school year. The students continued their studies during the summer school, which closed July 31, 1919. That the summer school course would not be sufficient became apparent to C. G. Pearse, the president of the school, and on July 28, 1919, he wrote a letter to Honorable Clough Gates, the president of the board of normal regents, stating the situation, from which I quote the following:
"I need your approval of the employment of teachers for 11½ days to fill out the year for something over 20 engineers. Whatever we do eventually with this work or course, these boys, most of whom were in the S. A. T. C., and this year suffer from that handicap, should be enabled to fill out their year's work. This will require 11½ days of service from 4 teachers. Mr. G—½ time, $54.65; Mr. M—¼ time, $28.75; Mrs. A—¼ time, $17.25; Mr. T—¼ time, $30.17. Total—$130.82."

On July 29, President Pearse addressed another letter to Mr. Clough Gates, president of the board of regents, referring to this work, and stating that there was enough money in the budget to cover the estimated expense.

On July 30, 1919, Mr. Gates telegraphed President Pearse as follows: "Go ahead with work outlined, if not exceeding funds."

In a letter dated August 2, 1919, President Pearse wrote to Mr. Gates, in part, as follows:

"Since writing you with reference to the continuance of the services of four instructors for a period of 11½ days to complete work now being done by our engineering students, Mrs. A—has decided that she does not wish to go on with the work, and it has been necessary to ask Mr. R—to take it; this he is willing to do. The compensation for Mr. R—will be $31.63 instead of $17.85, which was to be paid to Mrs. A—. This being due to the difference in their salary. This will increase the total amount by the sum of $14.38."

The summer school at the Milwaukee normal school ended on July 31, 1919. Account 66 in the normal school accounts is for summer schools. Account 631 in the normal school accounts is the regular operating account.

All the services mentioned in the resolution, except the claim of S—, were rendered from July 31 to August 16, 1919. The claims or indebtedness incurred by said services were not authorized by the board of regents of normal schools at any time. The only recognition of these claims is in the resolution above quoted. The auditing committee of the board of regents of normal schools declined to audit the claims and accounts of these teachers when they were presented for audit on December 18, 1919, in view of an opinion rendered by this department, addressed to you, and dated July 30, 1919, VIII Op. Atty. Gen. 575.
It will be noted that the account and claim of S— is for services rendered from June 6 to June 20, 1919, a period which, as I understand it, was included in her contract as a teacher, and the pay rolls show that she received her full salary for that month.

Ch. 37, Stats., relates to normal schools. According to sec. 37.02, the board of regents and their successors in office constitute a body corporate, and are given certain general powers and are limited in certain powers. Among other limitations of powers, I quote the following:

"* * * Nor shall they contract indebtedness nor incur liabilities to exceed, at any time, in the aggregate, the amount of money which, under the provisions of law, shall then be at their disposal in the hands of the state treasurer; nor shall said board ever reduce the amount so at their disposal below the aggregate amount of their indebtedness or liability, except in payment of such indebtedness or liability."

By sec. 37.11 the said board is given the government and control of all normal schools and has conferred upon it, among others, the following powers:

"(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.

"* * *

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

"(6) To cause notice to be given of the opening of such schools and the several terms thereof."

Secs. 20.36 to 20.38, inclusive, Stats., cover the appropriations made by the legislature for normal schools. Sec. 20.38, subsec. (5), relates particularly to the Milwaukee normal school. Sec. 20.38, subsec. (13), reads in part as follows:

"Summer schools for teachers shall be limited to six weeks in each year. For all fiscal purposes, the entire summer session shall be considered as occurring in the fiscal year in which the major part thereof occurs, and all expenditures therefor shall be charged to the appropriation for such fiscal year; * * *

In an opinion rendered to you by this department on July 30, 1919, I had occasion to construe sec. 37.11, Stats. 1917. This is the opinion referred to in your letter. In this opinion I held,
among other things, that the board of regents alone has the power to fix the salaries of those appointed and employed in connection with said schools; that said power cannot be delegated to a standing committee or to a special committee, or to a member of the board; that when it comes to the actual fixing of a salary, it is a duty and a prerogative that the board cannot delegate; that it is in the nature of a legislative power and must be performed by the body to whom it has been given.

In this opinion I also called attention to the provisions of art. IV, sec. 26, Const., which prohibits the legislature from granting any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into, and held that teachers and employees of normal schools are contractors, within the meaning of said provision, and as the legislature could not, under said constitutional provision, grant extra compensation to a normal school teacher, it cannot delegate to the board of normal regents power to grant any extra compensation to a teacher.

In this connection, I also held that if work is performed and services are rendered without any agreement as to the pay therefor, the law implies an agreement to pay what such work or services are reasonably worth, and that the board could legally audit claims of that character, having in mind, however, that public servants as well as officers take their position subject to the imposition of such duties as the governing body may impose, and that the mere fact that a board imposes new duties upon such servants does not necessarily entitle them to additional compensation.

Under the law and the opinion just referred to, it is clear that neither President Pearce nor Mr. Gates had authority to extend the term of study for said engineering students for a longer term than provided by the courses of study determined upon by the board of regents. It is doubtful whether the president of the Milwaukee normal school could, under the statute relating to summer schools for teachers, carry on a school for engineering students, and under the opinion above cited, it is very clear that the course of study for said engineering students could not be prolonged beyond the summer school period, if a summer school for engineers is construed to be a summer school for teachers, the legislature itself having limited the course to a period of six weeks.
While all this is true, I am satisfied that the board of normal school regents, acting as a board, could have authorized the additional weeks of study for the so-called engineering students and could have employed a corps of teachers therefor at any time during the school year, and if the services had been rendered under the direction of the said board, then there would be no question as to the validity of the claims and accounts of the teachers now pending before your auditing committee.

It is a well established rule of lawmaking that the legislature may legalize and validate the act or acts of a public officer or the act or acts of a municipal or other corporation, precisely as though authority to do the act or acts had been previously given, provided, of course, that the subject matter is within the constitutional power of the legislature. Under a similar rule, a principal may approve of the act of an agent, which act the agent was without authority to perform. This principle in legislation and in the law of contracts is known as ratification.

*** It is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done but also the time the ratification was made. Galloway v. Hamilton, 68 Wis. 651, 656; State ex rel. Mengel v. Steber; 154 Wis. 505, 510; Caxton Co. v. School District, 120 Wis. 374, 376.

It is my opinion, under the facts as they appear from your letter and from the correspondence thereto attached, that the resolution of the board of regents of normal schools adopted February 13, 1920, and above quoted, is an effort on the part of the board to legalize, validate and ratify the course of study which was provided for said engineers at the Milwaukee normal school, and to allow the teachers the compensation claimed in their bills. It may be true that there is no express contract as to the compensation to be paid and that the teachers would have difficulty in proving the same as a legal obligation against the board. That, however, is not necessary. If the compensation claimed is reasonable, under all the facts and circumstances, then it is within the power of the board to order it paid. The amount stated in the resolution must be presumed to be the compensation or salary determined upon and fixed by the board itself. What the board failed to do at and prior to the time when the services were rendered, the board has done by way of ratification, after said services were rendered. It had the
authority in July, 1919, and it had the authority in February, 1920. The form of resolution under which the course of study for said engineers and the compensation for said teachers was ratified, is not such a form as would have been drafted by this department. It is clear, however, that the board intended by said resolution to ratify the things which were done by President Pearse and by Mr. Gates, although they are not fully recited in the resolution.

It is my opinion, therefore, that your board of audit may legally allow the claims of all the teachers mentioned in said resolution except the claim of S——. It does not appear that she was in any way connected with the additional course of study provided for the engineering students. Her services, as before stated, are included within the term of her contract. If this is true, then the board of regents is without authority to grant extra compensation to her, it being contrary to the provisions of art. IV, sec. 26, Const., above referred to. Under the facts as they have been submitted to me, I am of the opinion that your board cannot lawfully audit the account of S——.

Contracts—Public Printing—Printing board without power to increase prices to be paid for state printing under contracts entered into pursuant to statutory authority, by substituting for compensation specified in contracts higher maximum rate permitted by subsequent statutes for subsequent contracts.

April 21, 1920.

Printing Board.

Sec. 35.42, Stats. 1917, authorizes the state printing board to enter into contracts for state printing.

"said contracts covering, as to time, the two years included in the governor's term of office next following."

Sec. 35.45 provides for the advertisement for bids; sec. 35.49 provides for a printing contract and bond; sec. 35.50 provides for procedure in case of breach of printing contracts; sec. 35.51 prescribes the procedure for emergency public printing pending readvertising and reletting contracts.

These statutes are substantially reproduced in the statutes of
1919. The legislature of 1919, by sec. 35.43, made a substantial increase in the maximum prices at which contracts might be let. Pursuant to the provisions of the statutes of 1917 above outlined, bids were advertised for and received, opened, and accepted, and contracts entered into pursuant thereto, dated on or about August 15, 1918. Subsequent to the passage of the statutes of 1917, and subsequent to entering into these contracts, there has been a general increase in wages, inks, machinery, and other items necessary for the carrying out of various contracts so entered into. The question now presented is whether or not the state printing board has power to substitute the maximum prices specified under sec. 35.43, Stats., for those contained in the contracts entered into on or about August 15, 1918.

You are advised that the printing board has no such power. As your letter suggests, the legislature itself would be without power to increase the compensation under contracts once entered into. Sec. 26, art. IV, Const., governs:

"The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased, or diminished during his term of office."

See Carpenter v. State, 39 Wis. 271; State ex rel. Consolidated Steel Co. v. Houser, 125 Wis. 256. In addition to this, it may be suggested that the legislature has made no effort to authorize the state printing board to substitute the increased prices for those specified in the original contract. The proposition that the state printing board has no powers except those with which it is expressly invested by the legislature is too elementary to require citation of authority.

Turning, then, to the statutory provisions already noted, we find that except in case of breach of contract, a contingency provided for by sec. 35.51, the state printing board is without power or authority to advertise for bids or enter into contracts except for a period covering

"the two years included in the governor's term of office next following;"

such advertisements to be made pursuant to sec. 35.45 during June and July of each even-numbered year.
Corporations—Alien corporation may be licensed under sec. 1770b.

April 22, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

You ask, under date of April 21, 1920, to be advised whether or not a license may be issued under sec. 1770b, Stats., to a corporation organized under the laws of a foreign government.

It is my opinion that such a license may be granted to an alien corporation, provided there is no objection other than the fact that it was created by a foreign sovereign. In fact, I see no chance for interpretation or construction of the statute. Its language is perfectly plain, simple and direct. The section referred to makes an absolutely complete classification of all corporations. They are divided into two classes: (1) those incorporated under the laws of this state, and (2) those not so incorporated. That embraces the entire world and all corporations. The legislature went to the pains of defining a foreign corporation, and did so in these words:

"Section 1770b. 1. For the purposes of this section, the term 'corporation' shall include all corporations, associations, companies, joint stock companies, or express companies organized otherwise than under the laws of this state."

This definition occurs in the very section which provides for the licensing of foreign corporations, and said section occurs in the subheading or chapter entitled "FOREIGN CORPORATIONS." The conclusion would probably be the same had the definition been omitted from this section, for it is but the declaration of the common meaning or definition of the phrase, "foreign corporation."

"A domestic corporation is one that has been organized under the laws of the state wherein it is referred to. A foreign corporation is one that has been organized under the laws of another state or of a foreign government. An alien corporation is one that has been organized under the laws of a foreign government." I Cook on Corporations, sec. 7, p. 36.

Thus we see that both the statutes and the text writers include alien corporations within foreign corporations.

There is nothing in the history or the statutes of Wisconsin to indicate a policy to exclude alien corporations from transact-
ing business here. On the contrary, alien corporations are now and long have been doing business in Wisconsin, and the statute, by express terms, has long provided for the licensing of alien corporations doing an insurance business. Sec. 1915, Stats., prescribes the conditions under which an insurance company

"incorporated under the laws of any other state or of any territory or of any foreign government"

may be licensed to transact business in Wisconsin. This same provision, with some modifications not germane to our question, is found in sec. 1915, Rev. Stats. 1878, and in sec. 22, ch. 56, laws of 1870.

Appropriations and Expenditures—Conditions precedent to appropriation to associations and societies; not necessary to turn over property or principal sums received prior to August 25, 1915.

April 23, 1920.

Honorable Henry Johnson,
State Treasurer.

I have your letter of February 27, with respect to what should be done with the money in the hands of the Southern Wisconsin Cheesemakers’ & Dairymen’s Association under the present law, and the several questions presented in the letter of Mr. Henry Elmer of Monroe, Wisconsin, secretary of said association.

Sec. 20.78, Stats., provides:

"All appropriations made by law from state revenues for any department, board, commission, or institution of the state, or any society or association receiving state aid are made on the express conditions that such department, board, commission or institution, society or association, as the case may be, pays all moneys received by it into the state treasury within one week of receipt, * * *

Sec. 20.785 provides that all moneys so paid into the state treasury are reappropriated therefrom for the use of the institution, society or association "so paying its receipts into the state treasury."

It appears that the association in question has in its possession some Liberty bonds and a note, and the question is whether or not either they or the proceeds therefrom are payable into the
state treasury as a condition precedent to obtaining the appropriation.

You will note that sec. 20.78 provides that the association shall "pay all moneys received by it into the state treasury" and in sec. 20.785 the phrase "paying its receipts into the state treasury" is used. Therefore, in my opinion, there is no provision in the statutes that requires any association or society to transfer or convey to the state any of its principal funds on hand at the time of the adoption of said sec. 20.78. Said sec. 20.78, so far as the question to which reference is made is concerned, was adopted by ch. 601, laws of 1915, which was published August 25, 1915. Therefore, any principal sum that was in the hands of any association or society prior to that date need not be paid into the state treasury as a condition precedent to the receipt of the appropriation, for the reason that the statute contemplates only the moneys and receipts and revenues coming into the hands of such association or society after said date. This answers Mr. Elmer's first question.

The second question is whether or not the state treasurer can accept the securities which are held by the society. Beg to state that under the rule above set forth, unless the Liberty bonds and notes constitute receipts and revenues of the society subsequent to the date above mentioned, the same or the proceeds thereof need not be turned over to the state treasury, but if they represent receipts subsequent to said date, then the same should be converted into cash. I suggest, however, that if such be the case, on account of the present money market, it might be advisable to make some arrangement through the state, if possible, for disposition of the Liberty bonds at the par value. The foregoing answers Mr. Elmer's third question. I think the foregoing also answers Mr. Elmer's fourth question.

Answering his fifth question, beg to state that no comment necessarily need be made with respect thereto, in view of the law quoted and what has just been stated.

Answering his sixth question, in which he states that in order to stimulate the attendance at the convention, he, together with others, acting as private individuals and not as officers of the association, during the past ten years or more, have secured amusements, plays and entertainments, and admission tickets are sold to pay the expense, and after the entertainments are over, if the parties who conducted them find that there was any
profit after paying the expenses of the entertainment, they are glad to turn the same over to the association and deposit them with the state treasurer, and he inquires if there is any objection to that proceeding.

Beg to state that what Mr. Elmer has described is purely a private undertaking and the parties can use the proceeds for the benefit of the association without turning the profits into the state treasury, though if such profits are in fact paid to the association, then the association, of course, must pay the same into the state treasury before being entitled to the appropriation provided by law.

Another question Mr. Elmer desires answered is whether or not such admission tickets are subject to the federal tax. Beg to state this matter was referred, shortly after the receipt of your letter, to the treasury department at Washington, and I submitted to the treasury department the facts as stated by Mr. Elmer, and the treasury department has made this ruling, which ruling was received today, to wit:

"'The fact that the authority charging admissions, or receiving the exclusive proceeds thereof, is one of the United States, or a political subdivision thereof, or a municipality, or a State or municipal institution does not make such admissions exempt from tax. Unless exempt on some other ground, such admissions are taxable. * * *'.

'By further reference to the above article of the Regulations you will note that the basis for this ruling holding admissions the proceeds of which go to a state or a subdivision thereof taxable is the fact that the tax is levied upon the persons paying for admissions and not upon the party collecting the admission charge. The amounts paid as tax become United States Government funds when paid and never belong to the party collecting them.'"

This answers Mr. Elmer's question on that point.
Bonds—State Funds—Public Officers—State Treasurer—Certificates of indebtedness issued pursuant to act of September 24, 1917, are interest-bearing bonds of United States within meaning of sec. 14.67, Wis. Stats.

April 24, 1920

HONORABLE HENRY JOHNSON,
State Treasurer.

Sec. 14.67, Stats., provides:

"The commissioners of the public lands, by and with the approval of the governor, may from time to time direct the investment of so much of the money of any fund or of the income of any fund in the state treasury, not otherwise provided for, as they may deem advantageous to the state to so invest, in the interest-bearing bonds of the United States, or of this state, specifying the amount and kind of bonds to be bought, and also direct the disposal of any such bonds at any time by their written order, signed by them, approved by the governor, and recorded in the office of the secretary of state; and every such investment shall be held as a part of the fund out of which made, and the loss or gain shall inure thereto, and a particular account thereof be separately kept with each fund."

Your inquiry of April 23 involves the determination of whether within the meaning of the foregoing section "certificates of indebtedness" of the United States issued pursuant to the act of September 24, 1917, 40 Stats. at Large 290, as amended by the act of March 3, 1919 (6829iii, U. S. Comp. Stats. 1919 Supp.), are "interest-bearing bonds of the United States," so that the commissioners of the public lands may, by and with the approval of the governor, direct the investment of state funds therein.

You are advised that after careful consideration of the matter, this department is of the opinion that such certificates are a proper investment within the meaning and contemplation of the statute quoted.

Without endeavoring to exhaust the subject, the following, among other considerations, require this construction.

Historically, sec. 14.67 was originally adopted by ch. 340, laws of 1876. The act then passed was entitled,

"An Act to provide for the safe keeping of public moneys, and the investment of surplus funds."
So far as pertinent, it provided then as now for investment in "interest bearing bonds of the United States." The substance of this enactment became sec. 160, Stats. 1878, and as so numbered continued in successive revisions of the statutes until it received its present number by ch. 622, laws of 1917.

So far as our information extends, no "bonds of the United States," in the general and popular sense in which these words are employed, have ever been issued that did not bear interest. As a matter of common information, as a result of the Civil War, there was outstanding in 1876 a great volume of greenbacks and treasury notes which did not bear interest, as well as "government bonds," popularly so called. Had the legislature contemplated that only such bonds as are now generally referred to as such, were or might be classified as bonds, it would have been wholly unnecessary to insert the modifying words, "interest-bearing." It seems clear that in the mind of the legislature all outstanding obligations of the United States, whether referred to and characterized as notes or, more restrictively, bonds, were, strictly speaking, "bonds" of the United States. In other words, it treated "bonds" as synonymous with "obligations" of the United States. The federal statutes themselves expressly pledged "the faith of the United States" to the payment of all the "obligations of the United States not bearing interest" and of all the "interest-bearing obligations of the United States" (sec. 3693, U. S. Rev. Stats., act of March 18, 1869, Barnes Federal Code, sec. 6093). This act, as originally drawn, therefore, authorized investment in any "interest-bearing obligation of the United States."

This view is confirmed by having regard to the primary meaning of the word "bond." As was said in Duncan v. Charleston, 39 S. E. 265, 272:

"* * * Any indebtedness, the payment of which is secured by a contract under seal, is a bonded indebtedness."

The certificates of indebtedness in question come squarely within this definition. They recite under seal that "the United States of America is indebted to the bearer."

"A 'bond' is an obligation in writing to pay." And see many other definitions. 1 Words and Phrases (Second Series) 473.

Littlejohn v. Littlejohn, 71 So. 448, 449:

"* * * The term 'bond' signifies an obligation in writing to pay a sum of money."

"* * * What is true about bonds is true about certificates of indebtedness. Indeed, it is difficult to see any distinction between the two as they are commonly known to the business world. The essence of each is that they contain a promise under the seal of the corporation, to pay a certain sum to order or to bearer."

It is true that the discussion there related to county certificates of indebtedness but we entertain no doubt that on proper occasion it would give the like application, and hold that a certificate of indebtedness of the United States was an interest-bearing bond.

It may be noted that in Schoonmaker v. Mitchell's Adm'r., 139 S. W. 968 (144 Ky. 794), the court held that the notes of an individual were devised by a testatrix who employed the word "bonds," the court saying, p. 969:

"* * * The notes of Irvine Prather were bonds within the ordinary meaning of the term, * * * ."

To our mind, no apter definition of a certificate of indebtedness can be given than to say that it is a government bond of a more limited term or temporary duration than the run of such obligations. A government bond is a generic term; a certificate of indebtedness is a species of government bond.

The usage of congress in the federal statutes illuminates the matter and strengthens the validity of the conclusion reached. In that portion of the act of September 24, 1917, numbered as sec. 6132, Barnes Federal Code, 40 Stats. at Large 290, we find this language providing for convertibility of bonds:

"* * * In any case of the issue of a series of convertible bonds, if a subsequent series of bonds (not including United States certificates of indebtedness, war savings certificates, and other obligations maturing not more than five years from the issue of such obligations, respectively) * * *

indicating that in the absence of an express exception, congress considered that United States certificates of indebtedness would be construed as possessing the element of convertibility by reason of the fact that they were "bonds."
The same act, sec. 6133, Barnes Federal Code, provides:

"In addition to the bonds authorized by section one of this Act the Secretary of the Treasury is authorized to borrow from time to time, on the credit of the United States, for the purpose of this Act and to meet public expenditures authorized by law, such sum or sums as in his judgment may be necessary, and to issue therefor certificates of indebtedness * * *

indicating again that these certificates of indebtedness were bonds "in addition to the bonds authorized."

The same act, sec. 6135, 40 Stats. at Large 291, provides:

"None of the bonds authorized by section one, nor of the certificates authorized by section five, or by section six, of this Act, shall bear the circulation privilege."

The certificates of indebtedness themselves, as you are aware, bear upon their face the statement: "This certificate does not bear the circulation privilege."

In view of the fact that the revised statutes (sec. 5158, first enacted June 3, 1864; Barnes Federal Code, sec. 9189, 13 Stats. at Large 100), have always provided that

"The term 'United States bonds,' as used throughout this chapter, shall be construed to mean registered bonds of the United States,"

the declaration of this section would be deemed of a peculiarly unnecessary character, unless in contemplation of congress certificates of indebtedness were in fact bonds.

Finally, we find in the act of March 3, 1919, 6829iiii, U. S. Comp. Stats. (1919) Supp., the general provision authorizing the issue of seven million dollars of notes of the United States, and express provision made that in certain contingencies the word bond "shall be deemed to include notes issued under this section," emphasizing the interchangeable quality of the words, "notes," "bonds," and "certificates of indebtedness."

From the foregoing review of statutory provisions and adjudicated cases illustrative of usage of the term "bond," and by reason of the illogical character of any other conclusion, this department is thoroughly convinced that authority exists, as has been stated, for the investment by the commissioners of the public lands of state funds in certificates of indebtedness of the United States.
Agriculture—Appropriations and Expenditures—Agricultural Societies—Valid charge cannot be created against state funds prior to time when appropriation therefor becomes available.

Moneys collected as fees and paid into state treasury under this rule may not be used to pay claims incurred prior to time when such money is deposited in state treasury.

April 28, 1920.

Honorable Merlin Hull,
Secretary of State.

Sec. 20.61, Stats., subds. (2), (4), and (9), provide in substance and effect as to the state horticultural society, the potato growers association and the live stock breeders association, that

"all moneys received by each and every person for or in behalf of said association shall be paid within one week after receipt into the general fund, and are appropriated therefrom and added to this appropriation."

Sec. 20.75, Stats., as to forestalling appropriations, declares that

"It shall be unlawful ** to contract or create, either directly or indirectly, any debt or liability ** prior to an appropriation of money by the state to pay the same, or in excess of an appropriation of money by the state to pay the same."

Sec. 20.77, subd. (6), provides:

"No appropriation shall be available for payment of any indebtedness incurred prior to the time as of which such appropriation is to take effect or for any other purpose than that for which it is made unless otherwise specifically provided by law."

The question presented is whether, in this state of the law, you are authorized to audit accounts for payment out of receipts of these various organizations paid into the state treasury subsequent to the date when the account or indebtedness in question has been attempted to be incurred.

You are advised that this department is of the opinion that you have no authority to audit the same. The statutes themselves seem conclusive upon this proposition. The moneys are appropriated only after the same have been paid into the state treasury. Consequently, the appropriation therefor does not take effect under sec. 20.77, subd. (6), until after the moneys have been received. Plainly, no other practicable construction
can be adopted. Until such moneys are actually paid into the state treasury, the state officer, committee, institution, or other body referred to in sec. 20.75, would have no means of knowing whether the same would exceed the amount of liabilities incurred or not.

The legislative policy as expressed in all of these statutes is one looking toward certainty. It was never contemplated that the matter should be left to conjecture; that an organization might estimate that its receipts would exceed liabilities incurred, and therefore hazard authorizing expenditures in expectation that sufficient moneys would be realized. A debt or liability sought to be contracted becomes such immediately or not at all. There is no twilight zone of uncertainty during which its character remains indeterminate.

Banks and Banking—Corporations—Trust Companies—State Depositories—Trust company may not become state depository for reason that it is not "national or state banking corporation" within meaning of sec. 14.43 and is expressly disabled by sec. 2024—77k, subd. (11), from receiving "deposits subject to draft, order, or check, or payable upon demand."

April 28, 1920.

HONORABLE HENRY JOHNSON,
State Treasurer.

A trust company may not become a state depository, for the reason that it is not a "national or state banking corporation" within the meaning of sec. 14.43, Stats., and for the further reason that it is expressly disabled by sec. 2024—77k, subd. (11), from receiving "deposits subject to draft, order, or check, or payable upon demand."

Sec. 14.43 provides:

"Any national or state banking corporation which is approved by the 'Board of Deposits,' consisting of the commissioner of public lands and the governor, may, upon filing a bond as hereinafter provided, and upon the compliance with all other requirements of law, become a state depository."

As commonly understood, a trust company is not a banking corporation. In 3 Am. & Eng. Encyc. of Law 791, it is said:
The distinction between a bank and trust company is well defined."

See also Dietrich v. Rothenberger, 75 S. W. 271.

In some jurisdictions trust companies are appointed as state depositories, but whether this may be permitted is wholly a question of legislative intent. As stated in Sears, Trust Company Law, p. 159, it "is dependent upon the particular language of the statutes." Our law upon the subject of state depositories was enacted by ch. 273, laws of 1891. Then as now, it provided for the designation only of "any national or state banking corporation." Trust companies had been known to the law of Wisconsin beginning with the enactment of ch. 294, laws of 1883, which provided "for the organization of trust companies." Sec. 1791d appeared in the statutes of 1889, and was entitled "Of Trust Companies." Ch. 263, laws of 1891 revised the existing statutory provisions on the subject, and provided for organization "as a trust, annuity, guaranty, safe deposit, and security company." This act was published April 21, 1891, while the act providing for state depositories was published May 4, 1891, less than two weeks later. Very clearly, had the legislature contemplated that trust companies might become state depositories at that time, that expression would have been employed. We think it clear that there is nothing even remotely suggestive of an intention to include them.

The provisions as to trust companies in the statutes of 1889, as well as in the statutes of 1898, were found in ch. 86, relating to organization of corporations. The provisions as to banks and banking were found in ch. 94, Stats. 1889 and 1898. It is true that as the result of ch. 186, laws of 1909, the provisions as to trust companies were codified and made a portion of ch. 94, which related to banking, and the subtitle, "Trust Company Banks," applied to trust companies. This mere change in terminology would not be sufficient to override the plain legislative intent expressed in the laws of 1891. It would, in our mind, have required some affirmative extension of power before trust companies might be included among corporations qualified to become state depositories.

The intent to negative rather than create such power is, we think, clearly apparent. Sec. 2, ch. 273, which embodied substantially the same provisions as sec. 14.44, Stats., then as now made provision for a bond "conditioned for the payment upon
demand” of all moneys deposited with it. Ch. 186, laws of 1909, which first employed the terminology, “trust company banks,” also created sec. 2024—77k, with the provision quoted above, relative to the receipt of deposits “payable upon demand.” Sec. 14.50, Stats., clearly contemplates that the state treasurer may draw checks or drafts upon the state depositories. The section of the trust company law just referred to then, as now, provided that a trust company “shall not receive deposits subject to draft, order or check.”

Obviously, therefore, a trust company may not become a state depository, because it may not give a good and sufficient bond “for the payment upon demand, * * * of * * * moneys deposited” (sec. 14.44). It cannot give a bond to do something which it is by law prohibited from doing. Under the terms of sec. 14.43, it may not become a depository until it files such bond.

Public Health—Beauty Parlor Shops—State board of health has authority to grant manager’s license to applicant who has educational and other qualifications even though applicant has never served as apprentice or operator.

April 29, 1920.

Honorable C. A. Harper,
State Health Officer.

In yours of April 28 you ask whether the state board of health may license an applicant as manager of a beauty parlor shop, under ch. 605, laws of 1919, when said person has the qualifications mentioned in subsec. 8, sec. 1636—30, Stats., but has never worked either as an apprentice or operator as defined in the act.

One of the purposes of this act is to protect the public against inefficiency of operators practicing the cosmetic art. Subsec. 8, sec. 1636—30 provides:

“No person shall be licensed as a manager of any beauty parlor shop unless such person shall have an education equivalent to the eighth grade in the public schools.”

Subsec. 1 of said section provides:

“No person shall act as manager of or as an operator or apprentice in any beauty parlor shop without first having obtained a license so to do as provided in this section.”
Subsec. 6 of said section provides:

"Any person desiring to become a manager of a beauty parlor shop shall make an application for a manager’s license, which application shall be accompanied by a fee of fifteen dollars. Upon approval of such application, the state board of health shall issue said manager’s license, which shall entitle the holder to be the manager of a beauty parlor for the period ending December thirty-first next after the date of said license ** *

It seems to have been the purpose of the legislature to authorize the board of health to maintain such standards of education and other qualifications for managers as the board in its discretion should decide are for the best interests of the public. For this reason no specific subjects were mentioned upon which examination must be given. The whole matter was left to the discretion of the board.

It has been suggested that by reason of the provisions of subsec. 9 of said section, a person could not become a manager without first having been an apprentice or an operator. Subsec. 9 provides:

"Apprentices shall practice for six months under the direction and supervision of a licensed manager before they shall be eligible to be licensed as operators. Upon proof of having so practiced and upon payment of the initial license fee, an operator’s license may be issued to such former apprentice and an operator in any such beauty parlor shop may be licensed as a manager after having served one year as an operator under a licensed manager and upon passing the required examination."

Keeping in mind that the principal purpose of the act is to insure efficient service to the public, we must construe the law to give the board the authority to license persons who have the requisite skill and other qualifications, unless some specific inhibition appears in the act.

The law does not in specific terms provide that in order to become a manager one must first be an apprentice. In other words, the grade of practitioner designated "manager" is the highest grade specified in the law, and the term "manager" as used in the act denotes the highest degree of skill and efficiency in the art. It is a fact of common knowledge that there are schools for teaching cosmesis that maintain a very high standard. Graduates from such schools are thoroughly equipped to practice every practical phase of the art. There is nothing in
the law to prevent the board from licensing such qualified applicants. The law seems to contemplate that one can reach the point where he is qualified for the manager’s license by either one of at least two routes: first, by becoming an apprentice and working under a licensed manager, then becoming an operator, and after serving as an operator for the required length of time and being otherwise qualified, he may become a manager; second, by becoming proficient in the art through a course of study in school or elsewhere, and thus obtaining a sufficient knowledge of the art and practice so that, in the discretion of the board, he is a proper person to receive a manager’s license.

Your question is therefore answered in the affirmative.

Contracts—Normal Schools—Public Lands—Taxation—Lands deeded to board of regents of normal schools after first Monday in August in any year subject to taxation for that year. Taxes should be certified to commissioners of public lands for payment.

Lands leased to board of regents of normal schools not exempt from taxation.

Where board has contracted to pay taxes on leased lands taxes should be paid to lessor as part of rental. April 29, 1920.

Honorable William Kittle, Secretary,
Board of Regents of Normal Schools.

I have your letter of March 22, transmitting to me a letter of Regent Clough Gates of Superior, dated March 20, relative to certain taxes on certain lands purchased by, and other lands leased to, the board of regents of normal schools, together with two copies of opinions, marked A and B, purporting to be signed by T. L. McIntosh, assistant corporation counsel for the city of Superior. Regent Gates has submitted for my opinion two propositions, which may be restated as follows:

1. On September 6, 1919, the said board of regents purchased what is known as the Paton property, described as lot 4 of block 3 of Kalkman’s addition to the city of Superior. Mr. Paton reserved the houses on said property and has taken care of the taxes assessed thereon. He has not, however, paid the gen-
eral and special improvement taxes assessed against said property. Are said taxes collectible, and can the said board of regents legally pay the taxes on said property?

2. On December 13, 1919, the board of regents of normal schools leased from the Land and River Company certain lands in connection with the normal school located in the city of Superior. The lease is for the term of three years, with an option by the lessee to purchase under terms therein stated. It also provides for the payment of an annual rental of $550, and requires the lessee to pay all taxes assessed and levied against the property during said term. Is said property exempt from taxation, and, if not, should the taxes be paid to the land company as a part of the rental, or should they be paid directly to the city?

Sec. 1038, Stats., reads in part as follows:

"The property in this section described is exempt from taxation, to wit:

"(1) That owned exclusively by the United States or by this state; but no lands contracted to be sold by the state shall be exempt."

Our supreme court, in the case entitled Petition of Wausau Investment Co., 163 Wis. 283, reviewed the law of this state relating to taxation and particularly the section and subsection above quoted, and laid down the following rule, which I quote from the syllabus:

"Lands deeded to the state prior to the first Monday in August in any year are exempt from taxation for that year, but lands of which the state becomes owner after that date are not exempt for that year."

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

Sec. 1149a, par. (a), Stats., reads as follows:

"It shall not be lawful for any county, city or village treasurer to sell any lands which shall have been acquired by the state after the taxes become a lien thereon. When such lands shall have been returned delinquent to the county treasurer he shall certify to the commissioners of public lands a description thereof together with the amount of taxes charged against each separate description. The commissioners of public lands within ten days after the receipt of such certificate from the county treasurer shall consider the question of whether such taxes are
just and legal, and if they so find shall order the same paid. They shall transmit a certified copy of their order to the secretary of state, and upon his audit and warrant drawn upon the state treasurer the amount of said taxes shall be paid out of the appropriation provided for carrying out the purposes of this section."

The supreme court of this state has often reaffirmed the rule that statutes exempting property from taxation must be strictly construed and that all doubts in respect to a specified piece of property must be resolved in favor of the taxability of the property. Douglas Co. Agricultural Society v. Douglas Co., 104 Wis. 429; Katzer v. Milwaukee, 104 Wis. 16; State ex rel. Milwaukee, etc. v. Anderson, 90 Wis. 550; State ex rel. Bell v. Harshaw, 76 Wis. 230.

In the first case above cited the court held that subsec. (4), sec. 1038, which exempts from taxation lands "owned" and used by any county agricultural society exclusively for fair grounds, is not intended to exempt from taxation lands leased by such a county agricultural society. This case is very analogous to the facts above stated, but in addition, it appears that the board of regents has expressly contracted, in addition to the annual rental, to pay the taxes to be levied on said property during the period of such lease.

From the statutes and the decisions above cited, I have reached the conclusion that your first proposition should be answered as follows: namely, that said taxes are collectible but that the taxes should not be paid by the board of regents but should be adjusted by the commissioners of public lands in the manner prescribed by sec. 1149a, par. (a), above quoted; and that your second proposition should be answered as follows: The said property so leased from the land company is not exempt from taxation. As the taxes are primarily assessed to and payable by the land company, and as according to the contract the board has agreed to pay a certain stipulated rental, together with the annual taxes, I am of the opinion that the land company should render a bill to the board for the amount of the taxes assessed against said property, in the same manner as it renders its bill for rentals due under the contract.
Optometry—Assistant optometrist, registered, has unlimited right to practice optometry.

May 1, 1920.

Board of Examiners in Optometry,
Milwaukee, Wisconsin.

I have your favor of April 28, in which you ask if a person can

"simply register with us as an assistant optometrist, and then take possession of the office of a registered optometrist, and practice optometry there without let or hindrance, except that the registered optometrist be responsible for the work turned out."

In reply beg to state that this question, while not decided, is referred to in the opinion rendered last year and found in VIII Op. Atty. Gen. 660.

Sec. 1435f—35, subsec. 2, provides:

"* * * It shall be unlawful for any person to practice optometry in this state, unless he shall first have obtained a certificate of examination and of registration as herein provided and shall file the latter or a certified copy thereof with the county clerk of the county wherein he resides."

As I stated in my opinion referred to, the statute does not define the rights of an assistant optometrist. The law is not entirely clear. Subsec. 7 of said section provides that the examination may be taken when the person

"shall have served as assistant to a registered optometrist for at least two years and shall have registered with said board as an assistant optometrist at least two years before appearing for examination."

This provision clearly contemplates that an assistant optometrist can register and if he can register, then under the provisions of subsec. 2 he will not be engaged unlawfully in the practice of optometry.

The optometry law has a penal provision and therefore the statutes must be strictly construed. The statute does not pre-
scribe to what extent the assistant optometrist may practice, and I know of no rule by which the extent of his practice may be controlled. After the board has made its rules and regulations for conducting the examinations and for the standards of professional or special qualifications and the person has registered under such rules as an assistant optometrist, it is my opinion that there is no limitation upon his right to practice optometry as an assistant to a registered optometrist.

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Education—School Districts—Elections—Where at election question of establishing union free high school was submitted and carried but officers of proposed district were not chosen, proper town and village officers may call and hold another election for such purpose, to be called and conducted in same manner.

May 1, 1920.

Honorable C. P. Cary,
Superintendent of Public Instruction.

I have your letters of April 21, relating to the creation of a union free high school district, embracing territory containing an incorporated village. As I understand it, all proceedings prescribed by sec. 40.47 were duly followed and an election was held and a majority of the electors in the territory voting outside of the village and a majority of the electors voting in the village voted for the establishment of a union free high school.

Sec. 40.48, subd. (1), reads as follows:

"The officers of a union free high school district shall be a director, a treasurer and a clerk who shall have the same authority and be charged with the same duties and liabilities respectively as the officers of other free high school districts. The term of each shall be three years, beginning with the annual union free high school district meeting to be held the third Monday in March, and each officer shall continue in office until his successor shall have been chosen; provided, that at the same election at which the proposal of establishing the district is submitted the clerk shall be chosen for one year; the treasurer for two years and the director for three years, but a separate ballot box shall be provided for the election of such officers."

It appears that the officers who had charge of giving notice of the election failed to give notice also that the officers of the
You wish to be advised in what manner the officers provided for in sec. 40.48, subd. (1), may now be chosen.

Sec. 40.47, subd. (4), prescribes the manner in which an election for the purpose of establishing a union free high school district is to be called and held. It reads as follows:

"In case the tract proposed for the union free high school district contains an incorporated village, the petition may be presented to any town chairman, as provided in subsection (3), or to the president of the village. Thereupon, the official to whom the petition is presented shall notify each chairman and the village president of the receipt of such petition and shall set a day for a meeting of said officers for the purpose of fixing the date for holding the union free high school election. The election for the village shall be held in the village on the same day that the election for the territory lying outside is held. The election for the territory lying outside the village may be held in the village or at any other convenient place agreed upon which shall be designated in the notice of election. The election for the village shall be noticed and conducted and the votes canvassed in the manner provided for village elections; and the election for the territory lying outside the village shall be noticed and conducted and the votes canvassed in the manner provided for town elections. If the outlying territory comprises parts of two or more towns the supervisors at their first meeting shall designate the town in which such election shall be held and the officers of said town shall notice, control and direct such election."

It is my opinion that the officers to whom the original petition for the submission of the question of the establishment of a union free high school district was filed should notify each chairman and the village president of the receipt of such petition and should set a day for a meeting of said officers for the purpose of fixing the date for the holding of an election to elect officers for the proposed union free high school district. The election for the village should then be noticed and conducted and the votes canvassed in the manner provided for village elections, and the election for the territory lying outside the village should be noticed and conducted and the votes canvassed in the manner provided for town elections. In case the outlying territory comprises parts of two or more towns, the supervisors at their first meeting should designate the town in which
such election shall be held and the officers of said town shall notice, control and direct such election.

The town and village officers should follow the same form of notice and the method of procedure which they followed in calling and holding the election at which the question of establishing a union free high school district was submitted to a vote of the electors. When this election is held and the results of the two elections are certified to the state superintendent and such actions meet with his approval, he will then issue a certificate of the establishment of a union free high school district as in sec. 40.47 provided.

According to sec. 40.48, subd. (3), the time until the first annual meeting must be counted as the first year in determining the term of office, so that on the last Monday in June, the day of holding the annual free high school district meeting, a new clerk will have to be chosen.

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Public Officers—Mayor—County Board Member—Both offices may be held by one person.

M. J. PAUL,
District Attorney,
Berlin, Wisconsin.

In your letter of April 28 you ask as to the status of a man who has been elected to the office of supervisor and mayor of a city and you inquire if he can sit on the county board.

I know of no reason why the same person cannot be elected to the office of mayor and supervisor. I find nothing in the duties of mayor and supervisor involving incompatibility. The statutes in prescribing the qualifications for each office in no way forbid the holding of the two offices by the same person.

Subsec. (3), sec. 59.03 prescribes the eligibility of a person to the office of supervisor and it provides that no county officer or deputy of any county officer, or undersheriff, is eligible to the office, but a county supervisor may also be a member of the common council of the city or of the board of trustees of the village.

Sec. 925—249 makes members of council ineligible to any other municipal office.
Sec. 960, Stats., does not affect the eligibility of a person to hold the two offices.

Sec. 61.24, Stats., makes the president of a village a trustee and yet the president of a village is not ineligible to hold the office of supervisor.

There being nothing in the nature of the two offices or the duties thereof to make the positions incompatible and there being no provision of the statutes prohibiting any person from holding the two offices, the conclusion then must be that the same person can hold the two offices if he succeeds in being elected to the two offices.

However, your whole question might be answered much more briefly. I have gone over the several sections of the statutes, however, with respect to eligibility of the several offices so that you might examine them for yourself, but it is quite immaterial whether the two offices can be held by the same person for the reason that if the person elected as mayor serves as a member of the county board, he is an officer de facto and until some one has a better right to the office than he has there is no reason why he cannot sit on the county board as an officer de facto.

Corporations—Foreign Corporations—In computing fees of foreign corporation for admission to this state value of nonpar
shares is determined according to statutory formula but cannot be less than $10 per share.

Value of such shares must be annually redetermined, in same manner, and, if value of then capital stock represented in this state exceeds sum for which fees have been paid, additional fees, measured by such excess, must be paid.

May 6, 1920.

Honorable Merlin Hull,
Secretary of State.

You ask to be advised as to my opinion of the proper administration of sec. 1770b, particularly with reference to the change recently made (ch. 213, Laws 1919), whereby that section was extended to shares of capital stock without nominal or par value.

At present domestic corporations are authorized to issue stock
of that character. The fees required for filing articles of domestic corporations which provide for nonpar value shares of capital stock is a flat rate of 5¢ for each such share, and without any reference to the market or other value thereof. Sec. 1759b. When the book value of a share of nonpar value stock is $10, the filing fee amounts to $50 per thousand of the corporate capital which is represented by the nonpar value stock.

On the other hand, there is a variable rate or sliding scale of fees exacted from foreign corporations having nonpar value stock, as a condition of obtaining a license to do business in Wisconsin. This feature of the law is entirely new, and was added in 1919, and applies to an original application of a corporation for a license to do business here, and also to the annual reports of such a corporation while it continues in this state. Subd. (e), subsec. 3, and subd. (d), subsec. 7, sec. 1770b. Said subds. (e) and (d) are alike in substance and nearly identical in phraseology. Upon application for admission to this state a foreign corporation must file with the secretary of state a sworn statement of:

“(e) The amount of the capital stock paid in money, property or services, including also the number and value of shares, if any, of capital stock issued without any nominal or par value. The amount or value of such authorized capital stock without nominal or par value for purpose of such statement and for the purpose of computing filing fees under this section shall be taken as the amount by which the entire property of said corporation shall exceed its liabilities other than such capital stock without nominal or par value, but each share of capital stock without nominal or par value shall be deemed to be of the value of not less than ten dollars.”

“(e) The proportion of the capital stock of said corporation which is represented in this state by its property located or to be acquired therein and by its business to be transacted therein.” Sec. 1770b, subsec. 3.

Then follows a formula for determining the part of the capital stock in this state. That part forms the basis for figuring the filing fees. That formula has no application when the corporation has and is to have no property outside of this state and is to do no business outside this state. In that situation the whole of the capital stock of the foreign corporation “is represented in this state.” But whether all of the capital stock or only a part
of it is represented here, the original filing fee is computed upon the face of par value stock so represented, plus the value of the nonpar stock.

The value of nonpar stock must be ascertained in the manner directed by statute. The minimum value per share of nonpar stock is fixed by law for the purpose of computing this fee. Should the liabilities (other than the nonpar stock liability) equal the entire property of the corporation and the nonpar stock therefore has no book value, still, for the purpose of computing or determining the filing fee, the value of each share of such stock is $10. But there is no absolute or fixed maximum value for such stock. The quotient obtained by dividing the excess of the entire corporate property over liabilities, other than for nonpar stock, may be $1 or $100 or any other sum, but whatever it be, the quotient must be taken as the value of each share of nonpar value stock and that quotient, if it exceed $10, determines the amount of the filing fee.

It seems plain that for computing that fee, a corporation which has nonpar value shares can have no surplus or undivided profit. The value of all the shares of stock is always equal to the net corporate property.

This equality exists at all times, as well when the application to enter the state is made as when an annual report is prepared. Upon filing such report you are to ascertain, according to the statutory formula, the amount of the capital stock represented in this state, and if such amount is greater than the amount for which filing fees or license fees have been paid, then an additional fee is required by the statute. The sum by which the capital stock represented in this state at the date of the report exceeds the amount of capital stock for which fees have theretofore been paid, is the basis for computing the additional fees required as a condition of filing the report and continuing the license to do business in Wisconsin.

With reference to any future report, it is not possible to say that the filing fee for a corporation issuing nonpar value stock has been fully paid. Although all of its authorized capital stock has been issued and is represented in Wisconsin and the fees therefor have been paid, the corporation may be required, as a condition of filing an annual report, to pay additional fees. For the purpose of determining fees the capital stock of such a corporation may increase, though no additional shares be issued.
Viewed as to liability for fees, the capital stock of such a corporation is never fixed or stationary but always fluctuating, as the property and liabilities of the corporation change. In contemplation of this statute, the nonpar value stock absorbs or takes to itself all of the property of the corporation in excess of "its liabilities other than such capital stock without nominal or par value."

We may take as an illustration, a foreign corporation with 500 shares of stock of the par value of $100 per share, and 500 shares of nonpar value stock, having $50,000 of property and no other liabilities, such corporation to have all of its property and conduct all of its business in Wisconsin. Such nonpar value stock has no value whatever if its worth is to be determined by the formula before mentioned. Upon application for a license to do business in Wisconsin it will be required to pay a fee upon $55,000 of capital stock ($50,000 for the par value and $5,000 for the nonpar value shares). When it comes to file its annual report, no additional fee will be required on account of additional capital stock, so long as the shares of nonpar value stock do not have a value of more than $10 each. However, should the corporation prosper and a report show these shares to be of greater value than $10, an additional capital stock filing fee is required. If the corporation continues year by year to accumulate wealth, it will have to continue to pay additional fees for additions to its capital stock represented in Wisconsin. It is true that such additional fees are in the nature of fees exacted on account of undivided surplus or profits. Heretofore no such requirement was made, but it seems to me that the statute as it now reads requires that to be done. The language is plain and I see no escape from this conclusion.

You are advised that the $10 minimum value provision applies both upon the original entry of the company into this state and also to the determination of the total authorized capital stock represented in this state for the purpose of computing the fees required by subsec. 7, sec. 1770b.
Bonds—Contracts—Municipal Corporations—Street Improvements—Village may, in case of street improvements, assess benefits to abutting property, issue special assessment certificates and bonds against said property, and provide in contract that contractor shall receive same in payment on contract.

City may continue to levy special assessments and issue certificates and bonds against benefited property, but may not provide in contract for street improvements that contractor shall accept said certificates or bonds; contractor must be paid in cash.

May 7, 1920.

Highway Commission.

Replying to your letter of May 3, 1920, you are advised that in my opinion villages incorporated under the general law have power to provide, in contracts for street improvements, that the contractor shall receive special assessment certificates and bonds in payment of the contract price. It is optional with the village board whether this power shall be exercised or not.

"(4) Whenever a contract is let for the construction or improvement of streets, sidewalks, gutters or alleys, or the construction, laying or improvement of sewers or drains in any incorporated village, such contract may provide that the amount chargeable may be paid with certificates against the lots or in special improvement bonds, or the proceeds of the sale of such bonds, or that payment may be in part made in certificates, part in cash and in special improvement bonds or the proceeds thereof, in similar manner and subject to the provisions of sections 925—188 to 925—197a of the statutes. In villages where there is no official paper the notice prescribed by section 925—191 shall be published in some newspaper published in said village, or, if there be no such newspaper, by posting said notice in three public places in said village." Sec. 61.41, Stats.

The reference in said subsec. (4) to "sections 925—188 to 925—197a of the statutes" has the legal effect of importing those sections into subsec. (4). These sections are thereby made part of the village charter for the purpose contemplated. A repeal of these sections of the general city charter chapter would not affect the village charter or the powers of the village board. Flanders v. Merrimac, 48 Wis. 567, 576.

Cities do not now possess such authority. It was taken from them by ch. 520, laws of 1919, amending sec. 959—356, Stats. 1917, but said ch. 520 did not change the village charter. Village street improvements may be paid for as heretofore.
Prior to the enactment of ch. 520, all cities except Milwaukee had authority, and in many instances, were required, to provide in contracts for street improvements that the contractor should receive special assessment certificates and bonds in payment for the work. Ch. 520, laws of 1919, made what was then an exception to be the universal rule:

"Hereafter in all cities however incorporated, no special assessment certificates shall be issued to contractors for the grading * * * or for any other street improvement whatever, but the contractor shall be paid in cash * * *." Sec. 959–35b.

This language is the broadest possible. It applies to every city and forbids it to issue such certificates or bonds to any contractor for street improvements.

Loans from Trust Funds—Application for loan authorized at special meeting of union free high school district cannot be approved where it appears that notice of such meeting was not published two full weeks prior thereto.

Matt Lampert, Acting Chief Clerk,
Commissioners of Public Lands.

In re: Application of union free high school of the town of Waterville, in Pepin county, for a loan of $25,000.

This application has had the consideration of this department. It appears from the proofs and other papers on file that the special union free high school district meeting which authorized this application was held on the 2d day of April, 1920.

The said meeting was called pursuant to the provisions of sec. 40.50, subd. (4), Stats., which reads in part as follows:

"Special meetings shall be called by the clerk, or in his absence by the director or treasurer, on the written request of twenty voters of the district. Notices specifying particularly the business to be transacted shall be posted in the manner prescribed for calling the annual meeting. In addition to such posting the notice shall be published once each week for two successive weeks immediately prior to the time set for holding such meeting in any newspaper published in the union free high school district. If no newspaper is published in the high school district the publication may be in one newspaper published at the county seat of the county containing the high school district."
According to said sec. 40.50, at least six days' previous notice of the annual meeting of a union free high school district must be given by posting notice thereof in six or more public places in the district, one of which shall be affixed to the outer door of the union free high school building, if there be one in the district.

The proofs filed show that notices of the special school district meeting were posted in eleven public places in the district on the 25th or 26th day of March, 1920, and that the notice was published in the Courier-Wedge, a newspaper published in the city of Durand, the county seat of Pepin county, as there was no newspaper published in said union free high school district, "on the 25th day of March, 1920, and once in each week and every week thereafter, for one week, that the date of the last publication was the 1st day of April, 1920; and that said publication was made once each week for two successive weeks in all."

The quoted part of the last sentence is from the affidavit of publication made by the foreman of the printer of the Courier-Wedge.

The question is: Was there a sufficient publication of the notice, according to the requirements of the law above quoted? It is my opinion that said notice was not published "once each week for two successive weeks immediately prior to" the second day of April, 1920. There were two publications, it is true, but said publications did not cover two full weeks immediately prior to the date of holding the meeting.

It has been repeatedly held by our supreme court in respect to the other legal notices, such as tax sale notices, county court notices, and sheriff's sale notices, that failure to comply with statutes reading similarly to the one above quoted makes the publication defective. I call particular attention to the case of Eaton v. Lyman, 33 Wis. 34, where the publication of a tax sale notice on March 13 and weekly thereafter, for a sale to be held on April 8, was held not a compliance with the statute requiring publication "once in each week for four successive weeks prior to the sale."

Other decisions which may be cited, which clearly support the conclusion that the notice of the special school meeting was not published in accordance with the statute above cited, are the
Corporations—Insurance—Insurance commissioner has exclusive supervision of organization of insurance corporations and sale of their stock or securities, pursuant to sec. 1897; provisions of blue sky law have no application thereto.

May 10, 1920.

HONORABLE G. S. CANRIGHT, Director,
Securities Division,
Railroad Commission.

Are the promoters of a corporation proposed to be organized under the laws of Wisconsin for the purpose of conducting the business of insurance in several of its forms within this state subject to the regulation and control of the railroad commission of Wisconsin, as falling within the contemplation of secs. 1753—48 to 1753—68; or is the matter of supervision of the organization of insurance corporations and the sale of their stock or securities under the exclusive supervision of the commissioner of insurance, pursuant to sec. 1897?

The answer to this question is dependent entirely upon the determination of the legislative intent. To arrive at what the legislature intended may best be accomplished by a preliminary consideration of the statutes involved.

The evidence is persuasive that sec. 1897, which was enacted by ch. 280, laws of 1911, was the direct antecedent of and pattern for the general securities or "blue sky" legislation now found in the statutes above referred to. As a matter of history, sec. 1897 was enacted by reason of the incidents that had characterized the promotion of various insurance corporations, the promoters of one of which had retained for promotion services and expenses an amount so large that it partook of the nature of a public scandal.
This first act was entitled,

An Act to create section 1897f of the statutes relating to the promotion and sale of stock of insurance companies."

As originally drawn, the act did not contain the provisions of subsec. 2m, par. (a). These were added by ch. 287, laws of 1911, containing the express restriction to 10% of the amount actually paid upon subscriptions as the limit that might be paid for promotion and sale of stock in insurance companies.

This restriction emphasizes one of the fundamental and continuing differences between the law relating to insurance organizations and other corporations now under the blue sky law. There has continuously been a definite limit upon the amount that might be so paid. Ch. 756, laws of 1913, created secs. 1753—48 to 1753—53. Its title limited its application "to the sale of stocks and bonds in the organization and promotion of certain corporations."

It was thus evident that this original act did not intend to codify or revise all laws upon the subject of corporate promotion and organization; it merely declared by its title the rule in the case of certain corporations. Sec. 1753—49, thereby created, expressly excepted certain securities. The securities or stock of insurance corporations were not excepted by this section. Sec. 1753—51 specifically provided:

"1. (a) The railroad commission shall have the supervision and charge of all matters mentioned in this section except where such supervision is expressly vested by law in any other or different agency of this state."

Thus it recognized that other or different agencies of the state might have supervision and charge of matters mentioned in the section. Subd. (b) made its terms applicable only "except as otherwise provided by law."

In this situation, it is very clear that there was no legislative intent to disturb the preexisting supervision and authority that had been vested in the commissioner of insurance. This view is confirmed by the action of the legislature itself, which recognized the continuing existence and validity of sec. 1897f in the adoption of ch. 173, laws of 1915, which amended sec. 1897f, subsec. 2m, par. (a) by increasing the amount that might be allowed for promotion from 10% to 15%. In the meantime, no restric-
tion or limitation upon the amount of promotion expenses was found in the general blue sky law at all. Whatever public policy the legislature was seeking to effectuate by the terms of that act it deemed sufficiently accomplished by giving publicity to the amount of commission that might be charged, and no affirmative restriction upon that amount was deemed necessary. The insurance blue sky law, or sec. 1897/4, likewise contained the other provisions of subsec. 2m, par. (a), which required a specification of the par value of the shares and the prices at which shares have been, are, or are to be sold, etc.

Prior to the enactment of ch. 674, laws of 1919, sec. 1897/4 was a valid subsisting law. Did the 1919 legislature repeal the same?

Ch. 674 was entitled:

"An Act to repeal sections 1753—48 to 1753—53, inclusive, and to create twenty-one new sections of the statutes to be numbered 1753—48 to 1753—68, inclusive, relating to the prevention of fraud in the issuance, sale and disposition of stocks, bonds or other securities, providing a penalty and making an appropriation."

Sec. 1 thereof provides:

"Sections 1753—48 to 1753—53, inclusive, of the statutes are repealed."

Apart from this, there is no repealing clause in the act. In this situation, the language of the supreme court in Ward v. Smith, 166 Wis. 342, 344-345, is so pertinent that a detailed quotation follows:

"* * * In that situation there are a few familiar principles which point the way to a correct conclusion as to whether the later enactment was intended to supersede such section. If the question suggested must be answered in the affirmative, it is upon the ground of implied repeal. Repeals of that nature are not favored. State ex rel. Milwaukee v. Milwaukee E. R. & L. Co., 144 Wis. 386, 395, 129 N. W. 623; Madison v. Southern Wis. R. Co., 156 Wis. 352, 146 N. W. 492. If no purpose to repeal the existing law by a new enactment is clearly indicated, the court should, if possible, give effect to both. In other words, it must not be supposed that the legislature intended, by the later statute, to repeal the prior one, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject and therefore displace the prior statute. State ex rel. Marinette, T. & W.
In the absence of some unmistakable indication to the contrary, each chapter of the statutes should be held to prevail as to its own subject matter and, in case of a special provision relating to a particular matter and a later general one in its letter repugnant thereto, the former should be held to prevail if by any reasonable construction that result can be reached, and to that end the special provision relating to the particular subject should, if that can reasonably be done, be regarded as controlling the general one. Woodbury v. Shackleford, 19 Wis. 55; Schieve v. State, 17 Wis. 253; State ex rel. Marinette, T. & W. R. Co. v. Tomahawk Common Council, supra."

In the case of State ex. rel. Marinette T. & W. R. Co. v. Tomahawk, 96 Wis. 73, 85-86, it was said:

"* * * It is well settled that repeals by implication are not to be favored, and where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court (no purpose to repeal being clearly expressed or indicated) is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended, by a later statute, to repeal a prior one on the same subject, unless the last statute is so broad in its terms, and so clear and explicit in its words, as to show that it was intended to cover the whole subject, and therefore to displace the prior statute."

In Gymnastic Association v. Milwaukee, 129 Wis. 429, 432, it was said:

"There is, of course, a well-recognized rule of statutory construction to the effect that an act directed towards a special subject is ordinarily preponderant over a more general act, yet that is, at best, but a rule of construction, yielding whenever a contrary legislative intent is reasonably apparent; and such intent will ordinarily be inferred, first, where the later and more general act governs the whole subject to which it relates, and is manifestly designed to embrace the entire law thereon; and, more specific still, when the earlier statute is special only in the sense that it applies to a single case, of which there are many in the state, and the later statute is general in its operation and applies to all such cases, then the earlier one is deemed to be superseded by the latter and, so far as inconsistent, to be repealed."

State ex rel. Milwaukee v. Milwaukee E. R. & L. Co., 144 Wis. 386, 395:

"* * * The exception, if such it may be called, is that where the legislature legislates on a given subject, and it is manifest that it intended to revise and codify all existing laws and to
cover the entire subject, former acts dealing with such subject will be deemed to have been impliedly repealed although there is an absence of an express repealing clause.''

Applying the more definite rule herein stated, we find it impossible to say that the legislature "intended to revise and codify all existing laws and to cover the entire subject" by the enactment of ch. 674, laws of 1919. As we have seen, the original act enacted by ch. 756, laws of 1913, clearly recognized the continuing validity of sec. 1897/. This act contained a list of exceptions from its provisions, numbered 1753—49, pars. (a) to (i), inclusive. The stock of state or national banks, or trust companies, or building and loan associations, and the securities of public service corporations were exempted by pars. (c) and (e), respectively.

Ch. 674, laws of 1919, contains the same list of exceptions, with the addition thereto of others designated by letters (j) to (o), inclusive. Par. (n), in addition to the exemptions previously existing, provided for the exception of cooperative associations, as therein specified. So that, so far as enumerating exceptions are concerned, the intent appears to have been to actually increase the exceptions and therefore to narrow the application of the statute, rather than to gather in all provisions of the law. It is true that sec. 1753—51, subsec. 1, pars. (a) and (b), were expressly repealed. The substance of par. (b) reappears in par. (o) of the exceptions under sec. 1753—49. Outside of the repeal of the specific provision relative to the exception from the jurisdiction of the commission, there is therefore no evidence of any intent to broaden the scope and application of the blue sky law. On the contrary, all the evidence points rather to a primary intention to make the law within its preexisting applications effective. It was not the intention to take in new subjects for regulation, but rather to make the regulation within the scope originally designed actually accomplish the purpose thereof.

The provisions of sec. 1897/ are found in ch. 89, Stats., while the securities law is found in ch. 85. Sec. 4972, Stats., contains the rule stated in subd. (14):

"If the provisions of different chapters of these statutes conflict with or contravene each other the provisions of each chap-
This section was under consideration in the case of Griswold v. Nichols, 111 Wis. 344, in which the rule was quoted, and it was said, p. 346:

"This statute but states a well-established rule of construction, long recognized by the courts."

In the quotation from Ward v. Smith, above set forth, the same rule was referred to, notwithstanding the fact that sec. 113.10 had come into existence through an enactment of the 1913 legislature. It is evident, therefore, that the court has not treated this as a rule of construction limited to the interpretation of the statutes of 1898, but that it is a general rule. Within its spirit, the provisions of the chapter on insurance should be taken as governing.

In view of the foregoing considerations, this department is unable to say that

"the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject and therefore to displace the prior statute."

The concensus of opinion among disinterested individuals concerned with the administration of the law appears to be that, as a matter of sound public policy, the regulation of all matters dealing with the subject of insurance companies should be left exclusively with the insurance commissioner. This consideration, while not in any sense controlling, is in a situation where the rule to be applied, as in the present case, is a matter of doubt, entitled to weight.

It is therefore the conclusion of this department that sec. 1897f prescribes the conditions that must be complied with in the sale of stock in insurance corporations, and that the provisions of the blue sky law are not applicable.
Public Officers—Sheriff—Duties—"Necessity knows no law" not a legal rule; may be moral rule, to be determined by circumstances.

George J. Leicht,
Acting District Attorney,
Wausau, Wisconsin.

You state in your favor of May 10 that the sheriff of Marathon county had some papers for a feeble-minded person who was subject to epileptic fits, that he felt it was his duty to reach the feeble-minded person in the shortest possible time, that in so doing he violated the speed law and that he was arrested by the speed officer in Wausau, charged with violating the speed provisions of the law. You inquire whether the sheriff, in the official discharge of his duties, has a right to exceed the speed limit.

You do not state what papers the sheriff had, nor the necessity for reaching the feeble-minded person, nor what emergency existed.

Sec. 1636—55 provides in part as follows:

"* * * 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 * * * ."

This is the only exemption given to the sheriff, and unless there was something with respect to the feeble-minded person which permits the sheriff to come within this express exception, I know of no rule by which the sheriff is exempt from violation of the speed law. The provisions just quoted clearly show that the legislature had in mind certain exemptions that should be extended to police officers, and by inserting such exemption it must be concluded that all other matters, so far as the legislative policy is concerned, are not to be considered as exempting the police officer from the penal provisions of the law. Had the legislature intended to exempt the sheriff or any other police officer from the provisions of the law because of some emergency to be determined by such officer, then of course the legislature would have so expressly provided.

Emergencies often occur whereby some particular act, from
the very necessity of things, must be done, in order to save life or property or prevent some calamity, and often must be done in the face of some express prohibition. There is an old rule that "Necessity knows no law," but such rule does not appear to have any judicial standing. Therefore, are not matters involving emergencies to be considered by enforcement officers in the light of the necessity of the occasion? And such enforcement officer, therefore, is charged with the responsibility of determining whether or not the call in response to an emergency involves mitigating circumstances favorable to the person charged with some violation of some penal provision of the statutes involving only a misdemeanor.

If an ambulance, or for that matter, the driver of a private car, were to find a person suffering and it appeared under all the circumstances that in order to save the life of the person he should be rushed at top speed to medical and surgical assistance, might not the enforcement officers take into consideration that fact, and as a matter of public policy, invoke the unrecognized rule "Necessity knows no law"?

This does not mean, however, that I hold that extreme necessity or emergency releases one from prosecution for a misdemeanor, but I do state that such circumstances ought at least to have great weight with respect to the enforcement of such a law, charging only a misdemeanor. This does not mean that the police officers are to arbitrarily determine necessities or emergencies, but I do mean that police officers, in the exercise of their functions, might well take into consideration an impelling necessity or a great emergency, in determining whether or not the public good will be served in proceeding to apprehend an offender charged only with a misdemeanor. Judges, at least, take such view, and mitigating circumstances often bring about a suspension of sentence. A just and righteous public opinion, of course, will always determine whether or not the police officer has properly exercised his functions, and therefore the responsibility is a personal one upon the police officer and the prosecuting attorney.
Automobiles—Touring car remodeled and used as commercial truck must pay license required for motor trucks.

May 13, 1920.

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

In yours of May 3 you ask regarding the amount of license fee required for a remodeled Ford automobile, runabout type. You state that the remodeling consists of

"placing two large tanks on the back part thereof. These tanks will hold fifty or sixty pounds of gasoline or oil. He uses this car in driving through the country and delivering gasoline and oil to his customers."

Sec. 1636—47, subsec. 5, par. (a), 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 law classifies motor vehicles into the touring and pleasure car types at $10 and the various grades of motor trucks for commercial use varying from $15 up to $25 depending upon the carrying capacity. It is obvious that this car in question has passed out of the $10 class and has gone into the commercial motor truck class and the only remaining question is which grade of the commercial trucks it should be placed in. If its carrying capacity is less than 2,100 pounds the proper fee is $15. From your statement that the tanks hold 50 or 60 pounds, I infer that the capacity is that which is covered by the $15 license, and you are so advised.
Charitable and Penal Institutions—Minors—Commitment to industrial school and reformatory discussed.
Under sec. 48.15 boy between 16 and 17 years of age may be committed to industrial school.

Honorable M. J. Tappins, Secretary, Board of Control.

Replying to your letter of May 7, with reference to the situation which arose in Sheboygan county in the matter of the sentence of John Papendieck, a minor between the ages of 16 and 17 years, I find that the law as it stood before the attempt to simplify by codifying,—with the present result, provided in sec. 4966, subsec. 1, with reference to the age for industrial school commitments was as follows:

"Any male child under the age of sixteen * * * convicted of a criminal offense may, in the discretion of the judge or magistrate before whom the case is tried, be committed to one of the industrial schools of this state instead of to the state prison, * * *.

The law then provided, sec. 4966, subsec. 2:

"The courts of record of this state may, in their discretion commit to the Wisconsin industrial school for boys, any male child * * * between the ages of eight and sixteen years, who, upon complaint and due proof, * * *.

The 1917 statutes before the codification and amendment of 1919 provided in sec. 4944c:

"Male persons who belong to one of the following classes may be committed to the reformatory: First. Persons convicted the first time of a felony, * * * and who when so convicted were not over thirty years of age, and not under sixteen years of age * * *.

It will be noted that the maximum age here was thirty years and the minimum sixteen years and that the commitment to industrial schools above referred to covered all those under sixteen—thus making a complete plan for commitment to the two institutions, the dividing line between the two being the sixteen-year point.

It seems to have been the intent of the legislature in the codification and amendment acts of 1919 to change this dividing line...
from the sixteen- to the seventeen-year point. In other words, it seems to have been the legislative intent to so shape the law as to permit commitment of boys between sixteen and seventeen years of age to the industrial school rather than to the reformatory.

To accomplish this purpose a part of two legislative acts was involved. Ch. 349, laws of 1919, has to do with the change in age of persons that might be committed to the reformatory. Sec. 4944c above quoted from was renumbered and revised to read sec. 54.02, subd. (1):

"Male persons not less than seventeen nor more than thirty, of the following classes, may, in the discretion of the court, be sentenced and committed, respectively, to the said reformatory.""

This, it will be noted, is in keeping with the general plan of increasing the age requirement from sixteen to seventeen for commitment to the reformatory.

Turning now to ch. 614, laws of 1919, we find the corresponding legislative attempt to increase the age requirement for commitment to the industrial school from sixteen to seventeen years. Sec. 4966 is renumbered and amended and now found in sec. 48.15 as follows:

"(1) Any male child under the age of sixteen convicted of a criminal offense may, in the discretion of the judge or magistrate be committed to one of the industrial schools of this state.""

Subsec. 2, sec. 4966, Stats. 1917, was amended to read:

"(2) The courts of record of this state may, in their discretion commit to one of the industrial schools of this state any male child between the ages of eight and seventeen years, or any female child under the age of eighteen.""

The italicized portion of subd. (2) last above quoted is new matter written in by the 1919 legislature.

It is quite obvious that it was the intent of the legislature to so shape the law that boys between sixteen and seventeen years might be sentenced to an industrial school rather than to the reformatory as they were formerly. The necessary change was made in every place except in subd. (1), sec. 48.15. The only conclusion that can fairly be arrived at is that omitting to
change the word sixteen to seventeen in subd. (1), sec. 48.15 was a legislative oversight.

It must be assumed that the legislature intended to have a comprehensive plan rather than to omit boys between sixteen and seventeen years. The changes were made throughout except in the one instance.

Inasmuch as subd. (2), sec. 48.15 provides that courts of record may commit any male child between the ages of eight and seventeen to an industrial school, we must conclude that it was the intent of the legislature to permit courts to commit any male child under the age of sixteen to an industrial school where such child has been convicted of a criminal offense.

I am of the opinion that under the statutes cited the court could properly commit a boy between sixteen and seventeen years of age to the industrial school.

I believe, if this matter were presented to the supreme court, that under well settled rules of construction, that court would give very favorable consideration to the views herein outlined.

Banks and Banking—Building and Loan Associations—Transaction described does not violate statute requiring license for selling foreign exchange nor banking law.

Honorable Marshall Cousins,
Commissioner of Banking.

You inquire in your letter of May 10 whether a person who is engaged in the business of buying and selling money issued by foreign governments and exchanging such money for United States money is required to take out a license, the same as a person engaged in the sale of foreign exchange, as required in sec. 2014—200; and if in my opinion the business described does not require the taking out of a license, then, you state, the question arises whether such person engaged in that business is trespassing upon the powers reserved by law to duly incorporated banks.

Under sec. 2014—200 it is provided:

"No person, firm or corporation, other than a bank, trust company, life insurance company, express company, telegraph
company, or a domestic corporation with a paid up capital stock of not less than one million dollars receiving moneys for transmission through its regularly authorized agencies, shall engage in the business of transmitting money to foreign countries, or of receiving money on deposit to be transmitted to foreign countries, without first having obtained a certificate of authority to transact such business from the commissioner of banking."

The party of which you speak is not engaged in the business of transmitting money to foreign countries, or of receiving money on deposit to be transmitted to foreign countries. In a broad sense, it is true that he is receiving money and is also sending it to foreign countries, but it is not sent there as the money of some other party; if he does transmit money to foreign countries, it is his own money, and it would seem that the statutory provision is not intended to cover such a case.

As to whether the person engaged in such business is trespassing upon the powers reserved by law for banking institutions, it is necessary to turn to the statute which defines banking. Sec. 2024—78t provides:

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

The party in question does not come within the letter or the spirit of this law. It may be true, as suggested by you, that there is opportunity for an unscrupulous person engaged in this business, to take advantage of a foreigner and obtain an unreasonable profit by the transaction, and that some regulation is advisable, but this is a matter for the legislature to deal with. If there is an evil to be remedied, it is for the legislature to do it. The statute as it reads now does not cover such transactions.
Criminal Law—Marriage—Polygamy—Polygamy must be prosecuted where second marriage took place.

One who cohabits with another under marriage vow not guilty of adultery if consort was already married at time of second marriage; after being informed lack of knowledge can no longer be pleaded.

May 19, 1920.

Alvin B. Peterson,
District Attorney,
Prairie du Chien, Wisconsin.

In your letter of May 13 you state that a resident of Soldiers Grove made complaint that his wife and a certain unmarried man committed the crime of adultery at a hotel in the village of Wauzeka, Crawford county, on the 29th day of April, 1920. At the preliminary hearing the husband by his oral testimony proved the marriage to his wife, that no divorce proceeding had ever been instituted and that she was still his lawful wife. The state then presented the evidence of the hotel proprietor, who introduced his register, showing the registration of the parties at the hotel as man and wife, and that they stayed at the hotel a period of one day, occupying Room No. 1. Both of the defendants took the stand and swore that they were married at Rockford, Illinois, on April 28, 1920, and also produced a marriage certificate showing the marriage, and they admitted that they had occupied a room at the hotel at Wauzeka and cohabitated as man and wife.

You inquire whether this woman may be prosecuted for polygamy, under sec. 4577, in Crawford county, or whether the action should be brought in the county where the city of Rockford is located; also whether the unmarried defendant can be prosecuted, under sec. 4576, for adultery, in this county, if he was not aware that the defendant, A——B——, had a lawful husband at the time of the marriage; also whether he would be guilty, after preliminary hearing and after having been informed that his supposed wife had a former husband, if he persisted in cohabitating and living with the defendant as his wife.


It follows that the woman cannot be prosecuted for polygamy in Crawford county.
In 2 C. J. 16, the following rule is stated:

"Where, * * *, a marriage is void by reason of the fact that one of the parties thereto has a consort living, and the other is ignorant of that fact, the party who is without knowledge of the polygamous nature of the marriage does not, by sexual intercourse with the supposed husband or wife after the marriage and before such knowledge is obtained, become guilty of adultery; * * *.'

See also State v. Cutshall, 14 S. E. 107 (N. C.); State v. Audette, 81 Vt. 400, 18 L. R. A. (N. S.) 527, and note; Vaughan v. State, 83 Ala. 55; Banks v. State, 96 Ala. 78.

I am therefore constrained to hold that the unmarried defendant cannot be prosecuted for adultery, and having been informed of the fact at the preliminary hearing that the woman he married has another husband, he can no longer plead lack of knowledge, and if he persists in living with her as his wife, he may be prosecuted thereafter.

Appropriations and Expenditures—Live Stock—Under sec. 20.17, subd. (27), hides not included in term "live stock."

Board of Control.

In your letter of May 17 you ask whether or not proceeds from the sale of hides of cattle slaughtered at state institutions can properly be put into the revolving fund for the purchase of "new live stock" for said institutions.

Sec. 20.17, subd. (27), provides:

"There is appropriated * * *
"* * *
"(27) From time to time, sums equal in amount to the receipts from the sale of live stock, and paid into the general fund, to be used as a revolving appropriation, for the purchase of new live stock; * * *.'"

It is apparent from a reading of this section that any of the proceeds from the by-products of live stock are not included in this provision. A hide is a by-product not included within the term "live stock."

You are therefore advised that the proceeds from the sale of hides should not be placed in the live stock revolving fund.
Opinions of the Attorney-General.

Criminal Law—Rape—Man 21 years old cannot be convicted under sec. 4382 for having carnal knowledge of female 17 years old.

M. J. Paul,  
District Attorney,  
Berlin, Wisconsin.

In your letter of May 22 you refer me to sec. 4382, and you inquire whether, under that section, a man twenty-one years of age may be prosecuted for having intercourse with a girl seventeen years of age.

In an official opinion rendered by my predecessor, VII Op. Atty. Gen. 521, it was held that a man thirty-eight years of age cannot be convicted, under sec. 4382, for having carnal knowledge of a female seventeen years old.

For the reasons there given, your question must be answered in the negative. I see no reasons for changing the ruling made in that opinion.

Appropriations and Expenditures—Public Printing—Maps—Duty of printing board to order printing of railroad maps mentioned in subd. (13a), sec. 35.84.  
Maps to be distributed by superintendent of public property and charged to appropriation to highway commission.

Railroad Commission.

In your letter of May 14 you call attention to the provisions of subd. (2), sec. 35.31, Stats., making it the duty of the railroad commission to purchase a stone or metal plate for the printing of a railroad map of the state, and to subds. (13) and (13a), sec. 35.84, providing for the distribution of maps printed therefrom. You also refer to subd. (5), sec. 20.49, relating to a $25,000 appropriation to the state highway commission, for carrying out the purposes of said subd. (13a), sec. 35.84, and to a change made by the legislature of 1919 in said subd. (13), sec. 35.84, by which the provisions for the distribution of railroad maps upon the requisition of members of the legislature are eliminated.
You wish to know upon whom devolves the duty of ordering the railroad maps for distribution as provided in subd. (13a), sec. 35.84, to be paid for out of the appropriation to the state highway commission, provided for in said subd. (5), sec. 20.49.

As stated in your letter, subd. (2), sec. 35.31 requires the railroad commission to purchase, in the manner therein prescribed, a stone or metal plate for the printing of a railroad map of the state, and further requires that said commission present to the printing board a requisition for the printing of railroad maps of the kind therein described, as required for distribution under subd. (13), sec. 35.84.

Sec. 20.51, subd. (3), makes an appropriation of not to exceed $15,000 to the railroad commission for the expenses incurred in printing the Wisconsin railroad map, including the cost of the stone.

Subd. (13a), sec. 35.84 reads as follows:

"To each member of the legislature at each regular session thereof, one hundred highway wall maps of Wisconsin, one hundred highway pocket maps of Wisconsin, and one hundred mounted railroad wall maps of Wisconsin."

Sec. 20.49, subd. (5), makes an appropriation of not to exceed $25,000 for carrying out the provisions of subd. (13a), sec. 35.84, above quoted.

Subd. (13a), sec. 35.84 entitles each member of the legislature, among other things, to one hundred mounted railroad wall maps of Wisconsin, and these wall maps must be provided for. The duty of ordering and distributing said wall maps does not seem to be charged, by any provision of law that I can discover, to either the railroad commission or to the highway commission. However, I call attention to the provisions of sec. 35.03, which reads in part as follows:

"The printing board is empowered and required:

"* * *"

"(4) To issue orders for any other public printing required by law, except printing of the first, fifth, sixth and seventh classes;

"* * *"

I also call attention to the first two lines of sec. 35.84, in connection with subd. (13a), above quoted, which lines read as follows:
"Immediately after the receipt of public printing by the superintendent of public property he shall make distribution therefrom as follows."

Your attention is also called to the provisions of subsec. (16), sec. 35.92, which reads as follows:

"The cost of carriage charges in the distribution of public printing as provided in sections 35.82 and 35.84 shall be charged to the appropriation for the state officer, department, board, commission or other body charged with the cost of such printing."

As the railroad wall map specified in subd. (13a), sec. 35.84 is printing required by law, and as the duty of making requisition therefor has not been imposed upon other officers or boards of the state, it is clearly the duty of the printing board to issue orders for the printing of said wall maps, and the duty of the superintendent of public property to make distribution of such wall maps when printed, the same to be charged to the appropriation made to the highway commission under the provisions of subd. (5), sec. 20.49.

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**Insurance**—Under subds. (c) and (d), subsec. 2, sec. 1897c, Stats., mutual insurance company cannot issue policies limiting liability of members of such company unless it has surplus required by said subd. (d).*

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**March 4, 1920.**

**Honorable F. W. Kubasta,**

*Deputy Commissioner of Insurance.*

I have examined and return herewith the verified copy of amendments to the articles of organization of the —— Company of Milwaukee.

One of such amendments is the following:

"Resolved that the Articles of Organization of this company be amended by adding thereto the following: That the total assessments which might be levied against any member during the life of any policy shall not exceed three times the annual premium, disregarding the reduction made for three years or other term insurance."

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*See opinion following.*
Subsec. 2, sec. 1897c, Stats., provides:

"The articles of a mutual insurance company, subject to the condition that the same be expressed in every policy, may limit:

"(c) The liability of members, which liability shall be the annual premium or a specified number of times the annual premium subject, however, to the provisions of subdivision (d) of this subsection.

"(d) No mutual fire, casualty or marine insurance company licensed to transact business in this state shall issue a non-assessable policy unless it has a surplus equal to the sum of the capital and surplus required of a stock company to begin to transact the same kind of business or equal to twenty per cent of its premium income during the preceding year, whichever is the greater, and provided further that it shall cease the issue of such policies when its surplus falls below that sum. No such company shall issue a non-assessable policy until its policy form and plan of operation is submitted to and approved by the commissioner of insurance." Ch. 101, Laws 1919, effective April 26, 1919.

I do not know of any other provisions under which mutual insurance companies incorporated under the laws of this state are authorized to limit the liability of its members. The very term "mutual" seems to me to imply that the members of the company bind themselves to share proportionately the losses of those who are members of the mutual scheme of insurance. Under the well known maxim "Expressio unius, exclusio alterius"—the statement or inclusion of one thing excludes all others—the express statement of this one limitation would exclude the right to include others. It will be noted that under subd. (c) the liability of members can be limited only subject to the provisions of subd. (d). It is true that subd. (d) refers to a non-assessable policy, but in view of the context it seems very clear to me that the legislature had in mind the kind of a policy provided for by subd. (c). That is, it seems to me that in speaking of a nonassessable policy the legislature meant a policy in which the liability of the member was limited to the annual premium or a specified number of times the annual premium under the provisions of subd. (c). The legislature has very properly, as it seems to me, provided that such policy cannot be issued until the company has a surplus as provided by that subdivision.

The statute nowhere requires that this provision or any ref-
erence to it be included in the articles of incorporation, but nevertheless, in order that those becoming members of the company may not be misled it seems to me that the articles should contain some reference to the provisions of this subdivision, because the company cannot legally limit its liability until it has the required surplus. In my opinion the insurance commissioner ought not to approve any articles or amendments to articles providing for the limiting of the liability of members of a mutual insurance company unless such articles or the amendments thereto call attention to the provisions of subd. (d).

For this reason I am returning these amendments without my approval.

Insurance—Ambiguity in subsec. 2, sec. 1897c, Stats., discussed.

Honorable Platt Whitman,
Commissioner of Insurance.

May 28, 1920.

After a hearing at which were present yourself and four or five persons interested in mutual insurance companies, other than town mutuals, I advised that I would supplement my opinion of March 4,* render to your deputy, with respect to amendments to the articles of organization of insurance companies organized under secs. 1897a, 1897b and 1897c, Stats.

Those present urged that the construction given to subsec. 2, sec. 1897c, on March 4, will greatly hamper mutual insurance companies in their competition with stock companies, and if such construction were maintained to be the law, that substantially all such mutual companies will be required to entirely change their mode of transacting business or violate the law, and that great injury will be done such mutual companies. They also contended, and with some force, that the words "nonassessable policy," used in subd. (d) of said subsection, should be construed according to the usual and ordinary meaning of those words as used by insurance companies and as understood by insurance companies, and it is contended that a nonassessable pol-

*Page 255 of this volume.

17—A. G.
icy is one having a fixed and definite premium, where the policy holder is not liable for any additional premium or assessment.

They contend that subd. (c) of said subsection classifies mutual insurance companies into two classes: namely, (1) that class where the liability of the membership is limited to one annual premium; and (2) that class where the liability of the membership is a specified number of times the annual premium.

There is some force to their contention, and it may be that subsec. 2 may be construed as they contend. Ch. 101, laws of 1919, embodying the provisions of said subsec. 2, quoted in my letter of March 4, is not entirely clear, and in fact the provision is indefinite and the meaning uncertain. This places the mutual insurance companies in a very unsatisfactory position, and involves the administrative officers of the state functioning under indefinite, uncertain and ambiguous provisions of the statute. Subd. (d) seems to have been written without any regard to the provisions of subd. (c), and therein lies the ambiguity and uncertainty.

This department is not the court of last resort, and whatever construction may be given to such uncertain, indefinite and ambiguous provisions will afford the insurance companies no protection.

However, you assure me that mutual insurance companies, where the liability of the membership is a number of times the annual premium, are and will be financially sound, and that the policy holders under such limited liability policies will be amply protected against insolvency. It must be understood, however, that where the liability of the membership is a specified number of times the annual premium, such "number of times the annual premium" cannot be taken as one annual premium plus the fraction of an annual premium, but must be the number of times the entire premium.

I am not prepared, however, to say with any feeling of certainty that the construction given in my letter of March 4 is not the correct one. The construction impliedly made herein may be the correct construction, and may be taken as the construction that will be placed upon subsec. 2, sec. 1897c, so that where the liability of membership is fixed at one annual premium, then in such case, such companies must have the surplus provided for in subd. (d), and as to those where the liability of membership is
limited to a specified number of times the annual premium, such number of times the annual premium must be the full annual premium and not aliquot parts thereof, and if the articles so provide, then such company will be classified as not being within the provisions of subd. (d).

However, permit me to suggest that at the next regular meeting of the legislature, the attention of the legislature should be called to the indefinite and uncertain provisions of the law with respect to mutual insurance companies, and that the law should be amended, to the end that the administrative officers may entertain no doubt as to what the law is.
Public Officers—Sheriff—One who was elected sheriff but resigned before end of term may be candidate for term following that for which he had previously been elected.

June 8, 1920.

E. E. Brindley,

District Attorney,

Richland Center, Wisconsin.

In your recent letter you write that Mr. G. W. Miller was elected sheriff of Richland county, Wisconsin, in November, 1918, and took his office in January, 1919; that in December, 1919, Mr. Miller resigned from the office of sheriff of Richland county and Frank Spry was appointed by the governor to take his place for the unexpired term.

You refer to my recent opinion, dated March 25, 1920,* to the district attorney of Green county. In that opinion I stated that I believed that one in Mr. Spry’s position could be a candidate, as he had not held a full term of office, but also stated that the law was unsettled, and until the supreme court had passed upon the question, there was doubt as to the correct construction to be placed upon our constitutional provision. Since that time our supreme court has rendered a decision to the effect that one appointed to the office of sheriff to fill out an unexpired term was ineligible to succeed himself in such office.

You inquire:

"In case the supreme court decides that Mr. Spry cannot be a candidate for election to the office this fall, would that render Mr. G. W. Miller eligible to be a candidate for the office of sheriff commencing in January, 1921?"

In the opinion rendered by the supreme court in the case of State ex rel. Knutson v. Johnson (not yet reported), the court came to the following conclusion:

*Page 139 of this volume.
We therefore hold that the ineligibility declared in the language just above quoted to be upon him who is, at the time of the general election just preceding the new term, filling the office of sheriff for the then present term whether he has been elected to such specific term or appointed to fill out and complete such term.

Under this decision it would seem that Mr. Miller would not succeed himself. Mr. Spry is the sheriff of Richland county at the present time and under this decision is ineligible to succeed himself in that office. Mr. Miller would not succeed himself if he were elected for the two-year term beginning in January.

Fish and Game—Bounties—Wolves which died in Vilas park zoo but were not directly killed, not within purview of statute granting bounties for killing wolves.

June 8, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

In your letter of June 7 you state that some time ago two young men dug out a wolf den and captured eight wolves in this county; that they brought the wolves to Madison, and the president of the Park and Pleasure Drive Association took them to Vilas park for the zoo; that after taking them out there three of the cubs died. These young men are now attempting to collect bounty from the county and state on the three cubs that died, as they claim they allowed them to be killed by letting them go to the park authorities. You state that the affidavit they made out states that they personally killed or caused to be killed. They have secured the certificate provided by sec. 29.60, (subd. 2), and have presented it to the county clerk, who has refused to pay the county bounty unless our department pronounces it a proper compliance with the law. You inquire whether in my opinion you have the right to pay bounty on the three dead cubs in question.

Under the facts stated by you I do not believe that there is any bounty due, either by the county or the state, to these young men. It cannot be said that they did not harbor the wolves, and
the statute expressly requires them to state that they did not in any way harbor the said animals. As I understand the facts the wolves died and were not killed. In order to secure the bounty strict compliance with the statute is necessary; no favoritism can be shown in any way. While it was very commendable that these wolves should have been turned over to the Madison zoo and not killed, it is not contemplated by the statute that a bounty should be paid in such cases. Had the legislature intended to pay bounty in such cases, it would have been an easy matter to say so. It is my opinion that the young men have no ground within the provisions of this statute, and your question must therefore be answered in the negative.

Bridges and Highways—In ascertaining value of lot under subd. (d), subsec. 1, sec. 1317m—3 improvements thereon are to be excluded.

June 9, 1920.

HIGHWAY COMMISSION.

Under date of June 8, 1920, you ask for a construction of subd. (d), subsec. 1, sec. 1317m—3 and more particularly of the word "lots."

The statute provides that only such portions of the county system of prospective state highways in cities shall be entitled to state aid which have

"an average valuation of less than ten dollars per front foot for the lots of one hundred and twenty feet in depth on each side."

In an opinion rendered October 30, 1917, this department held that the words "average valuation" referred to the value of the land alone as distinguished from improvements thereon and that the word "lots" referred to the naked land and excepted the improvements that might exist, VI Op. Atty. Gen. 712.

Though there may be doubt as to the legislative intent, the reasoning of that opinion seems fairly satisfactory and the practice, having probably been thereby settled, should be adhered to. Certainly there is no sufficient reason apparent at this time for a contrary ruling. If that construction is not correct the matter should be righted by legislative act.
Bridges and Highways—Maximum chargeable by county to municipality for emergency construction under subsec. 8, sec. 1317, 24% of entire cost.

June 9, 1920.

Orrin H. Larrabee,
District Attorney,
Chippewa Falls, Wisconsin.

By letter of May 25, 1920, you ask whether the maximum that a county board may assess against a village under the provisions of par. (d), subsec. 8, sec. 1317, Stats., is 24 per cent or 40 per cent of the entire cost of the construction or reconstruction of the bridge.

It is my opinion that the maximum is 24 per cent of the cost of the structure.

Said subsec. 8, par. (d), makes provision for emergency construction or repair of bridges and culverts on the state trunk highway system.

"* * * The county board may assess not more than forty per cent of the county's share of the cost of any such construction or reconstruction against the municipality in which the same shall lie, provided that where such construction or reconstruction shall lie within more than one municipality, such assessment shall be borne by them jointly in proportion of their assessed valuations."

It is noticed at once that the real question is: What is the "county's share of the cost"?

"* * * The state's share of the cost of all bridges and culverts constructed or reconstructed under this subsection shall be forty per cent, provided that the state's share of such cost shall not exceed one-half of the state aid allotted to the county for the succeeding year." Sec. 1317, subsec. 8, par. (d).

Were it not for the proviso the language would be perfectly clear and its meaning unmistakable. The proviso is not to be taken literally but is to be read in the light of what follows. Later in the same paragraph of the statute it is provided that not more than one-half of the state allotment of aid to the county the succeeding year shall be devoted to the emergency construction. Any deficiency in the state contribution the succeeding year to
its share, that is to say, 40 per cent of the cost, must be made up by the county, but it is also provided that the county

"may recover such deficit from the first one-half of the county's allotment of state aid for succeeding years until the whole of such deficit is recovered."

The deficit here spoken of must be the difference between 40 per cent of the cost of the structure and one-half of the state aid allotted to the county for the year succeeding that in which the construction occurred. So it seems to me fairly plain that this paragraph of the statutes sustains the thought that the state's share is 40 per cent and that the county will ultimately derive that portion of the cost from the state. The fact that the state's share may be contributed in installments through one or more succeeding years does not change the meaning of the words "the state's share of the cost."

Once the conclusion is reached that the state's share of the cost is 40 per cent, it necessarily follows that the county's share is 60 per cent of the cost and on this last named portion the percentage of cost chargeable to the municipality is to be computed.

You submit the further question of whether or not the county has a right to assess the municipality prior to the receipt by the county of the state allotment for the succeeding year. This question doubtless arises from uncertainty as to what is meant by the state's share or the county's share. If the county's share actually depended upon the amount of money actually received from the state and available for this emergency work, the determination of the maximum of the municipality's liability would have to be deferred until the allotment of state aid had been made.

Having concluded that the liability of the municipality does not depend upon the amount allotted by the state the succeeding year, no reason appears why the county should defer making the assessment against the village. You are advised that it may be made as soon as the cost of the work is determined.
Banks and Banking—Each and all stockholders of state bank must sign declaration to pay debts and liabilities of bank.

June 14, 1920.

HONORABLE MARSHALL COUSINS,
Commissioner of Banking.

On May 17 you submitted to this department a letter stating that a certain state bank in Wisconsin desires to file with you a declaration in writing signed by only part of the stockholders of said bank; that it appears that the stockholders not signing the declaration do not reside in the municipality where said bank is located.

With your letter you have submitted for my examination what appears to be the original declaration so tendered to you and you desire my opinion as to whether the same is in proper form and whether this instrument will protect the depositors of said bank.

Sec. 2024—51, Stats., reads as follows:

"The stockholders of any bank organized under the provisions of this chapter may file with the commissioner of banking a declaration in writing, signed by each and all of them and by them acknowledged, consenting and agreeing to hold themselves individually responsible for all the debts, demands and liabilities of said bank. Upon application therefor the commissioner of banking shall make and certify a copy of said declaration which shall be received in evidence and have the same effect as the original declaration would have if produced in evidence and duly proved."

The declaration submitted is in the nature of a statutory bond or undertaking and to be binding it should substantially comply as to terms, conditions and execution, with the requirements of the act pursuant to which it is given. This seems to be the general statement of the rule. See 5 Cyc. 747.

The supreme court of Oregon, in the case of Malheur Co. v. Carter, 52 Ore. 616, 626, defined a statutory undertaking in the following language:

"* * * A statutory undertaking is not a common-law recognizance or bond. It is simply a statutory contract to pay money under certain conditions: * * * To be enforceable it must have been taken in substantial compliance with the terms of the statute authorizing it, and if not so taken, it cannot be en-
forced as a common law undertaking, * * * and the sureties are entitled to stand on their contract according to its terms * * *

The section above quoted does not seem to have had the construction either of any of our courts or of this department. The legislature very explicitly requires that such a declaration shall be in writing and be

"signed by each and all of them and by them acknowledged, consenting and agreeing to hold themselves individually responsible for all debts, demands and liabilities of said bank."

Unless a declaration is so executed it cannot be said to comply substantially with the language of this section as to execution. Each stockholder has a right to assume that each and all of his fellow stockholders in said bank are going to sign the instrument. There is nothing in the instrument submitted which indicates that the stockholders whose signatures are attached did so knowing that the other stockholders in said bank were to be omitted or relieved from the liability imposed by this section.

While it is my opinion that the declaration is in due form, I am satisfied that it has not been executed in accordance with the letter and spirit of the section referred to.

_Counties—Public Officers—District Attorney—District attorney should not prosecute case which arises out of facts in civil action in which he appeared as attorney for either party. Circuit court should appoint prosecutor under see. 59.44._

L. W. Bruegger,

_District Attorney,_

_Kewaunee, Wisconsin._

In your communication of June 7 you state that in a civil trial in the circuit court of your county two persons committed perjury; that a motion was made and a new trial granted on the grounds of the false testimony given by these two witnesses; that the firm of which you are a member were the attorneys for the plaintiff in the civil action which is now pending; that the evidence given by the two witnesses who perjured themselves
was held by the court to be material; that it is, however, but a portion of the evidence in the civil action and the plaintiff’s case does not depend entirely upon the perjured facts; that one of the persons committing the perjury was the defendant in the action and the other was his principal witness.

You inquire whether you have the right, as district attorney of your county, under sec. 59.49, Stats., to prosecute the party who committed perjury in this ease in which you are interested, or whether the circuit court should appoint a special prosecutor under sec. 59.44.

Said sec. 59.49 provides as follows:

“No district attorney shall receive any fee or reward from or on behalf of any prosecutor or other individual for services in any prosecution or business to which it shall be his official duty to attend; nor be concerned as attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution commenced but undetermined shall depend; nor shall any district attorney while in office be eligible to or hold any judicial office whatever, nor shall any person who shall have acted as district attorney, assistant district attorney, or special district attorney at the time of the arrest, examination, or indictment of any person charged with crime, and who was at such time such official of the county where the crime charged was committed, thereafter appear for, or defend such person against the crime charged in such complaint, information or indictment.”

Under this section you are prohibited to

“be concerned as attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution commenced but undetermined shall depend.”

The civil action is still pending and you are the attorney of record for the plaintiff. I believe it would be improper for you to act as prosecuting attorney in the criminal prosecution against the said parties.

In such a case the court is authorized, under sec. 59.44, to appoint a person to act as district attorney, for you have acted as attorney for a party accused in relation to the matter of which the accused stands charged and for which he is to be tried.

The language used by our court in the case of Coon v. Metzler, 161 Wis. 328, is here apropos. The court said, p. 334:
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"We cannot close this opinion without remarking on the inadvisability, almost amounting to impropriety, of the district attorney acting as attorney to recover civil damages arising from a supposed criminal act.

"In such matters the prosecuting attorney of the state cannot serve two masters. Justice is his sole client, and any private retainer which in any way tends to sway his judgment or distort his vision as to the character of the act should be sedulously avoided.

"The distinction between civil and criminal liability is apt to be much confused in the lay mind, as well as the distinction between an attorney’s acts in his capacity as a public prosecutor of crime and his acts as a private attorney. The code of ethics of the district attorney in all such matters cannot too closely follow the ethics of the bench; indeed, his duties are quasi-judicial in their nature."

You are therefore advised that it is my opinion that you should not act as district attorney in said prosecution.

Bridges and Highways—Drainage Districts—Liability of counties and towns to reconstruct bridges over natural water courses in cases where bridges have become too small to accommodate increased flow resulting from artificial drainage, discussed.

June 15, 1920.

FRANK A. JACKSON,
District Attorney,
Colby, Wisconsin.

By letter of June 5, 1920, you ask to be advised relative to the action which your county should take following the notice of drainage commissioners. The drainage district law (sec. 1379—10a to 1370—40) is involved.

On September 30, 1919, the drainage commissioners gave written notice to the county clerk that the Rouse bridge, which spans a "natural water course, or draught," is insufficient to permit the prompt passage of water across the public highway at the point in question. This notice purports to be in accordance with sec. 1379—31u. The insufficiency of the bridge is due to the added volume of flow created by a drainage ditch.

It appears from your letter that the bridge was built long ago
by the county, and "stands on a state aid road, but not on a county trunk line highway."

"Section 1379—31u. 1. Whenever any embankment, grade, culvert or bridge built or maintained by any person or corporation across any natural watercourse or natural draw so obstructs such watercourse or draw that waters therein are set back or diverted upon lands in any district, such person or corporation shall so enlarge the waterway through such embankment, grade, culvert or bridge and the approaches thereof that it will not set back or divert such waters upon lands in such district."

Subsequent subsections provide for the enforcement of the provisions of subsec. 1. The ordinary meaning of the language of subsec. 1 does not embrace a town or county, for the manifest reason that a town or county is not a corporation, but the word "corporation," as used in the drainage district law, is defined to include "counties, towns, cities, villages, other drainage districts, and all other drainage corporations." Sec. 1379—10b.

This statutory construction is of course binding, and we must therefore concede that sec. 1379—31u does apply to such towns and counties as come within the terms of the statute.

It will be noted that the statute relates to "natural watercourses and natural draws," and inferentially the statute may be said to contemplate a natural flow. It may well be doubted that the legislature intended that where the natural watercourse was bridged in such a way as not to interfere with the natural flow, but where through the digging of extensive ditches and the artificial drainage of large areas the flow of the stream is so greatly increased that it is obstructed by the bridge, the expense of a larger bridge, which really is for the benefit of the drainage district, should be cast upon the general public. The general scheme of the drainage district law seems to be to cast upon the drainage district the original cost of adjusting public highways to the changed conditions and limiting the public expense to the maintenance or repair of the new bridges and culverts and grades which the drainage development necessitated. Such is the effect of sec. 1379—31m. This last named section deals with instances where the ditches actually intersect existing highways, or where
such ditches are enlarged. This section does not directly affect the case in hand, for the reason that no drainage ditch actually crosses the highway.

You are therefore advised that it is my opinion that neither sec. 1379—31m nor sec. 1379—31u applies to this case. I will say, however, that I do not feel very certain that sec. 1379—31u does not apply, and for that reason I will consider for a moment what the result would be to the county if the last named section should be held applicable.

You state that this bridge is on a "state aid road," and I infer therefrom that it is a highway covered by the provisions of secs. 1317m—1 to 1317m—15. That system of highways is designated by the statute as the "county system of prospective state highways." Sec. 1317m—3, subsec. 1, subd. (a). When any portion of said system of highways has been improved in the manner indicated by the statute and accepted by the state highway commission or is so adopted by the county board, such portion becomes "a state highway." Sec. 1317m—7, subsec. 8.

"All state highways herefore 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," Sec. 1317m—7, subsec. 9.

The duty of keeping the county system of prospective state highways in repair rests upon the town in which the highways are situated until such time as the various portions of the system become state highways. Sec. 1317m—4, subsec. 6.

It does not appear from your letter whether the highway where the bridge in question is located is a state highway or merely an unimproved portion of the county system of prospective state highways. If it is a state highway and the public is required to enlarge the bridge, the expense thereof would be upon the county, but if it is not a state aid road and such public obligation exists, the duty is that of the town.
Dog Licenses—Under sec. 1623 every dog not licensed on July 1, 1920, must have license 60 days after he becomes six months old.

June 15, 1920.

C. J. Smith,
District Attorney,
Viroqua, Wisconsin.

In your letter of June 5 you refer me to sec. 1623, Wis. Stats., which concerns the licensing of dogs. You state that the license period under this section begins July 1, 1920, and that it further appears from the reading that any person owning a dog that is over six months old must, before June 30 of this year, pay the license, and if the dog becomes six months old after the first of July he is not liable to taxation until June of next year. You inquire whether this is the right interpretation that should be given to this section, especially in view of sec. 1626, which provides that this shall be paid into the county treasury at the end of each month.

Said sec. 1623 provides:

"1. Every owner of a dog more than six months of age shall annually, before the thirtieth day of June, obtain a license therefor, and shall pay for such license three dollars for each male dog, and five dollars for each female dog; • * * .

"2. The license year shall commence on the first day of July and end on the thirtieth day of the following June. The first license period shall begin July 1, 1920. Every owner of a dog for which a license is required shall make application for such license before the beginning of the license year. The owner of any dog which shall become six months of age shall within sixty days thereafter apply for and obtain a license in the manner herein prescribed and the fee therefor shall be the same as for a full year. All licenses shall terminate on the thirtieth day of June of the license year for which issued. • * * ."

You will observe that under the language used in this statute it is required of every owner of a dog to make application for and obtain a license within sixty days after the dog becomes six months old. A dog that becomes of age after July 1 is therefore required to be licensed by the owner within sixty days after the dog becomes six months of age. There is no room for the construction that a dog which is not of age on June 30 may go without a license until July 1 of next year.
Taxation—Soldiers’ Bonus Tax—Recovery of Illegal Taxes—Illegal soldiers’ bonus tax may be recovered from political unit which collected it.

When such tax is refunded, reimbursement is obtained by taking credit from county, and county from state in next tax settlement.

No recovery can be had of tax voluntarily paid.

June 15, 1920.

Tax Commission.

You have submitted the following questions:

1. Can an illegal soldiers’ bonus surtax be lawfully recovered under sec. 1164, Stats., from the town, city, or village that collected the same?
2. If so, is the town, city, or village entitled to a credit for the amount so refunded in the next annual settlement with the county, and in turn is the county entitled to a credit for such amount in its corresponding settlement with the state under par. 2 of said sec. 1164?
3. Can such taxes be recovered or remitted in cases where they were paid voluntarily or not paid under protest in cases where the illegality was not discovered previous to payment?

I am of the opinion that questions 1 and 2 should be answered “yes.” That construction of sec. 1164 does no violence to the language of the statute and is in harmony with the general scheme for refund of illegal taxes. The other alternative would leave the person who has paid an illegal surtax without any remedy save an appeal to the mercy of the legislature; and it would compel the taxpayer who was being coerced into paying such a tax to resort to a suit in equity to arrest collection.

Sec. 1164 empowers the taxpayer to go for redress to the local authority which made the illegal exaction. That is only fair and reasonable. The one who took the money should return it. A taxpayer should not be forced to go to a distant place or to a higher official to recover what was wrongfully taken from him.

The fact that the surtax all goes to the state does not introduce any new principle. A part of the normal tax belongs to the state, and yet the town must repay all illegal income taxes it has collected. The town acts for the state in collecting 10%
of the normal income taxes and all of the surtax and can as well act for the state in refunding the one as the other when repayment is due.

Question 3 is answered in the negative, upon the authority of State ex rel. Marshall & Ilsley Bank v. Leuch, City Clerk, 155 Wis. 499, and the earlier decisions of the supreme court.

Insurance—"Inventory and Iron Safe Clause" referred to is not inconsistent with standard fire insurance policy.

June 15, 1920.

HONORABLE PLATT WHITMAN,
Commissioner of Insurance.

In your letter of June 2 you state that the present underwriting rules of the majority of the fire insurance companies operating in this state require that the following "Inventory and Iron Safe" clause be attached to certain policies:

"Inventory and Iron Safe Clause
(Requirement to Keep Books and Inventory)

"It being optional with the assured and the assured having elected to accept an Inventory and Iron Safe Clause in this policy in consideration of a reduced rate of premium, it is made a condition of this insurance: (1) That the assured under this policy shall take an inventory of the stock and other personal property hereby insured at least once every 12 months during the term of this policy, and unless such inventory has been taken within one year prior to the date of this policy, one shall be taken in detail within thirty (30) days thereafter; (2) That the assured shall keep a set of books showing a complete record of business transacted including all purchases and sales both for cash and credit; (3) That the assured shall keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the building where such business is carried on; (4) That in case of loss the assured shall produce such books and last inventory."

You state that it is your contention that this clause is inconsistent with the provisions of lines 130 to 133 inclusive, and lines 153 to 158 inclusive of the standard fire insurance policy.

18—A. G.
That portion of the standard policy referred to by you provides:

"The insured shall furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made."

I can see nothing inconsistent with these provisions in the clause referred to by you. It simply makes additional requirements to be complied with by the assured in case of loss, and in addition thereto the assured would also be required to comply with the provisions of the standard policy form.

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**Insurance**—"Reduced Rate Co-insurance Clause" submitted does not conflict with sec. 1943a, Stats.

"Three-Fourths Limitation Clause" submitted does not conflict with sec. 1943a, Stats.

June 15, 1920.

**Honorable Platt Whitman,**  
*Commissioner of Insurance.*

In your letter of June 2 you state that a question has been raised as to whether the following clause complies with the provisions of sec. 1943a.

"Reduced Rate Co-insurance Clause  
"It being optional with the assured and the assured having elected to accept a Co-insurance Clause in this policy in consideration of the rate at which this policy is written, it is expressly stipulated and made a condition of this contract, that this company shall be held liable for no greater proportion of any loss than the amount hereby insured bears to % of the actual cash value of the property described herein at the time when such loss shall happen; but if the total insurance upon such property exceeds % at the time of such loss, then this Company shall only be liable for the proportion which
the sum hereby insured bears to such total insurance, not exceeding the actual amount of loss to the property insured.

"If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately."

You state that it is your contention that this clause should be amended to read:

"It being optional with the assured, and the assured having elected to accept a coinsurance clause in this policy in consideration of the reduced rate, etc."

You state that while this is a rather technical correction, it is important, inasmuch as sec. 1943a requires that a reduced rate must be given for the attachment of a coinsurance clause and further provides that the rate for insurance with and without coinsurance shall be specified in each policy.

You further state that at the present time, on certain classes of risks, rates without coinsurance are not quoted and that you believe that a policy issued with a coinsurance clause attached, which does not contain the rate with and without coinsurance, makes the coinsurance clause null and void, as there can be no method of determining whether or not a rate has been reduced; that inserting the word "reduced" in the clause would make it mandatory for the company to show that a reduction in rate has been made.

Sec. 1943a provides:

"Except as otherwise provided by law, no fire insurance company shall issue any policy in this state containing any provision limiting the amount to be paid in case of loss below the actual cash value of the property, if within the amount for which the premium is paid, unless, at the option of the insured, a reduced rate shall be given for the use of a coinsurance clause made a part of the policy. The rate for the insurance, with and without the coinsurance clause, shall be specified upon every policy. Any company may, by so providing in the policy, distribute the total insurance in the manner and upon as many items as specified therein, or limit the amount recoverable upon any single item, article, or animal to an amount not exceeding the cost thereof, or to an amount specified in the policy. Any company, officer, or agent violating any provision of this section shall be subject to the penalty provided in section 1941—65."

I cannot see that it is either important or necessary that the clause referred to by you be amended so as to state that the
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The coinsurance clause was accepted in consideration of the reduced rate. The clause referred to does state that the coinsurance clause is accepted in consideration of the rate at which the policy is written. In addition to that, under the terms of sec. 1943a, the rate for the insurance, both with and without the coinsurance clause, must be specified upon the policy. When this provision is complied with it will show very plainly that the policy was written at a reduced rate. Inserting the word "reduced" in the clause would no more make it mandatory for the company to show that a reduction in rate had been made than does the law itself. I do not see that the clause quoted is inconsistent with sec. 1943a, and in my opinion the amendment suggested by you is not important.

You also state that in connection with the clause heretofore referred to, your attention has been called to the use of the following clause:

"Three-fourths Limitation Clause
(This Clause Applies to Stocks Only)

"It being optional with the assured and the assured having elected to accept the Three-Fourths Limitation Clause in this policy in consideration of a reduced rate of premium, the assured hereby agrees, that in the event of loss, this company shall not be liable for an amount greater than three-fourths of the actual cash value of the property covered by this policy at the time of such loss, and in case of other insurance, whether policies are concurrent or not, then for only its pro rata proportion of such three-fourths value.

"Total insurance permitted is hereby limited to three-fourths of the cash value of the property covered and to be concurrent herewith.

"If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately."

You state that while this clause is not a coinsurance clause in a strict sense of the word, it is attached to policies under the provisions of sec. 1943a; that in the use of this clause it might be a question as to whether or not the policy is voided in case the assured carried insurance in an amount greater than 75 per cent of the value; and that my opinion is desired as to whether or not the above clause complies with the statutes or whether the following clause, which you state has been passed on by the
supreme court and by this department, should be used in this state:

"At the option of the assured, and in consideration of the reduced rate of premium charged for this policy, permission is hereby granted for other insurance to an amount including this policy, aggregating not to exceed 75% of the actual cash value of the property, provided, however, that if at the time of the fire the total insurance on the property shall exceed said 75%, this policy shall thereby become void only in proportion of such excess to such total insurance.

"If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately."

You do not state when this department passed upon this latter clause, nor where the opinion of the supreme court passing upon it is to be found. However, I am assuming that those matters are not particularly important to the question that you are asking.

Either of these clauses complies with the provisions of sec. 1943a, or, rather neither of them is inconsistent with that section. In either case the policy should contain the regular rate for the insurance and the reduced rate at which the policy is being written.

The clause that you state is being used would probably be sufficient to void the insurance if the total amount of insurance being carried was in excess of three-fourths of the cash value of the property covered. Certainly it gives room for that contention. The other clause, the one that you state has been passed on by the supreme court and this department, is not open to such a construction. The question of which of these clauses should be used is not a question of law but rather a question of policy, and that is something that should not be passed upon by this department.
Insurance—"Work and Materials Clause" submitted is not waiver of that portion of standard policy referred to in opinion.

June 15, 1920.

HONORABLE PLATT WHITMAN,
Commissioner of Insurance.

In your letter of June 2 you state that a question has been raised as to whether or not this clause

"Work and Materials Clause

"Permission granted for use of the premises as is usual or incidental in the business of (Insert name of assured), and to keep and use all articles and materials usual or incidental to said business in such quantities as the exigencies of the business require,"

constitutes an agreement in writing as contemplated in the Wisconsin standard fire insurance policy, waiving the provisions of lines 38, 39, 40, 44-51 inclusive.

The standard policy adopted by this state pursuant to the provisions of sec. 1941x, Stats., in the lines referred to by you, provides:

"Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring

"(b) while the hazard is increased by any means within the control or knowledge of the insured; or

"(d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fireworks, Greek fire, phosphorus, explosives, benzine, gasoline, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; * * * * *.*"

It is very doubtful if the clause submitted by you is such an agreement as is contemplated by the quoted portion of the standard policy form. Certainly the proposed clause would leave the way open to a great deal of litigation as to just how far it could be considered an agreement in writing waiving these provisions of the standard policy. In my opinion it is a form that ought not to be approved by you, and I am quite strongly inclined to think that it is a clause that would not protect the assured.
Taxation—Equalization—County board in making equalized valuation under sec. 1073 should include as taxable property in any city, town or village railroad terminal properties which are separately assessed.

June 16, 1920.

Tax Commission.

June 2, 1920, you submitted this question: Should a county board, in equalizing the values of the several taxing districts for the apportionment of state and county taxes, include in the valuation of any such district railroad docks and other terminal properties?

Such property is separately valued by you—sec. 1211—8, subd. (4),—and the tax represented thereby and collected by the state is paid to the district in which the terminal property is situated. Sec. 1211—29.

It has been the practice to include such property. Omitting it from the equalization has the effect of exempting the local district to that extent from state and county taxes, notwithstanding the fact that such property has, in effect, paid a state and county tax to the city, town or village where it is located. Sec. 1211—29.

The county board is commanded to annually

determine and assess the relative value of all the taxable property in each town, city and village which collects taxes independently in their county.” Sec. 1073.

This valuation made by the county board forms the basis for the apportioning of state and county taxes to the local districts (sec. 1076, Stats.). Therefore the question really resolves itself into whether or not such terminal facilities are “taxable property in each town, city and village” where located. They are not only “taxable property in” the town, city or village, but they are actually taxed for the benefit of the city, town or village.

The ad valorem taxes levied on such terminal properties belong to the city, town or village.

“* * * These funds are not in any true sense state funds, but simply funds belonging to the city of Superior [Ashland] which have been collected by the state as a matter of a convenience in the administration of the tax laws and are temporarily held by the state treasurer as custodian only for the city and
are to be turned over to the owner upon proper demand." State ex rel. Superior v. Donald, 163 Wis. 626, 628.

You are advised that it is my opinion that the question should be answered in the affirmative. Railroad terminal properties should be considered and treated as part of the taxable property within the local district where situated when the county board determines the equalized values of the several taxing districts.

Indigent, Insane, etc.—Municipality giving relief to inmate in one of its institutions who at time of receiving such relief was owner of property may sue for and collect value of same against such person or his estate.

T. P. Abel,
District Attorney,
Sparta, Wisconsin.

In your letter of May 20 you call attention to the fact that sec. 604q, Stats. 1917, was repealed by sec. 11, ch. 345, laws of 1919, and that sec. 12 of said chapter amended and renumbered sec. 1505a, which is now known as sec. 49.10, Stats.

You desire an opinion upon the following statement of facts, as quoted from your letter:

""A" has been an inmate of a county asylum for fifteen years, and during that time has had no property of his own and has been supported and maintained entirely at county expense at such asylum. On January 15, 1920, "A" received an inheritance as an heir of his deceased sister of approximately $5,000 his sister having died intestate, unmarried, June 8, 1919. "A" has no wife nor children, and no parents dependent upon him for support. Under our present law, is the estate of "A" liable for support and maintenance either during the entire time that he has been an inmate of such asylum, or for any portion of such time?"

Sec. 49.10 reads in part as follows:

"If any person who has received any relief, support, or maintenance at public charge, under this chapter or as an inmate of any state or municipal institution, was at the time of receiving such relief, support, or maintenance the owner of property, the
authorities charged with the care of the poor of the municipality, or the board in charge of the institution, chargeable with such relief, support, or maintenance may sue for and collect the value of the same against such person and against his estate. In any such action or proceeding the statutes of limitation shall not be pleaded in defense; but the court may, in its discretion, refuse to render judgment or allow the claim in favor of the claimant in any case where a parent, wife, or child is dependent on such property for future support."

Subsec. 1, sec. 604q, Stats. 1917, used to read as follows:

"The property and estate of any insane person kept in any state or county hospital or county asylum or kept by any county at its charge and the property and estate of any deceased person who shall have been a patient of such hospital or asylum shall be liable for the continuing and past support, maintenance of such person or patient and chargeable for the payment thereof."

The legislature repealed the foregoing section and, after making certain amendments to sec. 1505a and renumbering it 49.10, made it apply not solely to poor persons but to inmates of all state and municipal institutions. Where, under sec. 604q, the property and estate of any insane person was declared liable for the continuing and past support and maintenance of such a person, under sec. 49.10, he may only be held liable if at the time of receiving any relief, support or maintenance he was the owner of property.

According to your statement of facts, "A" was not the owner of property prior to January 15, 1920, he having on that date come into the possession of an inheritance of about $5,000 as an heir of his deceased sister. Under the terms of sec. 49.10, "A" is only liable for any relief, support or maintenance furnished to him in said county asylum prior to January 15, 1920, but is liable for any relief, support or maintenance received by him since said date.

This conclusion results from a construction of the statute and does not depend upon authority. If any common law liability attached to the person or estate of an insane person for his support or maintenance while in a state institution under legal commitment, it has been abrogated by the statute here in question.
Opinions of the Attorney-General

and we must follow its language in determining the liability of any person coming within its purview. See Richardson v. Stues-ser, 125 Wis. 66; Elkay v. Seymour, 169 Wis. 223; 22 Cyc. 1176, as to liability of insane person’s estate; 30 Cyc. 1138, as to liability of pauper’s estate.

Fish and Game—Under sec. 29.05, subd. (6), conservation warden has right to board and enter boats in outlying waters, in apprehension of violators of game laws.

June 18, 1920.

Willard E. Gaede,
District Attorney,
Sturgeon Bay, Wisconsin.

Replying to your inquiry of June 7, in regard to the right of a conservation warden to board boats in outlying waters, you are advised as follows:

Sec. 29.05, subd. (6), provides in part:

"* * * Any such officer may, with or without warrant, open, enter and examine all buildings, camps, vessels or boats in inland or outlying waters, wagons, automobiles or other vehicles, * * * and places where he has reason to believe that wild animals, taken or held in violation of this chapter, are to be found; but no dwelling house or sealed railroad cars shall be searched for the above purposes without a warrant."

I am satisfied, from an examination of the powers given to the conservation commission, that they have statutory authority to enter upon any boat or other craft, whether in inland or outlying waters.
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Counties—Taxation—Income Taxes—When income tax is limited by sec. 1087m—23 to 2% of equalized value of municipality, valuation referred to is that of year of tax levy.

Where income tax is collected by county treasurer such penalty belongs to county.

Where income tax is collected by suit of county no part of expenses incurred by city in feeing lawyer to look after its interests in suit may be paid by county.

June 18, 1920.

Charles F. Morris,
District Attorney,
Washburn, Wisconsin.

May 28, 1920, you asked to be advised as to the proper division between Bayfield county and Bayfield city of the proceeds of the judgment recovered by the county against Frank Boutin for income taxes. In 1917 an income tax of $31,875.58 was assessed against Boutin, then a resident of the city of Bayfield. He refused to pay the tax and it was returned delinquent. Suit was brought by the county treasurer to collect said tax, and judgment was recovered April 10, 1919, and was paid March 1, 1920. The amount paid was $39,552.54 and included the original tax, the 2% penalty and 1% a month from January 1, 1918, to the date of the verdict, taxable costs, and interest on the judgment.

November, 1917, the county board, pursuant to sec. 1073, fixed the value of the taxable property in the city of Bayfield at $944,054, and in November, 1919, fixed the same at $1,008,937.

The problem for solution is the proper division to be made between the county and the city and the questions involved may be stated thus:

1. Which equalized valuation is to be taken as the basis for determining the city's share of the tax proper?

2. What portion of the 2% penalty provided by sec. 1090 and what part of the interest and other items in the judgment belong to the city?

3. Is the county liable for any portion of the expenses incurred by the city in feeing an attorney for services in the litigation and, if not liable, can the county board authorize the payment of such expenses?
1. Income taxes collected in cash are divided as follows:

"** Ten per cent to the state, twenty per cent to the county, and the balance to the town, city or village in which the tax was assessed, levied and collected, except that when such balance exceeds two per cent of the equalized value of such town, city or village under section 1073, such excess shall be paid to the county to be distributed and paid to the several towns, cities and villages of the county, according to the school population therein." Sec. 1087m—23.

It is my opinion that the "equalized value" meant by this statute is the one made the year that the tax is levied. Had the tax been paid to the city treasurer while the roll was yet in his hands, it is perfectly apparent that the equalized value of 1917 must have been used and it would have been used without question. It is entirely reasonable to assume that the legislature intended that the valuation used should antedate the earliest possible payment of the tax, and it is unreasonable to hold that the legislature intended a postponement of the tax would shift the basis for dividing it. Whether the tax be paid promptly or otherwise, the same equalized valuation is to be used. I entertain no doubt that the equalized valuation of 1917 forms the basis for computing the city's share of the tax proper.

2. The 2% penalty in question is authorized and disposed of under secs. 1090, 1112, 1144 and 1087m—22, Stats. Subd. (4), sec. 1087m—22 declares:

"All laws not in conflict with the provisions of this act, relating to the assessment, collection and payment of taxes on personal property, the correction of errors in assessment and tax rolls, the compromise or cancellation of illegal taxes and the refund of moneys paid thereon, shall be applicable to the income tax herein provided for; **.

Sec. 1090 authorizes the imposition of a penalty or collection fee as follows:

"Taxes not paid before the first day of February shall be subject to a penalty of two per cent on the amount of the tax, which penalty shall be collected and paid into the treasury by the town, city or village treasurer."

If the city treasurer had collected the tax and such penalty, the entire penalty would have belonged to the city. That much,
doubtless, the city concedes, and the entire penalty in that event would go to the city as a fee for having collected the tax. But having failed to collect this tax, the city treasurer returned it delinquent, and with it the penalty.

"If the treasurer shall be unable to collect any taxes mentioned in the tax roll annexed to his warrant within the time prescribed by law he shall make out a statement of the taxes so remaining unpaid, including the two per cent penalty provided by section 1090. * * *

Sec. 1112.

Provisions for the collection of delinquent personal property and income taxes by the county treasurer are found in secs. 1126 to 1129. In addition thereto, this very specific provision as to the penalty:

"The two per cent penalty prescribed by section 1090 on the delinquent tax list returned by the treasurer of any town, city or incorporated village to the county treasurer shall be collected by the county treasurer in the same manner as other delinquent taxes are collected and paid into the county treasury for the use of the county." Sec. 1144.

From the statutes before referred to and quoted from, it seems quite plain that the county treasurer, having collected this delinquent income tax, is bound to retain the entire penalty for the use of the county. No part of that penalty belongs to the city. The only other statute which has been found that has any bearing upon the question is subd. (3), sec. 1114. That subdivision may have no application to this case, for the reason that delinquent income taxes are returned to the county treasurer without any division or apportionment. Subd. (5), sec. 1087m—22, and sec. 1087m—23. But if said subd. (3) has any bearing, it does not support the contention that the city is entitled to any portion of the 2% penalty. It is there provided that payment shall be made to the city when the delinquent taxes

"exclusive of the penalty provided by section 1090, exceed the sum then due the county for unpaid county taxes."

Again, there is this specific provision as to delinquent income taxes:

"* * * The county treasurer shall account for and pay all delinquent taxes thereafter collected by him, upon the basis hereinbefore provided, to the state treasurer, and to the several
town, city and village treasurers entitled thereto quarterly thereaf- ter." Sec. 1087m—23.

It is my opinion that interest should be apportioned to the state, county and city according to their respective shares of the original tax. The interest belongs to the owner of the principal on which the interest is computed.

"Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention." 22 Cyc. 1469.

Interest is merely an incident to the principal debt or money obligation and is drawn thereto and forms part of it. 22 Cyc. 1570.

3. The city of Bayfield employed an attorney to represent its interests in the suit brought by the county for the collection of the tax in question. No proceedings were taken by the county or any of its boards or officers authorizing the city to incur any expense in connection with the prosecution of the suit. It is my opinion that the city, like the state, pays its own attorney in this matter, and that neither of them can make any charge against the county or is entitled to have the county stand any portion of such expense for legal services. If the county must pay any part of the city's expenses so incurred, then it would seem but fair that the city should stand its pro rata portion of the expenses incurred by the county for legal services in the prosecution of the suit. The city having the lion's share of the amount recovered, would, under such an arrangement, pay the major portion of the county's expenses and might, on the whole, lose rather than gain by any attempt at apportionment of expenses incurred in the prosecution of the suit. Be that as it may, I think that the city, county and state must each pay its own expenses for legal services and is entitled to no reimbursement therefor from any other party. I am further of the opinion that the county board has no lawful authority to make any payment to the city on account of said expenses.

To remove any possible doubt of the conclusion which has been reached as to the sum which should be paid by the county to the city, that sum has been computed as follows:

2% of $944,054 equals $18,881.08; interest on $18,881.08 at 1% per month from January 1, 1918, to March 19, 1919, is
$2,756.64, which, added to the tax, makes $21,637.72; and interest thereon at 6% from March 19, 1919, to March 1, 1920, equals $1,233.35, which makes a total of $22,871.07.

Criminal Law—Draft Evasion—Elections—Voting—Crime of aiding in evasion of draft law not having been felony at common law, conviction thereof does not destroy qualifications of elector under laws of Wisconsin.

June 21, 1920.

GEORGE W. LIPPERT,
District Attorney,
Wausau, Wisconsin.

Can an individual found guilty in federal court under the espionage act, 40 Stats. at Large 553, charged with aiding an evasion of the draft, vote at elections in Wisconsin?

Sec. 2, art. III, Wis. Const., provides:

"No person under guardianship, non compos mentis or insane shall be qualified to vote at any election; nor shall any person convicted of treason or felony be qualified to vote at any election unless restored to civil rights."

Sec. 6.01, subd. (5), Stats., provides:

"No person who shall have made or become interested, directly or indirectly, in any bet or wager depending upon the result of any election at which he shall offer to vote shall be permitted to vote at such election; and any person who shall have been convicted of bribery shall be excluded from the right of suffrage unless restored to civil rights."

Sec. 4637, Stats., defines the term "felony," but the definition of such term is restricted to its use "in any statute." It does not undertake to, and under elementary principles could not, define the meaning of a term found in the constitution. The meaning of the phrase found in the constitution has not been discussed in any judicial decision relative to that particular provision. Sec. 15, art. IV, Wis. Const., however, confers a privilege from arrest on members of the legislature "in all cases, except treason, felony and breach of the peace."

The meaning of this phrase has been before the court for in-
terpretation in the case of State ex rel. Iseuring v. Polacheck, 101 Wis. 427, where it was said, p. 431:

"* * * The word 'felony' in the provision of the constitution quoted must be limited to such offenses as were felonies at the time the constitution was adopted. Jackson v. State, 81 Wis. 131; Klein v. Valerius, 87 Wis. 60, 61. We must hold that the offense charged does not come within the exception named in the constitution."

The question then arises whether or not the offense referred to in the opening question was a felony at common law. A felony at common law was an offense which occasioned a total forfeiture of either lands or goods, or both, to which capital or other punishment might be superadded, according to the degree of guilt. Bouvier's Law Dictionary, Vol. 2, p. 1202.

Sedition appears to have been considered as a species of scandal or libel at common law (State ex. inf. v. Shepherd, 177 Mo. 205), but as such offense it does not appear to have been treated as a felony. On the contrary, criminal libel at common law was punishable by fine or imprisonment.

No information or authority has come to our attention that a crime of the nature involved in this opinion was ever punishable as a felony at common law. It would follow, therefore, that conviction thereof did not result in the loss of right to vote under the laws of this state.

Fish and Game—Private Fish Hatcheries—Public Officers—Conservation Commission—Conservation commission may cancel certificate when owner does not comply with statute and actually conduct private fish hatchery as defined in sec. 29.52.

Conservation Commission.

In your letter of June 17 you ask whether under sec. 29.52, Stats., the commission can cancel a certificate granted to the owner of lands in this state to conduct a private fish hatchery when the person so obtaining the certificate does not actually conduct a fish hatchery as contemplated in the statute.

The object of sec. 29.52 seems to have been to encourage the
propagation of fish by private enterprise and seems to have contemplated enabling private parties to propagate fish upon private property. The primary purpose of the entire act was to increase the supply of fish by propagation in addition to that which the state was carrying on.

Under the statute subd. (2), sec. 29.52 defines a "private fish hatchery" as property "used for the purpose of propagating fish * * *. " Then follows a description of the kind of surroundings that must attend such propagation in order to constitute it a "private fish hatchery." The statute then seeks under subd. (5) to protect such "private fish hatchery" by punishing trespass without permission of the owner.

It goes without saying that all of these rights granted by the state to the owner of a "private fish hatchery" are predicated upon the fact that the reserve necessarily embraced within the contemplated hatchery is actually used for the purpose specified. If it is not so used then no rights whatever accrue to the owner of such area as was to be included in the "private fish hatchery."

All of the rights that were offered by the conservation commission in the form of a certificate can accrue only when the private owner has complied with the law and has actually used the property as a private fish hatchery as contemplated in the act. If the property is not so used, the rights conferred automatically revert and the certificate confers no rights whatever. It may be recalled or canceled in that event at the will of the conservation commission.

Dairy and Food—Butter and Cheese Factory Licenses—Under sec. 1410b—3 court has power to revoke license as part of penalty.

June 23, 1920.

HONORABLE GEO. J. WEIGLE,
Dairy and Food Commissioner.

Replying to your letter of June 17, in which you ask for an interpretation of sec. 1410b—3 as to the revocation of license of a cheese maker, you are advised as follows:

Under sec. 1410b—2 the dairy and food commissioner is authorized to revoke or suspend the license. This can be done where
the licensee fails to comply with any provisions of sec. 14106—2 or with any rule or regulation under which the license is granted.

Sec. 14106—3 provides penalties for the violation of the provisions of sec. 14106—1 and 14106—2, as well as for a violation of any of the rules or regulations prescribed by the dairy and food commissioner. It further provides a penalty and as a portion of the penalty that the license issued to such person shall be revoked. It was no doubt the intention of the legislature in passing this penalty section that a part of the penalty in each case should be the revocation of the license where the licensee was convicted. The legislature fixed revocation as a definite part of the penalty and this revocation should follow conviction. Under the law as laid down in *State v. Gumber*, 37 Wis. 298, I am of the opinion that a court has the right to revoke the license as a part of the penalty. This is true of justice courts as well as of courts of record.

Both the dairy and food commissioner and the court before whom a licensee is convicted have respectively, under secs. 14106—2 and 14106—3, the authority to revoke the license of an offending licensee.

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**Counties—Taxation—Drainage Assessments—Penalties and interest collected by county treasurer on delinquent drainage assessments belong to district, not to county.**

June 25, 1920.

Albert W. Grady,
District Attorney,
Port Washington, Wisconsin.

June 16, 1920, you asked for my opinion upon the question submitted to you by the county treasurer in letters of the previous day. The question relates to the ownership of penalties and interest collected by the county upon delinquent drainage assessments and is stated thus by the county treasurer:

"I am aware of the decision of our supreme court in the case of *State ex rel. Portage County Drainage District, v. Newby, County Treasurer*, 169 Wis. 208, but I should like to be advised as to whether the rule there laid down still applies to penalties and interest collected at the tax sale in view of the change in the
statutes, made by ch. 557, laws of 1919. See sec. 1379—24, Wis. Stats."

The rule laid down in the case cited is nailed down by ch. 557. That case was decided April 29, 1919, and the drainage district act was revised by ch. 557, published in July, 1919. That decision held that the drainage act, particularly sec. 1379—25a, awarded the penalties and interest so collected by the county to the drainage district, although the section failed entirely to mention penalties and subd. (a) did not mention interest. Ch. 557 repealed said section but reenacted it as subsec. 2, sec. 1379—24, Stats., and in these words:

"The treasurer of the county in which any part of a drainage district is situated, shall keep in the books of account of such county, a separate account with each district. In each such account he shall credit the district with (a) all sums received by the county in payment of drainage assessments of that district, penalties and interest thereon; (b) all sums received by the county as principal on the sale of drainage assessment certificates at the tax sale (except such certificates as shall be sold to the county); (c) all sums received by the county for principal, penalties and interest on sale or assignment of drainage assessment certificates, after the county has bid them in; (d) the principal and accrued interest on all drainage assessment certificates up to the date of the drainage assessment deed, in case the county has taken a deed to itself on any drainage assessment certificate and (e) any and all other sums received by the county on account of such district."

The only change made was to add at the end of div. (a) the words "penalties and interest thereon" and to insert in div. (c) the word "penalties" and to substitute the word "principal" for the word "face" in div. (d). These changes merely wrote into the statute expressly what the supreme court had before found to be there by implication or construction. You will also note that the revision amended subsec. 1, sec. 1379—24 by inserting in line 10 the words "penalties and accrued interest thereon" and thus making express provision that the penalties and accrued interest should be included together with the principal in the drainage assessment sale certificate.

The statute now provides and formerly provided that the county treasurer shall on demand pay to the commissioners of the drainage district the balance of money held by the county.
for the district as shown in the separate account which the treasurer is required to keep with each district, sec. 1379—24.

You are advised that the penalties and interest collected by the county treasurer upon delinquent drainage assessments belong to the drainage district and not to the county. I do not see how this proposition can be disputed.

Physicians and Surgeons—Osteopaths—Public Health—Vital Statistics—Death certificate signed by osteopath is valid.

June 25, 1920.

DR. C. A. HARPER,

State Health Officer.

In your letter of June 22 you submit the question whether osteopaths who are licensed in this state are permitted to sign death certificates. You state that it is understood that this question applies to osteopaths who do not hold an M. D. degree in conjunction with their osteopathic license.

Sec. 1022—37, Stats. provides:

"The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased, who shall specify the time in attendance, the time he last saw the deceased alive, and the hour of the day at which death occurred."

Then other matters which the certificate is required to state are given.

Sec. 1022—38 provides:

"In case of death without the attendance of a physician, or if the certificate of the attending physician cannot be obtained early enough for the purpose, any physician employed for the purpose shall upon the request of the local registrar or his deputy, make such certificate as is required of the attending physician."

Sec. 1022—39 reads thus:

"When a physician cannot be obtained early enough and only in such case, the local registrar is authorized to insert the facts relative to the cause of death, from the statements of relatives or other competent persons, and the permit for burial shall be issued upon such information."
The question presents itself whether the term "physician" as used in these statutes is broad enough to include an osteopath. This question is answered definitely by the provisions of sec. 1436b, which reads as follows:

"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."

In an official opinion by this department, IV Op. Atty. Gen. 345, it was held that under the Wisconsin statute as it then read, an osteopath was not authorized to make an eugenic examination. This opinion was rendered April 27, 1915. The provisions of sec. 1436b were enacted in ch. 438, laws of 1915, approved July 23 and published July 26, 1915. It was therefore enacted subsequent to that opinion and was evidently enacted for the purpose of authorizing an osteopath to do those things which the statute provides may be performed by a physician. I am therefore of the opinion that a duly licensed osteopath is a physician in contemplation of said sec. 1022—37 and may sign a death certificate.

Real Estate—Oil Leases and Interest in Real Estate—Real estate agents should have license to sell land.

June 25, 1920.

Real Estate Brokers' Board.

In your request of June 23 you ask "whether the sale of leases to oil land by agents in this state" requires a license, under ch. 656, laws of 1919. You state that the oil land is portioned out in leases and the leases are sold to individuals by agents.

Assuming a state of facts not set forth in your request, namely, that the leases to which you refer permit the lessee to go upon lands and prospect for oil, permitting the drilling of holes, the erection of derricks, with the right to take oil, together with the right to construct certain necessary buildings and equipment in boring for oil and taking oil from the lands, together with the right of egress and ingress, or substantially those rights, it is my opinion that a lease carrying substantially such provisions constitutes an interest in real estate.
Therefore, under par. (a), subd. (2), sec. 1636—225, any person who sells or exchanges or offers or attempts to negotiate a sale or exchange of such a lease is a "real estate broker" and is subject to all the provisions of said ch. 656.

Appropriations and Expenditures—Transfer of Funds—Legislature may appropriate unexpended balance of moneys raised for payment of bonuses and apply same to construction of hospital.

In determining balance available for Wisconsin general hospital service recognition board may make any decision having reasonable basis in law and in fact.

June 26, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

Two questions arising out of the enactment of ch. 30, special laws of 1920, are presented.

This law provides for the transfer of certain sums of money from the service recognition fund to the university fund income. The service recognition fund was raised by a general tax and by surtax on incomes for the purpose of paying a bonus to residents of Wisconsin who served in various capacities in the late war against Germany and Austria. You ask if money raised by taxation for a specific purpose can be diverted by the legislature to some other purpose than that for which it was raised.

This department is familiar with no rule of law that prevents the legislature, subject only to paramount and controlling restrictions of the constitution, from applying any money in the state treasury, irrespective of the purpose for which it was raised, in the furtherance of any constitutional purpose whatsoever. Power to do so, indeed, would seem to rest upon most elementary principles. The supreme court of Wisconsin said in State ex rel. Board of Regents v. Donald, 163 Wis. 145, 147:

"Undoubtedly the legislature can repeal a statute carrying an appropriation and thus put an end to the appropriation, so far as it is unexpended, at any time."
Such a rule would seem peculiarly applicable to appropriations to the service recognition board, because such appropriation as a matter of ultimate legal analysis rests upon the mere uncontrolled bounty of the state and might have been repealed in its entirety before any moneys had been expended for the purpose of the act, or after the original purpose of the act had been but partially consummated. In such event, the legislature only would have power to make application of the funds necessarily remaining in the treasury of the state. Were the result of the act under consideration to deprive any soldier, sailor, or Red Cross nurse of the bonus provided for and, in lieu thereof, to provide for the erection of a state hospital as a memorial and in

"token of appreciation of the character and spirit of their patriotic service and to perpetuate such appreciation as a part of the history of Wisconsin"

such action would have been within the scope of legislative power. This follows as a necessary corollary to the rule already stated.

No such action, however, is contemplated in the present case. On the contrary, the act (sec. 3) provides only for the transfer of funds

"whenever, in the opinion of the service recognition board moneys in the service recognition fund are no longer needed for the carrying out of the provisions of chapter 667, laws of 1919."

This leads to the second question: How is the service recognition board to determine when this fund is no longer needed?

This provision finds a parallel in that portion of the original act which laid the basis for determination of the amount to be raised by taxation or bond issue. Subd. (8), sec. 7 provided:

"The service recognition board shall estimate or cause to be estimated the amount which may be collected under this section and determine as nearly as practicable the balance needed for said fund, which balance shall be raised by taxation or bond issues as provided by section 2 of this act."

(Ch. 667, Laws 1919.)

The functions to be exercised in the two cases are substantially identical in character. In one case, the service recognition board is called upon to estimate how much money is required to be raised for the purpose of carrying out the terms of the act. In
the other case, in the light of much fuller information, they are called upon to check up and determine the accuracy of their previous estimate, both as to the amount required and the amount that would result from the application of a specific rate of taxation.

The unconstitutionality of the original act, in the particular under consideration, was urged with much force by special counsel in the case of State v. Johnson, infra. The court met the argument by saying:

"It is further contended by relator that the duties conferred upon the recognition board provided in the act was a delegation of legislative power. We regard this contention untenable. The duties of the recognition board are purely ministerial, and under repeated decisions of this court cannot be regarded as a delegation of legislative power." State v. Johnson, 175 N. W. 589, 601.

You are therefore advised that the service recognition board is to determine when this fund is no longer needed, by the application of exactly the same considerations that prompted its original estimate as to the amount that would be required. In reaching this conclusion and in determining what amount shall be from time to time transferred from the service recognition fund to the university fund income, it is requisite only that the decisions of this board, in common with the decisions of other administrative boards, shall have some reasonable basis in fact and in law, as distinguished from being merely arbitrary determinations without foundation in reason. Ekern v. McGovern, 154 Wis. 157.

Appropriations and Expenditures—Escheats—Public Lands—Legislature, by sec. 20.06, subd. (6), has provided that proceeds of lands sold under mistaken assumption that they had escheated to state shall be repaid out of common school fund.

Payment of interest and taxes provided for in sec. 24.11 is to be made out of general fund.

June 26, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

Your letter of June 24 calls attention to a claim presented on behalf of the heirs of Henry Wolf for the refund of $1,600, on
account of the sale of escheated lands. The purchase price of this land was approximately $1,200, and the difference between that amount and the amount ordered refunded consists of taxes and interest. This claim is made under the provisions of sec. 24.11, subd. (4). This section provides, among other things:

"* * * If by virtue of a better title a recovery of such land be had by any other person or party within twenty years after such purchase, the state shall refund to the purchaser or his assigns or legal representatives the amount paid by him for the land together with interest thereon at the rate of six per cent per annum from the date of the purchase until the date of recovery and also the amount of all taxes on the land actually paid by him with like interest on each payment from the time of payment to the date of the recovery."

Art X, sec. 2, Const., provides:

"* * * The clear proceeds of all property that may accrue to the state by forfeiture or escheat. * * * shall be set apart as a separate fund, to be called 'the school fund,' the interest of which and all other revenues derived from the school lands shall be exclusively applied to the following objects, to wit:

1. To the support and maintenance of common schools"

Sec. 20.06 provides:

"There are appropriated from the proper respective funds, from time to time, such sums as may be necessary, for refunding or paying over moneys paid into the state treasury as follows:

(7) Such sums as may be necessary for repayment of moneys paid to the state on purchases of public or escheated lands, as provided in sections 24.11, 24.33, 24.34, 24.35 and 26.04."

Sec. 20.24, Stats., as to the common school fund, is merely declaratory of sec. 2, art. X, Const.

In this situation you are advised that you have no authority to pay the entire award of $1,600 from the common school fund. The continuing nature of the trust impressed upon the lands, described in sec. 2, art. X, Const., was emphasized by the supreme court in State ex rel. Owen v. Donald, 160 Wis. 21 (see particularly headnote 12). So far as the school fund is concerned, under express constitutional provision, it may not be diverted or affected or impaired in any way. The situation as to the pro-
ceeds of these lands, however, which may have never properly escheated to the state, is analogous to the situation of any other property that has inadvertently come into the hands of a trustee and been sold by him. Among cases passing on similar situations may be noted *Gordon v. Weaver*, 53 S. W. 740, which was an action growing out of proceedings by the state under an act of the legislature to wind up the Bank of Tennessee. It appears that in such winding-up process lands came into the hands of the receiver and were by him sold to the complainant. The complainant was evicted from a portion of the lands by paramount title, and brought suit against the receiver to recover the money paid into the general trust fund. The court stated the position of complainants thus, p. 754:

"The equitv of complainants rests upon the proposition that in demanding the money they are not demanding something to which the creditors are entitled, but that they, under mistake, paid into the trust a fund which did not belong there. In other words, the complainants insist that, if this money be repaid to them, the creditors of the bank, whoever they may be, will get all that the bank ever rightfully possessed. With the doctrine of caveat emptor out of the way, this contention is sound and logical. Under the facts of this case, and the record as it comes before us, we believe that the complainants are entitled to recover, and that there is no error in the decree of the chancellor."

The situation thus presented is akin to the present one, and repayment of moneys may be made upon the theory that the same were never legally a part of the common school fund, but other moneys which are legally a part of the common school fund may not be used to make up a sum sufficient to repay the purchaser the taxes paid by him and six per cent interest.

Sec. 20.06, subd. (7), seems designed merely to effectuate the purpose of making payment of moneys actually coming in to the common school fund. It will be noted that the appropriation is made "from the proper respective funds," and that the same is "for repayment of moneys paid to the state on purchases of public or escheated lands, as provided in sections 24.11," etc. There can be no such thing as repayment, or payment back, of money, unless such money shall first have been paid into the "proper respective fund." Interest upon the purchase price
which the buyer has invested in the lands, and taxes "paid by him with like interest," clearly are not payments that have been made, and consequently there is no provision for their repayment by sec. 20.06 from any fund whatsoever. It is the judgment of this department, therefore, that the net result of sec. 20.06, taken in conjunction with sec. 24.11, is to provide for the repayment of the principal arising from the sale of lands erroneously assumed to have been escheated and paid into the common school fund, and that the proper fund out of which such principal is to be paid is the common school fund.

In this situation, the further question is presented as to what, if any, shall be the source from which payment of interest on the purchase price, taxes and interest thereon, shall be paid. The language of sec. 24.11 is plain and specific. It provides:

"* * * The state shall refund * * * interest thereon at the rate of six per cent per annum * * * the amount of all taxes * * * with like interest on each payment * * *"

The rule has been of frequent statement that no specific form of words is requisite for making an appropriation. It was said in Campbell v. Board, 115 Ind. 591; 18 N. E. 83, 34:

"* * * It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law; but such an appropriation may be made impliedly, as well as expressly, and in general, as well as specific, terms. It may also be a continuing or fixed appropriation, as well as one for a temporary purpose, or a limited period. The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation. It may be said, generally, that a direction to the proper officer or officers to pay money out of the treasury on a given claim or class of claims, or for a given object, may by implication be held to be an appropriation of a sufficient amount of money to make the required payments."

This language is quoted with approval in Henderson v. Board of Commissioners, 28 N. E. 127, 130.

Within the rule thus stated, it seems plain that sec. 24.11, standing alone, is sufficient to constitute an appropriation. The soundness of this conclusion is confirmed by the decision of the supreme court in the case of State ex rel. Lotz v. Hull, which
involved the sufficiency of an appropriation for the payment of compensation to the state board of medical examiners. The language of the statute there involved contained no operative words making an appropriation. This fact was called to the attention of the court in the brief of this department, and the sufficiency of a mere designation of the amount to be paid to the state board of medical examiners, provided for in sec. 1436, was of necessity involved, and the court could only have reached the decision announced on June 23 upon the theory that the same constituted a sufficient appropriation.

It being thus established that the section operates to make an appropriation, the question arises, from what fund shall the same be paid? The language of the supreme court of California in the case of Proll v. Dunn, 22 Pac. 143, 145, is illuminating:

"* * * It has become and is the custom in this state, of very general, but not universal, application, to use the phrase 'appropriated out of any money in the treasury not otherwise appropriated;' but it seems to be mere custom, not founded upon any constitutional or other legislative requirement. And we learn from the argument that the comptroller interprets that phrase to mean 'out of the general fund.' We know of no law which authorizes such an interpretation. On the contrary, it would seem that everything authorized by law to be paid out of the state treasury is payable out of the general fund, if not specially made payable out of some specific fund,—as the 'school fund,' the 'interest and sinking fund,' and the like. The truth is, there are not many separate funds in the treasury, but there are many appropriations, and most of the latter are payable out of the same fund,—the general fund. * * *

"In this act we have a clear, distinct expression of the legislative will, making the appropriation. The words, 'out of any moneys in the treasury not otherwise appropriated,' are not necessary to the expression of that will, or the making of such appropriation. They are in common use in this state, but nowhere made necessary, and are not always used.'"

Other cases bearing upon the general subject might be stated, but it is deemed that the foregoing establish the proposition that the principal of moneys actually paid into the common school fund shall be repaid from that fund and that the balance required to be paid by sec. 24.11 shall be paid from the general fund.
Appropriations and Expenditures—Public Officers—County Board—Resolution by county board purporting to make allowance to county officials for clerk hire to be paid to county officials is in effect attempt to increase their compensation during term of office and is therefore void.

June 30, 1920.

EDWARD ELMER,
District Attorney,
Florence, Wisconsin.

Your letter of June 4, 1920, addressed to this office, contained this paragraph:

"At its annual meeting last November the county board for Florence county voted by separate resolutions for each of the following offices, district attorney, county clerk, county treasurer, sheriff, and clerk of the circuit court, to allow a certain amount for clerk hire and by a duly adopted resolution authorized the different county officers to designate such clerks and further directed that the money allowed for each office per month be paid to such designated parties. The different officers designated above thereupon appointed clerks for each office to assist in the duties of such office. The question now arises as to whether the amounts allowed can be legally paid to these clerks or any one of them."

Upon the state of facts so presented, your attention was, by letter of this department under date of June 5, 1920,* directed to the provisions of sec. 59.15, subd. (3), which provides that the county 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.

The chairman of your county board, Mr. E. A. Thieman, has now submitted to this office what purports to be a copy of the official publication of the proceedings of the county board for Florence county at the annual meeting of such board held on November 11, 1919. From such proceeding, it appears that the resolution adopted relative to the county clerk was as follows:

"RESOLVED, by the County Board of Florence County in Annual meeting duly assembled this 13th day of Nov. 1919, that the office of the county clerk in and for said county, be and hereby is allowed as clerk hire, the sum of three hundred sixty dol-

*Not published.
lars ($360.00) per annum, the same to be paid out of the treasury of said county and paid to the county clerk in monthly payments of thirty dollars, the first payment to be made Jan. 1st, 1920. This resolution to expire and be of no further effect on and after January 1st, A. D. 1920."

The resolutions as to each of the remaining officers are in like phraseology, making allowance of a specified amount as "clerk hire," and providing definitely and specifically for payment thereof, not to any deputy, clerk or assistant, to be designated, but to the official himself. So far as the plain terms of the resolutions are concerned, the payment to be made in each case is not conditioned upon the employment of a clerk, deputy or assistant at all, or the rendition and discharge of any service, and if the statements in the letter of the chairman of your county board are correct, such apparently is the construction that has been placed thereon by the various county officers, for it is said therein:

"The sum provided for clerk hire for the district attorney, county clerk, county treasurer, and clerk of the court, orders were made out by the clerk and cashed by the treasurer in favor of the respective wives of the officers.

"We would like your opinion on this resolution and also your opinion as to whether or not the wives of these officers can draw clerk hire when they are not performing any service."

If the resolutions actually adopted are correctly set forth in this printed publication, and the action taken thereunder is such as has been started in the foregoing quotation, then an entirely different situation from that set forth in your letter of June 4 is presented for consideration. The proposition then becomes squarely one of power on the part of the county board to increase or diminish the compensation of these officers during their term of office.

Sec. 59.15, subd. (1), is decisive, and controlling. It reads:

"The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who 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, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions: * * *

"
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_Etsell v. Knight_, 117 Wis. 540, passed upon the validity of a resolution that in terms authorized the county clerk and county treasurer to employ a clerk at a specified salary. Payments under said resolution were held illegal, the court saying, p. 543:

"* * * Any payment, therefore, of public moneys to said deputies is illegal, not only because such payment practically amounts to an increase of the officer's salary during his term of office, but also because the law does not authorize it."

That the effect of the resolution in question is to increase the salary or compensation of the officer was indeed established in a much earlier decision. _Rooney v. Supervisors of Milwaukee County_, 40 Wis. 23, involved the validity of an act of the legislature which declared:

"The county board of supervisors of Milwaukee county shall appropriate and allow to the county treasurer of said county the sum of three thousand dollars ($3,000) per annum in addition to the salary now allowed him for the term commencing on the 1st Monday of January, 1875, for the purpose of enabling him to employ such clerks and assistance as may be necessary in his office during said term; and said sum so allowed to be paid the said treasurer in quarterly installments * * * ."

The court, construing this language, said, pp. 25–26:

"Ch. 177 of 1875 does not purport to authorize or require the treasurer of Milwaukee county to employ clerks in his office, and the board of supervisors to pay him the compensation of clerks so employed. It requires the board to pay the treasurer an annual sum, in addition to his salary, for the purpose of enabling him to employ clerks. It does not appear in this case that the treasurer actually employs any clerks in his office, though it may be presumed that he does. He takes the office _cum onere_, bound to discharge its duties, with or without clerks, as he may be able. And the sum which the statute requires to be paid to him is, by its terms, absolutely payable, without reference to the number or compensation of the clerks he may employ. There is therefore no doubt, as was indeed conceded on the argument, that the statute must be held as directly increasing the compensation of the treasurer himself, after the commencement of his term of office."

The language of the supreme court in the case of _State ex rel. Raymer v. Cunningham_, 82 Wis. 39, is equally pertinent. This case involved the construction of a statute which sought to allow
the state superintendent of public instruction the sum of $1,500 for traveling expenses and $1,000 for clerk hire, the same to be payable, irrespective of the actual amount of traveling expenses incurred or expenditure for clerk hire. The court said, p. 50:

'* * * While such legislative power is sufficiently broad to authorize the payment of such employes, clerks, and assistants, and such expenses, from the public treasury, in the manner prescribed, yet it gives no authority for the increase of the compensation of the state superintendent under the guise of clerk hire performed by himself or not at all, nor for traveling expenses never made or incurred.'

It is thus apparent that any payments under the resolution, particularly if, as is alleged, such payments were made in the absence of the actual rendition of any services, would be void. This opinion is not to be taken as in any sense departing from the statements contained in the letter of this department under date of June 5, but merely applies principles of law deemed to be well settled to a different state of facts that has been disclosed.

_Agriculture—Farm Drainage Law—Taxation—Drainage Assessments_—Under farm drainage law interest collected by county treasurer on delinquent assessments goes with assessments and penalty collected belongs to county.

June 30, 1920.

_ALBERT W. GRADY,_

_District Attorney,_

Port Washington, Wisconsin,

In the opinion rendered you June 25, 1920,* I omitted to answer one of the questions submitted. One of your questions called for the construction of portions of the "drainage district law" (secs. 1379—10a to 1379—40), and that question was answered.

The other question related to the farm drainage law (secs. 1368—1 to 1368—30).

Drainage assessments made pursuant to sec. 1368—8, Stats., were returned delinquent to the county treasurer. Some of those

*Page 290 of this volume.
delinquent assessments, together with the penalty prescribed by sec. 1090 and accrued interest, have been paid to the county treasurer. Where assessments were not paid, the land affected was sold at the tax sale June 8, 1920, for the assessment and interest and penalty. Upon these facts, you ask whether the interest and penalties so collected by the county treasurer belong to the county or to the "drainage."

I am of the opinion that the interest belongs to the drainage, and the penalties to the county. That is evidently the disposition made of interest and penalty where the assessments are collected by the town treasurer.

The assessments under the farm drainage law draw interest from date of confirmation at the rate of six per cent per annum. Subsec. 4, sec. 1368—10.

The secretary of the drainage board is required to keep a record of all assessments and annually, before December 1, certify to the town, city or village clerk the amount due from each parcel of land. Sec. 1368—13.

"Each * * * clerk shall insert in the tax roll for each year the amounts of the unpaid assessments and interest thereon due that year against the respective lands and corporations to him by the secretary of the board. Such assessments and interest shall be collected by the treasurer of each respective town, city, and village and if unpaid, returned by him to the county treasurer. Such assessment and interest shall be kept separate from general taxes and if unpaid shall be sold in the same manner as general taxes and a separate certificate of sale shall be issued therefor in substantially the same form as certificates of sale of lands for general taxes."

All drainage assessment certificates bear interest at 10% from the date of sale. Sec. 1368—14.

The interest follows the principal, and belongs to the assessment on which it is computed. Neither the town nor county has any property interest in these drainage assessments. The treasurer acts merely as a collection agent, and in case he receives payments he becomes trustee of the fund, not for the county, but for the drainage. For that reason, the interest as well as the assessments are kept separate from public funds. State ex rel. Donnelly v. Hobe, County Treasurer, 106 Wis. 411.
The interest as well as the assessment is collected for the drainage and is payable to it.

"Moneys collected for or payable to any 'drainage' shall be turned over to or paid to the county treasurer of the county whose court has jurisdiction thereof and such treasurer shall keep a separate account for each separate 'drainage' and pay out the funds of such 'drainage' only upon the order of the court or upon proper warrants of the drainage board." Sec. 1368—18.

I see no reason to doubt that the statute intends that the interest is to go with the assessments, and is to be regarded as part and parcel of the drainage fund.

As to the penalties, the rule is different. That penalty is in many senses a collection fee and should belong to the collector. I think it is the universal practice, where collection is made by a town treasurer, to pay the 2% penalty to the town treasurer. Where the local treasurer fails to make collection, the penalty is returned as part of the delinquent taxes (sec. 1112, Stats.), and is thereafter to be collected by the county treasurer. Disposition of the penalty when collected by the county treasurer is provided for by sec. 1144:

"The two per cent penalty prescribed by section 1090 on the delinquent tax list returned by the treasurer of any town, city or incorporated village to the county treasurer shall be collected by the county treasurer * * and paid into the county treasury for the use of the county."

This is a most explicit direction in the premises, and I find nothing in conflict therewith in the farm drainage law.

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*Bridges and Highways—Gravel Pits—Eminent Domain—Condemnation Proceedings*—Stone quarry or gravel pit owned by city and situated outside its limits may not be condemned by county or state to obtain materials for highway construction.

June 30, 1920.

*Wisconsin Highway Commission.*

Manitowoc owns a gravel pit situated outside of the corporate limits and adjacent to a state trunk highway now being con-
structed, and it is desired that gravel be obtained from said pit in such construction work. Upon these facts, you ask to be advised whether or not there is a way in which the state or Manitowoc county may obtain this gravel deposit by exercise of the power of eminent domain, in the event that satisfactory mutual arrangements cannot be made with the city for obtaining the desired material.

It is my opinion that this question must be answered in the negative. If condemnation proceedings were resorted to, doubtless it would be under subsec. 3, sec. 1317m—6. It is there provided:

"In case the county committee shall deem it desirable to acquire the right to take stone, or gravel, clay or other material from private land for use in the execution of their duties, or acquire the right of access to or from said lands, they are empowered to take title to such right to the county for highway purposes and pay, or contract to pay therefor, out of the public funds provided for the improvement of highways in the county.

"In case the county committee and the owner of the private premises cannot agree as to the price for such right, such committee may acquire the same in the name of the county for the public use indicated, by exercising the right of eminent domain," as in said section provided.

It is quite evident that the words, "private land" and "private premises" are used in contradistinction to public property and places, and those words were probably used advisedly for the purpose of preventing any unseemly dispute, such as would arise in an effort to condemn the gravel deposit here in question. The premises are now devoted to the use of public roads maintained, it is true, by a different political division, but none the less for the public generally. It is the general rule that property devoted to a public use or purpose will not be taken under the power of eminent domain to be used for the same purpose and in the same manner. 15 C. 613. If the facts before us do not bring the case strictly within the letter, they are nevertheless within the spirit of that rule.

Should the county be held to have the right to condemn this gravel pit, it would logically follow that the city might thereafter proceed to condemn the same premises for park purposes.
"Every city is authorized, upon recommendation of its officers, board or body having the control and management of its public parks, to acquire by condemnation such lands outside of its corporate boundaries as it may need for public parks, parkways, boulevards and pleasure drives located in the same county in which such city, or any part thereof is located." Sec. 27.08, subd. (7), par. (e).

Ch. 571, laws of 1919, codified the statutes relating to the power of eminent domain and its exercise, and designated the same secs. 32.01 to 32.20 (ch. 32), Stats. It would not be possible to condemn this land under the provisions of said ch. 32.

"(1) The general power of condemnation conferred in this chapter does not extend to property owned by the state, a municipality, public board or commission, * * * unless such power is specifically conferred by law." Sec. 32.03.

The language just quoted is thought to express the general legislative intent, and is the only sound rule for the orderly and peaceful administration of public affairs in this field. The city cannot condemn lands owned by the county and used for accomplishing county purposes. Nor can a town take such lands from the county. There may be instances where property presently devoted to a public purpose of a very high order is imperatively needed for some other public object, but those cases are to be dealt with by express statute, or by necessary implication from such statute. I find no such authority. The right to condemn this city property is not expressly given to the county or state nor does it arise from powers expressly granted nor does deprivation of this privilege prevent the state and county from proceeding with its highway project.

The rule in such cases is stated by Chief Justice Winslow, in Kilbourn City v. Southern Wis. Power Co., 149 Wis. 168, 182, as follows:

"* * * The right to condemn property devoted to one public use for a different use exists (1) where such right is expressly given by statute; (2) where it arises by necessary implication from the powers and privileges granted; and (3) where the privileges granted cannot be beneficially exercised without the taking of the property already devoted to a public use."
Taxation—Dog Licenses—Dog license year begins July 1, 1920. Funds to pay damages available only out of fees for license year.

June 30, 1920.

R. M. Orchard,
Acting District Attorney,
Lancaster, Wisconsin.

I have your letter of June 29, in which you inquire whether a farmer who has had sheep killed by dogs prior to July 1, 1920, is entitled to compensation therefor.

Ch. 527, laws of 1919 (subsec. 2, sec. 1623, Stats.), provides as follows:

"The license year shall commence on the first day of July and end on the thirtieth day of the following June. The first license period shall begin July 1, 1920."

Sec. 1626, subsec. 2, Stats., requires the license clerk to pay the license fees to the county treasurer.

Sec. 1627, subsec. 1, creates the "dog license fund."

Subsec. 2, sec. 1627 provides that the expenses incurred by the county for certain claims "shall be paid out of the dog license fund." Said subsection further provides:

"... The amount remaining thereafter in said fund shall be available for and may be used as far as necessary for paying claims allowed by the county to the owners of domestic animals on account of damages done by dogs during the license year for which the fees were paid.

The only conclusion, therefore, is that the license year being from July 1 to June 30, inclusive, succeeding, and the first license year beginning July 1, no claim is payable out of such fund except "on account of damages done by dogs during the license year," that is, on damages occurring during the license year beginning July 1, 1920.

While you do not raise another question, the answer to which is very important, permit me to suggest that by reason of subsec. 2, sec. 1629 the question arises: Can the county board allow claims for the year beginning July 1, 1920, until after July 1, 1921?

You will note the county clerk under the provisions of said subsection shall lay before the county board at its annual meeting all claims filed and reported "for the preceding license year."
Under sec. 3, sec. 1629, the distribution of the license fund is made pro rata where the fund is insufficient to pay the full amount, and, of course, it is very clear that the fund cannot be pro rated unless a specific and definite term within which license money is paid, is used, and for that reason, no doubt, the legislature definitely prescribed what is the license year.

You will also note that by subsec. 2, sec. 1627, the surplus in the fund remaining "from the license fees of any license year" at the end of the succeeding license year belonging to it is payable to the towns, cities and villages in the proportions therein set forth.

It appears that the law makes the license year an essential element for the administration of the law with respect to the disbursement of the license fund, and the suggestions I have just made bear out my conclusion in answer to your specific question.

Counties—Courts—Indigent, Insane, etc.—Limitation of Actions—Claim of county for support of insane man does not outlaw within six years in view of sec. 49.10.

M. J. Paul,
District Attorney,
Berlin, Wisconsin.

My attention was called to the provisions of sec. 49.10, Stats., as amended by ch. 345, laws of 1919.

This section was overlooked in the opinion rendered to you during the month of March, 1920.* The statute as amended takes the claim against the county for support of an inmate of any state or municipal institution out of the statute of limitations, and to that extent the opinion to you should be modified.

* Page 131 of this volume.
Bridges and Highways—Shade Trees—Corporations—Public service company cannot molest shade trees on public highway without first having franchise under which they are acting approved by highway commission.

July 1, 1920.

H. F. Arps,
District Attorney,
Chilton, Wisconsin.

Replying to your inquiry as to the right of public service companies using trunk line highways to cut down and mutilate shade trees on said highways, your attention is called to the following provisions of the statute, sec. 1317, subsec. 7, par. (a):

"No franchise or permit shall hereafter be granted to any public service corporation for the use of any highway or bridge on the trunk system, unless the franchise or permit granted by the official or officials of the unit or units of government in which such highway or bridge shall lie shall have been first approved as to their terms and sufficiency by the commission."

I am informed that no franchise or permit has been submitted to the commission for approval with reference to the section of highway here in question. Assuming that to be the fact, the public service company has no right whatever to set poles or string wires on the highway. It seems to be the practice of the highway commission to protect the highway against uses that result in a detriment to the comfort, safety, and convenience of travel on the highways. Whether or not in the particular case in question the highway commission would insist upon the protection of the trees as one of the terms of the franchise or permit sought by the public service company is a question which we of course cannot answer at this time, but it is within their power if the conditions warrant to do so.

Subsec. 11, sec. 1317m—9 provides:

"No franchise or permit shall hereafter be granted on or over any highway or bridge which has been or shall hereafter be con-
structured under the provisions of sections 1317m—1 to 1317m—15, inclusive, unless the franchise or permit granted by the officials of the unit or units of government in which such highway or bridge shall lie shall have been first approved as to their terms and sufficiency by the county board of the county in which such road or bridge shall lie."

It will be noted that if the highway in question is one that falls within the provisions of secs. 1317m—1 to 1317m—15, inclusive, the terms of sufficiency of the permit must be approved by the county board.

Public service companies sometimes proceed to use the highway for electric lines, assuming that the only law that governs them is contained in sec. 1329a, which is erroneous. The provisions of sec. 1329a must be read with all other provisions of the statute, including those contained in secs. 1317m—9 and 1317. supra.

It seems quite obvious that under the provisions of secs. 1341 to 1345, inclusive, the public has a vital interest in propagating and protecting shade trees on public highways. This purpose is accentuated by the increased attention given to highways in the last decade.

There has been given to the highway commission, by implication, the function of protecting these trees along public highways in the interest of the comfort of the traveling public. The highway commission has been given a very broad authority looking toward the convenience, safety, comfort, and ease of travel of the public upon the public highways of the state and especially the trunk line systems. It is fair to assume that within the powers given them to control the terms upon which public service corporations could impose additional burdens upon public highways is contained the power to protect shade trees growing upon the public highway. It is also fair to assume that the legislature intended that the highway commission should preserve shade trees for the public and should prevent their destruction by those seeking to use the highway for purposes not incident to travel.

You are therefore advised that the public service company has no right to cut down or mutilate or otherwise molest or disturb shade trees growing upon the highway in question without first having the franchise or permit under which they claim to be operating approved by the highway commission.
State Board of Health.

On January 16, 1919 (VIII Op. Atty. Gen. 10), an opinion was rendered to you respecting the organization of boards of health in cities of the fourth class.

I have had occasion to review the statutes creating boards of health, and I find that in considering the question you submitted in January a material part of sec. 1411, Stats., was overlooked.

The provision to which I refer is in a rather obscure place in the section and will be found in subsec. 4 of said section and reads as follows:

"The foregoing provisions shall not apply to any city or village in which a board of health and a health officer are provided for by the charter thereof; \(* * *\)."

The rule of statutory construction set forth in said opinion is correct, but there is another rule of construction which I think results in modifying my former opinion.

That rule is, that acts directed to a special subject are generally to be given effect rather than a general act, yet, where the legislative intent to make the general act controlling is apparent, it will be given that effect. Chippewa and F. I Co. v. Railroad Commission, 164 Wis. 105.

You will therefore observe that subsec. 1, sec. 1411 provides that the common council of every city shall, within a certain time, organize as a board of health or appoint a board of health. That provision alone does not indicate the legislative intent to make the general act prevail over the special act, namely, sec. 925—107, but the provision above quoted in subsec. 4, sec. 1411 excludes only those cities from the provisions of said section in which a board of health and a health officer are provided for by the charter, and thus by such exception and exclusion it was the legislative intent under the rules set forth in the case just cited that boards of health should be organized in all cities except those cities where a board of health and a health officer are provided for by their charter.
Therefore, applying the proper rule of construction, boards of health should be organized under the general law of sec. 1411. This section has not been considered by our supreme court, but the circuit judge from Manitowoc county, in an action taken to the supreme court and found in 160 Wis. 452, held that sec. 1411 was the section under which boards of health are organized. This will not appear from the reported cases, but will be found in Cases and Briefs, Vol. 1175, in the case entitled Meaney v. Staehle.

Boards of health are created for the purpose of preserving the health of a community, and in the larger sense, the health of the entire state, and thus, as a legislative policy, a uniformity in the organization of boards of health is quite essential.

After considering sec. 1411, I am convinced that it was the intention of the legislature to have, as far as possible, a uniform system of organizing boards of health.

However, boards of health and commissioners of public health and health officers, otherwise constituted or appointed, are de facto officers. Meaney v. Staehle, 160 Wis. 452.

I might also call attention to the fact that in taking at random eight cities of the fourth class, I find from the records in your office that five of such cities organized their board of health and appointed their health officers under the provisions of sec. 1411, and have been doing so for many years. Two of such cities have a commissioner of public health without a board of health, and one of such cities has a board of health under a special statute.

It appears that cities generally have organized their boards of health under the provisions of sec. 1411.

Therefore, my former opinion is hereby modified in accordance with this opinion.
Banks and Banking—Corporations—Land mortgage associations not exempted from provisions of securities law.

July 2, 1920.

HONORABLE GARFIELD S. CANRIGHT, Director,
Securities Division,
Railroad Commission.

A careful review of statutory provisions leads to the conclusion that land mortgage associations organized under secs. 2024—100 to 2024—146, Stats. must comply with the provisions of the securities law.

The following considerations seem to be controlling. Provisions were first made for land mortgage associations by ch. 666, laws of 1913, published July 26, 1913. The original blue sky law, so called (secs. 1753—48 to 1753—53, Stats. 1913), is found in ch. 756, laws of 1913, published August 5, 1918, but ten days later. It is to be presumed that the legislature had fully in mind all classes of securities that it intended to exempt, and, in view of the scant lapse of ten days between the enactment of the two laws, the presumption is especially strong that its intention relative to the securities of land mortgage associations which had just been provided for were clear.

We find that sec. 1753—49, Stats. 1913, excepted by subd. (e) securities of state or national banks or trust companies or building and loan associations of this state. These organizations all partake somewhat of the same general nature. Under familiar rules, the enumeration of these three classes of corporations is to be taken as covering the full scope of those intended to be excepted from the application of the law. Subd. (e) is still found under sec. 1753—49, and land mortgage associations are not enumerated among those whose securities are excepted from regulation, and therefore it must be held that they are still subject thereto and have been since the original enactment of the law.

Quite a different situation is presented from that which was before the department in determining whether insurance companies were subject to regulation in the sale of their securities. Ample provision had been previously made for the regulation of their securities, and the original blue sky law expressly ex-

* Page 238 of this volume
cepted such preexisting regulations. No such exception as to
land mortgage associations is found.

We are quite inclined to agree with the conclusion that failure
to except such land mortgage associations must have been due
to oversight, as there would appear to be no good or valid rea-
son for subjecting them to such supervision or regulation. How-
ever, it is no part of the function of this office to undertake the
correction of legislative oversights, and the matter should be re-
ferred to the legislature itself.

We are calling the situation to the attention of the reviser of
statutes.

Appropriations and Expenditures—Claims—Public Officers—
Deputy Sheriff—Special deputies appointed by sheriff in ab-
sence of prior authorization by county board have no claim for
compensation against county.

O. J. Falge,
District Attorney,
Ladysmith, Wisconsin.

During a strike, it appears that the sheriff of your county em-
ployed a number of deputies but that the county board had at
no time passed any resolution fixing the salary of such deputies
or granted any specific authority for their employment at a speci-
ified salary. Under these circumstances, you inquire whether
the county can legally pay the compensation of such deputies.

You are advised that it cannot do so. The pertinent statu-
tory provisions are:

Sec. 59.15, which provides:

"(1) The county board at its annual meeting shall fix the
annual salary for each county officer. * * *. The salary so
fixed shall not be increased or diminished during the officer's
term, and shall be in lieu of all fees, per diem and compensation
for services."

Subd. (3) of the same section:

"The county 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, * * *."

July 2, 1920.
Subd. (2), sec. 59.21 provides that the sheriff may appoint as many other deputies as he may deem proper.

Sec. 59.24 provides:

“Sheriffs and their undersheriffs and deputies shall keep and preserve the peace in their respective counties, and quiet and suppress all affrays, routs, riots, unlawful assemblies and insurrections; * * *.”

The net effect of these various statutory provisions is that the county board shall provide for the compensation of the sheriff, and such compensation shall not be increased or diminished during his term of office. If in the judgment of the county board deputies are required by him, they may fix the annual salary of such deputies, in so far as they deem them needful. If, in addition to the deputies thus provided for by the county board, special circumstances render it necessary in the mind of the sheriff to provide for the appointment of additional deputies for the performance of his duties, then it is incumbent upon the sheriff himself to provide payment for the compensation and expenses of such additional deputies so appointed by him under the provisions of sec. 59.21.

Such was the conclusion reached and stated in an opinion rendered during a previous administration of this office. It was there said:

“There is, however, no statutory authority by which he [the sheriff] can charge the expense of the employment of such an officer to the county unless the county board has fixed the annual salary of such an officer under the provisions” of the statute noted. V Op. Atty. Gen. 448, 449.

It was said again in another opinion:

“Except where other provision is made by statute, deputies are to look to their superior officer for their compensation.” VI Op. Atty. Gen. 390.
Constitutional Law—Mothers’ Pensions—Statute provides that mother or grandmother of dependent children must have resided for one year in county where application is made for aid.

Error of revisor in incorporating different act should be disregarded.

July 2, 1920.

RALPH E. SMITH,
District Attorney,
Merrill, Wisconsin.

Ch. 251, laws of 1919, amends sec. 573f, Stats., in certain respects, but such amendment did not disturb the preexisting provision that, as a condition precedent to granting aid,

"the mother or grandparent * * * 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."

Ch. 308, laws of 1919, again amended sec. 573f in the specific particular under consideration, so as to make it read:

"The mother or grandparents * * * must have resided in the county in which application is made for aid for at least one year."

Apparently, through inadvertence, the revisor of statutes inserted in sec. 48.33 the provision of the law as it stood prior to either amendment. In this situation, you are advised that under elementary principles of statutory construction, which need no citation of authority to sustain them, the act of the legislature which came last in point of time is controlling, that the rule to be followed is found in ch. 308, and the residence of the mother or grandparent must have been for one year in the county prior to application for aid.

The action of the revisor is a mere ministerial error which the courts will disregard.
Corporations—Real Estate—Consul general of foreign country who has resided in this state ten years is resident alien; as such not subject to provisions of sec. 2200a, Wis. Stats.

Removal from U. S. ipso facto constitutes him nonresident alien, and land in excess of 320 acres owned by him or by corporation in which he owns in excess of 20% of stock immediately becomes subject to forfeiture.

Honorable Merlin Hull,
Secretary of State.

In re: Modena Farms, incorporated.

The principal stockholder owning more than twenty per cent of the stock of Modena Farms, Incorporated, a Minnesota corporation, desirous of acquiring real estate in excess of 320 acres located in the state of Wisconsin, is the Italian consul general, who resides, and for the ten years last past has resided, in Chicago.

Sec. 2200a, Wis. Stats., provides in substance that a nonresident alien or a corporation, more than twenty per cent of whose stock is owned by such alien, shall not "acquire, hold or own" more than 320 acres of land in this state.

The question has arisen whether, in view of the statute just noted, such consul general is a resident or a nonresident alien.

No doubt is entertained but what such consul is a resident alien. From 2 C. J. 1298, it appears:

"A consul is a commercial agent appointed by a government to reside in a foreign country, * * * ."

Citations contained in the memoranda transmitted with your communication sustain this conclusion. See Ex parte Blumer, 27 Tex. 734; Mann v. Taylor, 43 N. W. 220, 78 Ia. 355; Reckling v. McKinstry, 185 Fed. 842; Brisenden v. Chamberlain, 53 Fed. 307, 311; Stevens v. Larwill, 84 S. W. 113, 110 Mo. App. 140.

A second question presented is whether the fact that such consul "subsequently removed his residence from the United States to a foreign country" would ipso facto "constitute him a non-resident alien and result in a forfeiture to the State of Wisconsin of all lands held," and as a subdivision of this question, whether he would have a period of grace in which to dispose of his holdings in the corporation after his change of residence.
The first portion of this question automatically answers itself. If he removes his residence, his residence has been removed, and there is nothing more to be considered. Change of residential status is of necessity instantaneous. There is no such thing as a twilight zone during which an individual is a resident and at the same time a nonresident. This department is equally clear that such change of residence will automatically result in the creation of a liability to have such lands forfeited to the state, although formal action by the attorney general to that end would under well settled principles be requisite.

The rigor with which our courts have enforced statutory provisions against the ownership of lands in Wisconsin by foreign corporations is well illustrated by the decision in *Hanna v. Kelsey Realty Co.*, 145 Wis. 276, where it was held that a deed to a foreign corporation prohibited from acquiring land in this state is absolutely void. In the same case it is pointed out that in the case of aliens who have acquired property the transaction

"is not void, but is voidable only at the election of the state."

Under all the circumstances, we suggest that the period of grace as to which inquiry is made be exercised by the consul general in advance of his change of residence, and that for the protection of the corporation his interests be disposed of before and not after leaving this country.

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Appropriations and Expenditures—Education—Governing boards of various educational institutions of state can expend funds appropriated to them by legislature only after approval of budget by state board of education. After such approval is obtained they cannot alter purposes for which moneys are expended without consent of state board of education.

July 7, 1920.

Honorable Edward A. Fitzpatrick, Secretary, State Board of Education.

Sec. 38.01, subd. (13), Stats., provides:

"The regents of the university, the regents of the normal schools, the mining school board, the state board of vocational
education for itself and for Stout institute, and the state superintendent of public instruction shall during the month of April of each year submit their respective annual budgets for the following fiscal year beginning July first; and if such budgets are within the available funds and in reasonable conformity to the legislative will they shall be approved by the state board of education so far as they relate to operation and maintenance. After such approval, the administration of the budgets for operation and maintenance of the several classes of schools mentioned in this subsection shall in each case rest with the board or officer designated by law as being the immediate governing authority of said institution, school, or department."

You inquire whether any of the educational authorities mentioned in this subdivision can legally spend, prior to approval of their annual budget by the state board of education, funds appropriated to them by the legislature.

You are advised that in the judgment of this department they cannot do so. This conclusion is based upon an examination of the statutes as they existed prior to the adoption of subd. (13) and the amendment of subd. (8) by ch. 478, laws of 1917.

The original act creating the state board of education was ch. 497, laws of 1915. Subsec. 8, sec. 376—50 then provided:

"it shall be the duty of the state board of education to have the exclusive charge and management of all financial affairs of the educational activities of the state and to examine and study the business methods and management of and the expenditure of public funds for the common schools, high schools, county training schools, county schools of agriculture and domestic economy, continuation, commercial, industrial and evening schools, day schools for the deaf and blind, Stout institute, the mining trade school, the several normal schools and the university, shall ascertain the financial and business needs of such schools and institutions, the fair and proper distribution of such expenditures and the most efficient and economical use of public funds for educational purposes and shall have power to institute and maintain an adequate and uniform accounting system."

It is thus apparent that it was originally contemplated, as plainly stated in the act, that the board should have "exclusive charge and management of all financial affairs." In this situation, it is obvious that "the governing bodies of the several schools," as that expression is employed, were limited in their dealings with financial operations to the permissive right accorded by subsec. 12, to be present and be heard by the board.
of education or its committees, and the duty to submit information as provided by that section. The immediate governing bodies of the various institutions in the interim between 1915 and 1917 were, so far as the law was concerned, without power over the details of the administration of the financial affairs of the respective institutions entrusted to them.

Ch. 478, laws of 1917, amended subsec. 8 by inserting after the words, "financial affairs,"

"relating to capital account and all biennial estimates authorized by subsections 11 and 12 for,"

and by the creation of subd. (13), quoted at the head of this letter. The evident intent of the amendment was to modify the exclusive character of the preexisting financial control so that the exclusive charge and management of financial affairs was thereafter restricted to capital account and to biennial estimates authorized by subds. (11) and (12). Subd. (13) may be taken as a definition and affirmative statement of the character of the powers of the various governing boards, as thus enlarged.

It appears therefrom that these various governing bodies shall submit their respective annual budgets, and the board of education then exercises a limited veto power thereover, to the extent of determining whether they are

"within the available funds and in reasonable conformity to the legislative will."

It will be noted that it is only "after such approval" that the administration of the budgets shall in each case rest with the board or officer. In view of the preexisting absence of power during the interim between 1915 and 1917, this section is in the nature of an affirmative re-creation of power, and it expressly and affirmatively states that the "administration of the budgets for operation and maintenance" is to rest with the board or officer only "after such approval." In other words, approval of the budget by the state board of education is a condition precedent to the exercise of any financial authority by the bodies and persons designated.

The foregoing reasoning would seem to answer the second and third questions which you submit, which in substance present the only question as to whether the budget as approved by the state board of education must be adhered to by the governing
bodies of the various schools. Unless the approval provided for is to be construed as a matter of mere meaningless and perfunctory routine, obviously the boards must adhere to the budget as submitted and approved.

The situation presented would be somewhat analogous to an act of the legislature which became effective only after approval by the governor and a subsequent attempt to construe the act as thus approved as authority for the doing of something entirely different from that which appeared in the law presented to and approved by the executive.

_Corporations—Cooperative Associations_—Dissolution of cooperative association requires vote of at least two-thirds of outstanding stock of such corporation.

_Honorable Merlin Hull,_

_Secretary of State._

A resolution to dissolve the Farmers Cooperative Packing Company, of X, was adopted by a vote of 671 members, being the vote of all members present at a meeting duly called out of a total membership in the corporation of 5,223. The question presented by your communication of July 6 is whether a resolution regularly adopted at such meeting is effective to work a dissolution of the corporation in question.

It is the opinion of this department that the resolution in question is not sufficient.

This conclusion rests upon a consideration of the following statutory provisions:

Sec. 1789, Stats., provides, and prior to the adoption of the cooperative association law, provided:

"Any corporation organized under any law may, when no other mode is specially provided, dissolve by the adoption of a written resolution to that effect, at a meeting of its members specially called for that purpose, by a vote of the owners of at least two-thirds of the stock in the case of stock corporations and of one-half the members in other corporations; but when a mode or process of dissolution shall have been provided in the articles of organization, it shall be conducted accordingly."
Clearly, as the law stood prior to 1917, a cooperative association could only be dissolved by a vote of the owners of at least two-thirds of the stock, the same being a stock corporation.

Sec. 1786c—12a, first adopted by ch. 51, laws of 1917, and amended by ch. 508, laws of 1919, merely specifies that the number of individuals therein referred to, to wit, 10% or more, 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."

No special mode or process having been provided in the articles of organization, the method set forth in sec. 1789 is controlling and exclusive, and a majority of all the stockholders could not dissolve the corporation, because the statute expressly provides that there shall be a vote of the owners of at least two-thirds of the stock requisite to effect a dissolution. The rule is laid down in 10 Cyc. 1303:

"Where the statute prescribes the steps to be taken by the members of a corporation for the surrender of its charter, those steps must of course be followed, in order to terminate the existence of the corporation."

Sec. 1789 further provides that such dissolution may take place only at a meeting specially called for that purpose. The certificate in this case alleges that the meeting was specially called pursuant to law, but it does not state that it was specially called for the purpose of effecting a dissolution of the corporation.

This department has likewise given consideration to the fact that the articles of organization of the corporation in question provide by art. 8 as to meetings:

"A majority of stockholders of record shall constitute a quorum at any general or special meeting of stockholders when present or represented thereat."

It might well be questioned whether the effect of the statutory provision, in the absence of an amendment of the articles themselves, would operate to change the rule as to the quorum. In view of the fact, however, that the record in the present case is clearly insufficient in other respects, this question is not decided.

"
Elections—Corrupt Practices Act—Law contemplates itemized report of separate receipts and disbursements where same exceed $5 in amount. Totals of lesser contributions must be reported but need not be itemized.

HONORABLE MERLIN HULL,
Secretary of State.

Sec. 12.09, subd. (3), par. (a), provides for the report of

"every sum of money and all property, and every other thing of value, over five dollars in amount or value."

Par. (b) provides for the like report of

"every promise or pledge of money, property or other thing of value."

Par. (c) provides for the report of

"every disbursement over five dollars in amount or value."

Par. (d) provides for the report of

"every obligation, express or implied, to make any disbursement, over five dollars in amount of value."

You inquire whether these statutes contemplate a report only when the amount received or promised, or the amount disbursed or agreed to be disbursed, exceeds five dollars, or if it means that expenditures are to be reported as soon as they reach an aggregate in excess of five dollars.

You are advised that the law, in the judgment of this department, is plain and explicit; that under its terms reports are to be itemized when the single sum is over five dollars in amount or value; that apart from sums that exceed five dollars in amount or value no itemized report is required. A report must be made, however, of the total amount received or disbursed "in any amounts or manner whatsoever." The aggregate of expenditures made or agreed to be made or contributions received or agreed to be received must be reported in totals.
Taxation—Dog Licenses—Owner of dog brought temporarily into state must pay license.

Taxation—Drainage Assessments—Fees for printing notice of sale on account of drainage assessments are to be included in certificate of sale and collected therewith.

July 9, 1920.

Easton Johnson,
District Attorney,
Whitewater, Wisconsin.

Your inquiry raises the question whether people whose homes are without the state, bringing dogs into Wisconsin during the summer months, are required to procure a license under the Wisconsin dog license law.

You are advised that sec. 1623 specifically provides:

"Every owner of a dog more than six months of age (the word 'owner' when used in chapter 72 of the statutes in relation to property in, or possession of, dogs shall include every person who owns, harbors or keeps a dog) * * * ."

This language is broad enough to cover the case that you have in mind.

That such is the law is confirmed by the provision of sec. 1630, sec. 5:

"Dogs brought into the state temporarily for a period not to exceed thirty days for show purposes if kept confined or in leash shall be exempt from the provisions of chapter 72 of the statutes."

Under elementary rules of statutory construction, the enumeration of the class of excepted dogs by this section excludes the possibility that other dogs are excluded from the operation of the license law.

You are therefore advised that a license must be obtained for dogs so brought into the state.

Your inquiry as to the source of payment of a printer who advertises lands for sale on account of nonpayment of drainage assessments is answered by the statute.

Sec. 1379—24, subsec. 1, provides:
The county treasurer shall advertise the same in his list of lands to be sold for unpaid taxes, and unless paid to him prior to the tax sale, he shall sell such lands for the taxes and drainage assessments against the same treating such drainage assessments the same as, but keeping them separate from, the unpaid taxes on his records."

It is further provided:

"* * *' No extra advertising fee shall be added to the certificate of sale for drainage assessments when the land was at the same time sold for taxes as well as for drainage assessments."

Plainly therefore, where the general taxes against the land have been paid, the advertising fee shall be added to the certificate of sale for drainage assessments and the printer is paid from this source.

Public Health—Dentistry—Under sec. 1410g, subsec. 3, license to practice may be revoked for commission of felony involving moral turpitude.

July 9, 1920.

Dr. William Kettler, Secretary,
Wisconsin State Board of Dental Examiners,
Milwaukee, Wisconsin.

Replying to your letter July 7, in which you ask regarding the right of the Wisconsin state board of dental examiners to revoke the license of one Dr. , under the facts and circumstances stated in your letter, you are advised as follows:

Under subsec. 3, sec. 1410g, conviction of a felony involving moral turpitude is sufficient ground for the revocation of a license. The offense committed by the offender is a felony involving moral turpitude.

It lies within the power of the board to revoke this license, and there is no recourse against them if they act in good faith and in the exercise of a sound discretion in such revocation.
Bonds—Taxation—Loss resulting from loan of bonds for use as collateral to individual who becomes insolvent, with result that bonds are sold for payment of debt, constitutes loss which may be deducted from income under laws of Wisconsin.

July 9, 1920.

Tax Commission.

An individual purchased $10,000 of railway bonds, the income from which was taxable and upon which an income tax was actually paid. Subsequent to the purchase of such bonds, they were loaned by the owner to his brother for use as collateral. The brother’s note was taken, with the understanding that the same should be considered paid when the bonds were returned. The interest upon the bonds was collected and turned over to the owner. The brother so entrusted with the bonds made use thereof as collateral to his note and as a result of failure in business became wholly insolvent; and the bank with whom the bonds had been placed as collateral exercised its power of sale and disposed of the same at the market price.

Under these circumstances the question is presented as to whether the same may be deducted under the provisions of sec. 1087m—3, subd. (e):

"Losses actually sustained within the year and not compensated for by insurance or otherwise, provided that no loss resulting from the operation of business or the ownership of property may be allowed as a deduction, unless the income which might be derived from such business or property would be subject to taxation under this act."

We are of the opinion that, under the circumstances, there has been a loss as contemplated by the terms of the statute.

This conclusion might be rested upon the provisions of the amendment introduced by ch. 275, laws of 1919, which plainly imports that a loss sustained from the ownership of property may be allowed as a deduction, if the income which might be derived from such property would be subject to taxation.

In view of the statement in your letter that the tax commission has consistently held that an accommodation endorser cannot deduct as a loss any amount which he may be compelled to pay as such indorser; we are moved to suggest a doubt as to the correctness of this rule. The statute, as it originally stood prior
to the amendment of 1919, provided in the broadest terms (sec. 1087m—4, subd. (b), Stats. 1915) for the deduction of losses during the year not compensated for by insurance or otherwise.

The ruling of the commission noted appears to have been based in part at least upon the language of Black on Income Taxes, 2d ed., sec. 304, which discusses the provisions of the federal law and the drift of English decisions upon the subject. It is respectfully pointed out that the federal law contains and has at all times contained a provision equivalent to that found in sec. 5519, Barnes' Code, par. "Fourth," providing for deductions of

"losses actually sustained during the year, incurred in business or trade * * * ."

The so-called Wilson tariff law, in its income tax provisions, contained the language:

"* * * Losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise, and debts ascertained to be worthless, but excluding all estimated depreciation of values and losses within the year on sales of real estate purchased within two years previous to the year for which income is estimated." 28 U. S. Stats. at Large 553.

We have nowhere seen the statement directly made that the Wisconsin income tax law was patterned after the federal law of 1894 in this respect, although the inference is strong, in view of the similarity of the language, that it must have been. To our minds, the omission of the words, "incurred in trade," from the law of this state is indicative that a different rule was intended to be applied than that which is expressly enunciated in the federal statutes, and that a broader right of deduction is conferred, that losses which may be deducted are not confined to those arising out of the conduct of a trade or business. The fact that the deductions enumerated in sec. 1087m—3, which precede this provision as to losses sustained, relate to business or trade is equally significant, to our minds, that the qualifying words in those sections having been omitted, a different standard for the ascertaining of loss was intended to be established by this subdivision, and that losses occurring are not merely such as arise out of the use of property for the purpose of producing income, except as such rule is supplied by the amendment in the law of
1919. Prior to that time, as an illustration in our minds, the loss of a dwelling house by fire, not compensated by insurance, was a deductible loss, although the income therefrom was not taxable.

Public Health—Registered Nurses—Power to register nurses registered under laws of other states is dependent upon qualifications prescribed by laws of those states and not by fact that individual has in fact received training equivalent to that which would be required in this state.

July 12, 1920.

MRS. MABEL C. BRADSHAW, Chairman,
Committee of Examiners of Registered Nurses,
Milwaukee, Wisconsin.

Sec. 1435a provides for registration of nurses:

"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."

As we understand it, your inquiry of July 9 is directed to the ascertainment of whether, under the provisions of this section, it is within the power of the board of medical examiners to grant registration without examination to a nurse registered under the laws of Illinois, which now require but two years' training instead of three, if in fact the nurse in question has received three years' training.

You are advised that under the law as it stands the power of registration without examination is limited to cases where the general requirements have been determined by the Wisconsin state board of medical examiners to be equivalent to the requirements of this state. The fact that an individual has had a course of training which meets the requirements in this state would not, under the law as it stands, entitle her to be registered.
Contracts—Education—Public Officers—Superintendent of Public Instruction—Breach of contract by teacher is not immoral conduct within meaning of statutes.

Authority of state superintendent limited to revocation of state licenses and certificates.

July 12, 1920.

Honorable C. P. Cary, State Superintendent,
Department of Public Instruction.

Does the breach of a contract entered into and agreed upon, whereby a teacher is bound to teach for a specified term for a specified sum, constitute immoral conduct within the meaning of sec. 39.32, or does it affect his moral character, within the meaning of sec. 39.09? This question is in substance involved in your request for an opinion dated July 9, 1920.

You are advised that in the opinion of this department such breach of contract would not constitute immoral conduct within the contemplation of the legislature when this statute was enacted. It has been suggested that ordinarily and popularly immorality would involve some infraction of the decalogue. The legislative thought, doubtless, was that a teacher should set an example of probity and character to those committed to his charge. Ordinarily, action breaching a contract would not be calculated to attract the attention of those entrusted to his care, or influence the development of their character unfavorably. Generally speaking, too, mere breach of a contract is not considered immoral, as the same is a subject for the collection of damages in a civil action rather than for punishment under the criminal law. Should the legislature decide that such action should be ground for revocation, it might readily say so in plain terms. Until it so provides, this department is of opinion that such breach of contract was not contemplated by the statute.

You inquire further whether, under the provisions of sec. 39.32, the state superintendent has authority to annul a teacher's certificate.

In answer thereto, we beg to state that the authority of the state superintendent is limited to the revocation of state licenses and certificates, and would not extend to the annulment of teachers' certificates provided for by sec. 39.09, the annulment or revocation thereof being vested in the county superintendent.
Appropriations and Expenditures—Public Officers—State humane agent independent officer with separate appropriation. Accounts may be accepted without approval of commissioner of agriculture.

July 12, 1920.

Honorable Merlin Hull,
Secretary of State.

The question is raised whether the state humane agent is a subordinate of the commissioner of agriculture, whose expense accounts are subject to the approval of such commissioner before they may be audited by the secretary of state.

You are advised that in the opinion of this department such state humane agent is an independent officer, with a separate appropriation, whose accounts may be accepted without the approval of the commissioner of agriculture.

This department, in an opinion rendered October 8, 1919, VIII Op. Atty. Gen. 744, has held that notwithstanding the language of sec. 1495—2, subsec. 1, which provides:

"A division of markets, in charge of a director is created in the department of agriculture,"

the division of markets was an independent department, possessing independent powers and functions.

Ch. 359, Laws of 1919, creating sec. 1636km, does not purport to create the office of state humane agent under the department of agriculture. It merely provides that the commissioner of agriculture shall appoint such agent, and that his compensation is to be fixed by the commissioner. The appropriation made, under the reasoning contained in that opinion, is likewise to be construed as made to the state humane agent and not to the commissioner of agriculture.
Bridges and Highways—Shade Trees—Corporations—Public Utilities—In addition to authority of village board, consent of adjacent property owner must be obtained before public service corporation may trim trees located in public street outside traveled portion thereof.

Conservation Commission.

Attention Mr. C. L. Harrington.

Your favor of July 13, 1920, may involve a question of fact, and that is whether or not the so-called used street, which has not been formally authorized or platted, has or has not become a street by user or prescription. From the diagram submitted, it might plausibly be urged that if this were a public street the tree in question interfered with travel thereon.

Assuming, however, that the tree in question is one located adjacent to the property of a private land owner and not within the limits of the traveled portion of a street, we enclose for your information copy of opinion this day rendered the highway commission,* which supplements the opinion rendered to Mr. Arps,† to which you refer.

In addition to the information which you will find in these opinions, your attention is called to the provisions of sec. 1344m, which are as follows:

"1. It shall be unlawful for any person to injure, mutilate, cut down or destroy any shade tree growing on or within any street or highway in any incorporated village in this state, unless express permission so to do be first granted by the board of trustees of such village.

"2. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not less than ten nor more than thirty days."

And of sec. 1345:

"Every person who shall cut down, break, girdle, bruise or mar the bark or in any other manner injure any public or private shade tree growing on the side of or in any highway, or allow any animal under his control to do any injury to any such tree, or hitch any horse or other animal thereto shall pay five

* Not published.
† Page 311 of this volume.
dollars damages for every such act, to be collected by the superintendent of highways for the benefit of the highway fund, and such person shall be further liable to the owner of the land in treble damages. Every officer having any charge of a highway who shall cut down, destroy or damage any such shade tree shall forfeit twenty-five dollars, one-half to the use of the person prosecuting therefor."

In addition to these provisions, sec. 1329a, subsec. 3, provides:

"But no tree shall be cut, trimmed or the branches thereof cut or broken in the construction or maintenance of any such line without the consent of the owner of the tree."

Sec. 1342 provides:

"Any person owning or occupying land adjoining any highway may plant or set out trees on each side of said highway contiguous to his land, which trees shall not be set in the highway more than ten feet from the margin thereof, and if any person shall cut down, injure or destroy any tree that may have been or shall be so planted or set out or which shall have been left on the side of such highway for shade he shall be liable to treble damages to the owner or occupant of such adjoining lands."

These last two sections do not purport to specifically apply to trees located within the limits of incorporated villages, but it is the judgment of this department that the consent of the property owner in whom is vested the title to trees adjacent to his property is equally requisite to authorize the trimming of trees in a village, as in a town.

Corporations—Insurance—Corporation to act as agent for interinsurance may be formed under chs. 85 and 86, Stats.

HONORABLE MERLIN HULL,
Secretary of State.

The question has arisen as to whether a corporation such as is described in sec. 1915m, subsec. 2, Stats., which provides that interinsurance may be executed by an attorney and that

"a corporation duly authorized by its charter so to do may act as such attorney," may be incorporated under chs. 85 and 86 for such purpose.

July 15, 1920.
You are advised that it is the opinion of this department that while such corporate purpose is not specifically enumerated in sec. 1771, the proviso for incorporation

"for any lawful business or purpose whatever except other cases otherwise specially provided for"
is of such character as authorizes the incorporation in question, under these chapters.

There is no other specific provision for such incorporation, and hence it follows of course that chs. 85 and 86 prescribe the rule.

Agriculture—Public Officers—Weed Commissioner—Town not authorized to pay weed commissioner more than $3.25 a day.

Weed commissioner without power to prevent threshing of grain containing weed seed.

July 15, 1920.

HONORABLE A. L. STONE,
Deputy Weed Commissioner,
Department of Agriculture.

Your letter of July 13, with communication of J—J— of E., Wisconsin, enclosed, as to which you request an opinion, presents for consideration two propositions: first, as to the legality of a proposed arrangement under which a town board undertakes to enter into an arrangement with several individuals whereby they are to be paid not less than $4.00 per day for discharging the functions of weed commissioner.

You are advised that this phase of your inquiry was fully answered in an opinion rendered by this department, directed to you under date of July 23, 1918, the same being found in VII Op. Atty. Gen. 413. You were then advised, in answer to a like question, that it was

"beyond the power of the town to pay more than the specific amount mentioned in the statute." P. 415.

The law has not been changed in this respect, and the measure of authority conferred upon the town board is to pay three dollars, and no more. In answer to the suggestion that a charge of one dollar per hour is to be made against the owner of the land, the same limitation exists. The owner of the land
can be charged three dollars, and no more, for the destruction of
weeds.

The second question presented by your letter is as to the exist-
ence of power to prevent the threshing of grain which is so
badly infested with Canada thistles that the air is clouded with
thistle seed to such an extent, that, as the letter phrases it, it is
"hard to see the sun."

An examination of the provisions of the statute discloses that
the only procedure contemplated by the legislature is the entry
upon lands and the destruction of growing weeds. Sec. 1480b
provides for the destruction of weeds "standing or growing on
such lands." No provision is anywhere made for the destruc-
tion of such weeds after they have been harvested. In fact, the
only particulars prescribed by statute relative to the matter af-
ter they have reached the stage of maturity is found in sec.
1481m, which fixes a penalty for illegally hauling weed seed, and
the succeeding section (1481a), which provides for cleaning
machines of weed seed before the machines are moved.

Bridges and Highways—Drainage Ditches—Where bridge has
been rendered useless by enlargement of drainage ditch, town is
not entitled to emergency relief under sec. 1319.

Drainage district must pay to town, city or village expense of
lengthening existing bridge made necessary by enlargement of
drainage ditch.

M. J. Paul,
District Attorney,
Berlin, Wisconsin.

Proceedings for the construction of a drainage ditch were
initiated under the provisions of sec. 1359, Stats. 1917; relating
to town drains. The sections under which the procedure was
instituted were repealed by ch. 446, laws of 1919. Your request
for an opinion does not state under which statutes the work is
now being conducted, but we assume that proceedings have been
had under sec. 1368—20, whereby some formal order has been
made for the continuation of construction pursuant thereto.

Inasmuch as the provisions of both statutes are identical, it
is perhaps not material whether the proceeding is being continued under the farm drainage act (secs. 1368–1 to 1368–30, Stats.), or under the drainage district law (secs. 1379–10a to 1379–40, Stats.). In any event, it appears that as the result of the prosecution of this work, several bridges, by reason of a ditch having been made wider and deeper, have been rendered useless, and the abutments have fallen in. In this situation, you make inquiries which will be disposed of in order.

First, you state that the town board has filed its petition under the provisions of sec. 1319, subsec. 4, for the construction of a bridge under its terms, as a matter of emergency. You ask whether the town can legally claim aid from the county under this statement of facts.

You are advised that, in the opinion of this department, this is not an emergency such as is contemplated by the statutes under consideration. That provides for the construction or repair in the case of a bridge "being washed out or damaged by floods or other cause."

Under familiar rules, the phrase, "or other cause," would be construed to mean and refer to other similar causes. Some unexpected and unforeseen contingency, such perhaps as the work of a cyclone, a stroke of lightning, or an earthquake, would be such causes as were or might have been contemplated within the statute. The enlargement of a drain, the natural and necessary result of which in the ordinary course of construction would be to render an existing bridge inadequate and insufficient, would not come within the provisions of the statute.

Your second question relates to the original liability for the expense of building bridges across drainage ditches that were organized under sec. 1359, Stats. 1917, where there was an old bridge in existence at the time that the ditch is dug and such bridge becomes useless because of the ditch being dug.

Indulging in the assumption that the original proceedings under the town drainage law have been continued by proper order, we find that sec. 1368–15 provides:

"Whenever a drain is constructed, widened, deepened, or repaired across, or it is necessary to construct, remove, or repair any bridge on any highway, the procedure shall be as provided in, and the cost of such work and the maintenance of such drain shall be borne and apportioned as provided by statute with respect to highways in drainage districts."

22—A. G.
Sec. 1379—31m, to which you refer, by subsec. 2 thereof provides:

"Whenever by reason of a district widening a ditch a longer highway bridge is rendered necessary, the town, city or village shall lengthen such bridge and such district shall pay to the town, city or village the reasonable expense thereof but not of more expensive material and workmanship than is contained in such bridge. In case the town, city or village and the district cannot agree they shall submit to the court the facts and the court shall fix the sum to be paid by the district to the town, city or village."

You further inquire as to the kind of bridges that must be built to comply with sec. 1379—31m. Subsec. 3 thereof contains the provision:

"All bridges across drainage ditches hereafter constructed or repaired shall be of such width and so constructed or repaired that the floor thereof can be removed for the passage of dredges without the destruction of the same."

Beyond the specification as to removal of the floor of such bridges, and the very evident intention that they shall be of the same general material and workmanship as preexisting bridges, there appears to be no requirement as to the type and standard of bridge to be constructed by drainage districts.

We have assumed that the bridge in question is not located upon the state system of trunk highways.

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Armories—Corporations—Clause in articles of incorporation of armory association providing for reversion of property to state upon dissolution is valid; title to such property vests in state immediately upon dissolution.

Honorable Orlando Holway,
Adjutant General.

You have forwarded for consideration articles of organization of the Armory Association of Company D, 1st Infantry, Wisconsin National Guard, see. 8 of which provided:  

July 17, 1920.
"All funds and property held by this association shall become the property of the State of Wisconsin in the event of the dissolution of said association."

A similar provision is found in art. 6 of the amendments.

It appears that all members of this organization were drafted into the military service of the United States on August 5, 1917, and in pursuance of federal law were discharged from the national guard, thus effecting the mustering out and complete disbanding of the organization. At the time of such dissolution, the corporation was the owner of certain real estate located in the city of Milwaukee, which is now in possession of the state military authorities. Your request is whether further action is necessary or conveyance required to make the state's title absolute.

You are advised that in the judgment of this department sec. 1772, Stats., which authorizes the insertion in articles of incorporation of

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

is broad enough to sanction the validity of such provisions in the articles of incorporation of a military company.

This view of the matter is confirmed by the declared legislative policy embodied in ch. 261, laws of 1909, which became sec. 637m, Stats. 1915, sec. 21.42, Stats. 1917, and is sec. 21.42 of the present statutes, subd. (4) of which provides:

"Whenever any such company shall be disbanded as provided by law such corporation shall cease to exist and all property belonging to it shall become the property of the state of Wisconsin."

This being so, it follows that title to the property in question is now absolute in the state.

A distinction, however, is to be taken between the state of legal title and the record evidence thereof. Upon the basis of the facts submitted, the state is now the owner of the property, but affirmative record evidence of that fact might still be wanting. It would be the suggestion of this department, therefore,
that while nothing was requisite to perfect title in the state, to perfect the record of such title some record of the facts in question should be made. Such record might consist of a certified copy of the order or whatever other action was taken by which the particular company was transferred to the federal service. We suggest also that if a formal order of this character is not available, an affidavit be procured as to the fact of the transfer from some officer of the organization, prepared in such form as to entitle it to record; that when so obtained, such order or affidavit be recorded in the office of the register of deeds for Milwaukee county.

Public Officers—Words and Phrases—State employe in continuous service of state from and after Jan. 1, 1917, entitled to increased compensation from July 1, 1919, irrespective of basis of payment.

"Continuous service," within meaning of statute, implies readiness and expectation of employment by employe and reliance upon availability for service by officer of state.

July 17, 1920.

HONORABLE WILLIAM KITTLE, Secretary,
Board of Regents of Normal Schools.

Ch. 428, laws of 1919, by sec. 1, provides:

"The salary, wage or compensation of each state employe whose compensation, wage or salary is less than at the rate of one thousand two hundred dollars per annum, and who has been in continuous service of the state from and after January 1, 1917, except absence because of leave of absence, war service, sickness or other temporary cause, is hereby increased and advanced to a point which is twenty per centum over and above the rate of compensation, wage or salary of such employe as of January 1, 1917; * * * ."

From your letter of July 16 and accompanying papers, as nearly as the facts may be deduced, services were rendered by a clerk in one of the offices of the normal school at Milwaukee, beginning in December, 1916, and ending in March, 1920. Whether services were actually rendered by her during each and every month is not clear, although the president of the school states that she
had been in the employ of the Board continuously from a date prior to 1917."

And it is stated in another letter:

"She was paid each month for the actual number of hours worked."

Under these circumstances, you inquire whether a person employed by the hour and at a rate less than $100 per month must be paid the 20% increase specified in the chapter quoted above.

You are advised that in the opinion of this department, under the facts above set forth, she is entitled to the payment of such increase.

You will note that the manner or method of payment specified is not determinative. The phrase used is, "salary, wage or compensation," being broad enough to cover any species of employment, or manner of payment. It is quite immaterial whether the work be done by the hour or let by piece work, so to speak. The all-important test in determining whether increased compensation shall be paid is the continuity of the service. Service by an employe of the state may be deemed continuous if such employe is ready at all times to work when needed. Stated differently, continuous service involves a continuing mutual expectation of employment and readiness to serve on the one hand, coupled with continuous reliance upon the availability of the services of such employe by the state upon the other hand.

Such, we think, is the principle sanctioned in the case of U. S. v. Alger, 151 U. S. 362, which involved a somewhat analogous question of when an officer was entitled to "longevity pay." In that case an officer had been promoted from midshipman to professor of mathematics, but had resigned the lower office before accepting the one of higher grade. The court said, p. 365:

"The question is, in short, whether his actual service was for two distinct periods, or for a single and continuous period of time."

"This court is of opinion that, in substance and in law, it was for one continuous period. His express resignation of the lower office, the very day before his appointment to the higher office, and when he must have known of and counted upon the coming appointment, was evidently tendered with no intention of leaving the service, and was but equivalent to the resignation
which the law would have implied from his acceptance of the higher office."}


The statute specifies the exceptions to continuous service, among which are absence because of leave of absence or other temporary cause. Such other temporary cause, this department conceives, may well be a want of work to be done requiring the attention of the employe.

You make inquiry as to the application of this statute to the cases of normal schools where students have been employed at a rate of twenty cents to thirty cents per hour.

You are advised that if any cases exist where there has been a continuity of service by students within the terms of the statutes from January 1, 1917, to July 1, 1919, when this law became effective, for such period of time as such students rendered services after July 1, 1919, they would be entitled to compensation at the increased rate.

As we read the resolution submitted in question 2 of your request for an opinion, it merely provides for the payment of a balance due and unpaid. It is in no sense an attempt to pay extra compensation after the period during which services have been rendered has expired.

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_Criminal Law—Conviction secured through fraud by defendant will not protect him against new prosecution._

July 17, 1920.

CLINTON G. PRICE,
District Attorney,
Mauston, Wisconsin.

In your letter of July 14 you state that a few days ago an able-bodied man by the name of H— K— struck an old soldier over seventy years of age; that the party assaulted came to your office as district attorney the same evening, Saturday night, and that you could see a very deep cut on his cheek and you prepared a complaint for the complaining witness to file before a court commissioner; as you could not find the sheriff the warrant was held by the magistrate until Monday morning, when the defendant was brought before the court commissioner; that
a local attorney appeared for the defendant before the court commissioner, objecting to the proceedings for the reason that the defendant had already pleaded guilty to the same offense the Saturday night of the assault. You state that upon investigation you have found that as soon as the defendant assaulted the old gentleman he arranged to have a party sign a complaint charging the defendant with assault and battery on the old soldier, and then before the justice of the peace pleaded guilty and was fined $1.00 and costs.

You inquire whether a man can go up to anyone he desires in any public place or on the highway, strike him and then arrange to go before a justice of peace, get some friend to make a complaint, plead guilty and get the minimum fine and costs. The facts of your case are nearly parallel to those contained in the case of McFarland v. State, 68 Wis. 400. In this case it was held that where a person liable to be charged criminally by fraud procures himself to be convicted of the offense, such conviction is no bar to another prosecution, except perhaps where the full penalty of the law has been imposed and suffered.

Under the statement of facts presented by you I believe you would have the right to prosecute the man for the assault and battery and that the former conviction would be considered a nullity as having been obtained by fraud.

Bridges and Highways—Municipal Corporations—Villages—Taxation—Upon creation of incorporated village out of portion of town new village not entitled to any portion of funds raised by taxation for doing of specific county road and bridge work.

July 19, 1920.

Lucien T. Reid,
District Attorney,
La Crosse, Wisconsin.

The village of Rockland, in your county, was incorporated from a portion of the town of Burns. Prior to such incorporation, you state a fund of approximately $10,000 had been accumulated as the result of the town's voting various amounts to be used for county road and bridge work. The county board has voted the county share of such expenses, and nothing re-
mains except the actual construction of the work. The question presented by your inquiry is whether the newly created village is entitled to a portion of this fund, by reason of the fact that it was raised by taxing property now within the corporate limits of such village.

You are advised that somewhat similar situations have been the subject of rulings by prior incumbents of this office. I Op. Att'y. Gen. 73, involved the question of the expenditure of funds similarly appropriated in a case where a portion of the town of Blooming Grove withdrew therefrom and became a portion of the city of Madison. It was said in that opinion, p. 75:

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

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

A question having been presented as to the power to devote money raised for a specific improvement to a different improvement by a committee of the county board, it was held (IV Op. Att'y. Gen. 775) that no such power existed, referring to the opinion above quoted.

In VI Op. Att'y. Gen. 272, it was ruled:

"The division of a town that has raised money for the construction of state aid highways does not affect the expenditure of such money for such purpose."

And in the body of the opinion it was said, p. 273:

"* * * We have here no question of the division of credits or apportionment of debts between a new and an old town. The money expended in the improvement of highways is expended for the public, generally."
Opinions of the Attorney-General

No good reason appears for changing the rulings above cited. They are, on the contrary, expressly affirmed and adhered to, and you are therefore advised that the village in question is not entitled to any portion of the funds that have been raised for the construction of specific bridges and highways.

Taxation—Dog Licenses—Collection of penalties for violation of dog license law to be enforced by civil actions for forfeiture.

July 19, 1920.

C. S. Roberts,
District Attorney,
Balsam Lake, Wisconsin.

Your letter of July 17 raises the question as to the proper method of procedure for the enforcement of the penalty provided by subsec. 4, sec. 1628, Stats. The language in question reads:

"Any person who shall violate any of the provisions of chapter 72 of the statutes shall be liable to a penalty of not less than five dollars nor more than fifty dollars for such violation."

You have just been advised by telegram, as follows:

"Proceed for forfeiture pursuant to chapter one forty two."

This is hereby confirmed. The conclusion of the department is based upon the construction of sec. 7, ch. 175, laws of 1860. That section read as follows:

"Whoever keeps a dog, not registered, numbered, described and licensed, according to the provisions of this act, shall forfeit the sum of five dollars to the use of the town, city or village, wherein the dog is kept."

In the cases of State v. Ives, 15 Wis. 445, Ives v. Jefferson County, 18 Wis. 176, Carter v. Dow, 16 Wis. 298, this provision was before the supreme court. In the last of these cases, it was said, p. 321:

"* * * The forfeiture incurred under sec. 7 of ch. 175, Laws of 1860, must be enforced by civil action. That act does not prescribe the form of the remedy, further than that the prosecution shall be in the name of the state (sec. 13). The general
statute (R. S., ch. 155, secs. 1, 2) declares that in all cases not otherwise specially provided for, where the act or omission shall not be a misdemeanor, the penalty or forfeiture may be sued for and recovered in a civil action in the name of the state, and that it shall be prosecuted in the same manner as personal actions."

These are believed to be decisive of the present question.

Indigent, Insane, etc.—Public Officers—Board of control without power or authority to agree to support nonresident insane person.

July 22, 1920.

BOARD OF CONTROL.

From your letter of July 22 it appears that an effort is being made to return to this state an inmate of the hospital for the insane at Selkirk, Manitoba, Canada. You request an opinion as to whether the state board of control has the power or authority to consent to the return of the patient to this state, to be maintained at its expense.

You are advised that the answer to this question is dependent entirely upon the determination of whether the individual in question has in fact lost his residence in this state. If you are correct in saying that he has lost his residence and legal settlement here, then it is our judgment that you are wholly without power or authority to arrange for his return and support at state expense.

If the individual in question has a residence in the state, it must be at some point, as there can be no such thing as a floating residence that has no relation to any particular portion of the state. This party is now a resident of Green Lake county, or he is not a resident of Wisconsin at all.

Under elementary principles, it must be apparent that the state owes no duty to a nonresident insane person, and it would be an improper expenditure of public funds to apply the same to the support of such an individual. The correctness of this view is emphasized by the provisions of sec. 51.12, subd. (6), Stats., relative to the disposition of nonresident insane, it being there provided:

"Whenever it shall be found that any inmate of any hospital or asylum for the insane is a nonresident of the state the board
shall, if possible, ascertain the state, country, or other political division in which such inmate has his legal residence or is entitled to support, and cause him to be transported there if that can be done at a cost not exceeding two hundred fifty dollars; provided that such transportation shall be by the most direct and usual route both going and returning and shall be accomplished in the shortest practicable time and that only necessary and reasonable expenses shall be allowed and actual time necessarily taken by said trip."

Under these circumstances we suggest that you must first satisfy yourselves fully that the individual in question is a resident of this state. No such absurdity is contemplated as bringing him here and then transporting him elsewhere, pursuant to the plain terms of the statute quoted.

Intoxicating Liquors—City council without power to authorize transfer of liquor permit from one individual to another or from one location to another.

HONORABLE O. J. SWENNES,
City Attorney,
La Crosse, Wisconsin.

Your letter of July 21 contains two questions:

"Is it within the power of the city of La Crosse as a municipality to make such permits for fermented, malt and vinous nonintoxicating liquors transferable from one individual to another, provided the same is kept in the same location?"

"Is it within the power of the city of La Crosse to make such permits transferable from one location to another, provided the restrictions and conditions of the Baker law are complied with?"

You are advised that in the judgment of this department, a city council is without power to make permits for the sale of nonintoxicating liquors transferable.

You are of course familiar with the decision of the supreme court in State v. Bayne, 100 Wis. 35, which is reaffirmed and adhered to in John Barth Co. v. Brandy, 165 Wis. 196, holding that a license is a mere privilege to be enjoyed while the conditions and restrictions are complied with, and implies special confidence and trust in the licensee, and from the nature of things
such license is not assignable at common law. These decisions accord with what is said by Black on Intoxicating Liquors, sec. 130, and by Woollen and Thornton, The Law of Intoxicating Liquors, sec. 419.

It is true that the statute under which State v. Bayne was decided contained the words that licenses should be issued "to such persons as they deem proper," and that the court argued that this implied the exercise of judgment and discretion. This feature is wanting in the present law. It seems apparent, however, that it was intended that such places should be conducted only under supervision and restriction, and that the issuance of permits therefor under the police power could only be justified upon the theory that the public had an interest in the manner in which such premises are conducted. It seems fair to assume that, having expressly reenacted sec. 1557n, relative to the exclusion of minors from premises devoted to this business, the consideration of personal fitness of the holder of a permit would be equally strong. In the absence of a well defined expression of legislative intent to the contrary, this department feels that the same rule should be applied.

It is likewise the judgment of this department that a municipality is without power to authorize the transfer of such permits from one location to another.

This conclusion, we think, may be rested upon the express terms of the statute which provides that such permits "shall designate the premises for which such permit is granted." What was said in State ex rel. Chandler v. Mayor, 156 Wis. 203, 204, is equally pertinent:

"* * * Our attention has not been called to any statute which obligates or even authorizes a city council to transfer a license issued for one locality to another."
Public Health—Public Nuisances—Stockyard located and maintained with reasonable regard to public interest not a nuisance.

Public Officers—State Board of Health—State board of health without power to authorize village to institute sewer system.

Honorable C. A. Harper,
State Health Officer.

Your communication of July 23 calls attention to the fact that at many localities throughout the state complaint is made as to stock yards,

"on the grounds that they are detrimental to health and a public nuisance to the residents residing in that immediate vicinity."

You inquire as to the best mode of procedure to be followed in such cases.

You are advised that the supreme court of Wisconsin, in the case of Dolan v. C., M. & St. P. R. Co., 118 Wis. 362, has had this general subject under consideration. Its conclusion is best stated in the language of the opinion. Speaking of a railroad company, the court said, pp. 364–366:

"In order to discharge the statutory duty of receiving and transporting live stock, it must have facilities for the purpose at its stations, or in some convenient place within a reasonable distance. Inasmuch as it cannot have a train ready at all times to immediately receive and transport the stock offered, it must necessarily have yards or enclosures in which the animals may be kept until they can be taken away in the regular course of the operation of the road. That offensive smells and unpleasant noises will inevitably come from such yards, when in use, is matter of common knowledge. The skill of man has not yet devised means, within the bounds of reasonable expense and diligence, by which these disagreeable results can be wholly avoided. It must follow that, if a railway company exercises reasonable and proper diligence and care in the location of its yards and in its management, it has performed its whole duty. Impossibilities cannot be required. Duties cannot be imposed, and punishments inflicted, simply because the duties have been performed. If injury results to others, it must in such case be damnum absque injuria. The same rule must apply which applies to noise and smoke and steam resulting from the operation..."
of the railroad. If these annoyances result simply from the necessary and proper operation of the road, they must be borne. If the company use the best and most improved devices to prevent injury to others, it is protected by its franchises. If it is negligent in this regard, it must respond in damages, if a nuisance is thereby created. 2 Wood, Nuisances (3d ed.) sec. 755. So, in the case of stockyards, the railway company must use all reasonable diligence in the location of its yards in close proximity to dwellings or business houses, to their injury, without incurring liability. It must, doubtless, in order to perform its duty, place the yards in a reasonably practicable and convenient location in the vicinity of its station, for the reception and shipping of cattle, but it must at the same time place them where they will do the least possible injury to others. If these requirements be fulfilled, and if the yards be operated without negligence, and with that skill and diligence to avoid noise and noxious smells therefrom which the importance of the duty demands, there can be no liability, even though injury may result to others. Such injury, like many others, is simply one of the penalties we have to pay for the conveniences of modern methods of transportation."

This language covers the matter so fully that nothing can be added, except to state that the court apparently has not departed from this point of view, because so recently as January, 1917, in the case of Clark v. Wambold, 165 Wis. 70, in an opinion that attracted considerable attention, a similar rule was laid down with reference to keeping pigs, the court saying, p. 71:

"Manifestly pigs cannot be raised in the city, hence they must be raised on the farm. If they are raised there under conditions as clean and sanitary as can reasonably be attained considering the characteristics of the animal and the necessity for confinement in close quarters, the fact that odors from those quarters are carried abroad on the summer breeze will not make an actionable nuisance.

"It becomes one of those minor discomforts of life which must be borne in deference to the principle that one man's enjoyment of property cannot always be the controlling factor, but must be considered in connection with the reasonable and lawful use of other property by his neighbors."

It must thus be apparent that in each case presented, a question of fact is involved. The element of negligence upon the part of the railroad company must be affirmatively established. All the facts and circumstances surrounding the establishment of the yards will be taken into account. It would be our sugges-
tion that in purely borderline cases, where close questions of fact are likely to be developed upon the trial, your department might not be justified in taking the initiative, for the reason that any private individual may institute suit for the abatement of that which he conceives to be a nuisance. Where the condition is of a thoroughly aggravated character and of such long standing as to manifest a defiance or disregard of all proper rules looking to the conservation of public health, then under the statute (sec. 3180a) the matter may be laid before this department, which has authority to proceed, and, the conditions outlined existing, it will as heretofore cooperate with your department to the full extent of its power and ability.

Your second question relates to the method of procedure in a case where an incorporated village has provided no system of sewers, and due to the location of a large portion of the houses thereof upon low ground, it is subject to floods, which result in highly unsanitary conditions. You state further that the inhabitants of the lower area are desirous of having a sewage system established but that the officials of the village neglect and refuse to take action for the establishment of a drainage system or a sewer system. You inquire as to what can be done under these circumstances.

You are advised that the problem involved is primarily a governmental one, whose solution is to be found by the election of public officials that will enact and carry out the program desired by the citizens affected.

Sec. 61.34. subds. (21) and (28), outline in the fullest manner the power of the village board in the matter of arranging for the abatement of such conditions.

Sec. 61.45 provides:

"It shall be lawful for the president and trustees of any village whenever they shall deem it necessary for the public health, to cause sewers and drains to be made in any part of such village, and to order and direct the construction of either of the same, and to alter, repair or mend any sewer or drain heretofore, or hereafter, constructed within said village, and to cause a main sewer for the purpose of an outlet for the branch sewers and drains to be constructed without the limits of said village when necessary; * * * ."

It is thus apparent, we think, that the village board is lodged with the discretion as to whether it shall or shall not establish
a sewer system. This is a type of discretion that cannot be controlled by mandamus, so far as any authorities upon the subject that have come to our attention are concerned.

You are of course familiar with the provisions of law relative to the abatement of specific nuisances, but in a situation such as that which you outline, we think the only remedy lies in the education of the community and its public officials into a desire for better conditions.

Elections—If nomination papers are regularly filed and are in due form, county clerk has no power to keep name of candidate from ballot unless some court action is brought to prevent it.

E. S. Jedney,
District Attorney,
Black River Falls, Wisconsin.

An opinion was rendered by this department under date of June 10, 1910 (Op. Atty. Gen. for 1910, 341), in reliance upon the authority of 15 Cyc. 347, that a county clerk acts in a purely ministerial capacity in preparing and printing official ballots. In that opinion it was held that where nomination papers were filed on behalf of a woman for a county office, she was entitled to a place on the official ballot, irrespective of her eligibility. The same rule was adhered to in an opinion rendered August 10, 1916, V Op. Atty. Gen. 626.

To our minds State ex rel. Rinder v. Goff, 129 Wis. 668, impliedly sustains the same rule.

In reliance upon the foregoing, you are advised, in answer to your question, that if nomination papers are regularly filed and are in due form, the county clerk has no power to keep the name of the candidate from the ballot unless some court action is brought to prevent it.

July 26, 1920.
Elections—Nomination Papers—Statutes contemplate that nomination papers shall be actually delivered to and placed in custody of filing official. Mere deposit in mail not sufficient if papers are not in fact delivered.

July 29, 1920.

Honorable Merlin Hull,
Secretary of State.

Sec. 5.05, Stats., provides:

"The name of no candidate shall be printed upon an official ballot used at any September primary unless not later than the last Tuesday of July of the year in which such primary is to be held a nomination paper shall have been filed in his behalf as provided in this chapter, * * * ."

You ask for an opinion as to your authority to accept papers filed as of that date, which were deposited in the mail in ample time to reach your office on that date, but through fault of the mail service were not delivered.

You are advised that you have no authority to accept and file such papers.

No question is involved save the meaning to be given to the single word, "filed." The language of the court in United States v. Lombardo, 228 Fed. 980, is peculiarly apposite. It is said, p. 983:

"* * * The word 'file' was not defined by Congress. No definition having been given, the etymology of the word must be considered, and ordinary meaning applied. The word 'file' is derived from the Latin word 'filum,' and relates to the ancient practice of placing papers on a thread or wire for safe-keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office, and not send through the United States mails. Gates v. State, 128 N. Y. 221, 28 N. E. 373. A paper is filed when it is delivered to the proper official and by him received and filed. Bouvier, Law Dictionary; Hoyt v. Stark, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246; Wescott v. Eccles, 3 Utah 258, 2 Pac. 525; In re Von Boreke (D. C.) 94 Fed. 352; Mutual Life Ins. Co. v. Phinney, 76 Fed. 618, 22 C. C. A. 425. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act."

Substituting the word "legislature" for "congress," this language is adopted as controlling and decisive. The opinion of
the court was subsequently reviewed in *United States v. Lombardo*, 241 U. S. 73, and the language above quoted set forth in full, pp. 76-77.

*Gates v. State*, 28 N. E. 373, 374, 128 N. Y. 221, is a leading case, and it is there said:

"* * * There must have been a delivery by or on behalf of the party of his claim at the office itself * * *. Anything short of a delivery leaves the fact of the filing disputable. *

This case is cited with approval to the same proposition in *Burford v. Mayor*, 49 N. Y. S. 969, 970.

As said in Bouvier of the word "filed,"

"* * * The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become a part of the public record." (Cited with approval in *Spackman v. Gross*, 126 N. W. 389.)

These decisions sufficiently illustrate the meaning of the term in question, and conclusively negative the possibility that it may be construed as covering the deposit of such papers in the mail at some point outside your office. Were further authority required, 3 Words & Phrases 2764; 2 Id. (second series) 531, afford the same in great abundance.

Attention has been directed to a prior opinion rendered by this department (Op. Atty. Gen. for 1910, 288), where comment was made as to the practice of the secretary of state in filing papers that did not reach him until after the statutory date. What is therein contained is deemed merely to have been said by way of explanation of the practice of the office, and not as being the opinion of this department. On the contrary, this apt language is therein contained:

"This statute is not directory, but prohibitive. It is not susceptible of the liberal construction which is given to directory statutes." (P. 289.)

The opinion of the supreme court of North Dakota, in the very recent case of *State v. Hall*, 176 N. W. 117, has likewise been examined. But that opinion turned upon the peculiar wording of the statute, which adopted by reference the language of a prior statute which authorized delivery "by registered let-
In reliance thereon, it was held that nomination papers might be filed by registered mail.

The practical objections to the adoption of any other rule give added support to the conclusion herein expressed, which it is believed embodies a safe, certain, and definite rule which is fair to all. An endless succession of controversies upon questions of fact as to whether there had been an actual mailing "in ample time," and what would constitute "ample time," is immediately opened by the adoption of a different standard.

Until the supreme court of this state indicates a contrary view, this department sees no escape from the foregoing construction of your power and duty.

_Banks and Banking—Building and Loan Associations—Affairs of associations which are governed by secs. 2014—27 and 2014—28 subject to annual examination by commissioner of banking._

_Honorable Merlin Hull,
Secretary of State._

Under date of July 28, 1920, you ask to be advised whether the Wisconsin Bond and Mortgage Company, in the event that it qualifies, as required by secs. 2014—27 and 2014—28, to and does transact business as an investment association, will be subject to annual examinations by the commissioner of banking.

It is my opinion that your question must be answered in the affirmative. The steps by which that conclusion is reached are these:

1. The sections before mentioned require, as a condition precedent to doing business in Wisconsin, that every so-called investment association contemplated by these two sections shall first comply

"with all the provisions prescribed in chapter 93 of the statutes required of foreign building and loan associations authorized to do business in this state" (sec. 2014—27),

and

"all provisions of said chapter 93 with respect to the supervision, control and conditions upon which foreign building and
loan associations are permitted to do business in this state are thereby made applicable to and imposed upon" such investment associations, "the same as though they were foreign building and loan associations so far as such supervision, control and conditions can be made applicable to the particular business done" (sec. 2014—28).

Ch. 93 is entitled, "Mutual Loan and Building Associations," and is the chapter in which said sections occur. So that the question resolves itself into an investigation or inquiry relating to the supervision and examinations of foreign building and loan associations which do business in Wisconsin.

2. Secs. 2014—17 to 2014—26, inclusive, relate specifically to foreign building and loan associations. These sections contain no provision for regular examinations by the banking department of the affairs of such foreign associations, but the provisions as to domestic and foreign building and loan associations were enacted at the same time and have always formed part of the same chapter in the statutes. In the portion thereof relating more particularly to domestic associations, we find sec. 2014—13, which provides:

"At least once in each year, the said commissioner of banking shall make or cause to be made an examination into the affairs of all such associations and for that purpose said commission or the examiners appointed by him shall have full access to, and may compel the production of, all their books, papers, securities and moneys, administer oaths to and examine their officers and agents as to their affairs."

3. Does sec. 2014—13 apply to foreign building and loan associations? If it does, it applies to "investment associations" by express statutory declaration.

The section immediately preceding the one just quoted from declares:

"All associations formed under this or other similar law, or authorized to transact in this state a business similar to that authorized to be done by this chapter, shall be under the control and supervision of the commissioner of banking." Sec. 2014—12.

It seems to me reasonably certain that the phrase, "all such associations," where it occurs in the second and third lines of sec. 2014—13, refers to and comprises
all associations * * * authorized to transact in this state a business similar to that authorized to be done by this chapter [93],"

mentioned in sec. 2014—13, and that the provisions for annual examinations thereof are applicable to so-called investment associations.

Banks and Banking—National banks being duly authorized to act in fiduciary capacity and congress having provided for deposit and approval of securities and inspection of books and accounts, commissioner of banking, although not required to do so by state or federal law, may examine and approve such securities and accounts.

July 31, 1920.

HONORABLE MARSHALL COUSINS,
Commissioner of Banking.

The decision of the supreme court of Wisconsin and of the supreme court of the United States, interpreting the federal statutes, establish beyond question that congress has power to authorize a national bank

"to act as trustee, executor, administrator * * * or in any fiduciary capacity in which State banks, trust companies * * * are permitted to act" (U. S. Comp. Stats. 1919 Supp. 9794),

and that the state may pass no legislation, the effect of which is to prohibit or interfere with the discharge of such functions by national banks when so authorized.

The courts agree that appropriate legislation has been passed conferring such authority. It follows that the state of Wisconsin is now powerless to prevent its exercise. The federal law (see. 9293, Barnes' Federal Code) expressly provides as a condition precedent to the discharge of these functions, the deposit of securities, and that

"books and records shall be open to inspection by the State authorities to the same extent as the books and records of corporations organized under State law * * *." U. S. Comp. Stats. 1919 Supp. 9794.

In short, the federal law contemplates full compliance in all ways with the provisions of state statutes.
A national bank, however, continues to act as an agency of the federal government. After making a tender of securities in good faith and upon compliance with the condition of keeping its books and records open to inspection by state authorities, such bank becomes entitled to exercise and discharge all of the functions contemplated, this without regard to the acceptance and approval of securities and inspection and examination of books and accounts by state officials.

The national government is without power to impose upon a state official the discharge of purely federal functions. Such, in all probability, would be the nature of your acts with reference to approval of securities and examination of accounts. Congress cannot compel you to do this. It has not sought to do so. Inferentially, however, it authorizes you to do these acts.

The rule is well settled that, unless prohibited by state legislation, you may discharge a duty conferred by act of congress. Holmgren v. U. S., 217 U. S. 509, 517; People v. Witzeman, 191 Ill. App. 277 (cases cited). You are not required to do so by state law, nor are you in express terms forbidden to do so by such law. In this situation, it is optional with you personally whether you act in respect to the matters under consideration.

You will, however, pardon the suggestion that national banks will not suffer by reason of failure to examine them. It is the people of Wisconsin who are interested in having every safeguard thrown about the management of trust estates. Congress might have granted the authority in question without provision for state supervision or regulation, or any supervision or regulation at all. Having done so, public policy in the larger sense would indicate that state officials should avail themselves of all safeguards prescribed by congress, to insure the proper discharge of duty by national banks acting in a fiduciary capacity, and that any narrow, strained, or hypertechnical construction that resulted in failure to subject the operations of such banks to the same scrutiny as other institutions acting in similar capacity, would seem ill advised.

Any statement or opinion heretofore given in respect to the matter is modified, to the extent that it may appear consistent herewith.
Corporations—Filing Fees—In computing fees of foreign corporation, "authorized capital stock" must be taken as provided in articles. Fact that some stock has been retired not material.

August 2, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

You have asked to be advised whether the fees required by a foreign corporation as a condition of doing business in Wisconsin are affected by the fact that the articles of the corporation make provision for the retirement of the preferred shares, and if so, to what extent and under what circumstances the provision for retirement of shares of stock affects the filing fee to be paid.

This question arises in connection with the fees to be paid by O— E— & Bros., Incorporated, of Pennsylvania.

This corporation has an authorized capital of $10,000,000, of which $4,000,000 is preferred. The company contends that its present authorized capital stock is less than $10,000,000, and bases that contention upon the assertion that some of the preferred stock has been retired, in accordance with provisions contained in the articles of incorporation. Counsel for the company take the position that once stock has been retired under these provisions it cannot be reissued, and that it results therefore that the authorized capital stock has, by such retirement of preferred stock, been reduced by a like amount. The conclusion which has been reached on this proposition by this department makes it unnecessary to consider the soundness of counsel's legal proposition.

You are advised that in every case the amount of authorized capital of a corporation, be it domestic or foreign, is to be ascertained from the articles themselves, and from no other source, for the purpose of computing the filing fees. The secretary of state is not concerned with the contract that a corporation has made with the stockholders or with others, whereby the corporation has diminished or waived its power of issuing or continuing
outstanding shares of capital stock. In computing the filing fees of a foreign corporation you take as "the authorized capital stock" the sum named in the articles. That is the sum referred to in subd. (e), subsec. 7, sec. 1770b, Stats., where it says:

"* * * In determining the proportion of authorized capital stock employed in the state, the same shall be computed by taking the gross business in dollars of the corporation in the state and add the same to the full value in dollars of the property of the corporation located in the state. The sum so obtained shall be the numerator of a fraction of which the denominator shall consist of the total gross business in dollars of the corporation both within and without the state, added to the full value in dollars of the entire property of the corporation, both within and without the state. The fraction so obtained shall represent the proportion of the authorized capital stock represented within the estate."

The number by which this fraction is to be multiplied in ascertaining the filing fee is only changed when the articles of incorporation themselves are changed. It is not the province of your office to investigate or inquire into the number or amount of shares outstanding.

You are therefore advised that the total authorized capital stock of the company in question should be taken as the sum named in the articles of incorporation, and you should disregard any claim made on account of the retirement or nonissuance of any of the shares of stock.

Appropriations and Expenditures—Public Officers—State Superintendent of Public Instruction—Pay roll, expense accounts and other items of expenditure by department of public instruction need not be submitted for approval of state board of education before they can be audited by secretary of state.

August 3, 1920.

HONORABLE C. P. CARY,
State Superintendent of Public Instruction.

Must the pay roll, expense accounts, and other items of expenditure by the department of public instruction be approved by the state board of education, before they can be audited by
the secretary of state and paid? This question is presented in your letter of August 2, 1920.

This department is of opinion that the secretary of state may not properly exact such approval as a condition precedent to his audit thereof, for the reason that such action would in effect be an attempt to delegate the constitutional authority vested in the secretary of state by sec. 2, art. VI, Const., which provides that "he shall be ex officio auditor."

As was said in *State ex rel. Raymer v. Cunningham*, 82 Wis. 39, 52:

""* * * This function of the secretary of state as state auditor cannot be transferred wholly or partially to another person or officer by the legislature."

Obviously, what the legislature is unable to accomplish itself cannot be accomplished indirectly by the secretary of state.

This additional consideration bears out the same conclusion. The state board of education is of purely statutory creation, and that being so, as was said in *Monroe v. Railroad Commission*, 174 N. W. (Wis.) 450, 453,

"its power and jurisdiction must be found within the four corners of the statutes creating it."

Nowhere in the statutes is any provision found that it shall approve pay rolls, expense accounts, and other items of expenditure. It therefore follows that the secretary of state is without power to insist upon such approval, and that the state board of education does not possess the function to give such approval.

The opinion rendered by this department under date of July 7th is in no sense at variance with the view herein set forth. Pursuing the analogy there suggested, with reference to variance of a legislative act after approval by the governor, the governor as such is charged with no function or duty to prevent departures from the legislative purpose. So in the present case, the state board of education bears no responsibility for insuring adherence to the budget which it has approved. Its full duty is performed when it registers its decision that the budget presented is "in reasonable conformity to the legislative will." Sec. 38.61 subd. (13).

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* Page 320 of this volume.
Bridges and Highways—Gravel Pits—Under sec. 1223 town supervisors may condemn land for road materials.

George W. Lippert,
District Attorney,
Wausau, Wisconsin.

You say, under date of August 2, 1920:

Sec. 1226b has been repealed by the laws of 1919. With it were repealed secs. 896 to 902. These sections refer to the matter of condemning gravel pits for town road purposes. In view of the fact that these statutes are repealed, what procedure is necessary to condemn gravel pits for road purposes?

Your question is fully answered by the statute:

""* * * It shall be the duty of each board of supervisors:
""* * * *(2) To provide machinery, implements, stone, gravel and other material on such terms as may seem proper, and hire such machinery, laborers and animals as may be required to make, build, pave and repair highways and bridges; and for these purposes they shall have the power to purchase gravel pits and stone quarries and take the title thereto in the name of the town; and if such pits and quarries cannot be purchased, title thereto may be acquired in the manner provided in chapter 32."" Sec. 1223, Stats.

Ch. 32, Stats., is a codification of various practice statutes relating to eminent domain.

Taxation—Dog License Law—Forfeitures—Practice discussed.

Forfeitures under law enforced by civil action in usual way, same as other forfeitures.

Honorable C. P. Norgord,
Commissioner of Agriculture.

Replying to numerous inquiries which have come to you about the enforcement of the dog license law and others which have been submitted directly to this department, you are advised as follows:
Ch. 72, Stats., regulates the keeping of dogs and provides for licensing the same.

A person who violates the provisions of said chapter incurs a liability or penalty or forfeiture of not less than $5 nor more than $50. Subsec. 4, sec. 1628, Stats.

Such violation is not a misdemeanor and does not subject the violator to a fine. Therefore, the penalty prescribed by the statutes is to be recovered or collected in a civil suit or action, as provided by sec. 3294, Stats. The violator is not arrested, but is served with a summons as in an ordinary action for debt, the state being the creditor.

"Every such action shall be brought in the name of the state of Wisconsin, and the summons, pleadings and proceedings therein shall be the same as in civil actions." Sec. 3295, Stats.

See also State v. Egerer, 55 Wis. 527; Carter v. Dow, 16 Wis. 298; Ives v. Supervisors, 18 Wis. 166.

It is the duty of the district attorney, when informed of such violation, to institute and to prosecute actions to collect the penalty therefor. Subsec. 4, sec. 1630, Stats.

It is also the duty of the chairman of every town to cause such action to be brought whenever he knows or has reason to believe that such penalty has been incurred in his town, and other town officers are in duty bound to notify the chairman of such violation. Sec. 3304, Stats.

These are plain statutory official duties, which officers may not disregard except at their peril. Sec. 4550, Stats.

Justices of the peace have jurisdiction over actions to collect the penalty in question. Sec. 3572, subsec. (10). The action may be before any justice of the county in which the defendant is found.

The practice and forms to be followed and used are fully set forth in Bryant's Wisconsin Justice, ch. 14 (Actions for Forfeiture), secs. 512—534, inclusive.

With the aid of this recognized authority on justice court practice, and with the statutes before him, no attorney is likely to have any difficulty in framing a complaint or drafting any other paper in a forfeiture action for the enforcement of the dog license law. The summons, of course, is in the usual form, and the state of Wisconsin is always the plaintiff. Sec. 3295, Stats.
It would seem only fair to the average citizen that no action be commenced to recover such penalty until the district attorney has satisfied himself, by correspondence or other communication directly with the person reported as delinquent and otherwise, that a cause of action in fact exists. It would also seem prudent, in view of the duties of the chairman of the town (see. 3304), that the claimed delinquency be called to the attention of the chairman, mayor or president of the town, city or village in which the alleged offender resides, to the end that dependable information may be had as to the present state of facts, as well as to the attitude of the claimed offender and of the chief executive of the municipality towards this law and its enforcement.

Care should be taken to institute no action that cannot be well sustained by evidence and carried to judgment in favor of the state. Suits should not be instituted wholesale. The statute is new and is a marked departure from the prior existing law. Violations may be due to oversight and to misunderstanding of its meaning, as well as to a willful disregard of its obligations. No comprehensive statute was ever enacted which did not contain provisions which were obscure or ambiguous and therefore open to construction. The dog license act has many provisions, and before the scheme can be completely understood, the statute must be studied. It did not become operative until July 1 of this year, and judgment and discretion should be used in its enforcement at least until we have a right to assume that all persons actually know or have had a chance to learn what this law requires of them. Meritorious laws are frequently rendered obnoxious by the manner of their enforcement. Your department is anxious to avoid such a result and may well caution those acting under your supervision to exercise prudence in applying the law.

The assessor is required to file with the clerk, on or before June 30 of each year, a list containing the names of all dog owners within his district. Sec. 1624, subsec. 1. As a rule, assessors do their work during the month of May, and it is probable that the information from which this list of owners is prepared will have been obtained by the assessor during that month. The town clerk reports all persons delinquent for dog license fees to the district attorney. Sec. 1630, subsec. 4. Probably the clerk makes his report to the district attorney from the list which the
assessor made. A person who killed or otherwise disposed of his dog prior to July 1, 1920, is not affected by the law. He is not liable for a license fee or to any penalty. Aside from mistakes which the assessor may have made in compiling his list, we have, therefore, to guard against the further mistake that might come from assuming that a person who was the owner of a dog in May still continues to be such owner. In case he had killed his dog prior to July 1, a suit against him would subject him and the state to unwarranted expense and would quite likely outrage his feelings and bring discredit upon the officers charged with enforcement of the law, as well as animosity towards the legislators who enacted it, and such results are studiously to be avoided. Reasonable persons should first be reasoned with.

On the other hand, anyone who willfully violates or defies this law and challenges public officers to enforce it should be dealt with promptly and unflinchingly. No district attorney should hesitate in such a case to promptly start and vigorously prosecute a court proceeding to the end. It is fitting that such a person be used to illustrate how the law can be enforced. Milder cases may well wait upon the result in his case. I cannot believe that many suits will be necessary in a single community. If there are numerous persons in any community who have failed to pay the required license, it is highly probable that a sort of leader will be found among them. Successful prosecution of this leader will entirely solve the difficulty and lead to prompt observance of the law.

"What should be done when the sheriff cannot hire constables or undersheriffs to pick up the dogs at a dollar per head, and when he does not feel that he can afford to do it himself?"

This question has been submitted. Sheriffs and undersheriffs and constables may not weigh the financial returns to determine whether or not they will discharge the duty which the law imposes upon them. In assuming office they take the burdens with the benefits. There is but one course open to a public official who is unwilling to perform an official duty for the compensation which the law imposes, and that is to resign his office. So long as he remains in it he must perform the duties thereof.

"If the delinquent dog owner pays the fine and still refuses to license his dog, what shall then be done? Does the payment of the fine in any way remove the dog owner's duty and respon-
sibility under the law to license his dog? Is he to be fined again or what shall be done?"

These are also questions which have been submitted to you by a district attorney and which you desire answered.

The recovery of the penalty under this law is not equivalent to a license. The license for keeping a dog can be obtained only in the manner prescribed by the statute. Where an owner persists in his refusal to obtain a license for keeping his dog, the dog should be killed.

"... The sheriff and his deputies, any marshal or constable or other police officer shall seize, impound or restrain any dog for the keeping of which no license has been issued and for which one is required..." Sec. 1628, subsec. 1.

"... If after five days the owner does not claim such dog such officer shall dispose of the dog in a proper and humane manner;"

notice having been given to the owner by mail or otherwise as the statute provides. Sec. 1628, subsec. 2.

It is the intent of the law that the dog shall not be surrendered to the owner unless the license has been obtained for keeping the animal. The duty and liability of the sheriff and other officers named in such a circumstance are quite as plain and imperative as those of the dog owner. If the officer performs his duty no question can arise as to what the owner must do about the dog.

The payment of a judgment obtained in an action to collect the penalty does not authorize the defendant to keep an unlicensed dog. Harboring such an animal subsequent to the time when a judgment was obtained would be an additional and subsequent violation of the law for which a penalty could be recovered. But it is hard to see how such a case would arise. The minimum penalty is equal to the maximum license fee, to say nothing of the cost of the action and the fact that the court may impose a penalty ten times the maximum license fee. No man who is clearly subject to this law and who has paid a penalty at the end of a lawsuit for having violated the law will incur such an expense a second time.

The enforcement of this law may be likened to the collection of poll taxes when the law imposed such taxes. In some locali-
ties the poll taxes were collected of all persons liable thereto. In other communities the law was a dead letter. That did not mean that the law could not be enforced. It frequently happened, where it had not been enforced for some time and enforcement was attempted, that the law was at first defied, but its enforcement in the court in one or two cases had the effect of dispelling all resistance. Such will be the result of successful actions to collect the penalty provided in ch. 72, Stats. (ch. 527, laws of 1919).

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**Elections—Nomination Papers**—Sec. 5.28 does not confer power to place candidates upon primary election ballot on theory that vacancies have occurred through insufficiency of nomination papers.

_August 4, 1920._

**HONORABLE WILLIAM B. NAYLOR,**  
*Assistant Secretary of State._

Sec. 5.28, Stats., provides for a declination and annulment of a nomination to office, and continuing, contains this language:

"* * * 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."

You quote this provision of the statutes in your letter of August 3, and inquire whether vacancies may now be filled, "caused by the insufficiency of nomination papers."

You are advised that in the opinion of this department, no authority is conferred to fill vacancies occasioned by "the insufficiency of certificates of nomination or nomination papers," prior to the primary election.

(State ex rel. Bancroft v. Frear, 144 Wis. 79, decisively negates the possibility of such construction. At the time this da-
cision was rendered, sec. 34, Stats. 1898, was the section number under which the provision to which you refer appeared. In discussing the power to fill vacancies under this section, the supreme court stated, pp. 95-96:

"Again, sec. 34 relates in terms only to a person already nominated by a party; and it provides for the filling of a vacancy when one happens, by giving the party committee of that party power to fill it. This is logical, because the party committee is the executive arm of the party and very properly should represent it in such an emergency. But before the primary there is no party nominee. True, there may be several persons whose names have been properly put forward by nomination papers and who are thus entitled to have their names on the primary ballot, but these nominating signers have no executive committee recognized by law to act for them. It must frequently happen that these persons nominated before a primary represent factions in the party, and, in all probability, one at least represents a faction whose object it is to overthrow the faction which has control of the party and is represented by the party committee. Now, if sec. 34 be imported into the primary law, the party committee, under its terms, would be authorized to fill a vacancy occurring in the leadership of the party faction which was endeavoring to defeat and supplant the faction to which the committee belonged. This seems absurd. It is logical and sensible to enact that the party committee shall act for the party as a whole, because it represents the party. It is neither logical nor sensible to enact that a party committee shall act for a faction of the party or a mere group of party members, because it does not represent the faction or group. Indeed, it may be fighting such faction or group with all its power."

A careful examination of the statutes indicates that the legislature has taken no action to change the rule thus announced by the supreme court. Subd. (2), sec. 5.14 was enacted apparently to meet the specific situation in controversy in the case before the court, but beyond this, the section has been given no application.

There seems to be no room for controversy upon the proposition.
Contracts—Public Printing—For occasional delays or defaults by state printer state has option to have delayed work done by others at state printer’s expense and continue contract in effect, or to declare contract avoided and bond forfeited and recover damages suffered by state.

Such contract may not be canceled in part; it must be avoided in whole or not at all.

August 4, 1920.

Printing Board.

You ask to be advised upon the law governing your action with reference to the contract between the state and the Democrat Printing Company for three classes of state printing. The contract in question covers the biennial period ending December 31, 1920.

Delays have occurred and are likely to recur in the delivery of printed matter under said contract, which delays are in violation of the terms thereof to be performed by the state printer. Because of delays in delivering work, you have had some jobs done by other printers, at prices above the contract rates, and have charged the state printer with the added cost necessitated by his failure to comply with the contract. The circumstances give rise to at least two questions:

1. May the state printing board continue the practice of employing outside printers to do such work as the state printer fails to perform within the time limited and hold the state printer for the added cost; or must the state printing board declare the contract avoided and the surety bond forfeited and proceed to advertise anew for bids and let contracts for the balance of the contract period?

2. May the contract be canceled as to a single class of public printing and be left in force as to the other classes?

1.

The statutes provide that the work must be done promptly by the state printer:

"(8) Work must be done promptly and * * * be satisfactory to the printing board; and in case of any substantial failure to comply with these provisions, the printing board may refuse to receive such defective or delayed printing, and procure what was ordered elsewhere, charging the state printer with
the difference between the actual cost and the contract price thereof. * * *" Sec. 35.44.

The statutes further provide that if the contractor shall enter upon the performance of his printing contract, and shall thereafter at any time during the term thereof refuse or neglect to comply with its terms and conditions * * * he shall be liable to the state in damages to the amount of the difference between the cost of public printing under his printing contract and the cost thereof under any subsequent contract or contracts made by the printing board, pursuant to law for the supplying of such public printing as he ought to have supplied under the terms of his printing contract." Sec. 35.50.

And the contract in this case stipulates that the state printer "will at all times during the continuance of this contract be in readiness to do and will do all the work and furnish all the material required by this contract without delay, and in default thereof, the said party of the first part (the state) at their option or the legislature or any other person authorized by law may procure said work to be done and said materials to be furnished by some other person or persons at the expense of the party of the second part."

Were these the only provisions of the contract and of the statutes which bear upon the question, it would be quite evident that the state might permit the contract to continue in force and, pursuant to its terms and at the expense of the contractor, procure to be performed by others such pieces of work as the contractor failed or refused to do within the time limited therefor. That is exactly what the contract empowers the state and its representatives to do in such an emergency.

Any doubt that may exist as to such line of procedure being correct is raised by the language of sec. 35.51:

"* * * If the contractor refuses or neglects to execute the work according to law and the terms of his printing contract, said board shall declare such contract avoided and his bond forfeited, and shall forthwith advertise for bids as in the first instance for the remainder of the contract period."

After careful consideration of the contract and these provisions of statute, the conclusion is reached that sec. 35.51 does not override the other provisions before considered but must be harmonized with them. The last named section should be con-
strued to give to the state the option of canceling the contract entirely or of continuing it in force and letting to others such items of work as the contractor has defaulted upon, as has heretofore been done. Stated differently, the word "shall" where it occurs in the clause "said board shall declare such contract avoided" should be read "may," thus giving an actual election to the state.

If not so read, then sec. 35.51 is to be confined to cases of willful and complete failure or neglect on the part of the contractor to execute the work, as distinguished from inability to deliver some item or part of the work contracted for. Involuntary, occasional tardiness in delivering pieces of work does not compel an avoidance of the contract and the forfeiture of the bond.

When, under the circumstances stated, work which the Democrat Printing Company is engaged to perform, is let to others, the extra cost thereby occasioned to the state should be charged to the contractor. The contract itself and the statutes both direct that course. The state printer should at once be informed of the sum thus charged to it and credited to the state, and in passing upon the bills or statements rendered from time to time by the state printer, credits to which the state has thus become entitled should be taken into account.

However, in the event that the state printer refuses to allow those credits, its bill should be allowed as though they did not exist, and the matter of credits be reported to the attorney general.

"* * * It is the duty of the attorney-general, in all cases of damages and of forfeitures arising under this chapter [Public printing], to commence and prosecute to final judgment all necessary actions for the recovery thereof with costs, * * *."

Sec. 35.50.

An action may be commenced upon each item of credit as it arises, but it would seem advisable, unless the item is very large, to await the expiration of the contract period and then, if necessary, bring a single action covering all the items of damages.

2.

The law does not authorize a cancellation of the contract in part. Its provisions are not severable. The contract, if avoided and canceled because of the breach of its terms by the state
printer, would have to be avoided in its entirety and bids would
then have to be invited as in the first instance, for the remainder
of the contract period. Sec. 35.51.

Indigent, Insane—Mortgages, Deeds, etc.—Homesteads—
Dower—Deed by husband of his homestead is void without
wife’s signature.

Widow has dower estate in all lands owned by her husband
during their marriage unless she has released or waived her
right thereto.

A deed of lands by an insolvent debtor is void as to creditors
if made without consideration.

State and county have creditors’ rights to recover expenses
for care of insane wife.

August 4, 1920.

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

It appears from your letter of August 3, 1920, that some three
years ago a married woman was adjudged insane and was com-
mitted to the state hospital at Mendota, where she still remains
an inmate. About six months ago her husband, for a nominal
consideration, and in contemplation of death, conveyed his real
estate and shortly thereafter died. Upon these facts you have
submitted this question:

“Is there any way of forcing the grantee of this property to
stand the expense of the wife in the asylum? And if so what
would be the proper procedure to take?”

You do not state whether the expenses you refer to are for
past or for future maintenance. So far as it may be mainte-
nance prior to the husband’s death, such expense was a debt of
the husband and may be proved as a claim against his estate.
But his estate is not liable for such maintenance subsequent to
his death, except so far as the same is made liable by the pro-
visions of sec. 3935, Stats.

If the land in question was the grantor’s homestead, his deed
is void for want of the wife’s signature (sec. 2203), and the land
descended to the widow if he left no issue, and if he left issue,
then to her for life and the remainder to such issue (sec. 2270). However, a homestead is exempt from debts. In case this land has descended to the widow, it can be used for her support.

Passing to a consideration of the matter on the assumption that the land was not a homestead, it is plain that the widow has a dower right or estate therein (sec. 2159).

It is well settled that a conveyance by a debtor without consideration is in fraud of creditors and may be avoided, so far as necessary, to satisfy the grantor’s debts. If the husband was indebted for the maintenance of the wife and the land was not a homestead, administration upon his estate should be obtained and claims against his estate filed and reduced to judgment. When judgment has been obtained, this land, if it has been conveyed in fraud of creditors, may be reached and sold under such judgments.

Many additional facts are needed before it is possible to state in detail the procedure to be followed, but it is thought sufficient has been said to answer the question which you have submitted. It is very obvious that the grantee named in the deed mentioned is not personally liable to the state or county for the expense of caring for this woman.

Appropriations and Expenditures—Education—Budgets—Secretary of state not required to satisfy himself that pay rolls and expense accounts of various educational agencies of state correspond with budget submitted by them and approved by state board of education.

HONORABLE MERLIN HULL,
Secretary of State.

After the state board of education has filed in the office of the secretary of state an approval of the budget of one of the various educational agencies enumerated in sec. 38.01, subd. (13), may the secretary of state thereafter accept the certification of the various boards provided for in sec. 14.37, and the heads of departments provided for in sec. 14.31, subd. (2), as to the correctness of the account or pay roll submitted, or must he go further and satisfy himself that the claim or pay roll conforms to
the budget approved by the state board of education? This question is submitted in your letter of August 4.

A full examination of the statutes relating to your duties and to the powers of the state board of education and the various agencies involved has led to the conclusion that you need not concern yourself with the details presented in such budgets but that the only criterion which you should apply is that of determining whether the expenditure submitted falls within the amount of the appropriation made by the legislature to the various agencies, and is within the proper scope of the duties and functions respectively entrusted to them.

The matter is not entirely free from doubt, but statutory provisions and general principles of law following indicate quite convincingly that such is the correct interpretation of your duties.

Sec. 14.30 provides:

"The secretary of state as auditor shall:

*(12)* Keep clear, distinct and separate accounts of all appropriations authorizing expenditures from the state treasury, which accounts shall show the amounts appropriated, the amounts expended and the unexpended balance of each appropriation."

Sec. 14.31, subd. (2), reads as follows:

"Pay rolls, to be entitled to audit, shall be certified by the proper officers who shall set forth the nature of the services rendered by each person named therein."

The language of sec. 14.37 is:

"The certificate of the proper officers of the board of regents of the normal schools, the regents of the University of Wisconsin, the state board of control, or the proper officers of any other board or commission organized or established by the state, shall in all cases be evidence of the correctness of any account which may be certified by them."

You state that the budget approved by the state board of education has been filed in your office. The statute, however, nowhere provides for such filing, and the same may be taken as without significance as an official act. Nowhere is there any provision that your department shall keep its accounts in con-
formity with budgetary arrangements. The sole reference is that they shall correspond to appropriations.

Sec. 20.73 provides:

"Except as expressly provided by law, the * * * state superintendent," among other officials enumerated, is "authorized to appoint,—subject to the state 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 employees 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."

It will be noted that while, under certain contingencies, appointments may be subject to the approval of other bodies, there is no restraint upon the power of the state superintendent to fix the compensation of his subordinates. Sec. 20.74 makes specific provision for emergency appropriations to any state department, which would include the superintendent of public instruction, where sufficient money has not been appropriated to properly carry on the ordinary regular work. There is no specific provision that such application for an emergency appropriation may not be made after the approval of the budget by the state board of education, nor is there any restriction that the superintendent may not fix or increase salaries after such budget has been approved. The language of the emergency appropriation statute and of the budgetary approval statute indicate the contrary. Sec. 38.01 provides for approval, "if such budgets are within the available funds." Sec. 20.74 provides for granting an additional appropriation when "no other appropriation is available."

The state board of education is thus limited in its function and jurisdiction to pass upon a budget within the general legislative appropriation. Sec. 20.74 contemplates the possibility of the exercise of the ordinary functions of the department in such a way that money may be required outside the regular appropriation, and in such situation, as was ruled in a former opinion by this department, VI Op. Atty. Gen. 504, 505,

"the state board of education has no authority in the matter of the expenditures of the appropriations made by the last named section,"
and the educational agency immediately in charge may make its application direct to the emergency board.

Sec. 20.75 makes it a penal offense for any state officer to make expenditure of any money appropriated or set aside by law for a specific use, to or for any other purpose or object than that for which the same has been or may be so set apart. It will be noted that the prohibition is against the diversion of funds "set aside by law." This must be taken to mean, "set aside by operation of law," and not by the act of some board or official. Burke v. Backus, 53 N. W. 458, 459; Klauber v. San Diego Street Car Co., 30 Pac. 555, 556. There is thus no prohibition or penalty attached for making a different application of funds than one specified in a budget.

Sec. 20.77, subd. (6), also provides that no appropriation shall be available for any other purpose than that for which it is made. The penalties and prohibitions thus set forth are all against variation from appropriations, and cannot be construed as penalizing the mere variation from the detailed items of a budget. Some force and effect, it might well be urged, should also be given to the phrasing of sec. 38.01, which provides that "the administration of the budgets" shall rest with the agencies designated. An administration implies the existence of the factor of discretion and the power of management. 1 Words & Phrases 197; 1 Words & Phrases (Second Series) 117.

The effect of the foregoing is to modify and limit any prior opinion rendered by this department, to the extent that the same may have warranted the conclusion that there existed a complete want of power on the part of the administrative officer to vary the details of his budget when once submitted by him for approval. At least, the secretary of state need not concern himself with the possibility of variation, the same being a question for adjustment between the state board of education and the particular educational agency involved.

Sec. 38.01, standing alone, clearly indicates that adherence to such budget is intended. Constrained in connection with other statutes herein set forth, it appears that such obligation as there may be in the matter is not susceptible of legal enforcement. The question is thus left to the good faith and individual conscience of the agency involved in submitting its budget, and subsequent adherence thereto, within the scope of the legislative ap-
appropriation, is purely a matter of moral restraint and official discretion.

If this conclusion suggests the possibility of abuse of such discretion and evasion of any ethical restraint in the matter, the sufficient answer is that it is within the power of the legislature to remedy the situation by making a direct provision that no audit shall be made unless the pay roll submitted is in full conformity with the budget as approved or, it may, in its discretion, make detailed and specific appropriations of particular sums, and direct the manner of their expenditure. It is likewise suggested that the emergency board provided for in sec. 20.74 might well take all of these considerations into account in determining whether it should grant to any department or agency funds in addition to the regular appropriation.

Automobiles—Speed Law—Firemen—Firemen while answering fire alarm or going to fire may exceed speed limit; in performing other errands they must observe speed laws.

August 9, 1920.

L. M. SHEARER,
Deputy State Fire Marshal.

The question submitted in your letter of August 9 is answered by sec. 1636—55, which provides, in part:

"... 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 seems to have been the intent of the legislature to exempt members of the fire department, while going to fires or answering fire alarms, from the provisions of the traffic regulations required of automobiles and other motor vehicles. Further than this, the legislature does not seem to have intended to extend the exemption.

You are therefore advised that, in exceeding the speed limit while performing duties outside of those specified in the statute, the driver of a fire wagon is subject to the traffic laws, including speed provisions.

It goes without saying that while the department is responding to a fire alarm or going to a fire the members are exempt from the provisions of the speed regulations.
Agriculture—Dog Licenses—Private person may not kill dog not his own though the dog be trespassing at night but not in act of worrying or killing domestic animals.

August 10, 1920.

WINFRED G. HADDOW,
District Attorney,
Ellsworth, Wisconsin.

You ask to be advised whether a private citizen may kill a dog that strays onto his premises at night, if the dog is not found killing or worrying any domestic animal.

Your question is answered in the negative. At common law a dog is a subject of property, and a person has no more right to kill another's dog than he has to kill other domestic animals not his property. 2 Cyc. 416; Tenhopen v. Walker, 55 N. W. 657; Bowers v. Horan, 53 N. W. 535.

You say this question is on the interpretation of subsec. 3, sec. 1628, and you call attention to the words, "seized, restrained, impounded and disposed of as provided by this section by any one."

You query if it is not possible that the quoted words relate back to the manner of disposing of a dog by an officer who, under certain circumstances, is given authority, after futile pursuit, to kill a dog. The history of this statute makes it quite apparent that no such meaning was intended or is to be attributed to the statute. The draftsman of the bill intended to give a person the right to kill an unattended dog committing trespass, but the legislature thought this remedy too drastic and summary.

The bill was No. 468, A., and the original bill provided:

"* * * Any dog unaccompanied by its owner or keeper which enters the field, pasture, meadow or farm enclosure of another shall constitute a private nuisance and the owner or tenant of such field, pasture, meadow or farm enclosure may kill such dog while therein without liability or responsibility of any nature for such killing." (Lines 133 to 137, subsec. 1.)

And the bill further provided, in subsec. 3, sec. 1628:

"* * * Any dog found or discovered off the premises of its owner between sunset and sunrise and unaccompanied by its owner or some person in control of it shall be considered an unlicensed dog and a private nuisance and may be killed by any-
one during said time and before it returns to the control or premises of its owner.’” (Lines 148 to 152.)

The assembly, by amendment No. 6, offered by the author of the bill, changed the language to the form in which it now appears in the statute.

In case a private citizen seizes or impounds an unlicensed dog, the disposition which the law intends he shall make of such dog is to turn the same over to the sheriff or some other police officer.

Automobiles—Dealers’ Licenses—Foreign-owned Cars—Dealer or manufacturer must have license for each city in which he has place of business.

Dealer’s license covers only his automobile business and his personal use of his automobiles.

Foreign-owned car if licensed by state of owner’s domicile, needs no Wisconsin license.

August 10, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

You ask for a ruling by this department upon the following matters connected with the administration of the automobile laws:

“First: The M—— Motor Car Company, with its home office at Wausau, has substantial branch houses at Eland, Antigo and Merrill, but is operating under one dealer’s license issued to the home office. Will you kindly advise whether or not a separate dealer’s license is required for each office.”

A license is required for each of said offices or places of business. Every dealer, manufacturer and distributor of motor vehicles may, upon application, have issued to him a certificate of registration and a distinguishing number or mark, assigned to him in lieu of registering each vehicle,

“provided, if such applicant has an established place of business in two or more towns or cities in the state, distinct register numbers must be assigned such applicant for each such town or city upon the payment of the fee for each registration granted.” Subsec. 1, sec. 1636—48.
This statute requires that a fee shall be paid and a certificate and registration number issued and assigned for each place of business in case the places of business are in different municipalities.

"Second: The Ford garage at Algoma has a dealer's license for the automobile branch of its business. These people also sell farm machinery as another branch of the same business. They deliver this farm machinery into the country or wherever it may be necessary, by using the truck on which they have their dealer's license and plates. These people also have a Ford car used exclusively as a means of transportation for demonstrating electric lighting plants to farmers, which is also another side of their business. On this Ford car they are using an extra pair of dealer's plates on the one license."

The business mentioned requires that the cars used shall be licensed in the usual manner. Such use of cars without the regular registration is a violation of the automobile laws and subjects the offenders to the penalties prescribed. The certificate and distinguishing number which dealers, manufacturers and distributors may avail themselves of is intended as a license to operate motor vehicles only when said vehicles are operated directly in connection with the business of dealing, manufacturing or distributing.

"3. No manufacturer, distributor, dealer or subdealer shall use any motor car, motor truck or other motor vehicle registered under the preceding provisions of this section for any other purpose than the trial, test and adjustment of such motor vehicle, or for its demonstration or exhibition to a prospective buyer, or for some purpose necessarily incidental to the legitimate business, or personal use of such manufacturer, distributor, dealer, or subdealer, including service cars, but in no case shall a motor vehicle registered under the provisions of this section be rented for hire, or used for hire for the purpose of conveying passengers or freight." Sec. 1636—48.

"Third. We have a number of cases where men living near the state line are operating a car on a license obtained, for example, in Minnesota, where they pay $5.00 for a three years' license. The men who operate the cars here in Wisconsin are residents and taxpayers in this state. When approached on the matter of a Wisconsin license they evade by claiming that the owner of the car is some relative who is a resident of Minnesota."

Cars which in fact are owned by residents of adjoining states and licensed by the state in which the owner resides may be op-
erated on the public highways of Wisconsin. The operator of said car does not need a Wisconsin license.

"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." Sec. 1635—53.

Whether residents of Wisconsin resort to Minnesota registration as a subterfuge to escape payment of Wisconsin registration fees presents questions of fact rather than law. The operation on our public highways of a Wisconsin-owned motor vehicle without a Wisconsin license is a violation of law, and the fact that the owner or operator may have gone through the form of obtaining a Minnesota license would be no protection to him or defense in case of prosecution.

Criminal law—Rape—Facts show a violation of three statutes; accused should be charged with a violation of each in separate counts.

Clive J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

In your letter of August 6 you inquire what offense has been committed under the following statement of facts:

"A neighbor's girl not quite fourteen years of age came to the house of the accused to work. About three o'clock in the morning she awoke and found that the accused was in bed with her. She immediately got up and went home. So far as the complainant knows the accused did not put hand upon her. The accused had undoubtedly just gotten into the bed though we have no proof as to how long he had been there. From these facts I am convinced that his intentions were to commit rape upon the girl but was thwarted by her running home."

You refer me to sec. 4588a, which provides:

"Any male person over the age of eighteen years who shall take indecent or improper liberties with the person of a female
under the age of sixteen years, with or without her consent, without intending to commit rape on such female, shall be punished," etc.

Your statement of facts is somewhat meagre, but I would judge that this section of the statute is applicable so far as the facts show that the person was guilty of taking improper liberties, but the facts do not show that he did not intend to commit the crime of rape. It would, therefore, be advisable, in order to meet the evidence as it may be disclosed at the trial, to charge the accused with an offense in one count under sec. 4588a, and charge him also with an offense under sec. 4385a, which provides:

"Any person who shall advise the commission of or attempt to commit any felony as defined in section 4637, that shall fail in being committed, the punishment for which such advice or attempt is not otherwise prescribed in these statutes, shall be imprisoned," etc.

The acts of the accused, as disclosed in your statement of facts, would tend to show that he intended to commit a felony and he would therefore be guilty under this section.

Another count could charge the defendant with an offense under sec. 4383, which provides:

"Any person who shall assault any female with intent to commit the crime of rape shall be punished," etc.

Taking indecent liberties with a female has been held to be an assault. 3 Cyc. 1023 and cases cited under Note 11. On page 1027 of the same volume we find the following:

"To constitute the offense of assaulting a female child, and taking indecent liberties with her person, the liberties taken need not have been with her private parts, but may be such liberties as the common sense of society would regard as indecent and improper. Where the child is below the age of consent the acts need not be against her consent or positive resistance."

You are therefore advised that it is advisable to charge the accused with an offense in three separate counts under the three sections of our statutes above indicated. It is a well settled rule in Wisconsin that separate counts for separate felonies may be charged in the same complaint or information.
 Elections—Nomination Papers—Where affidavit appended to nomination paper fails to comply with subd. (b), subsec. (5), sec. 5.05, nomination paper is defective and should be disregarded by county clerk.

Only nomination paper fair on its face should be recognized by county clerk.

August 12, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

You request the opinion of this department as to the sufficiency of a nomination paper which is in the following form:

"I, the undersigned, a qualified elector of the town of G—— County of S—— and State of Wisconsin, and a member of the Republican party, hereby nominate John Doe, who resides in Town of Blank in the county of S——, as a candidate for the office of (name of office) to be voted for at the primary to be held on the first Tuesday of September, 19——, as representing the principles of said party, and I further declare that I intend to support the candidate named herein.

NAME OF SIGNER

Residence

DATE OF SIGNING

E——

7-23-20

(Other names with the same residence and date of signing.)

STATE OF WISCONSIN, ss.

COUNTY OF S——

"J—— L——, being duly sworn, on oath does depose and say that he knows all of the persons who signed the above nomination paper, that their residences and dates of signing herein shown are true and that this affiant intends to support the candidate above mentioned."

(Followed by the signature of affiant and the jurat of the notary public.)

Such nomination paper is fatally defective. It fails in several particulars to conform to the requirements of sec. 5.05, Stats. Among the omissions and defects, mention is made of the omission from the affidavit of a statement that the affiant knows the persons who signed the nomination paper to be electors, and fails to state that he knows they signed with full knowledge of the contents of the paper.

Such a document is not a valid nomination paper, is not entitled to filing, and may be disregarded by the county clerk.
Opinions of the Attorney-General

Education—Tuition—Municipal Corporations—Towns—Town is liable for tuition of pupils who have completed regular four-year high school course and return for additional work in teachers' training course.

August 12, 1920.

James Murray,
District Attorney,
Fond du Lac, Wisconsin.

Your inquiry of August 10, 1920, presents the question of whether a town is liable for the tuition of pupils who have completed the regular four-year high school course and return for additional work in a teachers' training course established pursuant to sec. 40.63. You are advised that under date of October 3, 1913 (II Op. Atty. Gen. 366), this department rendered an opinion which involved the following question:

"May a nonresident under twenty years of age, after graduating from the full four year high school English or classical course, continue in, or return to the school, taking another course or other studies offered by the school, and still be entitled to have his tuition made a charge upon the town, village or city in which he resides?" (P. 367.)

It was there said:

"* * * As long as a pupil has not exceeded the age limit and finds that there are branches of study or courses offered in the high school which he desires to take, he is privileged to attend such high school, under these provisions of the law, and the town in which he resides is required to pay the necessary tuition. The words of the statute are clear and unambiguous and there is no room for construction." (Pp. 367-368.)

There is no change in the statutes necessitating a different construction and no reason is apparent for a change in ruling. Consequently you are advised that it is the opinion of this department that under such circumstances the town is liable irrespective of the subject taught.
Elections—Nomination Papers—Duty of county clerk in passing upon nomination papers is ministerial; he may not resort to other evidence and upon same declare papers invalid.

Elector may not by telephone effectively authorize placing of their names upon nomination papers.

Affidavit appended to nomination papers must be made by elector who knows facts therein stated of his own knowledge.

August 13, 1920.

FRANK W. CALKINS,
District Attorney,
Grand Rapids, Wisconsin.

You say in a letter dated August 9, 1920, that you have advised the county clerk that he should place upon the primary ballot the name of every candidate whose nomination papers are regular upon their face and which have been filed on time in his office unless he is restrained by court from so doing.

You state further that he asks you to obtain the opinion of this department on the action to be taken with reference to said nomination papers.

This office is reluctant to express an opinion as to whether or not the name of a given candidate should be placed on the primary ballot. It is better, all things considered, that this department confine itself to a statement of its opinion of the law and leave the application thereof and the determination of questions of fact to the officers charged with the administration of the law.

The statutes do not contemplate or permit that a person should call electors on the telephone and obtain their consent to have their names signed by the party calling them upon nomination papers nor does the statute permit the making of the affidavit required by sec. 5.05 as to the genuineness of the signatures, the correctness of the residences given and the dates of the signatures or the qualifications of the signers to vote at the election, except that said affidavit be made upon personal knowledge of the affiant. The affidavit must be made by a qualified elector who actually saw the signatures affixed to the nomination paper and who could testify that those signatures were made by qualified electors and that the electors knew the contents of the nomination paper when they signed.

25—A. G.
Neither does the law permit the mutilation or material change of a completed nomination paper by the person therein named as a candidate or by anyone else. To change the name of the office after such paper had been completed would be a palpable fraud upon the electors who signed it. It might result in their appearing to sign for more than one candidate for a given office. Quite likely there are statutes which penalize such actions.

However, the clerk is merely a ministerial officer. He has no judicial powers. In determining what name shall go on the primary ballot he looks merely to the nomination papers themselves. There is no provision of law for making or filing affidavits which dispute said nomination papers or show their invalidity. Those matters may be examined but the inquiry is a judicial proceeding.


A member of one political party is eligible to become a candidate at the primary for nomination as a candidate for office of a different political party. Qualifications for office do not depend upon affiliation with any political party, VII Op. Atty. Gen. 542.

Criminal Law—Inquests—Public Officers—District attorney may order inquest even after deceased has been buried.

August 13, 1920.

GEORGE W. LIPPERT,
District Attorney,
Wausau, Wisconsin.

In your communication of August 11 you state that a man was killed by a blow on the head; that the coroner was not informed nor was the district attorney given any notice; that it looks as though the man might have been killed by a blow with some blunt instrument, like a hammer, which might have been murder; that the doctor who was called after the death signed the death certificate. You inquire whether the doctor had any right to sign a death certificate in such a case as this, and whether they had any right to ignore the coroner and district attorney in a matter of this kind.
Under sec. 1022—38, Stats., it is provided that

"In case of death without the attendance of a physician, or if the certificate of the attending physician cannot be obtained early enough for the purpose, any physician employed for the purpose shall upon the request of the local registrar or his deputy, make such certificate as is required of the attending physician."

A physician called for that purpose may sign the death certificate, under this provision of the statute, although he has not seen the patient before his death. Deaths often occur by accidental blows on the head when it is perfectly clear that there was no homicide committed. In a great many cases, however, the cause of the death is uncertain. The blow may have been administered in such a way that it is murder, while the circumstances and facts are such that a conclusion that the party came to his death accidentally is perfectly logical.

It sometimes happens that what is believed at first to be an accidental death turns out later to have been murder, and where the physicians or those who have charge of the body of the deceased have buried the same, and the physician has signed a death certificate, the district attorney is not in any way deterred, after he receives notice, from holding an inquest even after the body is buried.

It is therefore impossible for us to state whether, under the peculiar circumstances in the case presented by you, the notice should have been given to the district attorney, but you, as district attorney, are not prevented from having an inquest, even after the body is buried. You have the right to order an inquest as soon as you receive notice of the death of the party and you have reason to believe that he came to his death not by accident but by the act of an assassin. An official opinion on this question which may aid you will be found in IV Op. Atty. Gen. 177, in which the cases of State v. Hayes, 112 Wis. 304, and Palmer v. Broder, 78 Wis. 483, are cited.

Our statutes do not prescribe the procedure for securing a post-mortem examination, but you, as district attorney, have the right to order an inquest and have the body exhumed and an autopsy performed, for the purpose of ascertaining whether the death was caused by unlawful means or by accident.
Corporations—Cooperative Associations—Public Utilities—Cooperative society, incorporated, has power to engage in business of transmitting electricity.

Such society must comply with statutes regulating public utilities in order to act as public service corporation.

August 16, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

By letter of August 11, 1920, you submitted the articles of incorporation of The M— Co. The articles declare that the incorporation is made under secs. 1786c—1 to 1786c—17, Stats. Those sections provide for the forming of cooperative associations. The articles submitted comply with those sections in every particular with the possible exception of the business of the corporation.

Art. II reads thus:

"The business and purposes of said association shall be transmitting electric light and power."

Are those purposes for which a cooperative association may be formed or incorporated?

"Any number of persons, not less than five, may associate themselves as a co-operative association, society, company or exchange, for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing or mechanical business on the co-operative plan, and of acting as a selling agency for its members or patrons." Sec. 1786c—1.

Is "transmitting electric light and power" "manufacturing or mechanical business" within the meaning of the section just quoted?

A transmission line or system is necessary for the purpose mentioned in the articles. To enable the corporation to carry on the business named a transmission line or system would have to be either built, bought or leased and thereafter maintained and operated. It is the opinion of this department that the building, maintenance or operation of electrical transmission lines is a "mechanical business" and that a cooperative society may be formed under the sections named for that purpose or business. It was held by the supreme court of Minnesota in
Finnegan v. Knights of Labor Building Association et al., 53 N. W. 1150, that the erecting of buildings is a mechanical business within a statute authorizing the formation of cooperative associations for trade or carrying on any lawful mechanical, manufacturing or agricultural business. The court said, p. 1151:

"* * * Giving a reasonably liberal meaning to the word 'trade' in the act, it would include the buying and selling of real estate, and, upon a similar construction, the word 'mechanical' would include the erection of buildings. The doing of the mason, or brick, or carpenter, or any other, work upon a building is certainly mechanical. There can be little question that corporations might be formed to do either of those kinds of work on buildings, and, that being so, there is no reason why they may not be formed to do all of them. There is no reason to claim that such a corporation must do its work as a contractor for some other person."

The same court held in Cowling v. Zenith Iron Co., 68 N. W. 48, 49, 33 L. R. A. 508, that the mining of iron ore was "mechanical business" within the meaning of a certain provision of the state constitution.

You ask to be advised whether a public service corporation may be formed under said sections. The articles of incorporation submitted do not necessarily raise that question. There is nothing in the articles which either expressly or necessarily looks to serving the public. The transmission of electric current may be for the exclusive use and benefit of the members of the association. It may be added, however, that no reason has been advanced or statute found which would prevent this association from supplying electric light and power to the public. Of course, in the event that it enters the public utility field, the association would be compelled to comply with the statutes regulating such service. Possibly some statute has been overlooked which bars such an association from entering the field of public service and this opinion is given upon the assumption that no such statute exists.
Elections—Nominations—Vacancies—Failure of political party to nominate candidate at September primary does not create vacancy.

Except as provided in sec. 5.14, subd. (2), primary nomination must have been made before vacancy can exist in party ticket on general election ballot. Place must be filled before it can become vacant.

Vacancies named in sec. 5.28, caused by defective certificates or insufficient nomination papers, are vacancies in “Independent” column of official ballot and not vacancies in political party’s ticket.

Only vacancies in party ticket may be filled by party committee; in filling vacancies committee may name any person.

August 18, 1920.

Honorable Merlin Hull,
Secretary of State.

You ask to be advised whether a vacancy is caused or occurs where preprimary nomination papers were filed but were insufficient for want of signatures and no party nomination was made at the primary; and in the event a vacancy is thereby created, must the party committee, in filling the vacancy, confine itself to those candidates for whom insufficient papers were filed.

You are advised that the facts stated do not create a vacancy within the meaning of secs. 5.14 and 5.28 as applied to the September primary. The mere omission of a party or failure of a party to make nomination of candidates by use of the primary machinery neither causes, creates or leaves any vacancy within the meaning of the sections just cited. The provision for filling vacancies has no application to the state of facts implied by your letter. It is true that the places for names of candidates on the party ticket at the following general election will be blank spaces, but there will be no vacancies in the sense that they may be filled by the party committee. If they were vacancies they did not occur after the primary. They existed as much before as after. Nor were the blank spaces the result of any declinations or resignations. Therefore neither sec. 5.14 nor 5.28 has application. This is in accordance with an opinion rendered to the district attorney of Ashland county in 1916.
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V. Op. Atty. Gen. 705. That opinion is believed to be sound and is adhered to.

Opinions to the contrary have been expressed. VII Op. Atty. Gen. 450, 451 and 478, 479. What was said in the last cited opinions upon this point was obiter and is now thought to be erroneous and is therefore disapproved.

In view of the decision in State ex rel. Bancroft v. Frear, 144 Wis. 79, there can be no party primary nomination unless the votes given at the primary to nominate a candidate for a particular office total at least 10% of the party vote for governor at the last election. Wanting that number of votes, there is no party nomination and there can be no vacancy on the party ticket. That rule applies where names of candidates for the particular nomination in question were regularly upon the party primary ticket, as well as where there was no name and the place left blank on the primary ballot. The rule is entirely general. A nomination must first be made, a place must first be filled, before there can be a vacancy on a party ticket at the general election.

It would be a strange legal anomaly indeed if an unsuccessful attempt to make a party nomination by use of the primary left or created no vacancy on the general election ticket and at best merely gave a place in the independent column to the person attempted to be nominated; while absolute nonaction by a political party and its members at and prior to the primary would create a "vacancy" or vacancies which the party committee could fill, and vice versa.

In an opinion to the district attorney of Calumet county, September 9, 1918, VII Op. Atty. Gen. 517, it was ruled that where the total vote of a primary party ticket was less than 10% of the gubernatorial vote at the last preceding election and the number of votes for one candidate exceeded 3% of said gubernatorial vote, such candidate was not nominated on the party ticket and his name could not be placed thereon but must be placed in the independent column of the official ballot. It is not conceivable that the filing of either sufficient or insufficient preprimary nomination papers would have changed the effect of the primary as to this candidate, the votes remaining the same.

To hold that the filing or attempted filing of insufficient primary nomination papers, followed by an insufficient vote to
name a party candidate or candidates would result in giving the party committee the power to fill out the party ticket on the official ballot at the ensuing general election would mean that all party nominations of candidates for the general election might be picked by the party committee, and that the primary election could be dispensed with in case any party adopted such a program. It would mean that minority parties might and likely would defer making any move to nominate their respective tickets till after the primary, and that the members of those minority parties would vote, with dire intent, in the majority party's primary. Again, to hold that an insufficient pre-primary nomination paper may cause a vacancy after the primary is to hold that a fake nomination paper may have that effect, for surely a forged or pretended nomination paper is "insufficient." The law does not invite jokers in election. Enough of them will come unbidden.

Sec. 5.28 deals with more than one kind of vacancy.

Vacancies may be caused by death of a person regularly nominated at the primary, or by his declining the nomination. Such declination nulls the nomination. The name is thereby withdrawn. Those acts cause vacancies in the party ticket. Such a vacancy may be filled by the party committee. "In case the candidate is the nominee of a political party" a vacancy created by his declination may be filled "by the committee representing the party." Sec. 5.28.

This provision for filling the vacancies, however, does not apply to a pseudonominee contesting at the primary for a place on his party ticket. A moment's reflection will show this must be the fact. There are at this moment not less than six persons contending for the Republican nomination for governor, and for whom sufficient nomination papers have been filed to entitle all of them to a place on the Republican primary ballot. Not one of these six is the Republican nominee as yet. Each one is striving to be that nominee, and the primary will determine the party nomination. The Republican party nomination for governor must be made through the primary. It can be made in no other way. If it makes such a nomination, thereafter a vacancy may occur which could be filled by the party committee. That is the rule, to which there is but one exception, and that exception is contained in subd. (2), which was added to
sec. 5.14 following the decision in the case of *State ex rel. Bancroft v. Frear*, and is in these words:

"If a person whose name is printed on the primary ballot shall die or file a declination to accept the nomination after the ballots are printed, or if he shall be disqualified to accept such nomination, the votes cast for him shall be counted and returned; and if he shall receive the greatest number of votes, as provided by section 5.15, the vacancy shall be filled by the party committee, as aforesaid."

Secs. 5.26 and 5.27 provide for independent and nonpartisan nominations to be made for any office to be voted for at any general, judicial, special or city election, and also town and village elections. Some of such nominations may be made either by caucus or by nomination papers. Where the nominations are made by caucuses, the nominations are to be certified by the caucus officers. These are the nominations and certificates of nomination referred to by secs. 5.28 where it is provided that

"any vacancy caused by the insufficiency of certificates of nomination or nomination papers may be filled in the same manner as original nominations."

That is to say, if the result of the town caucus is insufficiently certified or the independent nomination papers are insufficient, the defects may be supplied or cured by subsequent nomination papers or caucuses.

In view of what has been said, the second branch of your question scarcely needs further attention. However, it may be well to add that it is the opinion of this department that wherever a party committee has jurisdiction or authority to fill a vacancy in the party ticket, such committee is not confined to the persons who are candidates at the primary or who were voted for at the primary, but may select any person.
Bonds—Municipal Corporations—Cities—Armories—City bonds to build armory must be authorized by electors.

Honorable O. Holway,
Adjutant General.

In response to your communication of August 17, 1920, relative to the building of an armory by the city of Oconomowoc, you are advised that a referendum to and a favorable vote by the electors of the city is necessary to a valid issue of bonds to raise funds needed to construct such a building.

Cities are given authority to be exercised by the common council to purchase sites and to build armories (sec. 21.61). The common council of any city in which there is a company of the national guard

"may purchase land and build armories in the same manner as they are now authorized by law to build other city buildings." Subd. (3).

You will notice that the authority is given merely by reference to other provisions of statute regulating the acquisition of lands, the erection of buildings thereon and the financing of the project. That the city may build an armory and buy a site is beyond question. The inquiry relates solely to the authority of issuing bonds.

The authority for issuing bonds by the city of Oconomowoc is expressly given by sec. 925—133, Stats., and the limitations upon that power that need to be examined for the present purpose are contained in said section and in sec. 943, Stats. We are really concerned with the limitations. Sec. 925—133 specifies eight purposes for which bonds may be issued, and ends with a ninth, in these words: "(9) Such other purposes as are authorized by the statutes." That includes armories. Then follow the limitations on the power. No such bonds shall be issued unless authorized by ordinance adopted by a three-fourths vote of all the members of the common council at a regular meeting held not less than one week after the proposed ordinance has been published in the official paper.

"• • • In case of bonds issued for street improvements, school purposes, waterworks, lighting works for streets and public buildings, hospitals, dredging, docking, river and other har-
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bor improvements, sewerage, parks and public grounds, a vote of the people of the city shall not be required unless within thirty days after the passage by the common council of the city of the ordinance authorizing the issue of the bonds for such purposes there shall be filed in the office of the city clerk a petition in writing, signed by not less than ten per cent in number of the voters who voted in said city at the last general state election, asking for submission of the question of issuing such bonds to a vote of the people, in which case such question shall be submitted as provided in section 943; * * *.” Sec. 925—133, subd. (9).

The qualified exception to the referendum requirement does not include armories. That kind of buildings falls in the general class or is governed by the general rule. Armories are not named in that exception and therefore by the strongest legal implication are not affected by the exception.

Turning now to sec. 943, we find that its opening provisions prohibit every town, city and village from issuing any bonds until the proposition for their issue for a special purpose shall have been submitted to the people of the municipality and adopted by a majority voting thereon. There is, however, an exception to that general rule, and it is substantially the same as to cities as the exception above quoted from sec. 925—133. It is provided by subsec. 7, sec. 943 that said section

“shall not apply to the issuing of bonds by any city of this state for street improvements, school purposes, waterworks, electric light works, gas works, street railway property, hospitals, sewerage, parks and public grounds, or, * * * for apparatus or equipment of fire departments, unless within thirty days after the passage by the common council of * * * a resolution or ordinance authorizing the issuing of bonds for such purposes there shall be filed in the office of the city clerk”

a written petition signed by ten per cent in number of the votes at the last general election asking that the matter be submitted to popular vote, and in the event of such petition, providing for a referendum. Again we find that armories are not expressly or impliedly enumerated in the exceptions to the general rule that a referendum is necessary to a valid bond issue by a city. In view of all the provisions of statute, it seems plain that bonds for the erection of a city hall could not be issued without a referendum upon the proposition, and it seems equally plain that the rule in this matter is the same for building an armory that it is for building a city hall.
Taxation—Saw logs, under facts stated, are taxed in district where located on May 1.

August 20, 1920.

CHARLES E. LOVITT,
District Attorney,
Park Falls, Wisconsin.

You state that you have advised the county income tax assessor that certain saw logs which, on the first of May, were situated in the city of Phillips and were covered by a sales contract and were subsequently sawed at the vendee’s mill in Park Falls were properly assessable at Phillips. Upon the facts as stated by you this department concurs in that opinion.

On the first of May these logs were not in transit nor were they in the taxing district in which they had been cut. Therefore they are not within the exceptions provided in subsec. 4, sec. 1040 but are within the provision of subsec. 3, which says:

"* * * Saw logs, timber, railroad ties, lumber and other forest products, except as hereinafter provided, shall be assessed in the district where located."

If the place of assessment is controlled by the language just quoted, and there is no reason to doubt that it is so controlled, then it becomes unnecessary to determine who owned the logs on May first.

Perhaps the ownership is left in doubt, by the facts you state, as it may be fairly inferred therefrom that the vendor was to load the logs on to cars and hence had not completed delivery on May first. The fact of delivery would seem to be controlling as to where the title was on that date, under the decision in Allen v. Greenwood, 147 Wis. 626. That case arose prior to the enactment of our uniform sales act. Probably the law was changed by that act. See 1684t—18, Stats. This question of law is again considered, but not much clarified, in Gehl v. Peycke Bros. Commission Co., 158 Wis. 494, for no mention is there made of our uniform sales act.

In case the vendor was in possession of these logs on the first of May or the logs were on his premises or premises occupied by the vendor, then they should be assessed to the vendor, even though the title had passed and the logs were owned by the Flambeau Paper Company of Park Falls. See 1044.
Elections—Declinations—Candidate for state office may file declination to accept nomination if such declination is filed after time specified in statutes for printing ballots.

Secretary of state has no function to exercise relative thereto. Votes cast for such candidate must be counted, and if he receives highest number of votes vacancy arises to be filled by party committee.

August 21, 1920.

HONORABLE MERLIN HULL,

Secretary of State.

Sec. 5.14, subd. (2), Stats., provides:

"If a person whose name is printed on the primary ballot shall die or file a declination to accept the nomination after the ballots are printed, or if he shall be disqualified to accept such nomination, the votes cast for him shall be counted and returned; and if he shall receive the greatest number of votes, as provided by sec. 5.15, the vacancy shall be filled by the party committee, as aforesaid."

Sec. 5.08, Stats., provides that the secretary of state

"At least twenty-five days before any September primary election shall transmit to each county clerk a certified list containing the name and post-office address of each person for whom nomination papers have been filed in his office."

Sec. 5.11 provides that not later than the first Tuesday of August before the September primary each county clerk shall prepare sample official ballots. Subd. (5) of the same section provides:

"Not later than the second Tuesday of August before such primary the county clerk shall correct any errors or omissions in the ballot, cause the same to be printed and distributed as required by law in the case of ballots for the general election."

Your letter of August 20 calls attention to the fact that several county clerks have informed you that their official ballots are already printed, and you make inquiry as to whether a candidate for state office may withdraw from the race at this time.

You are advised that under the plain language of sec. 5.14 above quoted, it is contemplated that a declination may be filed by the candidate. The effect of such declination is regulated
by the provisions of that section. Should he receive the greatest number of votes cast, the same will result in a vacancy to be filled by the party committee.

We assume that your interest lies in ascertaining whether any duty exists with reference to the ballots on the part of the secretary of state in the situation to which you call attention. The statute contains no provision for any action to be taken by the secretary of state subsequent to the certification of names, twenty-five days before the primary, as provided for in sec. 5.08. The query occurs as to whether the secretary of state has any function with reference to a declination after he has so certified the list of names. Decision upon this point is expressly reserved.

You are advised, however, that this department is of opinion that under the provisions of sec. 5.11, subd. (5), the law contemplates the ballots shall have been printed by the second Tuesday of August, that the secretary of state in his dealings must assume that the law has been complied with, and that the ballots have in fact been printed, irrespective of whether he has information to this effect or not, and that the result of filing a declination at this time would be governed by sec. 5.14, and that the secretary of state now has no duty or function to discharge with reference to the make-up of the primary ballot.

_Taxation—Delinquent Taxes—_Personal property in hands of assignee is liable only for tax upon such property; may not be taken to pay other taxes of assignor.

Town treasurer and his bondsmen are liable for damages if he fails to collect tax where there is property on which he might levy.

Charles E. Lovett,
District Attorney,
Park Falls, Wisconsin.

The sheriff of your county has for collection a large personal property tax against the Milwaukee Sheep & Wool Company, a Wisconsin corporation, which conducted a sheep ranch in one of the towns of your county. The corporation recently made a
voluntary assignment and the assignee's attorneys suggest that you file a claim with the assignee for the delinquent taxes. Most of the property on which the tax was levied has been disposed of, but there is sufficient property in the assignee's hands to pay the tax provided all the property may be taken for the tax.

You call attention to sec. 1700, Stats., and say you are not clear as to whether, in case the claim is filed, you are limited strictly to the collection of so much of the tax as is represented by the property in the assignee's hands, or may proceed on the treasurer's warrant to collect the entire tax from said property notwithstanding the assignment.

We start with the proposition that the statutes nowhere create a tax lien on personal property in advance of an actual levy, so that when the property passed to the assignee there was no tax lien upon said property. The title passed free from such incumbrance the same as did the other personal property of the taxpayer which has been sold.

The language of the statute, as well as the decisions of our supreme court, rather force the conclusion that the property assigned can be subjected to the payment of only those taxes which were assessed against the owner on account of the particular property held by the assignee, although that would not be the rule in bankruptcy.

"* * * But before making any dividend the assignee shall pay all taxes assessed upon the property assigned which remain unpaid, * * *" Sec. 1700.

Literally, that does not mean the same as "all taxes assessed against the assigner." It may have been the intention of the legislature that all taxes due from the assigner should first be paid, as taxes are everywhere regarded as an obligation of a higher order than a common debt. But in Upson v. Milwaukee National Bank, 57 Wis. 526, it was held that taxes upon mortgaged property should not be paid by the assignee if the equity of redemption was worthless. And so it was held in Milwaukee v. Momsen, 89 Wis. 351, that the assignee should not pay out of other funds taxes levied upon bank stock which had been pledged by his assignor for more than it was worth.

While the payment by the assignee is limited to the taxes upon the property in his possession, still the sheriff should collect whatever he can from the assignee. If the sum collected is less
than the total tax, the unpaid portion will be returned as still delinquent and subsequently be charged back to the town, pursuant to sec. 1128.

It appears from your letter that the town treasurer made no effort to collect this tax, although at the time the town tax roll was in his hands there were ample assets out of which the tax might have been collected by him. If such are the facts, he was guilty of a great breach of duty, for which he and his bondsmen are liable. Furthermore, he must have made a false affidavit, for the statute requires that the delinquent return shall have attached the town treasurer’s affidavit, which states, among other things that

"he has not, upon diligent inquiry, been able to discover any goods or chattels belonging to the persons charged with such unpaid taxes whereon he could levy the same." See. 1114.

Many local treasurers seem to be little impressed with this duty, notwithstanding the fact that the tax commission has sought to bring it sharply to their attention. See 1920 Pamphlet, Assessment and Collection of Taxes, p. 110, note to sec. 1081.

Perhaps more attention would be given to this statute if some treasurers were held strictly accountable. See 37 Cyclopedia 1209.

Education—Public Officers—County and District Superintendent of Schools—Members of county board not coming from cities having city superintendent of schools have exclusive jurisdiction to determine employment of clerk to county superintendent of schools and to fix salary of such clerk.

In determining number of schools under sec. 39.04, subsec. (5), schools in such cities are not to be counted.

August 23, 1920.

GEORGE F. MERRILL,
District Attorney,
Ashland, Wisconsin.

I quote the following from your letter of July 26:

"The supervisors representing the towns outside of the cities made a resolution authorizing the county superintendent of schools to employ a clerk and fixed the salary. Subsequently the county board as a whole, including supervisors from the
cities made provision for clerk hire in several cases in the county. Afterwards they passed a resolution rescinding all resolutions adopted previously relative to clerk hire and appointed a committee to take the matter into consideration. This committee reported on the different propositions except as to the county superintendent of schools. It is claimed that this rescinding of the previous resolutions had the effect to rescind the resolution adopted by the supervisors representing districts outside of the city. The vote was unanimous by the whole board.

"The statutes provide under sec. 39.04, subsec. (5), that where there are more than sixty schools in the county, the board of supervisors may authorize the county superintendent to employ a clerk. Can the city schools, over which the county superintendent has no jurisdiction, be counted in this number of sixty schools?"

Sec. 39.04, subsec. (5), reads in part as follows:

"In counties having more than sixty schools the county board of supervisors at the annual meeting in November, 1915, and annually thereafter, may authorize the county superintendent to employ a clerk, and shall fix the salary to be paid to such clerk for the county superintendent, which shall be paid in monthly instalments and paid as other claims against the county are now audited, allowed and paid."

Of said sec. 39.04, I also quote subsecs. (6), (7) and (8), which read as follows:

"(6) In all cases where the county is divided into two superintendent districts only those members of the county board of supervisors residing within the superintendent district—superintendents from cities under city superintendents to be excluded—shall have and exercise the power and authority granted above to the county board of supervisors in cases where the superintendent district comprises the entire county.

"(7) In order to exercise such power and authority the supervisors from each superintendent district shall meet and organize after the manner of organization provided for county boards of supervisors so far as necessary in order to transact the business before them, and when so organized the supervisors from one superintendent district shall act independently and free from any interference, voice, direction or control from the supervisors of the other district.

"(8) All supervisors representing only cities or wards of cities or districts in cities having an independent system of schools supervised by an independent city superintendent are excluded from any participation in the deliberations of the supervisors of any superintendent district had with reference to
the manner of directing the administration of its school affairs, nor shall any tax be levied in any such city to pay any part of the salary, expenses, printing or postage of such county or district superintendent, or the salary of the clerk for such superintendent, or the per diem and expenses of the members of the board of examiners for common school diplomas."

Reading all these sections together, I am constrained to hold that it was the intent of the legislature to exclude from the jurisdiction of a county superintendent or a district superintendent all cities in such county or district having a board of education, a superintendent of schools or other board or officer vested with power to examine and license teachers and supervise and manage the schools therein" and that such cities shall be exempt from "all provisions relating to county superintendents of schools, except so far as required to make reports to the county superintendent of the district in which such city is situated; * * *." Sec. 39.05.

The legislature, in the sections above quoted, specifically provided that the electors of such cities shall have no voice in electing such county or district superintendent, that the supervisors of such cities shall have no voice in the county board in determining or providing the compensation or allowance of or any matter relating to such county or district superintendent, and that no tax shall be levied in such cities to pay any part of such compensation or allowances. These provisions make it clear that in the general scheme of school administration, county, district and cities of the character above described constitute separate administrative units, subject to general law. Each county, district and city superintendent has exclusive jurisdiction within his territory.

The legislature, in granting to the county board power and authority over county and district superintendents, has carefully provided that only the members of the board elected from the territory over which such superintendents have jurisdiction shall have power to authorize the employment of a clerk for such superintendent and fix his compensation. Supervisors from cities having city superintendents are excluded from taking any part in the exercise of such power. It is, therefore, my opinion that only the supervisors representing the towns outside of such cities in your county have jurisdiction to authorize the county superintendent to employ a clerk and to fix his salary. Such
authority can only be exercised in the manner prescribed by subsec. (7) above quoted. According to your statement of facts, the supervisors having jurisdiction did lawfully and legally authorize the county superintendent of schools to employ a clerk and did fix his salary. It is further my opinion that such action and determination by said supervisors has not been lawfully and legally rescinded.

In determining the sixty schools in the county, schools of cities having an independent system of schools supervised by an independent city superintendent should not be counted. This conclusion is at variance with an opinion rendered by this department on July 29, 1919 (see VIII Op. Atty. Gen. 570), construing sec. 39.04, subsec. (2), as amended by ch. 253, laws 1919.

Throughout sec. 39.04 the legislature uses the words "county" and "district" rather loosely. When this section is read in connection with the provisions of secs. 39.03 to 39.12, inclusive, it is apparent that the conclusion reached in the opinion above referred to cannot be upheld and should be reversed. In other words, the salary of a county or district superintendent should be based upon the number of teachers in the county or district, but not counting the teachers in cities having an independent system of schools supervised by an independent city superintendent.

My answer to your second question is that city schools over which your county superintendent has no jurisdiction should not be counted in determining the number of schools in your county and determining the authority of your county board, under sec. 39.04, subsec. (5).
Constitutional Law—Elections—Woman Suffrage—Proclamation and publication of amendment to U. S. constitution by department of state is only promulgation provided for and only one needed. No state officer has any duty in relation thereto.

Wife of citizen of U. S. is also citizen; wife of alien is also alien.

Registration requirement as condition to voting is exactly same for women and men.

Voters may both register and vote at September primary. No recent change in districts wherein registration is required. No registration required in towns unless population thereof is 5,000.

Electors must reside in precinct ten days before election.

Ballots of men and women should not be kept separate.


Honorable Merlin Hull,

Secretary of State.

The adoption or impending adoption of the Nineteenth Amendment to the United States constitution, which forbids any state to deny any citizen the right to vote on account of sex, has raised numerous questions.

As to the notification or proclamation of such ratification, the constitution provides that an amendment shall become part of the constitution for every purpose when ratified by the legislatures of three-fourths of the states, and by act of congress it is made the duty of the secretary of state, whenever official notice shall have been received by his department that a proposed amendment to the United States constitution has been adopted by the requisite number of state legislatures (thirty-six at present)

"forthwith to cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes as part of the Constitution of the United States." 3 U. S. Stats. at Large 439, ch. 80, sec. 2.

Ratification by a state legislature exhausts its power in regard to the matter and precludes a reconsideration. 12 C. J. 681–682.
The proclamation by the United States secretary of state is the only publication or promulgation provided for and is the only one needed. All citizens, including state and other officials, take notice of the federal proclamation and are presumed to know that the United States constitution has been amended and what the amendment is. No duty in regard to that matter is imposed upon the secretary of state. Any notice he might give would not be official, in the sense that it is required of him or is essential to the amendment coming into full operation.

The following questions and answers are all based on the assumption and understanding that women have or will presently have the right to vote.

1. Is the wife of a citizen of the United States also a citizen, notwithstanding she was born an alien?

Yes. An alien, that is, a foreign-born woman, becomes a citizen upon her marriage to a citizen of the United States. Such marriage operates as a naturalization of the woman. Furthermore, the naturalization of an alien husband naturalizes his wife and his minor children.

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." Sec. 3401 Barnes' Fed. Code, sec. 1994 U. S. Rev. Stats.

On the other hand, a woman may lose her citizenship by marrying an alien. The rule works both ways. The husband's citizenship controls or determines that of his wife.

"Any American woman who marries a foreigner shall take the nationality of her husband." Sec. 3402 Barnes' Fed. Code, 34 Stats. at Large 1229.

Therefore, if the husband is not a citizen, his wife is not, and cannot vote, although she was born in the United States.

2. What is the requirement as to registration of women preliminary to the right to vote?

The same as the requirement for men. The Nineteenth Amendment abolishes the distinction of sex in the matter of voting. Where the men must register in order to vote, the women must also register, and where the men are not required to register the women are not. If we bear in mind the fundamental rule that the law on this subject is exactly the same for
women as it is for men, it will enable us to answer nearly every question that will arise on account of the enfranchisement of women. Under the Nineteenth Amendment, the exercise of the right of suffrage by women is subject to precisely the same regulation that the right of men is subject to.

3. May an unregistered woman swear in her vote at the September primary?

She may do so wherever a man, similarly circumstanced, would swear in his vote. But it is not apparent how this question is to have any practical application. Primary day is a registration day and every qualified elector in any election precinct where registration is required may register on that day.

"(2) Every primary election day and the Tuesday next preceding shall be registration days in every election district where both registration and a primary are required to precede an election." Sec. 6.16, Stats.

The coming primary is to be held in every election precinct in the state. Therefore, the registration board, wherever such a board exists, will be in session on that day and unregistered electors may become registered.

To avoid confusion, every person who intends to vote at the primary should see to it that he or she is registered at the session to be held next Tuesday, August 31. Without regard to the Nineteenth Amendment, women are qualified voters for presidential electors, and may be registered. The statute requires the board of registry to make use of the last poll lists and to enter in the register the names of all persons whose names appear on said poll lists

"together with the name of every person known by the board to be an elector of the district, and also the name of every person who shall on any registration day appear and file an affidavit stating that he [or she] is a qualified elector in such district and giving his place of residence." Subsec. (6), sec. 6.16, Stats.

No affidavit need be required if the registry board knows the person applying for registration to be an elector. The affidavit requirement is only for strangers or those not known to the registry board to be electors.

It is thought proper to emphasize the point that a person may register on the primary day and may, after being registered,
vote at the primary. No warrant is found in the statute for the opinion more or less prevalent that a person cannot both register and vote on the primary day. Once an elector is registered, the law takes no note of the time which has elapsed since registration or the session at which he was registered.

4. Must women register in rural districts as well as in cities?
Women, like men, must register where registration is required.

"(1) In every city, every incorporated village, and every town, which according to the last preceding United States census had a population of five thousand or more, a registry of electors shall be made * * * in each year when a general election is by law required to be held. * * *

"(2) In every city and every village having a population of less than five thousand, according to such census, the common council of the city or the board of trustees * * * may by ordinance or resolution authorize and require registration in such city or village." Sec. 6.14, Stats.

There are very few towns in which registration for the coming primary is required. Such registration is required only in case the town has a population of 5,000 or over. There has been no recent material change in the law relating to registration of voters.

5. How long must a woman reside in a precinct before she can vote?
The same residence is required of a woman as of a man. However, the residence of the wife is controlled by that of her husband, so long as a marital relation continues. A person must have resided in the state one year and in the election district where he or she offers to vote ten days next preceding any election in order to be qualified to vote thereat. Sec. 6.01.

6. Should the ballots cast by women be counted or kept separate from the ballots cast by men?
The law makes no such requirement. A common ballot box should be used and if this rule is observed it will be impossible to determine the sex of the elector who cast any particular ballot unless the ballot was sworn in and its identity thereby preserved.

7. Who will administer the oath to women whose right to vote is challenged?
The inspectors of election administer the oath to persons offering to vote in case their right to vote is challenged. Secs. 6.50 and 6.53, Stats.
Armories—Mortgages, Deeds, etc.—Public Officers—Armory board cannot accept deed to armory site which is other than conveyance in fee.

August 26, 1920.

HONORABLE ORLANDO HOLWAY,
Adjutant General.

A proposed form of warranty deed running from "The Light Horse Squadron Armory Association," a corporation, to the state of Wisconsin, is submitted by you with the request for an opinion as to what alterations, if any, should be made in the proposed deed to warrant its acceptance by the armory board under the armory aid act, sec. 21.615, Wis. Stats.

You are advised that, as heretofore ruled as to state boards generally, in an opinion rendered by this department under date of May 3, 1918, and as is the well established rule of law, your board has no power to accept any deed containing conditions, reservations or stipulations which are not conferred by law, VII Op. Atty. Gen. 260. The section to which you refer embodies the full measure of authority conferred upon the armory board. It provides for the expenditure of public funds, subd. (3), par. (a), after

"there shall have been conveyed to the state, with title free of incumbrance, a site,"

or as provided by subd. (4) the board

"may accept a conveyance to the state of the unincumbered title in fee."

It is therefore apparent that your board can accept only titles as therein specified.

The deed that you submit is objectionable in all respects in which it deviates from this prescribed condition. Among objections thereto that may be particularly noted are the reservations contained to the grantor and to various bodies therein specified, of various rights and privileges. These rights and privileges possibly would arise by implication of law upon the execution of the deed which complied with the statute and might to a certain extent be treated as surplusage.

Of a different character, however, is the provision for the assumption of a $13,000 mortgage and certain special improve-
ment taxes. It is clearly beyond the power of the armory board to accept a deed with such condition inserted. The deed likewise contains a provision for forfeiture of title in case the grantee

"shall at any time devote the said premises, lands and buildings to other than military uses or purposes."

The statutes specifically provide, sec. 21.615, subd. (8):

"Any municipality within which an armory is constructed or acquired under the provisions of this section shall have, free of rental charge, the use of the main drill hall for conventions and other meetings of a general and public nature," etc.

Again the deed contains a paragraph as follows:

"It is understood and agreed that in case said title shall revert as set forth in the preceding paragraph, that then and in such case the then value for nonmilitary purposes of the improvements and betterments made or caused to have been made by said Grantee, shall be ascertained by a Board of Appraisers, consisting of three members, one to be chosen by said Grantor or its assigns, one by said Grantee, and the third by the two so chosen. The findings of such Board shall be final and conclusive and the value, or amount so fixed, if any, shall be paid to said Grantee, or become a lien upon such premises."

This entire matter is regulated by subds. (9) and (10), which provide as follows:

"(9) If and whenever a military company or companies which is in occupation of an armory constructed and acquired under the provisions of this section, is mustered out of the service of this state and it shall appear probable to the armory board that no new state military organization will be mustered in the same locality, then the armory board is empowered and authorized to sell, transfer and convey the said armory premises to the municipality in which the same is located upon the repayment to the state, without interest, of a sum equal to the amount allotted from state military funds and expended by the armory board in the improvement of the premises.

"(10) If the municipality as such shall not have participated in procuring the armory site or in the construction of such armory, or having participated, declines to purchase, the said armory board is hereby empowered and authorized to sell, transfer and convey such armory premises to any person, association or corporation for a consideration not less than the moneys, with interest, expended by the state in improving or acquiring the said premises, giving preference of purchase to that person, as-
association or corporation which contributed most liberally in aid of the local armory construction."

The effort to prescribe a different method of disposition would likewise render the deed unacceptable. In conclusion, it is the judgment of this department that the practice to be followed by your board in all cases is to accept only such deeds as comply with the statute which make conveyance of the unincumbered title in fee of the premises specified.

Fish and Game—Conservation commission has power to provide that the one deer allowed to each licensed hunter must be a buck.

GEORGE F. MERRILL,

District Attorney,

Ashland, Wisconsin.

In your letter of August 24 you refer me to sec. 29.18, Stats., which provides that the bag limit for deer in any one year is one. You state that the conservation commission has made a rule that this one shall be a buck. You inquire whether the game wardens or conservation commission can make this change in the law.

This question must be answered in the affirmative. Sec. 29.21 empowers the state conservation commission to issue orders determining in what manner, in what numbers, in what places, and at what times the taking, catching and 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 animals, and then provides for petitions to be signed and notices to be given, and how the order is to be promulgated. The conservation commission has had petitions presented to them and hearings have been held in the various counties and the order has been promulgated in compliance with said sec. 29.21. This additional protection to the deer of this state is clearly authorized by said section.
Fish and Game—Conservation commission order for conservation of deer, muskrat and mink, if promulgated, is valid.

Order as to attaching metal tag to carcass not within powers of conservation commission.

Conservation Commission.

You have sent me a copy of Order No. 17, which you state you desire to issue, and you ask to be advised whether or not, in my opinion, this order is properly worded to come within the requirements of the law. The said order reads as follows:

"Whereas, after careful consideration, the state conservation commission of Wisconsin, deeming it necessary for the conservation of deer, muskrat and mink

"It is hereby ordered, by said conservation commission of Wisconsin as follows:

"1. That in the counties and during the open season as provided by section 29.18 subsection (2) of the statutes the killing of does, of fawns of either sex, and of bucks with horns less than three inches in length shall be prohibited, i.e., that in such open counties and during such open season and as otherwise provided by law no person shall kill more than one buck with horns not less than three inches in length.

"2. That the metal tag furnished by the commission shall be attached to the carcass as follows: At the hock joint, back of the tendon and locked around the leg of the animal.

"3. That there shall be a closed season on muskrat and mink in all counties of the state except in the counties of Waupaca, Winnebago and in the townships of Bloomfield and Poyssippi in Waushara county, until November 15, 1921. In the said counties of Waupaca, Winnebago and in the townships of Bloomfield and Poyssippi in Waushara county the open season on muskrat and mink shall be from November 15 to March 31; both dates inclusive.

"This order is issued pursuant to the powers given the said commission in section 29.21 of the statutes and shall be in full force and effect on and after October —, 1920."

It will, of course, be necessary, in order to give the commission jurisdiction to promulgate this order, to have all the procedural steps taken which are outlined in sec. 29.21. I assume that this will be done.
Under subd. (1), sec. 29.21, it is provided that 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 animals. Par. (1) of this order is, in my opinion, valid, as the commission is authorized to determine in what numbers the deer can be killed. Under this provision the commission would have the right to order a closed season for deer throughout the year in all parts of the state, and I believe the commission may also provide, as is provided in this paragraph, that no person shall kill more than one buck with horns not less than three inches in length. Under sec. 29.19, in the table contained in said section, the bag limit as given refers not only to number of fish or animals taken but also to the size. I believe the legislature intended, by authorizing the commission to determine the number of animals that could be killed, that a limitation might also be made upon the kind or size of the animal or the size of its horns. I therefore believe that this provision is valid.

The second paragraph of this order does not, in my opinion, come within any of the authorized powers of the commission. It does not determine the manner, the number, the place, nor the time of the killing or taking of the deer. Can it be said that it regulates the manner in which the deer can be taken? I believe not. Before the tag is put upon the carcass the animal has already been taken or killed, and this is rather a regulation of the transportation or the possession of the animal after it is taken. The commission has no power to make any regulation concerning this. My conclusion therefore is that this paragraph is invalid.

The third paragraph is valid because the commission is clearly authorized to provide at what times animals may be taken. In other words, the commission has power to give additional protection to the animal by creating closed seasons at other times than those created by statute. That is all that is attempted by this paragraph and I conclude that if it is promulgated it is valid.
Municipal Corporations—Villages—Village having population in excess of 1,200 may incorporate as city under provisions of sec. 61.58, Stats.

August 27, 1920.

HONORABLE W. B. NAYLOR,
Assistant Secretary of State.

In your letter of August 24 you submit a letter from J. G. Prueher of Bloomer, Wisconsin, inquiring whether the village of Bloomer, having a population of more than 1,200, may become a city of the fourth class by action of the village trustees under sec. 61.58, Stats., or if an election must be held as provided in sec. 925—10.

The statutes formerly provided, and still provide, two different methods for the incorporation of cities. See, 61.58, which was formerly see 925g, provides:

"Whenever the resident population of any village shall exceed twelve hundred as shown by a census herein provided for, such village may become a city of the fourth class, and the trustees of such village may at a regular meeting, by a two-thirds vote of the members thereof, by resolution, so determine. Such resolution shall fix the number and boundary of the wards into which such city shall be divided and fix the time for holding the first city election, which shall not be less than twenty days from the date of such resolution, and shall therein name three inspectors and one clerk of election for each ward. The election shall be noticed and conducted and the result canvassed and certified as in the case of regular village elections and the village clerk shall immediately certify the fact of holding such election and the result thereof to the secretary of state, including in such certificate a description of the legal boundaries of such village or proposed city; and thereupon a patent shall be issued to such city as provided in sections 925—5, 925—12 and 925—13. Thereafter such city shall in all things be governed by the general city charter law."

Under this section a village which has a population exceeding 1,200, as shown by a census taken in accordance with the provisions of this same section, may, by the action of the trustees of the village and the holding of an election as therein provided for, become a city of the fourth class and be governed by the general city charter law. This applies only to the village itself and makes no provision for including therein any adjacent territory. No other action on the part of the electors is necessary.
Prior to the legislative session of 1919, a population of 1,500 was required for action under this section, but by ch. 249, laws of 1919, that was changed to 1,200.

Sec. 925—7, being a part of the general charter law, 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."

Sec. 925—8 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 such 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."

Sec. 925—9 provides that after the filing of such a petition the trustees may submit the question to a vote of the electors residing within the limits of the proposed city; sec. 925—10 relates to the notice of election to be given; sec. 925—11 provides for the conduct of the election, and sec. 925—12 relates to the issuing of a patent.

It will be noted that these provisions are not, by their terms, exclusive and they relate expressly to a district containing a population of 1,500 or over, while the provisions of sec. 61.58 have reference to a village having a population of 1,200 or more. Under the provisions of secs. 925—7 et seq. no part of the territory to be incorporated need be an incorporated village, while under the provisions of sec. 61.58 there must be an incorporated village. Under the provisions of secs. 925—7 et seq. adjacent territory may be included with the incorporated or unincorporated village in the incorporation of the proposed city, while sec. 61.58 contains no such provision.

I am satisfied that an incorporated village having a population in excess of 1,200 may become a city by taking the action provided for by sec. 61.58, and that the provisions of secs.
925—7 et seq. are not inconsistent with such construction. If it is desired to include adjacent territory, then it would be necessary to have a population of 1,500 or more and it would then be necessary to take the proceedings outlined in those sections.

Municipal Corporations—Cities—Cities of fourth class operating under general charter law may reduce number of aldermen in each ward to one under provisions of sec. 926—107, Stats.

Fred V. Heinemann,
District Attorney,
Appleton, Wisconsin.

In your letter of August 28 you submit the following questions:

"Can a city of the fourth class operating under the general charter, providing (sec. 925—23) that two aldermen be elected from each ward, change its common council so that the same shall be constituted by one alderman from each ward, under either of the following section or sections of the statute?

"1st. Can 'direct legislation' under the provisions of sec. 1043 be instituted to make such change?

"2d. Can the change be made under the provisions of sec. 926—107?

"3d. Is there any statute authorizing the reduction of the number of aldermen from each ward in cities of the fourth class?"

It is no part of the duties of a district attorney to advise city officials. It follows that these questions could not come before you officially. This department is not authorized to give official advice to district attorneys except upon those matters that come before them officially. It follows that whatever is said herein must be considered as wholly unofficial, and not binding upon any person.

I will attempt to answer your second question first. See 926—107 provides:

"In all cities of the second, third and fourth class, the common council may, by an ordinance, adopted by a two-thirds vote of all its members, provide that there shall be one or two aldermen from each ward, or that in addition to one alderman the
supervisor of each ward shall be an alderman, and shall determine the time and manner of their election; provided, however, that said ordinance shall not take effect until the same is submitted to and approved by a majority of the voters voting thereon at a general or special municipal election."

It will be noted that this section forms a part of ch. 64c, Stats., which has the general heading "Cities under Special Charters."

This section was originally enacted by ch. 92, laws of 1905, and as so enacted its provisions specifically applied to "all cities of this state of the second, third and fourth class whether governed by general or special charter, or by both."

It is very clear that as thus originally enacted it applied to cities organized under the general charter law, or which had adopted the general charter law, as well as to cities organized and operating under special charters. In the 1906 supplement to the statutes this law was placed in the statutes in two different places, first as sec. 925—23a, a part of the general charter law, and also as 926—107. By ch. 118, laws of 1907, the legislature specifically adopted the numbering of the 1906 supplement. By ch. 503, laws of 1913, the language "whether governed by general or special charter, or by both," was stricken out, and by sec. 33, ch. 773, laws of 1913, sec. 925—23a was renumbered to be sec. 926—107, and at the same time the former sec. 926—107 was repealed.

To my mind there is nothing in all of these amendments indicating an intent to change the original provisions of this particular law. When the language specifically making it apply to cities operating under either the general charter law or under special charters was stricken out, this provision was still left as a part of the general charter law. The change renumbering sec. 925—23a occurred in a reviser's bill. It is well understood that the reviser's bills are not supposed to change the substantive law in any respect, but merely to correct errors and to place the various provisions of law in their appropriate place in the statutes. In placing this provision with the provisions for cities under special charters it was not, as I view it, with the intent to have it applied to such cities only, but the legislature supposed that it would still apply to all cities regardless of the kind of charter they were operating under.
The supreme court has recognized that the mere placing of a provision relating to cities in the one chapter or the other is not, in and of itself, necessarily an indication that such provision applies to cities operating under such charters only. *Superior v. Industrial Commission*, 160 Wis. 541.

In my opinion a city of the fourth class operating under the general charter law, sec. 925—23 of which provides for two aldermen from each ward, may, under the provisions of sec. 926—107, provide that thereafter the common council shall be constituted by one alderman from each ward.

Having come to this conclusion, it is not necessary that any further attention be paid to your third question.

Probably such change can be made under the provisions of sec. 10.43, Stats., although I have not gone into that question very carefully, as it does not seem to be particularly important in view of the conclusion I have come to as to your second question.

Elections—Citizenship of Women—Married woman takes citizenship of husband. If he is alien, she is alien; if he is citizen, she is citizen.

Prior to 1907 female citizen did not lose citizenship by marriage to alien unless she resided abroad.

Woman who is made citizen through marriage continues to be citizen after termination of marriage.

Woman who was made alien by marriage may resume citizenship at termination of marriage by residing in U. S.

JOHN F. DRESSLER.

Potosi, Wisconsin.

You inquire whether a woman born in the United States and who married an alien, the husband dying in 1884, now has the right to vote, or is she an alien.

She is not an alien and never was, if she continued to reside in the United States during her marriage. That marriage in no way affects her right to vote.

In view of the many kindred questions that are constantly arising, it may be well to state the rules which determine the ef-
fece of marriage upon citizenship, and indirectly upon the right to vote.

Marriage does not affect the citizenship of the husband, and what is here said relates solely to the effect of marriage upon the citizenship and allegiance of women.

"* * * The Revised Statutes [of the United States] provide that any woman who marries a citizen of the United States, and who might herself be lawfully naturalized, is to be deemed a citizen, irrespective of the time or place of the marriage or the residence of the parties. In the application of this rule, it is wholly immaterial whether the husband is a citizen by birth or a naturalized citizen. Nor is it essential in applying this rule that the citizenship of the husband exists at the time of the marriage." 11 C. J. 780.

The rule just stated is quite generally known. There is more uncertainty as to the effect of the marriage to an alien husband upon the citizenship of a woman born here.

Formerly, a woman who was a citizen of the United States did not forfeit or lose such citizenship by marriage to an alien so long as she continued to reside in the United States.

"* * * Marriage with an alien * * * produces no dissolution of the native allegiance of the wife." Shanks v. Dupont, 28 U. S. 242, 246.

That rule continued in effect down to March 2, 1907. Therefore, it may be said that any woman who was a citizen of the United States, who married an alien and continued to reside in the United States till a dissolution of the marriage by death or otherwise, is still a citizen and may vote. If the marriage was dissolved prior to the date just mentioned, she was always a citizen.

The law as to the effect of marriage to an alien husband upon the citizenship of the wife was changed and declared by act of congress approved March 2, 1907, ch. 2534 (34 U. S. Stats. at Large 1228), and cannot be stated better than in the words of the statute which enacts as follows:

"Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation, she may resume her American citizenship * * * if residing in the United States at the termination of the marital relation, by continuing to reside therein."
Stated differently, a woman who has an alien husband, acquired after March 2, 1907, is not a citizen of the United States, and has no right to vote here. If she was a citizen before her marriage, she will regain such citizenship upon the termination of the marriage, either by death or divorce, providing she continues to reside here, or, if abroad, returns to reside in the United States.

A marriage contracted prior to March 2, 1907, between a woman who was a citizen and a man who was an alien does not affect the citizenship of the woman. She retained, and still retains, her United States citizenship, and the marriage does not deprive her of the right to vote.

Perhaps it might be well to add:

"That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation, if she continues to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, * * *

" 34 U. S. Stats. at Large 1229, ch. 2534, sec. 4."
Physicians and Surgeons—Public Health—Vital Statistics—
Physician may not charge more than 25¢ for preparation and
delivery of death certificate.

DR. C. A. HARPER,
State Health Officer.

Your letter of August 27 calls attention to the fact that vari-
os physicians are making a practice of charging two dollars
for signing death certificates, and refusing to deliver them to
the undertaker until this amount is paid. You inquire whether
such a charge may be made and collected.

Your attention is directed to sec. 1022—37, Stats., which pro-
vides:

"The medical certificate shall be made and signed by the
physician, if any, last in attendance on the deceased," etc.

Sec. 1022—41 provides for submission of the certificate by
the undertaker to the physician.

Sec. 1022—58 specifies that each physician shall be entitled
to receive the sum of twenty-five cents for each death certifi-
cate, to be paid by the treasurer of the county upon certifica-
tion by the state registrar.

In this situation, the principles of law controlling are quite
elementary. A physician licensed to practice medicine in the
state of Wisconsin is charged with a public duty and respon-
sibility. His status is at least quasi official, and when he pro-
cures his license to practice medicine he accepts the same sub-
ject to all the burdens and conditions that may be attached
thereto.

The legislature has seen fit to stipulate that death certificates
shall be executed upon payment of the fee of twenty-five cents,
and such physician may charge that amount and no more.

It may be well to call the attention of such physicians to the
provision of sec. 2955, which follows:

"No judge, justice, sheriff or other officer whatever, or other
person to whom any fees or compensation shall be allowed by
law for any service, shall take or receive any other or greater fee or reward for such service than such as shall be allowed by the laws of this state."

Sec. 2957 provides for the recovery of the sum of $25 damages for the violation of such section.

Elections—Ballots—At primary elector must deposit unused tickets in blank ballot box.

After canvass contents of blank ballot box must be destroyed; contents cannot be used to construct new or additional official ballots.

If official ballots are exhausted sample ballots may be used.

September 3, 1920.

EMANUEL PFAFF,
County Clerk,
Juneau, Wisconsin.

Referring to the conversation just had with you over the telephone, you are advised that it is strictly forbidden by statute to make use, at the primary election, of the blank ballots which are deposited in the blank ballot box. They must be destroyed without examination by the inspectors.

Should the official ballots be insufficient in number for the voters who present themselves at the polling place, the deficiency in the number of ballots must be made up of sample ballots. The deficiency can be supplied in no other way.

It would seem that the supply of official ballots should be ample if the county clerk should print the largest number authorized. The number of official ballots printed by the county clerks for each precinct shall not exceed twice the number of votes cast thereat in the next preceding general election." Sec. 5.11, subd. (5), Stats.

Sec. 5.13 specifies with particularity how the primary ballots shall be used:

"(6) After preparing his ballot, the elector shall detach the same from the remaining tickets and fold it so that its face will be concealed and the printed indorsements and signatures or initials thereon seen."
"(7) The remaining tickets attached together shall be folded in like manner by the elector, who shall thereupon without leaving the polling place, vote the marked ballot forthwith, and deposit the remaining tickets in the separate ballot box to be marked and designated as the blank ballot box.

"(8) Immediately after the canvass, the inspectors shall, without examination, destroy the tickets deposited in the blank ballot box."

These requirements of the statute are as plain as language can make them. For inspectors to disregard these provisions of statute would be a misdemeanor. The purpose of these provisions is to preserve the absolute secrecy of the ballot and to prevent election frauds.

In regard to the use, where such use becomes necessary, of sample ballots, attention is called to sec. 5.29, which makes the provisions of ch. 6, Stats., applicable to the conduct of primary elections. Sec. 6.27, Stats., authorizes any political committee, at its own expense, to cause any number of sample ballots to be printed.

"If from any cause the ballots are not ready for distribution at any polling place * * * or if the supply shall be exhausted before the polls are closed, facsimile unofficial ballots may be used, but the voter using it must, before voting, present it unmarked to the ballot clerks, have their signature or initials indorsed thereon, and then he shall prepare it for voting." Sec. 6.29, subd. (6).

It is believed that the provision just quoted applies to the coming primary election.

Corporations—Wisconsin corporation which operates hydroelectric plant and sells its entire output to single manufacturing concern and which does not sell or offer to sell any such current to general public does not fall within prohibition of sec. 1797m—75, forbidding transfer of license, permit or franchise.

September 9, 1920.

Railroad Commission of Wisconsin.

Sec. 1797m—75, Stats., is worded as follows:

"No license permit or franchise to own, operate, manage or control any plant or equipment for the production, transmis-
sion, delivery or furnishing of heat, light, water or power shall be hereafter granted, or transferred except to a corporation duly organized under the laws of the state of Wisconsin.”

Sec. 1797m—1 provides:

“The term ‘public utility’ as used in sections 1797m—1 to 1797m—109, inclusive, shall mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, and every town, village, or city that now or hereafter may own, operate, manage, or control any plant or equipment or any part of a plant or equipment within the state, for the conveyance of telephone messages or for the production, transmission, delivery, or furnishing of heat, light, water, or power either directly or indirectly to or for the public, or that now or hereafter may own, operate, manage, or control any toll bridge wholly within the state.”

Your letters of August 10 and September 4 call attention to a Wisconsin corporation which has acquired a dam pursuant to the authority of ch. 308, laws of 1903, and delivers its entire output to a Michigan corporation operating a manufacturing plant in Michigan; and you inquire whether this Wisconsin corporation is the owner of a license, permit, or franchise, within the scope of the statutory provision above quoted.

You are advised that, in the judgment of this department, under the circumstances noted, this corporation is not subject to the restraint of the statute in question. While the matter is perhaps not entirely free from doubt, authorities herein to be noted seem to demonstrate the correctness of this conclusion.

Both of these statutes came into existence as a portion of ch. 499 of the laws of 1907. The title of this act purported to give “the Wisconsin railroad commission jurisdiction over public utilities, providing for the regulation of such public utilities.”

The special title of sec. 1797m—75 is “Foreign utilities excluded.”

The reasoning of the supreme court of Missouri in the case of State v. Public Service Commission, 205 S. W. 36, 40, seems pertinent, with reference to the construction to be put upon the terms, “license, permit, or franchise.”

“While the definitions quoted supra express therein no word of public use, or necessity that the sale of the electricity be to
the public, it is apparent that the words "for public use" are to be understood and to be read therein. State ex rel. v. Spokane, etc., Co., 89 Wash. 399, 154 Pac. 1110. For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation. Mum m v. Illinois, 94 U. S. 113, 24 L. Ed. 77. Since the sole right of regulation depends upon the public interest, the subdivisions quoted above, and which define an electric plant and an electric corporation, mean the same, whether the idea of a public use is expressly written therein or not; it is, nevertheless, of necessity connoted and to be understood therein. We are not to be understood as saying that an electric plant constructed solely for private use could not, by professing public service, become by such profession, and by the furnishing of general public service, a public utility."

In other words, this section was intended only to prevent the sale or transfer of the property of a public utility to foreign operation.

This being so, it must be determined whether the sale of the entire output of the hydroelectric plant to a single manufacturing corporation renders such corporation a public utility. The fact that, by the terms of ch. 308, laws of 1903, hydroelectric power may be disposed of as the owner from time to time sees fit, is in no sense controlling, because, as stated by the supreme court of the United States in Terminal Taxi cab Co. v. District of Columbia, 241 U. S. 252, 254,

"the important thing is what it does, not what its charter says."


See also De Pauw University v. Public Service Commission of Oregon, 253 Fed. 848; same case, 247 Fed. 183.
Bridges and Highways—Road Machinery—Under secs. 1223 and 1235a town supervisors and superintendent of highways may purchase road machinery without being authorized by town meeting.

September 10, 1920.

FRANK W. CALKINS,
District Attorney,
Grand Rapids, Wisconsin.

You are advised that in the opinion of this department, the town authorities in Wood county may purchase highway machinery without the matter having been passed upon at a town meeting.

Sec. 1235a, Stats., provides among other things:

"* * * In any town where the one-man road superintendent system is in effect, such superintendent may, if he shall deem it necessary, procure and purchase " all machinery and equipment such "as road contractors ordinarily use; * * * but all such purchases shall be made and only with the advice and consent of the supervisors of said town and the orders for said machines shall be signed by at least two of said supervisors, in order to make such orders valid."

This section was created by ch. 356, laws of 1919, and published June 16, 1919.

Later in the same session the legislature, by ch. 518, secs. 2 and 3, made the "one-man road superintendent system" universal. The last named chapter makes it the duty of the supervisors of the several towns

"1. The town supervisors shall appoint and fix the compensation of a competent person to superintend the construction and repair of all highways and bridges in the town. * * * ” Sec. 1229, Stats.

Subd. (2), sec. 1223 makes it the duty of the supervisors to provide machinery needed to construct and repair the highways and bridges.

These sections make it quite plain that the superintendent of highways and the supervisors of the town may purchase suit-
able machinery and equipment for carrying on the highway work without having been specially authorized by the town meeting, provided there are funds sufficient therefor in the "highway tax fund, bridge and road fund, or the general fund.

No opinion was asked and none is expressed as to the scope or meaning of the words "with the advice and consent of the supervisors" as used in sec. 12350. Doubtless almost unlimited discussion of the meaning of the words "with the advice and consent" can be found in the Congressional Record's report of the debates of the senate upon the Versailles treaty.

Public Officers—County Treasurer—Clerk of Election—Candidate for office of county treasurer may not act as clerk of election.

S. G. Dunwiddie,
District Attorney,
Janesville, Wisconsin.

In your letter of September 15 you state that your present county treasurer, who is also a candidate to succeed himself, is and has been for some time past town clerk in one of the townships in the county, and you inquire whether there is anything inconsistent in his acting as clerk of election when he is a candidate to hold office at such election.

You direct my attention to subsecs. (1) and (2), sec. 6.32, Wis. Stats. In subsec. (1) we find the following:

"There shall be three inspectors, two clerks of election, and two ballot clerks at each poll at every election held under the provisions of this title, each of whom shall be a qualified elector in the election district, able to read and write the English language understandingly and not a candidate to be voted for at such election."

Then there is a provision that where there are voting machines, no ballot clerk shall be employed, and another provision as to the party to which they shall belong. Subsec. (2) provides as follows:
In towns the supervisors shall be inspectors of election when they belong to the political parties described in subsection (1). Whenever they all belong to the same political party, the supervisor last named in the clerk's certificate of election recorded in the town clerk's office shall be ineligible and shall not act; but an inspector from the electors present, possessing the qualifications aforesaid, and belonging to the other of the two political parties mentioned, shall be chosen in his place by the viva voce vote of the electors present at the polling place at the opening of the polls. The town clerk, if present, shall be one of the clerks of election, and the inspectors shall, before opening the polls, appoint another and also two ballot clerks. If the town clerk be absent, the inspectors shall appoint two clerks of election."

You will note that subsec. (1), above quoted, contains the provision that no inspector, clerk of election, or ballot clerk shall be a candidate to be voted for at such election. In other words, no candidate who is voted for at the election can act as inspector, clerk of election, or ballot clerk.

The provision in subsec. (2) that the town clerk, if present, shall be one of the clerks of election must be construed to be in pari materia with the above provision of subsec. (1), and the two must be considered and construed together, and it must be understood that the town clerk, if qualified to act, shall be one of the ballot clerks of the election. I am satisfied, that the provision in subsec. (1), that a ballot clerk shall not be a candidate to be voted for at such election is applicable to all ballot clerks, including those who are town clerks. This is a wise provision in our statute, and is intended to protect the elections from fraud, or the suspicion of fraud.

You are therefore advised that your county treasurer is disqualified from acting as clerk of the election when he is a candidate for the office of county treasurer.
Bonds—Bridges and Highways—Counties—County Highway Improvement Bonds—County having duly authorized issue of bonds for highway improvements, it is duty of county clerk to certify tax levy to pay principal and interest even though such bonds have not been sold.

County board may not increase rate of interest on bonds.

September 18, 1920.

A. L. Stengel,
District Attorney,
Fort Atkinson, Wisconsin.

Your letter of August 23 reads as follows:

"May I respectfully request your opinion upon the following point? As per inclosed resolution of the Jefferson county board of supervisors, can a levy be made in the taxes to be collected in 1921 for the $100,000 to become due on April 1, 1921, in the event that no bonds are sold this year? In the event that no bonds are sold and your answer is that a levy cannot be made for the $100,000, will that cut down the possible bonds to $1,900,000 instead of $2,000,000? What steps can be taken to increase the rate of interest on these bonds so as to make them merchantable? Can the rate of interest be increased on only part of the bonds?"

By the resolution of the county board of Jefferson county, there was levied a tax upon all the property, real and personal, within said county, sufficient to pay the interest on the bonds as it falls due, and also to pay and discharge the principal thereof as such principal falls due. Pursuant to this resolution, it is plainly the duty of the county clerk to levy the tax to meet the interest to become due on the first day of April, 1921, and also to meet the bonds, numbered 1 to 200, inclusive, which become due on April 1, 1921, and which amount to $100,000.

According to the proceedings of the county board, it is the duty of the proper officers of the county to sell the $2,000,000 of highway bonds as authorized. According to your letter, these bonds have not as yet been sold. The chairman of the county board and the county state road and bridge committee are authorized to negotiate said bonds in the manner prescribed by the resolution. There is nothing to prevent their being sold at any time subsequent to the date when it becomes the duty of the county clerk to certify to the town clerks the amount of taxes to be levied for the payment of these bonds. If these bonds are
sold before the time when the taxes are collected, then the money will be in the county treasury to take care of the interest and the bonds maturing on the first day of April, 1921. In case these bonds are not sold until after the taxes to pay the $100,000 of bonds maturing on April 1, 1921, are collected, then it will become unnecessary for the officers charged with the duty of negotiating the bonds maturing April 1, 1921, to sell the same. Under these circumstances, the $100,000 bonds so maturing on April 1, 1921, should be canceled. This will, of course, automatically decrease the amount of bonds to be sold by the officers charged with the duty of negotiating the same, to $1,900,000.

Sec. 1317m—12, subsec. 1, reads in part as follows:

"Any county, if its board shall so determine, may raise money for the improvement of any portions of the system of prospective state highways or of the state trunk highway system by issuing nontaxable semiannual interest payment coupon bonds bearing interest at a rate not exceeding five per cent per annum running not more than twenty years, * * *. Such bonds are not to be sold at less than par."

This section fixes the amount of interest which may be lawfully paid by a county on its highway improvement bonds. I know of no way by which the county board can increase the interest on these bonds so as to make them more salable. Neither can the rate of interest be increased on only a part of said proposed bond issue. You will note that the legislature has specifically prescribed that such bonds are not to be sold at less than par.

Fish and Game—Words and Phrases—"State park" lands, as used in sec. 29.57, subd. (4), defined.

Devil's Lake Park not "wild life refuge" as contemplated in sec. 29.57.

Conservation Commission.

Replying to your letter of September 9 regarding the areas in which hunting is prohibited by law in and around Devil's Lake Park, you are advised that by sec. 29.57, subd. (4), territory is prohibited territory for hunting and fishing if it is either a wild
game refuge or a state park. By the statutory requirement the lands in question do not constitute a wild game refuge. Therefore no prohibition results for that reason.

The legislature did not prescribe by metes and bounds the territory that should constitute Devil's Lake Park; but it authorized the purchase of lands which should become, upon transfer of title to the state, "a state park." Therefore, land which has been taken over by the state for park purposes automatically becomes, in the language of sec. 29.57, subsec. (4), "state park," and prohibited territory, in which no person shall hunt or trap, or have in his possession or under his control any gun or rifle, unless the same is unloaded and knocked down or enclosed within its carrying case.

In your letter you state that the right of way of the Chicago & North Western Railway passes through state park lands and that there are other owners of lands within the area ultimately selected as desirable park lands. You are advised that the right of way of the Chicago & North Western Railway and such other private lands as are under no contract or other specific arrangement giving control to the state, are not affected by the prohibition above mentioned relative to state park lands.

Appropriations and Expenditures—State Funds—Taxation—Terminal Properties—State treasurer may not advance money to municipality on account of terminal taxes in anticipation of payment thereof to state treasurer under sec. 1211—30.

State funds other than state trust funds may not be loaned to cities or invested in city securities.

September 20, 1920.

Honorable Henry Johnson,
State Treasurer.

The chapter upon assessment and taxation of the property of railroad companies provides:

"(4) After the property of a company shall first have been valued as a whole, if any docks, piers, wharves or grain elevators used in transferring freight or passengers between cars and vessels, shall have been included in such valuation, then for the purpose of accounting to the proper assessment districts, the
commission shall make a separate valuation of each such dock, pier, wharf and grain elevator, including the approaches and appurtenances thereto.” Sec. 1211—8, Stats.

And it is provided further by sec. 1211—30:

“When the taxes due from any * * * company on account of any dock, pier, wharf or grain elevator separately valued under section 1211—8, shall be paid in whole or in part to the state treasurer, he shall forthwith notify the secretary of state of the name of such company and the amount of the payment, and the secretary of state shall audit the amounts payable to each municipality and the treasurer shall pay the same. In case only a part of the tax due from any such company is paid, a proportionate part shall be audited and paid to the municipalities. If a tax due from any such company becomes delinquent and is subsequently collected or paid into the state treasury with interest thereon, the interest on the amount to be distributed to municipalities shall also be distributed to the municipalities in the same proportion as herein provided for payment of the tax itself.”

At present there is no money in your hands derived from taxes paid by railroad companies on account of docks or other terminal properties, but on November first the last half of the railroad taxes for the year are due and will probably be paid. You inquire if you may anticipate such payment by advancing to a city some of the money which will be due to it out of the railroad taxes to be paid the first of November. Manifestly that cannot be done unless the statutes authorize it, and no statute has been found which does. In fact, the statutes are thought to forbid any such act.

The language of the statute as quoted makes it perfectly apparent that you have no moneys now due to any city on account of terminal taxes. If you advance any money on account of those taxes to a municipality, it would be in anticipation of the time when the law apportions or grants such money to the municipality. To make the advancement you would have to take the money from some other fund and the statutes do not permit the state treasurer to take from Peter to pay Paul. They forbid the state treasurer to do that.

“It shall be unlawful for any state officer, * * * to authorize, direct or approve the diversion, use or expenditure, directly or indirectly, of any funds, money or property belong-
You suggest the possibility of the city’s issuing certificates of indebtedness to the state for the amount so advanced, the certificates to draw interest at the rate received by the state upon moneys heretofore invested in United States securities. The execution of such a plan would be, in effect, a loan of state moneys. It is not thought necessary to advise you of the law regulating the loaning or investment of state trust funds. You are quite familiar with that subject and know who has authority to make the loans and the conditions under which they may be made. That matter is within the jurisdiction of the commissioners of public lands. Sec. 25.01. With respect to state funds other than trust funds, you are advised that all authority relative thereto is vested in the board of deposits, and that such board is limited to investments in “interest bearing bonds of the United States or of this state.” Sec. 14.67.

You are advised that state funds, other than trust funds, may not be loaned to municipalities, and therefore the idea of loaning or advancing money to a city upon its certificates of indebtedness must be abandoned.

Courts—Actions—Taxation—Suit Taxes—Sec. 2939 requires payment of suit tax in actions only as defined in secs. 2594 to 2596.

HONORABLE HENRY JOHNSON,
State Treasurer.

A question has arisen as to the cases in which a suit tax is payable, and it is deemed proper at this time to advise you of the opinion of this department upon that subject.

The question involves the scope of sec. 2939, Stats., and involves the meaning of the word “action” as used in that section.

The precise question may be stated thus: Is a suit tax levied or required to be paid in a special proceeding in a court of record? The statute provides:
"In each action in a court of record having civil jurisdiction there shall be levied a tax of one dollar which shall be paid to the clerk at the time of the commencement thereof, which tax on suits in the circuit court shall be paid into the state treasury and form a separate fund to be applied to the payment of salaries of the circuit judges; * * *." Sec. 2939.

In the practice statutes of Wisconsin the word "action" has an exact and well defined meaning, which is decisive of this question:

"An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Sec. 2595.

"Every other remedy is a special proceeding." Sec. 2596.

As a matter of practice, it is believed that the exaction of the tax of $1.00, under sec. 2939, has been limited to actions, and has not been extended to special proceedings, and it is the opinion of this department that the statutes require such practice. Perhaps the distinction between actions and special proceedings has been drawn and enforced most frequently when the question of taxable costs was involved. The decisions of the supreme court adhere strictly to that statutory distinction. Milwaukee Light, Heat & Traction Co. v. Ela Co., 142 Wis. 424.

Sec. 2939 occurs in ch. 129, Stats., entitled "Costs and Fees allowed to Parties in Circuit Court." The sections (2918 and 2920) allowing costs to parties in the circuit court made mention of actions only. Special proceedings were not therein named. In Wisconsin Central Ry. Co. v. Enea Co., 79 Wis. 89, 96, the distinction between actions and special proceedings was maintained. The plaintiff had instituted and was prosecuting condemnation proceedings in the circuit court and was defeated. The defendant sought to tax costs. This relief was denied, the court saying, referring to said ch. 129:

"* * * This chapter only awards costs to a party to an action. Is the proceeding by the railroad company to condemn lands for its use an action within the meaning of said chapter? This question has been answered by this court in the negative. * * * The statute having omitted to provide for awarding costs in a proceeding of this kind, the court has no right to award them."
Again, in In re Guardianship of Welch, 108 Wis. 387, it was held that the suit was not an action but a "special proceeding" and that costs could not be awarded against the estate or made payable out of the estate, under a statute which provided that "in any action prosecuted or defended by an executor" costs might be made payable out of the estate, that statute applying to "actions" only. It was there said, p. 393:

"... * * * Costs are the creature of statute, cannot be allowed in the absence of express statute, and, when such statute exists, must be allowed according to its terms."

The opinion goes on to say that said ch. 129, Stats. 1898, controls the question of costs in circuit court and that subsec. 7, sec. 2918 allows the court, in its discretion, to award costs in whole or in part "in all equitable actions and special proceedings." In the same chapter is sec. 2932, with a provision as to payment of costs out of the estate "in an action prosecuted or defended by an executor," etc. After quoting secs. 2594 and 2596, the opinion proceeds, pp. 393–394:

"... * * * The application for appointment of a guardian is clearly a special proceeding. The distinction between actions and special proceedings has, with few exceptions, been preserved in the framing of our statutes; and when the legislature, in enacting our present revision, ex industria made sec. 2918 include special proceedings, and refrained from so extending sec. 2932, the purpose to distinguish the scope of one from the other should be presumed, and the court should not give to the latter section an extension which the legislature withheld from it, but should apply it according to its words to actions only."

The language just quoted fits the present situation exactly. The legislature has seen fit to exact a tax of $1.00 at the commencement of actions in courts of record. It has said nothing on that score as to special proceedings, and therefore we are bound to conclude that no tax is required in special proceedings.

You are therefore advised, in the matter of settlements with clerks of the circuit court, to require the payment of this tax for actions only, and that no tax is due the state on account of special proceedings.
Elections—Voting machines must be so constructed that all ballots may be voted thereon; otherwise machines cannot be used.

Voting must be in ordinary manner entirely or by machines entirely; two systems cannot be combined or used in part.

September 20, 1920.

James Murray,
District Attorney,
Fond du Lac, Wisconsin.

I quote your letter of September 18, 1920:

"The city of Fond du Lac, Wisconsin, desires to use voting machines in the November election. It is impossible to put both the state and presidential ticket on machines and vote them separately. The referendum questions can be put on machines and voted separately.

"Is it legal to use the machines for the state and county ticket and the referendum and use paper ballots for the presidential ticket?"

Your question is answered in the negative. V Op. Atty. Gen. 658, 703, 739, 752. The opinions just referred to were rendered August 23, September 20, September 29, and October 3, 1916. Three of those opinions were given to the district attorney of Fond du Lac county and the other to the district attorney of Milwaukee county. It was then ruled that voting machines cannot be used at a presidential election unless the machines are so constructed as to permit of voting the presidential ticket, the official ballot, the referendum ballot, and voting each of them in the manner prescribed by statute. No change has been made in the statute since those opinions were given, and no reason is now apparent for entertaining a contrary opinion. The machines being constructed so that it is not possible to vote all of the ballots in the manner provided by law as to splitting of tickets, the machines may not be used at all at the coming general election.
Elections—Political Parties—Nominations for presidential electors of party not heretofore participating in elections in this state, where no petition has been filed prior to September primary, must be made by petition or nomination papers.

Separate nomination paper must be filed on behalf of each elector; statement of party or principle represented at head of such nomination paper limited to five words.

September 20, 1920.

HONORABLE W. B. NAYLOR,
Assistant Secretary of State.

The Farmer-Labor party, through its secretary, has requested from you information as to the manner in which such party may cause the names of its candidates for presidential electors to be placed upon the ballot at the coming November election.

You are advised that, under date of July 31, 1912, an opinion was rendered by this department, relative to the manner in which the electors of the Progressive party might be placed upon the ballot. It was then said:

"As the new party has not participated in prior elections in Wisconsin, they cannot be placed upon the official ballot under the party designation, but must go on as independent nominees.

"Sec. 30 of the Stats, as amended provides how independent or nonpartisan nominations may be made for any office to be voted for at any general election: that is, by petition. In my opinion the Presidential electors for the new party will have to be placed on the ballot by such petitions, as provided in said section." 1 Op. Atty. Gen. 215, 216.

Sec. 30, Stats. 1911, has been renumbered, and now appears as sec. 5.26. This ruling having been made eight years ago, and the intervening sessions of the legislature having left the provisions of the statute without change, it seems proper that the same should be and it is hereby adhered to.

In the correspondence submitted the question is asked:

"Would it be legal under the laws of Wisconsin to place the names of our presidential and vice-presidential candidates, with thirteen presidential electors, upon one petition, to be signed by individuals who have not participated in a primary for presidential nominees or electors?"

In answer thereto, attention is called to the language of sec. 5.26, subsec. (2):
"Except as otherwise provided in subsection (8) such nominations shall be made by nomination papers, containing the name of the candidate, the office for which he is nominated, his business or vocation, residence, post-office address, and except as otherwise provided by law the party or principle he represents, if any, expressed in not more than five words."

There is nothing contained in subsec. (8), there referred to, in any wise altering the provisions of this section. Under its plain terms, this department is of the opinion that thirteen presidential electors may not be placed upon one petition, but, in order to effect their nomination, thirteen separate sets of nomination papers must be employed, the language used being in the singular throughout.

It will be noted that the section specifically provides that such paper shall state the party or principle represented, "if any, expressed in not more than five words." Consequently, such nomination paper may contain the language, "Farmer-Labor party," as the same consists of but two words, or at most three; or any other combination of party designation with names of candidates that is desired may be submitted and formulated, provided it is expressed within the limits of five words.

Our law contains no restriction against the signing of such petition or nomination papers by those who have participated in a primary for presidential nominees or electors. The only restriction is found is subsec. (5), which provides:

"Each voter shall sign for but one candidate for the same office, and shall add his residence, post-office address and the date of signing."

If, as is apparent, this results in a somewhat cumbersome method of procedure, the answer is that the constitution of the United States provides:

"Each state shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: * * *;

And the foregoing is the only method or manner provided by the legislature.

The only other manner provided for placing the names of presidential electors upon the November ballot is by the route
prescribed in sec. 5.05, subsec. (6), par. (d), which contem-
plates the filing of a petition with the secretary of state not less
than ninety days prior to the holding of the September primary.
After such September primary, sec. 5.20 provides for the nom-
ination of presidential electors by the platform convention.
Such are the only two methods by which a new party may find
a place upon the ballot.

Elections—Nominations—Where no name is printed on party
primary ballot for given office, no party nomination is made
unless votes therefor equal 10% of party vote at last general
election.
Wanting that percentage, person receiving highest number is
nominated as independent candidate.
Where no name was printed on primary ballot he is not nom-
inated as independent candidate unless he received, if for
county office, 3% of party vote in county and 3% of party vote
in 1-6 of election precincts.

September 20, 1920.
M. J. Paul,
District Attorney,
Berlin, Wisconsin.
You say that no name was printed on the Democratic ballot
but that X—-'s name was written on 73 Democratic ballots
for the office of sheriff, and you ask:
"Is X—- entitled to have his name placed on the ticket for
the November election? If he is under what column does his
name appear, Democratic or Independent?"

He is not entitled to have his name on the Democratic ballot
at the coming general election. Votes at least equal to 10%
of the party vote cast at the last general election are essential
to a party nomination at the primary. Subd. (2), sec. 5.17.
The Democratic nominee for governor received 917 votes in
Green Lake county at the last general election. Therefore, to
nominate a party candidate on the Democratic ticket in that
county this year required at least 92 votes. It follows that
X—- is not the Democratic nominee for sheriff.
To entitle his name to a place in the Independent column it was essential that he receive at least 3% of the Democratic votes cast for president in this county at the 1916 election, and in at least one-sixth of the precincts of the county. Subd. (3), sec. 5.17 and subd. (5), sec. 5.05. That presidential vote was 1,352. It follows that he must have received at least 41 votes. There were 18 precincts in Green Lake county. Therefore he must have received at least 3% of the Democratic presidential vote of at least three voting precincts. You have not stated facts sufficient to determine whether the 73 votes which he received were so distributed as to satisfy the last named requirement.

Contracts—Public Officers—Highway Commission—Real Estate—Highway commission has implied authority to purchase or lease real estate for construction of building to be used in equipping, storing, repairing and building motor vehicles given state by federal government.

Contracts for such purchase or lease should be executed in name of highway commission.

September 21, 1920.

HONORABLE MERLIN HULL,
Secretary of State.

Sec. 20.49, subd. (8), Stats., makes an appropriation from the general fund to the state highway commission:

"From time to time, sums sufficient to defray the cost of delivering into the state, equipping, storing, repairing and handling motor vehicles and other equipment and supplies and explosives which may be given to the state of Wisconsin by the federal government for use in highway construction but not exceeding in total from the general fund one hundred thousand dollars."

Your letter of September 11 calls attention to the fact that the language of this section clearly contemplates the necessity of having some place in which the functions outlined may be discharged. You state that present quarters at the state fair park in West Allis are inadequate, and that the highway commission have asked if they have the power to purchase a site and construct a suitable building for their use in carrying out the work
prescribed. You ask, further, in case they do not possess this power, have they the power to enter into a rental contract for a building, said contract to cover a period of years.

You are advised that, in the judgment of this department, the state highway commission is by necessary implication vested with authority to arrange for some suitable place in which to store automobiles so loaned by the federal government, and in which to make the alterations and repairs that are contemplated.

An opinion rendered by this department on June 23, 1913, II Op. Atty. Gen. 6, is quite pertinent. Attention is there called to the language of sec. 1317m—2, subsec. 1, the phraseology of which remains unchanged:

"The commission shall have charge of all matters pertaining to the expenditure of state aid for the improvement of public roads and bridges in the state, and shall do all things necessary and expedient in the exercise of such supervision."

Under this wording it was held that the highway commission might purchase automobiles for the use of its field men, it being said, p. 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 legislature 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."

To the same effect is the language of *State v. Hackmann*, 207 S. W. 64, 65:

"It is also well-settled, if not fundamental, law that, whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual is conferred by implication."

The same language and reasoning would be equally applicable in the present situation. To the commission is given an appropriation of $100,000 to accomplish certain objects, and it is entrusted with the duty of doing all things necessary and expedient in the accomplishment thereof.
Subsec. 6, sec. 1317m—2 contains the further language with reference to the power of the commission:

"* * * It shall have necessary authority to perform all other duties imposed by the legislature from time to time."

This sentence is found in the section which authorizes the commission to receive gifts. The appropriation provided for in sec. 20.49, subd. (8), it will be noted, is one of $100,000, to be expended in dealing with supplies

"which may be given to the state of Wisconsin by the federal government."

By the plainest implication of law, the commission is invested with the power and discretion of determining how it shall exercise this power. Upon it is enjoined the duty of accomplishing certain results. Inasmuch as there is no express limitation restricting the commission in its power to the acquisition of leasehold interests, and inasmuch as it must be perfectly apparent that the commission will not always be able to lease lands, so that of necessity it may be constrained to buy, the question as to whether it shall lease or buy thus resolves itself into a matter of pure discretion.

The further question arises as to the proper state officers authorized to exercise the power of rental or acquisition. It has been suggested that the superintendent of public property might exercise such power. This view is believed to be incorrect, for the following reasons:

Ch. 33, which enumerates the powers of the superintendent of public property, indicates plainly the intention that his jurisdiction over real estate shall be limited to the capitol building and grounds and the executive residence and grounds. He is given certain power in the matter of the acquisition of personal property, but his power to lease rooms outside of the capitol is specified by subd. (4), sec. 33.03:

"* * * To lease suitable rooms elsewhere in the city of Madison for such officers when rooms for them in the capitol are not available."

It is in this sense that the language of sec. 1317m—1, subsec. 2, is to be construed:
The commission shall maintain its principal office in the state capitol at Madison, and division offices at such other cities as the necessities of the work demand. The superintendent of public property shall provide suitable rooms for the use of the commission and such furnishings, instruments, postage, stationery, maps, books, periodicals, and office supplies as may be necessary to carry on the work of the commission, and all expenses therefore shall be audited and paid as other state expenses are audited and paid.'"

In other words, the superintendent of public property is restricted in his authority to the rental of such rooms as shall be of the same kind as those available in the capitol. His power is that of renting rooms for office quarters.

This conclusion is confirmed by an examination of ch. 32, relative to the power of eminent domain. Sec. 32.02, subd. (1), specifying the public authorities who shall have the power of condemnation, sets forth the following:

"Any county, town, village, city including villages and cities incorporated under general or special acts, school district, the state board of control, the regents of the University of Wisconsin, the board of regents of normal schools, or any public board or commission, for any lawful purpose."

This includes the state highway commission, and excludes the superintendent of public property.

Obviously, as the section itself sets forth, the power of condemnation is given as alternative to the power of acquisition by gift or purchase at an agreed price. It is definitely provided that, in every case where the power of purchase exists, the power of condemnation is given. The inference is equally strong that only those agencies which in express terms are given the power of condemnation have the power to acquire by purchase or gift.

You are therefore advised that sites may be purchased and buildings erected thereon for storing and repairing federal highway supplies, and that such provision is to be made directly in the name of the state highway commission, and through no other intermediary or officer.
Criminal Law—Requisitions—It is not a criminal offense for person to raise his own check.

If there are other circumstances, such as that the bank on which it is drawn certifies the same after it is drawn and before it is raised, which would make it forgery, such facts should appear in affidavit used as basis for warrant.

Rule 4 relating to requisitions requires that evidentiary facts showing prima facie guilt of accused must be shown by affidavit.

September 24, 1920.

Honorable Emanuel L. Philipp,
Governor.

I have again examined and return herewith the application of the district attorney for Milwaukee county for a requisition upon the governor of the state of Illinois for the apprehension and return to this state of one X——, who stands charged in district court for Milwaukee county with the offense of forgery.

I cannot see that the affidavit of Mr. Bartelt adds anything material to the papers as they were when they were before me on a former occasion. A person has the same right to raise his own check that he has to draw it in the first place. The raising of a check by the person who draws it, there being nothing else to the matter, does not constitute forgery.

After I had written my former opinion in this matter* the officer who was here informed me that this check was in fact originally drawn for $8.50 and was then certified by the First National Bank of Waukegan, the bank upon which it was drawn, and that after such certification it was raised to $68.50. This, in my opinion, would constitute forgery, but there is nothing in these papers anywhere to show those facts. In my opinion those facts are essential to be shown in the affidavit that was made as a basis for securing the warrant. The affidavit and warrant in their present form are, in my opinion, fatally defective.

I again call your attention to rule 4 of the rules of the executive office, which provides:

"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."

This department has repeatedly held that this requires an affidavit of the evidentiary facts and that a mere repetition of the

* Not published.
statements contained in the affidavit made for the purpose of securing the warrant is not a compliance with this rule. This rule has not been complied with in this instance.

For the reasons stated I cannot approve this application in its present form.

Minors—Public Officers—Deputy Sheriff—Minor, whether male or female, may be appointed and act as deputy sheriff.

September 27, 1920.

ALBERT W. GRADY,

District Attorney,

Port Washington, Wisconsin.

In your letter of September 22 you inquire whether a person under the age of twenty-one years may be appointed and serve as deputy sheriff, and also whether it would make any difference under the present law whether the party be male or female.

It is laid down as a general rule that, in the absence of statute, any person is competent to act as the deputy of a sheriff or constable. 25 Am. & Eng. Encyc. of Law (2d ed.) 675.

Sec. 59.21 of our statutes contains the following:

"Within ten days after entering upon the duties of his office the sheriff shall appoint some proper person, resident of his county, undersheriff, and shall within such time appoint deputy sheriffs for his county as follows: [then it provides the locations in which deputies should be appointed]."

And sec. 59.22 reads:

"Except as provided otherwise in subsection (3), the sheriff shall be responsible for every default or misconduct in office of his undersheriff, jailer and deputies during the term of his office, and after the death, resignation or removal from office of such sheriff as well as before *. *.*"

In subsec. (2) provision is made authorizing the sheriff to require his deputies to give bonds to him for the faithful performance of their duties.

I find no provision in our statutes which in any way limits the appointment of deputy sheriffs to persons above twenty-one years of age.
In 9 Am. & Eng. Encyc. of Law (2d ed.) 374, we find the following:

"Where there is no statute prescribing the qualifications of a deputy, the principal has authority as a general rule to appoint whomsoever he pleases, provided the duties of the deputy are purely ministerial.

"Thus it has been held that, in the absence of statute restricting a sheriff or county clerk as to whom he shall appoint as deputy, the appointment of a minor will be valid." Citing Jamesville, etc., R. Co. v. Fisher, 109 N. C. 1; State v. Toland, 36 S. C. 515; Harkreader v. State, 35 Tex. Crim. Rep. 243.

It has also been held that a minor may act as a special deputy sheriff. Moore v. Graves, 3 N. H. 408; State v. Toland, 36 S. C. 515; Barret v. Seward, 22 Vt. 176.

The same reasoning applies to women. In 9 Am. & Eng. Encyc. of Law (2d ed.) 374, we find that in the same way it has been held that, in the absence of statute, a woman may be appointed deputy county clerk, and the case of Wilson v. Newton, 87 Mich. 493, is cited as authority.

Under these authorities, I am persuaded that a minor, whether a male or female, may be appointed and act as deputy sheriff in this state.

Indigent, Insane, etc.—Feeble-minded—Provision for reexamination of person committed to home for feeble-minded was repealed and not reenacted in some other section.

Orrin H. Larrabee,
District Attorney,
Chippewa Falls, Wisconsin.

In your communication of September 9 you refer me to ch. 85, laws of 1919, which, referring to the home for the feeble-minded, provides:

"The board of control shall make all necessary regulations to govern the temporary or final discharge of all inmates in said homes."
You state that said ch. 85 also repeals sec 573I, Stats. 1917, which in substance provided that all provisions relating to the examination and commitment of such insane persons shall, so far as applicable, apply to persons whom it is sought to commit to the home for the feeble-minded. Heretofore sec. 573I, Stats. 1917, was construed by the county courts to make sec. 51.11, Stats. (sec. 587, Stats. 1917), the provisions for reexamination of persons adjudged insane, applicable to feeble-minded patients. You state that besides the reexamination statute, so-called, there is the habeas corpus statute, sec. 3407, subd. (2), which gives all persons who were confined in any hospital or asylum as insane patients, the right to test their insanity by habeas corpus. You inquire whether a patient can still have a reexamination to test whether he is feeble-minded or not, or whether he still has his right to proceed under the habeas corpus statute. You state that it would appear to you that the attempt to confine this power to the board of control is an invalid legislative enactment.

I have examined the statute carefully and also consulted the newly appointed revisor, and from the records in the office it would seem that it was intended to repeal sec. 573I, but the revisor's note states that its provisions were practically taken care of by sec. 51.11. A reference to this section reveals the fact that it applies only to the reexamination of insane persons and does not in any way include those committed to the home for the feeble-minded. It would therefore seem that there was an oversight in not reenacting the provisions of sec. 573I in some other form or incorporating it into some other section of statute. As the law now stands, I know of no way in which a rehearing can be had except by application to the board of control, who have the right to discharge an inmate either temporarily or finally.

Concerning the discharge by writ of habeas corpus, neither sec. 3407 nor any other section seems to authorize such proceeding for inmates of the home for the feeble-minded, but that may not be decisive of the question, as it is a general rule that

"The state courts of general original jurisdiction are common-law courts of record, and, therefore, have jurisdiction to issue writs of habeas corpus independently of any statutory authorization. ** * * *." 15 Am. & Eng. Encyc. of Law (2d ed.) 145.
I shall call the revisor's attention to the effect of the provisions of ch. 85, laws of 1919, with reference to the reexamination of persons committed to the home for the feeble-minded, so that he may call the legislature's attention to it.

Corporations—Detective Agencies—License to act as detective may be revoked by secretary of state.

After such revocation former holder of license may not act as detective.

Person directly injured by willful or malicious act of such licensed person may sue on bond and recover.

September 27, 1920.

HONORABLE WILLIAM B. NAYLOR,
Assistant Secretary of State.

In your communication of September 23 you direct my attention to ch. 444, laws of 1919, and you state that under its provisions the Pioneer Detective Bureau of Minneapolis was duly licensed as a detective agency in this state; that this corporation was also required to procure a permit as a foreign corporation to do business in this state, and it was required to furnish a bond, as required by ch. 444, laws of 1919. You state further that recently a duly verified complaint was filed against said corporation, making certain charges against it and requesting that its license be revoked; that you have had a hearing on the question and the defendant gave evidence, by its attorney and its auditor; that you are now ready to decide the question, but before doing so you desire my opinion as to whether or not you have authority to revoke the license of this defendant for sufficient cause shown.

Subsec. 4, sec. 1636—12m, as created by said ch. 444, contains the following:

"The license granted pursuant to this section shall be for the period of five years from the date of issue but may be revoked at any time by the secretary of state, for cause shown."

Your question must, therefore, be answered in the affirmative.
You also desire my opinion as to the effect of such revocation on the existing contracts held by various subscribers in this state, amounting, as you are told, to about 600 people. You inquire whether the defendant company will be permitted to continue its service to these holders of their written contracts regardless of any revocation, or whether such revocation, if made, entirely terminates its business in this state as a detective agency.

Subsec. 1, sec. 1636—12m, as contained in said ch. 444, Laws 1919, provides as follows:

"No person, copartnership, or corporation shall act as a private detective for hire or reward or engage in the business of private detective for hire or reward, or advertise such business to be that of private detective or that of conducting a detective agency, without having first obtained a license so to do, as hereinafter provided, from the secretary of state of the state of Wisconsin."

It is only the license that authorizes the company to operate as a detective agency. After the license is revoked the company no longer has a license, and is therefore not authorized to continue its operation.

You also inquire as to what the rights of the contract holders may be as to the defendant's bond for $2,000 now on file in your office. In subsec. 3 of this section, there is the following provision:

"* * * Such license shall not be issued by the secretary of state, unless there is executed, delivered and filed in his office a bond by such applicant or applicants, with two sureties, freeholders of the state, in the sum of two thousand dollars, conditioned that such applicant or applicants will faithfully and honestly act as private detective or detectives or faithfully and honestly conduct the business of private detectives and the business of detective agency, which bond, as to its form, manner of execution and sufficiency of the sureties must be approved by said secretary of state. Such bond shall be taken in the name of the state of Wisconsin, and any person injured by the willful, malicious or wrongful act of the licensee may bring an action on said bond in his own name to recover damages suffered by reason of such willful, malicious or wrongful act."

This provision is specific, and any person injured by the willful, malicious or wrongful act of the licensee may recover on
the bond. Any private person who has a contract with said corporation and is injured by the willful, malicious or wrongful acts of the licensee is therefore entitled to recover. As forfeitures are not, however, favored in the law, I doubt very much whether a person who has a contract with such company, unless he is directly injured by the willful, malicious or wrongful acts of the licensee, can recover damages under the bond.

Contracts—University—Statutes providing for creation of Wisconsin state general hospital do not contemplate that in advance of construction of such hospital patients should be accepted by university and rental arrangements made for their care by other hospitals.

September 27, 1920.

Honorable E. L. Philipp,
Governor.

Requests for admission to the Wisconsin State General Hospital have become so numerous that it is impossible to accommodate all of the applicants in the Bradley Memorial Hospital, and the question presented to you by Dr. J. S. Evans and by you forwarded to this department, is whether, under these circumstances, the board of regents of the university is authorized to rent space in other hospitals for the treatment of these state cases, providing the cost of rental does not exceed the per diem charge made to the state for the care of such patients in the university hospitals.

You are advised that, under the circumstances detailed, the board of regents has no authority to make the arrangements contemplated.

This conclusion is based upon an examination of the following statutory provisions:
First of all, sec. 36.03 provides:
"The board of regents * * * shall possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law, * * * ."

Ch. 17, laws of 1920 (special session), which relates "to the treatment of county and state patients in the State of
Wisconsin General Hospital,” and provides “payment therefor by the several counties.”

was approved June 3, 1920, and contains the provision that it should take effect upon July 1, 1920. Secs. 1417a—1, 1417a—2, Stats., and the succeeding sections, create the duty to care for a specified class of individuals, and provide the manner of payment therefor.

Ch. 30, laws of 1920, establishes the State of Wisconsin General Hospital, and subsec. (2), sec. 36.31, thereby created, makes the university infirmary and the Bradley Memorial Hospital a part of said hospital.

If the foregoing provisions stood alone, construed as the acts must be, together, there would be no doubt but what the board of regents possessed the power to make the arrangements contemplated. But, it will be noted that sec. 1417a—4 provides, in the course of the procedure outlined:

“...* Upon the entry of the order of the court approving said application, he shall communicate with the superintendent of the State of Wisconsin General Hospital and ascertain whether or not the applicant can be received as a patient. If the State of Wisconsin General Hospital can receive such applicant, the court shall thereupon certify his approval of such application to said hospital, and to the chairman of the county board.”

And again, sec. 1417a—6, in outlining the procedure, provides:

“...* It shall be the duty of the board of regents to investigate applications made for such treatment under this section and, if satisfied of the truth of the allegations made, and of the necessity for treatment, shall admit such patient whenever there is room in said hospital.”

These provisions would exclude the possibility that the legislature contemplated that patients might be admitted when there was no room.

It is likewise a general rule of law that no money can be taken from the state treasury except pursuant to legislative appropriation. Sec. 20.41, subsec. (10), found in ch. 30, makes appropriations for the purposes therein specified, for the construction of a nurses’ home, for equipping and furnishing a hospital
building, while sec. 5 of that act creates sec. 20.41, subsec. (10), par. (a), which provides:

"All moneys collected or received by each and every person for or on account of the State of Wisconsin General Hospital, University Clinic, dispensary, infirmary or hospital fees, shall be paid, within one week after receipt, into the university fund income, and are appropriated therefrom as a revolving appropriation, to be used for the payment of operating expenses in connection with the State of Wisconsin General Hospital."

It is not believed that, under the most liberal rule of construction, payment to an outside hospital could be construed as an operating expense in connection with the State of Wisconsin General Hospital, especially when the language is construed in connection with the provisions already noted, which indicate a policy to admit to the hospital "whenever there is room in said hospital."

In conclusion, it is suggested that no reason is apparent why, in case other hospitals are willing to accept such patients, they may not make their own individual arrangements, or why officials of the Wisconsin State General Hospital may not as an act of courtesy recommend such patients and provide for their reception. The present ruling is confined in its application to the specific proposition that the statutes, as now drawn, do not confer upon the university authorities the power to enter into binding contracts for the care of patients in outside hospitals, in cases where the university itself is not able to provide sufficient facilities.

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**Bonds—Public Officers**—Assistant secretary of state and assistant state treasurer are officers and their bonds official bonds within meaning of statute providing for payment of premiums on such bonds by state.

**HONORABLE MERLIN HULL,**

*Secretary of State.*

Sec. 14.25 provides:

"The secretary of state may appoint, in writing, an assistant secretary of state who may perform and execute any of the du-
ties of the secretary of state, except as commissioner of the public lands and as auditor. The assistant secretary shall take and subscribe the oath of office prescribed by the constitution and shall give bond to the secretary of state, in such sum and with such conditions as the said secretary prescribes, conditioned for the faithful discharge of his duties. Such oath shall be filed and preserved in the executive office.

Sec. 14.41 provides:

"The treasurer may appoint, in writing, an assistant state treasurer who may perform and execute any of the duties of the treasurer, except as commissioner of the public lands. The assistant treasurer shall take and subscribe the oath of office prescribed by the constitution and shall give bond to the treasurer, in such sum and with such conditions as the treasurer prescribes, conditioned for the faithful discharge of his duties. The oath of the assistant treasurer and the certificate of his appointment shall be filed and preserved in the office of the secretary of 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."

The opinion of this department is that a bond given by the assistant secretary of state, pursuant to the provisions of sec. 14.25, is an "official bond furnished by an officer," and that the same is true of the bond to be given by the assistant state treasurer.

The whole subject is covered so fully by the reasoning of the appellate court of Indiana, in the case of Southern Surety Co. v. Kinney, 127 N. E. 575, that the language of the court in that opinion is adopted. It follows, p. 578–579:

"Thus we have a case where a public official gives a bond required of him by his superior, in pursuance of a statute in that
regard, and in which bond the official capacity of such officer is expressly recognized, and an obligation is assumed to make good losses sustained by reason of his fraud or dishonesty in connection with his office. It has been held that a bond, taken in pursuance of a public statute, falls under the description of an official bond. Faurote v. State (1886) 110 Ind. 463, 11 N. E. 472; Hart v. State (1889) 120 Ind. 83, 21 N. E. 654, 24 N. E. 131; Herod v. State (1896) 15 Ind. App. 648, 43 N. E. 144, 44 N. E. 378. Or, as sometimes stated, a bond taken pursuant to the requirement of a statute is an official bond. United States, etc., Co. v. Poetker (1913) 180 Ind. 255, 102 N. E. 372, L. R. A. 1917B, 984. The bond in suit was evidently given in pursuance of said section 9478, and therefore is an official bond within the meaning of the first definition given. But if it be held that a bond, to be an official bond, must not only be given in pursuance of a statute, but must be given because of a requirement thereof, still the bond in question would nevertheless be an official bond, since the statute at least gave appellee the right to require the bond, and, when so required, it in effect became the requirement of the statute. To hold that a bond, ‘to be an official bond, must be given in pursuance of a mandatory rather than a permissive statute, would be to make a distinction not warranted by any sufficient reason. The Supreme Court of California in the course of an opinion involving the bond of a deputy treasurer, given in pursuance of a permissive statute, said, ‘Every bond demanded of and given by a deputy for the faithful discharge of his official duties is an official bond.’ Hubert v. Mendheim, 64 Cal. 213, 30 Pac. 633. The same statement is found in 22 R. C. L. p. 587. Mechem in his work on Public Officers, at page 170, makes the following statement with reference to the bonds of deputies: ‘Statutes which expressly authorize officers to appoint deputies usually permit or require the taking of bonds from them, and prescribe their terms and conditions. Bonds taken under such statutes would be subject to the same considerations which apply to other official bonds.’ ”

A contrary opinion of this department, heretofore rendered under date of December 14, 1916 (V Op. Atty. Gen. 899), is expressly overruled and withdrawn. The opinion rendered under date of August 13, 1918 (VII Op. Atty. Gen. 452), which is deemed inconsistent with the earlier opinion cited, is adhered to.
Indigent, Insane, etc.—Minors—Indigent or dependent non-resident child may be adopted by qualified parties residing in this state.

September 29, 1920.

Board of Control.

A child confined in the Chicago Industrial Home for Children, who has never been a resident of this state and whose relatives have never resided in this state, is now sought to be adopted by two residents of Wisconsin. Your letter of September 28 presents the question whether this child may be legally brought into La Fayette county, and an order for her adoption issued by the county judge of that county. You also inquire whether such order can be legally issued without the consent of the parents or parent.

You are advised that, in the judgment of this department, there is nothing to prevent an inhabitant of this state from adopting a child located without the state. As has been frequently ruled, the right of adoption is a purely statutory one. The law of adopter's domicile controls. Our statute, sec. 4021, in general terms confers the right of adoption upon "any inhabitant of this state." Nothing is said as to the residence of the child.

This department, in an opinion rendered July 12, 1917, ruled that a dependent child might be committed to the state school for dependent children, though a nonresident, it being said in the body of the opinion:

"There is nothing in the provisions of the statute concerning dependent children which requires their residence in this state in order to be committed to the state school for dependent children." VI Op. Atty. Gen. 500.

The same reasoning is applicable here. The statute which you have in mind as preventing the bringing of such child or children into the state is sec. 49.06. This provides:

"Any person who shall bring or remove or cause to be brought or removed any poor person from any place without this state into any municipality within it, with intent to make such municipality chargeable with his support, shall forfeit fifty dollars;"
This question of intent to make the municipality chargeable is necessarily wholly absent in the case of adoption. Sec. 4023 expressly requires that the court must find

"that the petitioners are of sufficient ability to bring up and furnish suitable nurture and education for the child."

The question of possible dependence is therefore automatically eliminated.

Sec. 4022 contains full provision as to the manner of consent where parents have abandoned their child, it being provided that such consent may be given by the guardian or by some suitable person to be appointed by the court.

The county judge is doubtless familiar with all of these provisions.

Appropriations and Expenditures—Charitable and Penal Institutions—Humane Society—County, city or village may appropriate money, either to local humane society or to branch of Wisconsin humane society, provided such appropriation does not exceed statutory limits.

A. E. Frederick,
State Humane Officer,
Sparta, Wisconsin.

Sec. 58.07, subd. (5) provides:

"Any county, city, or village may appropriate for the maintenance and support of such societies in the prosecution within their respective boundaries of the work for which they are organized any sum of money deemed needful; but the aggregate of all such appropriations in any county shall not exceed twelve hundred dollars in any one year. Each county may, in addition thereto, appropriate and pay to one authorized and active agent of any such society such salary as the county board may fix."

Under this provision, it is deemed immaterial whether the humane society in question is incorporated as a county humane society, or incorporated as a branch of the Wisconsin humane so-
ciety. So far as the statute indicates, it is entirely possible that there may be both in a county.

In such case, the limitation of $1,200 a year for all appropriations would apply, and it might be distributed between a purely local society or a branch of the general organization.

Contracts—Public Officers—Highway Commission—Real Estate—Option contract agreeing to make conveyance of lands to state should be signed by witnesses and acknowledged; should be executed by highway commission through its proper officers, not by state highway engineer.

September 29, 1920.

HIGHWAY COMMISSION.

A form of lease and option submitted by you is signed by all of the parties entering into the lease. Three of the lessors, however, have not acknowledged such instrument, nor have their signatures been witnessed. Under these circumstances, you raise the question as to the necessity of procuring witnesses to these three signatures, and causing their execution of the instrument in question to be acknowledged.

You are advised that this is purely a question of policy; that, so far as the lease is concerned, if the lessee actually enters into possession, the same would constitute actual notice to all the world of the possession of some right with reference to the premises. The option feature of the instrument, however, is controlled by certain statutory provisions.

Sec. 2238 provides:

“Every bond or contract for the sale or purchase of lands or concerning any interest in lands, made in writing, under seal, attested by two witnesses and acknowledged, may be recorded in the office of the register of deeds of the county where the lands lie.”

Sec. 2241 provides:

“Every conveyance of real estate within this state hereafter made (except patents issued by the United States or this state, or by the proper officers of either) which shall not be recorded as provided by law shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the
same real estate or any portion thereof whose conveyance shall first be duly recorded."

Sec. 2242 provides:

""The term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned or by which the title to any real estate may be effected in law or equity, except wills and leases for a term not exceeding three years; and the term 'purchaser,' as so used, shall be construed to embrace every person to whom any estate or interest in real estate shall be conveyed for a valuable consideration and also every assignee of a mortgage or lease or other conditional estate."

The net result of these three sections would, in the judgment of this department, render this option ineffectual as to the purchasers of the undivided interests of one or all of these three parties, prior to the election of the state to exercise its option, as against any subsequent purchaser in good faith of their interest. As business is practically transacted, it is of course extremely unlikely that in case the option were recorded with the acknowledgments as they stand, any purchaser could be found who would make an investment in good faith in the property in question, without knowledge of the lease outstanding. The sounder practice, however, is to procure witnesses to the three signatures, and to have the execution of the instrument acknowledged.

An examination of the instrument suggests another consideration as to which you do not invite attention. The lease in question is executed on behalf of the state of Wisconsin by A. R. Hirst, state highway engineer. Without going into any question of estoppel that may subsequently arise, or any question of ratification of his acts in this respect, it is the judgment of this department that such lease or contract should be entered into by the highway commission, and not by the state highway engineer.

Sec. 13177—2, referred to in the opinion of this department to the secretary of state under date of September 21, 1920,* provides:

* Page 439 of this volume.
"The commission • • • shall do all things necessary and expedient in the exercise of such supervision."

Subsec. 6 provides that the commission

"shall have necessary authority to perform all other duties imposed by the legislature from time to time."

Sec. 1312 bears out and confirms this conclusion. It is there provided:

"• • • The Wisconsin highway commission is hereby authorized to enter into all contracts and agreements • • •."

By plain implication, the highway commission, through its chairman and secretary, are the proper parties for the execution of the present contract.

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**Indians—Live Stock—Tuberculin Tests**—Indians living on reservation may join with white citizens in petition for creation of testing area under law for control of bovine tuberculosis; cattle of such Indians may be slaughtered and paid for in accordance with law.

It is doubtful whether Indians who do not sign such petition may be compelled to surrender their cattle for slaughter.

Dr. O. H. Eliason,

*State Veterinarian.*

Sec. 20.60, subd. (7), Stats., provides that whenever a petition is filed with the department of agriculture, signed by not less than one-half of the resident farmers and cattle owners of any area, which area shall be described in the petition, requesting that the cattle in that area be tested for bovine tuberculosis, the department is authorized to do so. Sec. 20.60, subd. (2), prescribes the indemnity to be paid for cattle slaughtered on account of being infected with tuberculosis.

The question presented by your letter of September 29 is whether cattle owned by Indians living on reservations controlled by the federal government come under the same regula-
tion as cattle owned by citizens off the reservation; and like-
wise, whether the Indians can join in the petition for the area
test and have their cattle tested, the same as the other farm-
ers; and whether, in case infected cattle are found, payment
shall be made therefor, the same as in other cases.

You are advised that, as disclosed by the opinions of this de-
partment, the exact limits of the jurisdiction of the state and
federal government with respect to Indians has been the subject
of considerable discussion. The courts of the state have uni-
formly asserted full and complete jurisdiction in the matter of
the commission of crimes upon such reservations, while the fed-
eral courts have disputed the scope of such jurisdiction. The
opinions of the department have drawn a distinction between
Indians who were still wards of the government, and those who
were not.

Without extended citation of authority, it would seem clear
that Indians so residing upon government reservations might
join in a petition for the creation of a testing area, and that
such Indians as signed such petition would be bound thereby,
and in case their cattle were tested and reacted to tuberculosis,
having voluntarily submitted to the police regulation of the
state, they would be bound thereby, and the state would be au-
thorized to pay the same compensation as in other cases.

A different question is presented, however, as to those Indians
who did not sign the petition, and in accordance with prior rul-
ings of this department, it may well be doubted whether they
could be compelled to submit their cattle to the tuberculin test
and to slaughter the same in case they reacted. In so far as
sales of such cattle were sought to be made, it is believed that
they would come under the same ruling that is applicable to
the sales of cattle by other citizens.
Bridges and Highways—Contracts—When contract so provides completed portions of highway work may be paid for without avoiding bond given under 3327a.

September 30, 1920.

Highway Commission.

Sees. 43 and 58 of the regular specifications for road work contain the following provision:

"Nothing in this section shall prevent the Commission from accepting a section or sections of the road as completed and from making final acceptance and final payment on the same if the Commission so desires."

You desire to know if that provision in said specifications and the acceptance of any completed portion of the highway work thereunder would have the effect of avoiding the bond required by sec. 3327a, Stats.

You are advised that the presence of the quoted provision in the specifications and action thereunder would not have that effect. Said provision and such action would have no effect upon the bonds whatever. Sec. 3327a requires contractors to furnish bonds for the kinds of work therein mentioned, which bonds are for the dual purpose of protecting the state or other subdivision thereof, a party to the contract, and also for the protection of every person who performs labor or furnishes material in or about the work contracted to be done. The contractor and the surety or sureties on the bond specifically agree that the bond is given to insure the performance of the work according to the terms of the contract. The specifications form part of the contract and the execution of the bond is a consent thereto, and no obligee can raise any objection because the terms of the contract have been complied with. The statute even guards against releasing the signers of the bond in the event that the contract is changed.

"* * * No assignment, modification or change of the contract, or change in the work covered thereby, nor any extension of time for the completion of the contract shall release the sureties on said bond." Sec. 3327a.

It would seem plain, therefore, that even though the specifications did not have in them the provisions before quoted, you would be at liberty to accept portions of the work and make payments in advance of the time and in disregard of the terms for payment expressed in the contract.
Elections—Individual who receives at primary in excess of 3% of total party vote at last general election is entitled to place upon ballot at regular election as independent candidate, regardless of distribution of vote.

October 1, 1920.

Honorable Merlin Hull,
Secretary of State.

Your letter of September 30, 1920, details a situation where in a senatorial district a number of votes has been written upon the primary ballot, which exceed three per cent of the party votes cast in such senatorial district. The distribution of such votes, however, does not agree with the distribution of votes required by sec. 5.05, subd. (6), par. (e), in the case of signatures to nomination papers. You inquire whether in such a situation the party whose name has thus been written upon the ballots is entitled to a place upon the ballot at the general election as an independent candidate.

This department recognizes the possibility of difference of opinion as to the construction of these sections. The rule, however, is well settled that election laws are to be liberally construed, in order, if possible, to enable the voters to express a choice. It will be noted that sec. 5.17, subd. (3), restricts the qualification to the receipt

"at such primary election" of "a number of votes not less than the number of signers required by sections 5.05 and 5.07."

It will thus be seen that the requirement that such voters shall be distributed in like manner as the signers to nomination papers is wholly wanting. The only provision is that the number of signatures shall exceed the specified minimum.

This rule would be equally applicable to the case of the assembly district to which you refer.
Mortgages, Deeds, etc.—Escheated Estates—When person died intestate between Oct. 12, 1864, and some time in 1868, leaving widow but no kindred, entire estate descended to widow. Real estate did not escheat to state.

October 1, 1920.

HONORABLE MATT LAMPERT, Acting Chief Clerk,
Commissioners of Public Lands.

I have your letter of October 24, wherein you state that at a meeting of the commissioners of public lands held on October 18 the contents of letters from H. W. Goodwin, Esq., attorney at law, at Hartland, Wisconsin, relative to the estate of John Pople, were presented and you were instructed to refer said letters to me for consideration and for an opinion.

According to the letters of H. W. Goodwin, one John Pople died some time between October 12, 1864, and the date of the publication of the statutes of 1868, and he died seized of the lands described in the letter dated September 4, 1920. He left surviving his widow, Clara Pople, who was afterwards twice married, her name appearing in the records first as Clara Goodwin and later as Clara Reid. Said John Pople left no issue and no other known relatives, so far as could be ascertained, and no one ever appeared to claim the property.

Clara Reid, née Clara Goodwin, née Clara Pople, died a number of years ago, and her brother, a nonresident, for a number of years has had an agent looking after said parcel of land, and this agent has continued to pay the taxes on the tract in question and has had the use of it. It further appears that in November, 1898, the widow executed a warranty deed of this land in fee simple to Eunice N. Davison, then living at Hartland but long since gone, and so far as Mr. Goodwin can learn, this grantee never took possession nor exercised any control over the property. The premises in question are partly under cultivation and there are no buildings thereon.

According to Mr. Goodwin's understanding of the law, the widow, at John Pople's death, took only a life estate in said premises, and there being no other heirs, at her death the land escheated to the state. Mr. Goodwin has a client who desires to purchase the land from the state if it can be done.

In a letter dated September 9, 1920, Mr. Goodwin makes the following observation: namely,
"Under the revised statutes of 1858, which were not amended in this particular until 1868 and were in force at the date of the death of John Pople, his widow was not an heir, but took only a life estate in the property in question, and in default of any heirs the real estate left by him, upon the death of his widow, escheated to the state. The present inheritance law does not govern, but the law in force when he died."

Ch. XCII, Rev. Stats. 1858, relates to the title of real property by descent. Subsecs. 2 and 3 of sec. 1 thereof read as follows:

"2. If he [any person] shall leave no issue, his estate shall descend to his widow during her natural lifetime, and after her decease to his father; and if he shall leave no issue or widow, his estate shall descend to his father.

"3. If he shall leave no issue nor father, his estate shall descend to his widow during her natural life, and after her decease in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by right of representation: provided, that if he shall leave a mother, she shall take an equal share with his brothers and sisters."

Ch. 61, laws of 1868, amended subsec. 2 above quoted, so as to read as follows:

"If he shall leave no issue, his estate, real and personal, shall descend to his widow; and if he shall leave no issue or widow, his estate shall descend to his father."

The conclusion of Mr. Goodwin as to the rights of Clara Pople in the real estate of John Pople was correct, basing the same upon the subsection above quoted. There is, however, another subsection which I think, under the facts stated, entitled the widow to the fee in said lands. Subsec. 9 of said section reads as follows:

"If the intestate shall leave a widow, and no kindred, his estate shall descend to such widow."

Subsec. 10 of said section reads as follows:

"If the intestate shall leave no widow nor kindred, his estate shall escheat to the people of this state for the use of the primary school fund."

Upon the above statement of the facts and the quotations from the law of 1858, it is my opinion that the state has no interest in the lands in question. If John Pople had no kindred
living at the time of his decease, his widow, under subsec. 9, became his sole heir, and her heirs or her grantee have the legal title thereto.

Elections—Ballots—Election officials are required to provide ballots of color prescribed by statute. Failure to do so will not invalidate election or cause rejection of ballots because of different color.

October 1, 1920.

HONORABLE WILLIAM B. NAYLOR,
Assistant Secretary of State.

Referring to your letter of September 30, you are advised that sec. 6.23, subd. (17), which provides as to the color of the ballot, is mandatory in so far as prescribing the duties of the election officials is concerned, but, so far as the voter is concerned, a variation in the color of such ballot would, as you suggest, not be permitted to deprive the voter of his rights.

This conclusion is based upon the cases of Kellogg v. Hickman, 21 Pac. 325, State v. Wolf, 20 Pac. 316, and Carn v. Moore, 76 So. 337. The last case states the principle involved in these decisions. At page 339 it is said:

"* * * The law, which required the secretary of state to furnish the paper on which the ballots must be printed, shifted the duty from the voter to the secretary of state to provide proper ballot paper, and that, if he furnished some with white paper and others with tinted paper, the voters were not to be deprived of their right to vote on account of the mistake of the secretary of state. State v. Wolf, 17 Or. 119, 20 Pac. 316."

The foregoing constitutes a statement of the law. In the present situation, as we are advised, many clerks have reported to you the entire impossibility of procuring a shade of paper that complies exactly with the statutory requirements. Under these circumstances, in the absence of legislative authority or direction, this department is of opinion that the paramount public purpose to be served, which transcends any question of technical exactitude, in obtaining a definite color of the spectrum and which officials should keep steadily in mind, is the fundamental purpose that each individual voter should have his right to express a choice in the selection of all candidates for office.
The law does not require the performance of impossibilities. A latitude of discretion in the officers charged with the duty of printing the ballots is permitted, to the extent that they are allowed to obtain the nearest available substitute for the color prescribed. If, after making all reasonable efforts to procure a light blue print paper, none can be obtained, then the use of a paper differing in color from that prescribed for the other ballots is certainly within the spirit of the law.

Appropriations and Expenditures—Unexpended Balance—Allotment for permanent improvements made from nonlapsable appropriation continues available for purpose of allotment, and for that purpose only, until expended.

Sum annually appropriated includes not merely stated amount but also such increase as may be made thereto in discretion of executive, up to expressed limitation where entire amount is referred to as appropriated annually.

October 5, 1920.

Board of Public Affairs.

The general appropriation for the Wisconsin national guard is made by sec. 20.03, subd. (1), and reads as follows:

"There is appropriated from the general fund:

(1) General Appropriation. To the Wisconsin national guard, annually, beginning July 1, 1919, three hundred thousand dollars, and such additional sums, not exceeding three hundred thousand dollars, in each year, as may be necessary, upon the approval of the governor, to maintain and train the full number of national guard troops required by United States statutes to be maintained and trained by the state of Wisconsin. Of this there is allotted: * * * ."

Par. (m) of this same section makes the following allotment:

"For the purchase and construction of armories, subject to the approval of the armory board, as provided by law, not to exceed fifteen per centum of the total sum annually appropriated for the uses and purposes of the Wisconsin national guard."

Sec. 20.77, subd. (3), reads as follows:

"Any unexpended balance of moneys allotted from any appropriation for administration or operation, and not needed for
the payment of outstanding claims, shall be available generally for the purposes of the appropriation from which the allotment is made; and any unexpended balance of moneys allotted from any appropriation for repairs and maintenance, or for permanent property and improvements, shall be available for no other purpose than that specified in such allotment. Any appropriation in the following or substantially similar language: 'There is appropriated on July 1, . . . . , dollars to (department, board or commission), for (purpose or object),' shall be available until used unless specifically repealed; but no appropriation for operation shall be used for permanent property and improvements. Moneys appropriated for operation may be used for ordinary repairs and maintenance, except replacements.'"

The following questions then present themselves:

(1) If, as was the case in 1919–1920, no moneys are expended for armory purposes, does the allotment carry over to the following year or until used, or does it lapse in accordance with sec. 20.77, subd. (3)?

(2) Is the appropriation made on July 1, 1919, of three hundred thousand dollars the annual appropriation, or in case additional moneys are made available in accordance with subd. (1), is fifteen per cent of the total sum available for armory purposes?

The foregoing is set forth in your letter and request for an opinion, dated October 5.

The answer to your first question is that, in case no moneys are expended for armory purposes, the allotment carries over. An expenditure for armory purposes is obviously one for permanent improvements. The language of the appropriation quoted is of that character described in sec. 20.77, subd. (1):

"Appropriations in the following language, or substantially similar language, shall be construed to be annual, continuing, nonlapsable appropriations, and shall be available until used:

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

The appropriation is therefore available until used. Sec. 20.77, subd. (3), which you quote, provides that any unexpended balance allotted for "permanent property and improvements" shall be available for no other purpose than that specified in such allotment. The result of the two sections is to make the
appropriation a continuing one, and to restrict its application exclusively to the purpose allotted.

Your second question is answered as follows:

The total sum annually appropriated, within the meaning of sec. 20.03, subd. (1), par. (m), is the specific appropriation of $300,000,

"and such additional sums, not exceeding three hundred thousand dollars, in each year, as may be necessary, upon the approval of the governor."

This conclusion results from a consideration of the language of the entire section. It will be noted, by par. (a), there is allotted

"To the adjutant general, an annual salary of five thousand dollars."

Other specific appropriations in similar amounts are made. Had it been the intention of the legislature to restrict the appropriation for armory purposes to fifteen per cent of $300,000, similar language would have been employed, and an allotment of $45,000, or of a sum not to exceed $45,000, would have been made. Such would be the natural and orderly course to pursue. It would seem clear that the reason that a percentage was employed was so that the same should sustain a direct relation to the total amount actually made available for military purposes.

It will be noted that the language of sec. 20.03, subd. (1), makes an annual appropriation of "three hundred thousand dollars, and such additional sums, * * *." In other words, the combination of the two items is necessary to make up the total appropriated.

Bridges and Highways—Street Sprinkling—Municipal Corporations—Cities—City council has power to provide for sprinkling streets, and law applies alike to street which forms part of state trunk highway system and street which does not.

Wisconsin Highway Commission.

In reply to yours of October 4, 1920, relative to the rights of property owners along city streets that form part of the state
trunk highway system, you are advised that the city council has power to cause said streets to be sprinkled, but that the exercise of this power rests in the discretion of the common council. The exercise of the power cannot be coerced by the courts. Public sentiment and the right of suffrage are the only coercive forces.

Authority to sprinkle city streets is given by the following and perhaps other statutes: subd. (40), sec. 925—52, and secs. 925—175, 926—10 and 959m—1 to 959p. It is thought that secs. 959m—1 to 959p apply to all cities except those of the first class. These sections give the matter entirely into the keeping of the common council and provide that the cost of sprinkling shall be paid out of the general fund or out of ward funds, or be assessed against abutting property, as the common council shall decide.

The validity of the provision for special assessments to cover the cost of sprinkling is an open question in Wisconsin. *Borgman v. Antigo*, 120 Wis. 296, 301. It is believed by this department that those provisions, when they come to be passed on by the court, will be held valid.

The sprinkling of streets is primarily a measure of sanitation, although it partakes somewhat of the nature of street maintenance or improvement. 28 Cyc. 855.

No provision has been found, and it is thought there is none, which imposes any obligation upon the state or county to sprinkle the portions of the state trunk highway system which lie within cities. The rights and duties of the city relative to those portions of the trunk highway system in the matter of sprinkling are the same as they are to all other streets within the city. The fact that some of the streets belong to the trunk system introduces no new question or feature which bears upon the matter of sprinkling the city streets. Householders along the trunk system in the cities have the same rights that other householders have and must get relief from street dust through action of the city council.
Elections—Corrupt Practices—Candidate who incurs no expense during primary campaign need file no expense account; can have name on ballot at election.

D. K. Allen,  
District Attorney,  
Oshkosh, Wisconsin.

In answer to the question submitted by you by telephone this morning, arising under sec. 12.10, where a candidate at the primary incurred no expenses and filed no statement to that effect with his filing officer, I find that on October 14, 1918, this question was passed upon in an opinion to George E. O'Connor, district attorney at Eagle River, Wisconsin, and is found in VII Op. Atty. Gen. 576.

In that opinion there is a quotation from a former opinion as follows:

"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."

You are advised that under the authority of the opinion above cited the candidate in question may have his name placed upon the ballot at the election.

Fish and Game—Blinds—Words and Phrases—Open Water—Construction of artificial pier or extension into open water does not alter character of such water within meaning of statute, so as to authorize shooting game from blinds constructed at extremity of pier.

Banks of ditch dug through open water fall within same rule; blinds may not be constructed upon such banks.

Conservation Commission.

Sec. 29.25, subs. (1) and (2) provide:

"(1) PROHIBITED METHODS. No person shall hunt any game bird between sunset and thirty minutes before sunrise of the following morning; or by shooting it or at it from any boat, canoe, raft, blind, contrivance or device in open water, or from
any boat or craft other than such as are propelled by paddle, oars, or pole or with the use of more than fifty decoys within, or any decoys beyond, two hundred feet from the blind or covering in which the hunter is located, or with any decoys left in the water unattended; or any game bird other than wild geese and brant with the use of a rifle.

"(2) 'Open Water' Defined. 'Open water' is any water outside or beyond a natural growth of vegetation extending over the water surface, and of such height as to offer partial or whole concealment for the hunter.'

You refer to these provisions of the statute and state that in certain duck-hunting areas of the state hunters have started the following method of hunting: From the shore line of the property that they own they have filled in with stones and dirt what may be called a pier, which is entirely artificial. At the end of this pier they erect a blind, and you contend that under the above cited sections of law they are shooting in violation of the said sections by erecting an artificial blind, contrivance or blind in open waters.

You set forth that in certain portions of the Poygan marshes, the owners of adjacent land, in order to be able to run up to the solid land with launches and boats, have dug out a ditch, the dirt from this ditch having been thrown on one side and forming a bank. This bank is in open water and is, of course, artificially made. The hunters are erecting blinds on these banks and shooting therefrom, and you also contend that this is a violation of sec. 29.25, subds. (1) and (2).

You ask as to the correctness of your interpretation.

You are advised that in the opinion of this department your interpretation is correct in both particulars. This opinion is based primarily upon the plain language of the statutory provisions themselves. It would seem to be reinforced by certain other considerations. What the law appears to contemplate is, of course, primarily the preservation of the game from the destructive tactics of the pot hunters. Secondarily, it must be presumed to have been intended that there should be insured equality of opportunity to the general public in the matter of taking game within the area where all are entitled of right to hunt.

In *Diana Shooting Club v. Hustig*, 156 Wis. 261, 272, the court has been at pains to define the extent of the public right
to fish and hunt up to the ordinary high-water mark. It is said, p. 272:

"Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks. When so confined it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation. By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic."

Any intrusion beyond this high-water mark by the adjacent owner is, under repeated decisions of the supreme court of this state, an encroachment upon public right subject to abatement. The law contemplates no such absurdity as a reward of special and exceptional privilege to one thus guilty of intruding upon the common right of access and ownership in the bed of a navigable lake.

Based upon the foregoing considerations, this department holds that your interpretation of the law is correct.

Fish and Game — Blinds — Words and Phrases — Open Water — Pier or breakwater constructed along side of channel, authorized by war department, does not confer authority upon owner thereof to erect blinds for shooting game.

October 18, 1920.

Conservation Commission.

The department of engineers of the war department of the government of the United States has granted permission to a resident owner upon the shores of Lake Winnebago

"to dredge a channel from shore out to navigable water, and construct a protection pier or breakwater along the northerly side of channel."

At the end of this breakwater, you advise us, the owner has built a blind for the shooting of ducks, and you ask the opinion of this department as to whether or not the construction of the blind at the end of this pier for the shooting of ducks would be
a violation of the prohibition of sec. 29.25, Stats., which prohibits the shooting of game birds

"from any boat, canoe, raft, blind, contrivance or device in open water,"

and defines open water as

"any water outside or beyond a natural growth of vegetation extending over the water surface."

You are advised that, while the question is not entirely free from doubt, this department is of opinion that a blind so constructed must be held to violate the provisions of the statute. It is of course elementary law that whatever land is created by the process of accretion becomes the property of the adjoining shore owner, and were the land in question permanently brought above the surface of the water as the result of natural accretion, it would take on all of the characteristics of the preexisting shore line, both as to ownership and as to privileges to be exercised thereon.

There is, however, a distinction to be made between the gradual transformation of open water, as it existed at the time when the law in question was passed, and artificial change of the character herein referred to. "Open water," within the meaning of the statute, is subject to limitation and restriction and change, so far as legal rights are concerned, through the working of the ordinary and natural forces of nature. It is not subject to change through purely artificial alterations made by men.

Notwithstanding the construction of the pier or breakwater in question, the area still remains, as it was when this statute was enacted, open water, within which shooting from a blind is prohibited. The permit which attorneys for the riparian owners submit, to our mind, clearly emphasizes the correctness of this position. It is there said:

"That this authority does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. It merely expresses the assent of the Federal Government so far as concerns the public rights of navigation. (See Cummings v. Chicago, 188 U. S. 410.)"
With so much of the opinion submitted by Messrs. Thompson, Gruenewald & Hull as refers to the right to shoot from this land, we have no dispute. This right, however, we think is subject to the right of every other person to shoot from the same point of land, within the meaning of the rule laid down in *Diana Shooting Club v. Hustig*, 156 Wis. 261, and is subject to the limitation already stated, that being, in contemplation of law, "open water," no blind may be erected thereon. If, in the exercise of its paramount power over navigation, the federal government could create private rights in the area in question, or had sought to do so, a different proposition would be presented.

Under the facts as they stand, until a different construction is put upon the statute by our supreme court, this department adheres to the view above outlined.

*Fish and Game—Confiscation*—In case individual violating game law comes into possession of device subject to confiscation with permission or knowledge of owner, same is subject to confiscation regardless of owner's knowledge or intention that it should be employed in violation of law.

Conservation Commission.

The employee of a corporation, furnished by it with an automobile to be used in traveling between the various places of business of such corporation and generally used in the business of the corporation, uses such automobile to go on a hunting excursion, kills a partridge in violation of the game laws, and while in the act of transporting the same in the automobile of his employer is arrested, pleads guilty to the charge, and is fined. The question presented by your letter of October 16 is whether, under these circumstances, the automobile of the employer is subject to forfeiture.

You are advised that if the automobile was placed in the custody of the employee, with knowledge on the part of the corporation of its intended use, it is clearly subject to forfeiture. You are further advised that if the facts develop that the employee was entrusted by the company with the automobile in the course
of the prosecution of his usual and regular employment and while so engaged illegally shot the partridge in question, and subsequently transported the same, the liability of the automobile to forfeiture under these circumstances is a matter of some doubt.

Prior to the decision of the supreme court of this state, in the case of Gemert v. Pooler, this department was of opinion that vehicles of the character enumerated in sec. 29.05, when used in violation of the game laws, were subject to forfeiture in all cases, unless the element of volition on the part of the owner or employer was wholly absent. In other words, the vehicle or device was subject to forfeiture in all cases, unless possession thereof was taken against the will of the owner—this irrespective of the question of knowledge or intention on his part.

The supreme court, in the case of Gemert v. Pooler, 177 N. W. 1, 3, said:

"We hold in this case that it was not the legislative intent in section 29.05 (7), in connection with the other provisions of chapter 29, that the personal property of an innocent holder, which property is being unlawfully used in violation of the provisions of such section or chapter by one who is a trespasser or thief as to such property, shall be subject to forfeiture and the property rights of the innocent owner taken away. State v. Davis (Utah) 184 Pac. 161; Moody v. McKinney, 73 S. C. 438, 53 S. E. 543; Smith v. Spencer-Dowler Co. (Ga. App.) 100 S. E. 651; United States v. Two Gals. Whiskey (D. C.) 213 Fed. 986."

Notwithstanding this language, this department is of opinion that the rule is well settled as above stated, and that the language of the court is not necessarily inconsistent with a decision that under the circumstances last supposed, the automobile may still be forfeited. This question, however, cannot be finally determined or settled until actually litigated and presented to the court.

Assuming that the automobile was taken by the employe from the garage of his employer without his knowledge or consent and contrary to his instructions, then very clearly, under the decision and language noted, the same would not be liable to forfeiture.

It must therefore be apparent that the answer to your question is dependent upon the facts and circumstances that may have developed upon a trial of the action.
Contracts—Education—Teachers—Public Officers—Board of normal regents may contract with teacher in normal school for printing bulletins and commencement programs and may pay for work done and material supplied under such contract.

October 19, 1920.

Honorable William Kittle, Secretary, Board of Normal Regents.

Your letter of October 19 presents a bill of $59 for printing bulletins and commencement programs for the state normal school at Milwaukee. This bill has been presented by a teacher in the state normal school. You inquire whether the normal board can legally pay such a bill, and further, whether the law permits a person employed as president, teacher, or librarian to render other service for the state while employed by the state normal school.

You are advised that there is nothing illegal in the matter of such a bill, if it is, as it appears to be, fair and regular in other respects. This matter has been the subject of opinion by this department (III Op. Atty. Gen. 748), where it was held that the university might legally enter into a contract for the lease of a house and lot owned by a member of the instructional staff, provided that he did not enter into the contract with himself.

A prior opinion was rendered holding that a professor in the university was not a public officer and might receive compensation from the state for other services as a state officer. In the body of that opinion it was said by the then attorney general:

"The regents are thereby, in my opinion, given authority to employ instructors in that institution, fix their compensation, and define their duties and hours of employment. If those duties are performed satisfactorily to the regents, and the time devoted to the work in the institution is such as they require, I see no objection to a person so employed seeking other employment, even though he be compensated therefor by the state."


The reasoning that underlies these two opinions appears sound, and is expressly adhered to. If the teacher in question has satisfactorily discharged other services required by the state board of normal regents, there can be no legal reason why he may not enter into a contract with such board to render services or supply materials not within the scope of his employment.
Municipal Corporations—Cities—When city passes from lower to higher class it remains in class attained notwithstanding subsequent decline in population, at least in absence of adoption of ordinance or resolution by common council and publication of such fact in compliance with provisions of statute.

October 20, 1920.

Paul F. Hunter, Editor,
The Blue Book.

Your letter of October 20 calls attention to the provisions of sec. 925—1, which enumerates the population of the various classes of cities, and provides:

"* * * Any city incorporated hereunder shall pass from one class to another when it has sufficient population and its common council shall by ordinance or resolution make publication thereof and make proper provisions for such change in the city government."

You call attention to the fact that the population of the city of Superior, which exceeded 40,000 in 1910, has fallen below 40,000, as shown by the last census, and inquire whether the city remains in the second class, or automatically recedes to the third class.

This department is of opinion that there is grave doubt whether the statute contemplates that, having once attained a higher rank, a city shall take the lower classification. It would not seem to be necessary to pass upon this question in the present instance, however, because the mere attainment of population is not the only condition.

You will note that the law specifically provides that change of status shall become operative only when

"its common council shall by ordinance or resolution make publication thereof and make proper provisions for such change in the city government."

Until this extremely improbable contingency arises, the city of Superior will continue, as heretofore, a city of the second class.
Elections—Corrupt Practices—No candidate should be reported to district attorney merely because he has filed no statement of election expenses, presumption being that no disbursement was made and no statement required.

HONORABLE W. B. NAYLOR,
Assistant Secretary of State.

Sec. 12.27 provides that every officer with whom the expense account of a candidate for a public office is required by law to be filed shall notify the candidate five days in advance of the expiration of the time for filing and upon expiration of the time fixed by law for filing such expense account and, none being filed, notify the candidate of his failure to comply with the law and

"shall notify the district attorney of the county where such candidate resides of the fact of his failure to file, and said district attorney shall thereupon prosecute such candidate."

In view of the construction placed by this department upon sec. 12.10, you ask for an opinion as to the duty of the secretary of state in the matter of notifying district attorneys when no statement has been filed by a candidate.

Sec. 12.10 was enacted in its present form as ch. 10, special session 1912, and took effect May 6, 1912.

That provision was construed by this department October 9, 1912. It was then held that a candidate who had neither received nor disbursed campaign funds is not required to file any statement on the subject of campaign expenditures and that

"he does not lose his right to have his name on the ballot by failing to file a statement." I Op. Atty. Gen. 244, 245.


Four regular sessions of the state legislature have intervened since this construction was put upon sec. 12.10 and yet no change has been made in said section. This may be regarded as an acquiescence on the part of the legislature in the interpreta-

*Page 469 of this volume.
tion which the law has received in its administration. The opinions referred to have been furnished all the district attorneys and have doubtless come to the attention of many other lawyers and have been acted on and are now being relied upon.

It would be manifestly unjust to now adopt a different construction of the statute. Whatever may be said as to the correctness of such construction as an original proposition, that construction should be treated as settled by this department and the question no longer open to examination so long as the statute remains unchanged and no court has passed upon it.

In answering your inquiry we start then with the settled proposition that the total absence of any statement of accounts and expenses by a candidate from the official files raises the presumption that no expenditures were made or accounts created and that such candidate was therefore not required to file any statement whatever relating to that subject. Sec. 12.27 should be administered in harmony with the other sections of the corrupt practices act. Such harmonizing requires that no notice be given to the district attorney that a candidate has failed to file his statement when the presumption before spoken of obtains. The injustice of notifying a district attorney that a candidate who is not required to file a statement had failed to make due filing and thus cast upon the district attorney the duty to prosecute a candidate who was guiltless is equally manifest. There is every reason to assume that candidates are proceeding on the theory that these two sections would be administered in harmony, that no candidate who has not offended against sec. 12.10 will be reported to the district attorney for prosecution under sec. 12.27. This department is charged with the duty of advising executive and administrative officers in the discharge of their duties, and citizens have a right to expect that such advice will not be changed from time to time to the injury and disgrace of citizens. No candidate who has relied upon the law as heretofore administered should be subjected to even the stigma of being reported to the district attorney as a fit subject for criminal prosecution.

You are advised that you should not report any candidate to the district attorney under sec. 12.27 unless there is on file in your office or before you officially some affirmative proof that the candidate has violated the provisions of law which require the filing of statements of campaign expenses.
Intoxicating Liquors—Fact that person engaged in business of selling intoxicating beverages makes his home in building in which he conducts his business does not except such building from prohibition of statute against keeping intoxicating liquors there.

October 23, 1920.

HONORABLE T. T. HAZELBERG,

Prohibition Commissioner.

Sec. 1569—8, Stats., reads as follows:

"No person who shall keep or have in possession for retail sale nonintoxicating beverages as defined in section 1569—3 hereof shall at any time have in his possession or under his control in the building in which he conducts his business or selling or dispensing any such beverages any intoxicating liquor as defined in said section. The prohibition commissioner or his deputies shall have the right of access at all reasonable hours, without notice, to the premises occupied by any such retail dealer in nonintoxicating beverages, to investigate if this provision is being violated."

Sec. 1569—13 is in these words:

"This act shall not be construed to authorize the confiscation or seizure or make unlawful the possession of liquors defined in section 1569—3 hereof as intoxicating liquor, owned by individuals and possessed and kept for the individual use of the owners thereof at the time this act becomes operative; provided such liquors were lawfully purchased prior thereto for private purposes and not for purposes of unlawful sale, but all such liquors kept by retail dealers in nonintoxicating beverages as defined in said section and on hand in the building where such business is conducted at the time this act becomes operative, or at any time subsequent thereto, shall be deemed contraband and subject to seizure by the prohibition commissioner."

You call attention to these sections, and ask for an interpretation thereof when a person engaged in the business of selling nonintoxicating beverages has in his possession intoxicating liquors

"in the building in which he conducts his said business, but in a room or rooms where such person lives and makes same his bona fide home."

You are advised that, in the judgment of this department, the language of the two quoted sections is too plain and specific to
require interpretation. It states in plain, precise, and definite language that no liquors may be kept "in the building" where business is conducted. There is no exception whatever in favor of rooms that may be occupied for residence purposes, or for other purposes. A dealer in nonintoxicating beverages may have no intoxicating liquors in the building in which his business is conducted. There the matter ends.

Appropriations and Expenditures—Counties—Public Officers—Assessor—Dog Licenses—Claim of assessor for compensation for making list of dogs must be filed and audited as other claims against county.

October 23, 1920.

E. S. Jedney,
District Attorney,
Black River Falls, Wisconsin.

You quote that portion of see. 1624, Wis. Stats., which provides,

"** Said clerk shall immediately file one of said lists in his office and deliver the other to the department of agriculture. The assessor shall receive as compensation therefor the sum of twenty cents for each dog listed by him to be audited and allowed by the county board as other claims against the county, but to be paid solely out of the dog license fund,"

and state that some of the town clerks have filed certificates with the county clerk of your county, showing the number of dogs listed, and that the county clerk contends that this is sufficient to authorize the county board to make payment. You inquire whether this is correct, and suggest that in your judgment such certificate is not a claim against the county and is not sufficient to authorize payment by the county board.

Sec. 59.77 provides:

"Every person [with certain exceptions not material here] having any such claim against any county shall:

(a) Make a statement thereof in writing, **.
(b) Such statement shall be verified by the affidavit of the claimant, his agent or attorney, and filed with the county clerk; and no such claim against any county shall be acted upon or considered by any county board unless such statement is so made and filed."

In view of the fact that sec. 1624 specifically provides that the claim of the assessor shall be audited and allowed by the county board as other claims against the county, and that the law contains no exception in his favor, you are advised that in the judgment of this department the construction which you suggest is correct and that the mere filing of the list with the county clerk does not authorize him to issue an order to the assessor.

Elections—Ballots—How ballots are counted when marked in circle at top of column and also with cross in square after name of candidate in different column.

October 25, 1920.

Honorable Merlin Hull,
Secretary of State,

The method of counting ballots is so plainly stated in sec. 6.42, Stats., that it seems difficult to present the rules any more clearly or simply.

First, no ballot will be counted unless it has some mark placed on it, showing an intention to vote. This mark may be a cross or any other mark, it being sufficient if the voter places a mark of some sort on the ballot, within the square after the name of any candidate, or at any place within the space in which the name appears. Where a name is written upon the ballot by the voter, that is sufficient without any mark.

Second, a voter may vote a so-called straight ticket by placing a mark in the circle at the top of the ballot, but names marked or written in control, so that, if a mark is placed in the circle at the top of a column, the same is counted as a vote for all persons who appear in that column, unless a mark is made or a name is written in some other column. Then the name written in or followed by a mark is the name voted for, whether the name printed for that office in the column that has been marked is scratched out or not. In such case a vote is counted for all other candidates in the column marked as to which he has made no exception.
Opinions of the Attorney-General.

Corporations — Words and Phrases — Securities — Privilege card, purporting to confer upon holder right to buy merchandise at certain percentage above jobbers', manufacturers' or growers' lists, is not a "security" within meaning of blue sky law; sale of such cards is not forbidden by any other statute.

October 27, 1920.

Honorable G. S. Canright, Director, Securities Division, Railroad Commission.

It is proposed by a copartnership domiciled in Minnesota to establish a store in that state near the Wisconsin boundary line, and in connection with their operations to issue so-called "privilege cards," which are to be sold in Wisconsin to prospective patrons. A form of such privilege card is submitted in a letter of attorneys for the copartnership. In substance it recites the payment of a certain amount of money, in consideration for which the holder of the card may purchase, for family use only, merchandise at a selling price which is not to exceed an average of 12½% above the jobbers' lists. You forward the inquiry of the attorneys as to whether the sale of these privilege cards constitutes the sale of securities within the meaning of the blue sky law and submit certain suggestions which lead you to believe that their sale should be prevented, and you inquire whether the same falls within the securities law or whether there is some other law to control or prevent the sale of such certificates.

You are advised that, in the opinion of this department, such cards are not included within the scope of any of the definitions found in subd. (c), sec. 1753—48, as they do not constitute "evidence of," nor are they "secured by, title to, interest in or lien upon" any property of the company. So far as this department is able to determine, there is no other provision of the statutes which would regulate the sale of these privilege cards, so-called.

Upon its face the contract submitted is open to a variety of objections, all of which are naturally addressed to the prudence and business acumen of the individual who is solicited to purchase the same. It should be borne in mind that the state does not undertake to guarantee the individual against entry into all foolish contracts. It is still expected that he should exercise some element of discretion, and in the absence of plain, specific,
and positive statutory provision, the individual must rely for protection upon his common sense and his common law rights.

The foregoing considerations having disposed of the matter, this department has deemed it unnecessary to give consideration to the question that suggests itself as to whether or not, the store and stock of merchandise being located without this state, the transaction itself would not involve interstate commerce, to regulate which is beyond the power and authority of a state.

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**Public Officers—Sheriff**—One holding office of sheriff is ineligible for two years next succeeding termination of his office, no matter how such termination comes about.

H. N. B. Caradine,

*District Attorney,*

Monroe, Wisconsin.

Sec. 4, art. V, Const., provides, among other things:

"...* * * Sheriffs shall hold no other office, and be ineligible for two years next succeeding the termination of their offices; * * *."

Under this language there is no room for construction. An individual holding the office of sheriff is ineligible for two years next succeeding the termination of his office, no matter how such termination comes about.

In other words, the test of eligibility for the office of sheriff is not whether he holds that office at the time he is a candidate for election, but whether he has occupied the office of sheriff during the period of two years preceding the commencement of the term of office for which he is a candidate.

Anything that may have appeared in any opinion of this department in any wise conflicting with the foregoing is hereby expressly overruled.

October 27, 1920.
Education—Schoolhouses—Words and Phrases—Auspices—

School board may grant permission to hold Chautauquas of educational character, proceeds of which are turned over to school fund of city, if such lectures are held under "auspices" of school board.

October 27, 1920.

Honorable C. P. Cary,
State Superintendent of Public Instruction.

Sec. 40.26, subd. (2), Stats., contains the provision:

"... They may grant the use of the schoolhouse for the holding of lectures, entertainments and school exercises, providing they are held under the auspices of the school authorities, and are for the benefit of the school, and may permit the charging of an admission fee thereto."

Your letter of October 27 presents the question of whether a school board is warranted, under the provisions of this section, in granting permission to hold Chautauqua lectures consisting of some ten entertainments during the season of 1920–1921, it being understood that the entertainments will be of an educational character and nonsectarian, and that the proceeds, if any, will be turned over to the school fund of the city.

You are advised that, in the judgment of this department, the sentence quoted clearly contemplates that a school board may grant permission for holding such entertainments.

The following considerations enforce this point of view. First of all, it will be noted that the board grants the use of the schoolhouse to someone, and that it "may permit" the charging of an admission fee thereto. Under these circumstances, it is plain that it is not intended that the school board itself shall arrange for and conduct the entertainments in question. Were they in charge of such lectures and entertainments, the statute would not provide that they might permit admission fees to be charged, but would provide that the board itself might charge admission fees.

The only restriction upon the granting of such permission is that the same shall be "held under the auspices of the school authorities."

The Century Dictionary contains this definition of "auspice":

"Protection or lead; favoring or propitious influence; patronage; especially in the phrase under the auspices (of)."
Webster’s New International Dictionary contains the following:

"Protection; patronage and care; guidance;—usually in pl."

Under these circumstances, apparently what the statute contemplates is that such entertainment should have the encouragement, endorsement, and moral support of the school board, and that the net proceeds that shall be derived therefrom shall be for the benefit of the school, meaning for the financial benefit.

These conditions being complied with, there seems no reason why the permission requested should not be granted.

Corporations—Blue Sky Law—Sale and conveyance in fee simple of undivided interest in lands leased for production of oil does not constitute sale of securities within meaning of blue sky law.


HONORABLE G. S. CANRIGHT, Director,
Securities Division,
Railroad Commission.

"Two or more individuals have purchased a tract of land in Texas and have executed leases of the land by the terms of which they are to receive royalties on all oil produced on the land. They now propose to sell and convey, in fee simple, undivided interests in such land. Does the sale and conveyance, in fee simple, of such interests constitute the sale of securities within the provisions of secs. 1753—48 to 1753—68, Stats.?

The foregoing is quoted from your letter of October 26.

You are advised that, in the judgment of this department, the sale and conveyance of such interests does not constitute the sale of securities, within the provisions of secs. 1753—48 to 1753—68, Stats. Nor does the fact that the present owner of the property is willing to enter into an arrangement to become the agent for the purchaser for the collection and remittance of his portion of the royalties bring the same within the terms of our law.
Intoxicating Liquors—Physicians and Surgeons—Operative statutes discussed covering sale of intoxicating liquors by physicians.

Otto L. Olen,
District Attorney,
Clintonville, Wisconsin.

Ch. 556, laws of 1919, provides, by sec. 1:

"Chapter 66 of the statutes of Wisconsin for 1917, entitled 'Excise and the sale of intoxicating liquors' is hereby suspended and declared to be inoperative so long as this act shall be and remain in force and effect."

The effect of this was to render sec. 1548o of the statutes inoperative. Sec. 2, ch. 685 enumerates certain sections that are revived and continued in full force and effect. Sec. 1548o is not among the sections so enumerated, and consequently the same is not now operative in this state.

Sec. 7, Title II of the so-called Volstead act contains substantially the same provisions as sec. 1548o:

"No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word 'canceled,' together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

"Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose." 41 Stats. at Large 311.

So that, at the present time, acts which would have violated sec. 1548o would constitute a violation of the federal law.
Sec. 1569—12 provides that

"physicians * * * may secure a permit from the prohibition commissioner, authorizing the purchase and possession of alcohol and liquors for the purposes permitted by this act."

It provides for a bond that said alcohol

"and other liquors will be used only for the purposes stated in the application and permit and in accordance with law."

Sec. 1569—4 provides that liquors, as therein specified, may be manufactured in or imported into or exported from this state for

"medicinal * * * purposes only and may be so sold as herein provided and not otherwise."

Sec. 1569—7 provides for the issuance of permits for the sale of liquor "to be used exclusively for medicinal * * * purposes."

Sec. 1569—19 provides for punishment for the evasion of any of these provisions.

None of these provisions has been superseded or rendered inoperative by the federal law, and any physician who sells liquor in violation of these provisions is guilty of an offense thereunder and liable to punishment.

This department is advised that the prohibition commissioner has made no rule or regulation in regard to prescribing liquor by physicians.

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Corporations — Public Utilities — Municipal Corporations

—City may enter into agreement to lease waterworks plant owned by private corporation. Acquisition of leasehold interest not considered.


RAILROAD COMMISSION OF WISCONSIN.

Attention Mr. Carl D. Jackson.

The question presented by your letter of October 27 and correspondence attached is whether a city has power to enter into a lease of a privately owned water plant located within its limits.
The terms of sec. 927—1 are plain and specific:

"* * * Any such city or village, when authorized so to do by ordinance adopted by a vote of a majority of all the members of its common council or board of trustees, after such ordinance has been submitted to a vote of the people and a majority have voted in favor thereof, may purchase or lease the waterworks or lighting works."

From the correspondence submitted, we understand that there is no question involved of the power of the city to acquire a leasehold interest by condemnation. Consequently, this question has received no consideration.

You are advised that in case the city and the utility are able to agree upon the terms of the lease, the statute contemplates that the same may be entered into pursuant to its terms.

Fish and Game—Sand Bars—Words and Phrases—Open Water—Mere fact that sand bar in open waters of state is above water during low-water season does not take away character of area involved as open water, within meaning of fish and game laws.

Conservation Commission.

A sand bar in Lake Mendota during the high-water period of the lake is entirely covered with water, but at other times the bar extends above water. The question presented by your letter of October 27, 1920, is whether it is lawful to construct a blind and shoot ducks from this bar during the period that the same appears above water.

You are advised that, in the opinion of this department, the construction of such a blind for shooting ducks is illegal.

The same considerations set forth in two opinions of this department under date of October 18* have controlling weight.

It is believed that open water, within the meaning of the statute, is any area whose predominate characteristics are those set forth in sec. 29.25, subd. (2). That is to say, if the normal condition of any area is that of water outside or beyond a natural growth of vegetation extending over the water surface,

Pages 469 and 471 of this volume.
such area continues at all times to be open water, within the meaning of the statute, notwithstanding there may be temporary periods of emergence of a sand bar, which alter temporarily the physical aspect of the area.

In addition to the foregoing, it is desired to emphasize that a blind, or other structure, so placed upon a sand bar, within the well settled law of this state, would constitute an illegal intrusion upon the public domain, which would be liable to abatement in a suit in equity by the attorney general. Attorney General v. Smith, 109 Wis. 532. In other words, the state legislature itself could not directly authorize the construction of a blind or other structure upon this sand bar. Rossmiller v. State, 114 Wis. 169, 186.

Until the supreme court of this state shall otherwise hold, this department will adhere to the conclusion that the statute in question is not to be so construed as to grant a permissive right to encroach upon the public domain, and that the doing of an act which would be clearly illegal, entirely apart from any question of the fish and game laws, is equally so, within the policy of those statutes.
Education—Taxation—Vocational Schools—Board of education in city of less than 5,000 having created board of industrial education and latter board having determined to establish vocational school and reported to common council amount required, it becomes duty of city officers to levy and collect necessary tax.

November 1, 1920.

John Callahan, Secretary,
State Board of Vocational Education.

Your letter of this date reads as follows:

"The city of Washburn has a population of less than 5,000. During the month of March, 1920, the regular board of education appointed a board of industrial education. Later this board met and decided to establish a vocational school. During the month of August, 1920, they filed their requisition with the city clerk, requesting that a half mill tax be placed in the levy, for the support of the vocational school. The question arises as to whether in the case of Washburn, the mandatory feature of the law applies. We have two other similar situations in the state, so I would like your opinion as to whether or not the city council is required by law to levy a tax for vocational school purposes in such cases."

Sec. 41.15 reads in part as follows:

"(1) In every town or village or city of over five thousand inhabitants there shall be, and in towns, cities and villages of less than five thousand inhabitants there may be a local board of industrial education, whose duty it shall be to establish, foster and maintain vocational schools for instruction in trades and industries, commerce and household arts in part-time-day, all-day and evening classes and such other branches as are enumerated in section 41.17. Said board may take over and maintain in the manner provided in sections 41.14 to 41.21 any existing schools of similar nature.

"(2) Such board shall consist of the city superintendent of schools ex officio or the principal of the high school ex officio, if there be no city superintendent, or the president or chairman of the local board charged with the supervision of the schools in case there be neither of the above-mentioned officers, and four other members, two employers and two employees, who shall be
appointed by the local board charged with the supervision of the schools and who shall serve without pay."

Sec. 41.16 reads in part as follows:

"(1) The local board of industrial education of every city, village or town shall report to the common council, or in case of cities having commission form of government to the commission, or to the village or town clerk at or before the first day of September in each year, the amount of money required for the next fiscal year for the support of all the schools established or to be established under sections 41.13 to 41.21 in said city, village or town, and for the purchase of necessary additions to school sites, building operations, fixtures and supplies.

"(2) There shall be levied and collected in every city, village or town, subject to taxation under sections 41.13 to 41.21 a tax upon all taxable property in said city, village or town, at the same time and in the same manner as other taxes are levied and collected by law, which together with the other funds provided by law and placed at the disposal of said city, village or town for the same purpose, shall be equal to the amount of money so required by said local board of industrial education for the purposes of said sections."

In towns, villages, and cities of 5,000 inhabitants or over the law commands that there shall be created a local board of industrial education, whose duty it shall be to establish, foster, and maintain vocational schools. In towns, villages, or cities of less than 5,000 inhabitants such a local board of industrial education may be created.

According to the facts stated in your letter, the city of Washburn has a population of less than 5,000 inhabitants, but the regular board of education in March, 1920, appointed a board of industrial education, and this board began to function in accordance with secs. 41.13 to 41.21. Pursuant to said sections, said board of industrial education made a report to the common council of the city, stating the amount of moneys required for the next fiscal year for the support of the vocational school now existing or to be established. Under this state of facts, it now becomes the duty of the city of Washburn, through its proper officers, to levy and collect a tax which, together with other funds provided by law and placed at the disposal of said city, shall be equal to the amount of moneys required by said local board of industrial education.

In my opinion your question must be answered by the ruling
of this department in an opinion to the state superintendent of public instruction, Mr. C. P. Cary, found in Op. Atty. Gen. for 1912, 196. In said opinion the authority of the county board to discontinue a joint county training school for teachers was under consideration. It was there held that the provisions of the statute relating to the creation of a joint county training school for teachers were mandatory, and that after a county had elected to establish a joint county training school for teachers, it could not withdraw its support therefrom and instruct its officers to refuse to perform the duties prescribed by law. The attorney general gave it as his opinion that the county officers could be compelled by mandamus to levy the necessary tax for its share of the support of such training school, and cited the following cases in support of this conclusion: *Jt. Free High School District v. Town of Green Grove*, 77 Wis. 532; *State ex rel. Free High School Board v. Lamont, Town Clerk*, 86 Wis. 563.

This opinion seems to be decisive of your inquiry. In other words, it is my opinion that when the board of education of the city of Washburn decided to create the board of industrial education and appointed such a board, and said board began to function, all the mandatory features of secs. 41.13 to 41.21 became operative.

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*Indigent, Insane, etc.—Residence*—Legal residence or settlement of woman capable of contracting marriage follows that of her husband. If insane at time of her attempted marriage there is no change in her residence and settlement. Question of sanity is one of fact, to be determined in each case.

Board of Control.

A patient was admitted to the northern hospital for the insane on February 22, 1919, upon commitment of the county judge of Wood county. She was paroled May 14, 1919, returned to the residence of her father, and shortly thereafter married a resident of Adams county. After such marriage and on October 23, 1920, she was returned to the hospital from her parole. This state of facts is disclosed by correspondence submitted to this department, and the question presented for determina-

November 3, 1920.
tion is whether the maintenance of the patient should be charged to Adams or Wood county.

It is believed that the situation is clearly ruled by the provisions of sec. 49.02, which provides:

"Legal settlements may be acquired in any town, village, or city so as to oblige such municipality to relieve and support the persons acquiring the same in case they are poor and stand in need of relief, as follows:

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

The fact that the party in question was at one time adjudicated to be insane, and committed to the asylum, as evidenced by her being paroled, is in no wise inconsistent with her capacity to contract marriage. If in a direct proceeding, pursuant to the provision of sec. 2351, the marriage were annulled because of the insanity of the wife, a different question would be presented.

Possibly, if in the present case it were determined that the wife was an insane person, within the prohibition of sec. 2330, at the time of contracting her marriage, the county of her residence at the time of her commitment would be liable. In other words, the question for ultimate determination is as to whether the lady was or was not insane at the time of her marriage. If not insane, and capable of contracting marriage, her residence automatically followed that of her husband.

Mortgages, Deeds, etc.—Public Officers—Armory Board—
Words and Phrases—Fee—Term "fee," as employed in statutes, prescribing power of armory board to acquire title to armory site, is equivalent of phrase "fee simple," "fee simple absolute," or "absolute fee."

November 3, 1920.

HONORABLE ORLANDO HOLWAY,
Adjutant General.

This department is in receipt of your communication of November 2, together with letter of Mr. Irving A. Fish, an attorney of Milwaukee.
As noted in the prior opinion rendered to you, the statutes contemplate

"conveyance to the state of the unincumbered title in fee of premises," subd. (4), sec. 21.615.

Mr. Fish quotes the provisions of sec. 2026, Stats., and raises the distinction that the statute does not provide for a conveyance in fee simple, fee simple absolute, or an absolute fee; that the conveyance tendered, which provides for a reversion of title to the present owners when the property shall cease to be devoted to military purposes, conveys a "conditional fee," and that such conveyance constitutes a title "in fee," within the meaning of the statute.

After a careful consideration of the suggestions made by Mr. Fish and a reexamination of authorities upon the subject, this department is of opinion that his position is not well taken, and adheres to its former opinion.

Sec. 4971 provides:

"In the construction of the statutes of this state the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the legislature; that is to say:

(1) All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning."

This department is of opinion that the terms "fee," "fee simple," and "fee simple absolute" are equivalent terms. This proposition is established by numerous cases. Bowen v. John, 66 N. E. 357, 358, 201 Ill. 292; Lott v. Wykoff, 2 N. Y. (2 Const.) 355, 357; People v. White, 11 Barb. (N. Y.) 26, 28.

The terms, "fee" and "fee simple," are used indifferently by the best law writers to express the same quantity of estate. Jordan v. Record, 70 Me. 529, 531; Blevins v. Smith, 16 S. W. 213, 218, 104 Mo. 583, 13 L. R. A. 441.

Again it is said, the word "fee," as used in a deed, imports a fee simple absolute. Jeeck v. Taussig, 45 Mo. 167, 168.

The foregoing cases are cited in 3 Words & Phrases 2706–
The rule is laid down in 12 Am. & Eng. Encyc. of Law (2d ed.) 890–891 that the terms "fee," "fee simple," and "fee simple absolute" are equivalent terms.

Within the rule of construction noted this department is of opinion that where the word "fee" is used in the statute, relative to the acquisition of armory sites, the legislature intended the same to mean "fee simple," "absolute fee," or "fee simple absolute," exactly the same as if such expressions had been employed in each and every case.

Within the same rule, if a different construction were permissible in the judgment of this department, it "would be inconsistent with the manifest intent of the legislature." The manifest intent of the legislature, as it appears to this department, as evidenced by sec. 21.615, is to confer upon the state the unrestricted, unhampered power to deal with the property acquired. The statute contemplates the acquisition of such armory sites, and such armory sites only as the "armory board is empowered and authorized to sell, transfer, and convey" whenever the need thereof for military purposes shall have come to an end.

The acquisition of a qualified title would not permit compliance with this plain statutory purpose. Counsel states that under his construction the armory board would be authorized to accept such qualified title without any proviso whatsoever for an appraisal of the improvements made by the state, and repayment to it of such amount. Counsel's statement in this respect is true, and being so, constitutes an additional objection against the acceptance of such construction.

The legislature has sought jealously to safeguard the terms and conditions under which armory sites and armories might be acquired and under which the same might be subsequently disposed of. To adopt counsel's construction would result in placing the whole matter within the discretion of the armory board. Any title with any condition that by any stretch of interpretation might be construed to constitute a qualified or conditional fee might be accepted by the board. It is conceivable, indeed, that the failure and neglect of state officials, in manifest violation of their duty, to continue to devote the property to military purposes would bring into play the condition of defeasance that would result in loss of title to the state. Such a policy, in the opinion of this department, is manifestly contrary to the
legislative intent and inconsistent with the character of administration which the law contemplates.

The suggestion which you make of the extreme unlikelihood that this property will ever cease to be devoted to military purposes should appeal with equal or greater force to the present owners of the property. They are unhampered by any statutory provisions or legislative policy in the matter of their dealing with the subject matter of this contract. You are bound down, by the restrictions noted, to the acceptance of no title except one in fee, and by the term "fee" is meant an absolute fee, a fee simple, or a fee simple absolute.

Peddlers—One selling merchandise on street corners from truck on which he travels from place to place is a peddler.

D. K. Allen,
District Attorney,
Oshkosh, Wisconsin.

You have submitted the following as a basis for an official opinion:

"The Knebler Grocery Company of this city has established a store at your door system. This means that they have a truck on which they have built a store and in which store they carry a stock of goods of the value of something like $800. The truck and its load weighs something like five tons. The driver of the truck drives along the streets of the city of Oshkosh and stops at convenient places where he sells goods from the travelling store to customers for cash. Most of the goods are put in bags and packages, before the truck starts out. The truck is loaded at a warehouse from which the company gets groceries for sale at its stationary stores."

You inquire whether these people are peddlers and ought to have a state license.

Under your statement of facts, it seems perfectly clear that the party in question is a peddler, and is not authorized to carry on the business without a peddler's license. He is not delivering to regular customers for an established business. He comes within the definition of a peddler; he is traveling from place to place and selling goods and merchandise. He is a peddler, and
not a transient merchant, although he stops at certain parts of
the city and sells from a certain locality to various purchasers.

The opinion heretofore rendered on May 16, 1919 (VIII Op.
Att'y Gen. 399), is somewhat in point, where it was held that
one selling Bibles and tracts from a pack on a street corner is
a peddler, and not a transient merchant.

You are therefore advised that it is my opinion that the party
in question is a peddler.

Bonds—Public Officers—Notary Public—Action may be
maintained against sureties on notary public's bond by person
damaged by his official malfeasance.

How action should be entitled and the practice in such actions
discussed.

November 5, 1920.

M. C. MEAD,

Plymouth, Wisconsin.

I have your letter of November 1, to the effect that one
N——, lately deceased, was for many years a notary public
residing in the city of Sheboygan; that he held such office dur-
ing the years 1910 to 1918; that during the period from January,
1910, to January, 1914, the B—— Company, of Cleveland, Ohio,
was surety on his official bond; that on his bond dated January
21, 1914, and on his bond dated January 21, 1918, the A——
Company, of New York, signed as surety; that since his death
it has been discovered that he forged certain mortgages and
other documents, to the damage of diverse persons, which dam-
ages you estimate to be in all about $75,000, and that it is pro-
posed to bring action against the sureties on his official bonds as
such notary public.

In your letter you call attention to the fact that these bonds
run to the governor of the state of Wisconsin as obligee, and
you call particular attention to the provisions of sec. 19.02, re-
lating to how actions may be brought on official bonds, and to
the fact that this section seems to except from its operation
state officers, and that under sec. 173, Stats., notaries public
are declared to be state officers. You express yourself in doubt
as to how to proceed in the proposed action, in view of the
fact that the bonds run to the governor, and request my opinion as to how to proceed.

Without citing authorities, I take it for granted that the rights and remedies of the parties interested depend upon the statutes in force at the time of the execution of the bonds in question.

Sec. 173, Stats., requires the governor to appoint one or more notaries public in each organized county of the state, and declares:

"* * * They shall be considered state officers, and shall hold their offices for the term of four years from the date of their appointment, and have power to act by virtue of their office throughout the state."

Sec. 174, Stats. 1915, requires:

"Every notary public, before he enters upon the duties of his office, shall take and subscribe the constitutional oath and give a bond to the governor in the sum of five hundred dollars, with surety to be approved by the county judge or clerk of the circuit court of his county or when executed by a surety company may be approved by the secretary of state, conditioned for the faithful discharge of the duties of his office."

Sec. 19.015, Stats., relates to actions by the state or a municipality on official bonds, and sec. 19.02 to actions on such bonds by individuals. It reads as follows:

"Any person injured by the act, neglect or default of any officer, except the state officers, his deputies or other persons which constitutes a breach of the condition of the official bond of such officer, may maintain an action in his own name against such officer and his sureties thereof, without leave and without any assignment of any such bond."

Sec. 180, Stats., reads as follows:

"If any notary public shall be guilty of any misconduct or neglect of duty in office he shall be liable to the party injured for all the damages thereby sustained."

I am unable to find any Wisconsin cases involving an action against a notary public upon his official bond, but in an opinion given by this department to Honorable Merlin Hull, secretary of state, dated January 25, 1918, and found in VII Op. Atty. Gen. 55, it was held as follows:
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.

Under your statement of facts it is clear to me that neither the governor nor the state of Wisconsin is directly concerned in the breach of the conditions of the bonds under consideration, neither the governor nor the state of Wisconsin having suffered any loss by reason of the alleged fraudulent conduct of said notary public. The loss and damage is that of private persons.

Sec. 180, above quoted, makes a notary public liable to a party injured for all damages sustained by reason of any misconduct or neglect of duty. The bonds which were executed by N——, now deceased, were conditioned for the faithful discharge of his duties as such notary public. Said bonds run to the governor of the state of Wisconsin.

I cannot now cite any instance as to how a notary public may bring his bond to the injury of the governor or the state, but I can readily see how he may do so to the damage of other persons. While the bond does not in terms so provide, it was certainly intended that the bonds should secure individuals, and the state of Wisconsin, as well as the governor, who is named as the obligee. The statute above quoted does not specifically authorize an individual who has suffered damage to sue in his own name. The implication is strong, however, that an injured party may sue on such a bond in the name of the governor.

I call your attention to the case of State ex rel. Sheldon v. Dahl, 150 Wis. 73. This was an action brought by the plaintiff and a long list of other bond holders and creditors, on relation of the state of Wisconsin, against Andrew H. Dahl, formerly state treasurer. Objection was raised by demurrer to the plaintiff's right to maintain the action in the name of the state, it being asserted that the action should have been brought by the attorney general. The language of sec. 19.02 was cited by the defendants as a denial of the right of an individual to bring such an action against a state officer. The supreme court overruled the objection. I quote from the language of the chief justice, p. 79:

"* * * The promise is made in form to the state, but, so far as this fund is concerned, it is entirely for the beneficial in-
terest of third persons, and those third persons must (if they are to receive the full benefit of the promise) have some way of enforcing its provisions not dependent upon the will of others who have no beneficial interest in the promise. Such bonds running to the state or some public official as obligee, but securing the performance of duties owing only to individuals or classes of individuals, are quite frequent, and the general principle is that in the absence of express statutory provision it will be held that the statutory intent is to grant permission to the individual or class protected by the bond to use the name of the state, or official, as plaintiff in an action brought to recover for breach of such a duty. *Howard v. U. S.* 184 U. S. 676, 22 Sup. Ct. 543. Unquestionably the attorney general could bring the action without relator, and use the name of the state as plaintiff, because the state is for this purpose the trustee of an express trust (*State v. Wettstein*, 64 Wis. 234, 25 N. W. 34); but where, as here, the attorney general has refused, as he doubtless properly may, to bring the action because the state has no beneficial interest in it, there seems no good reason which should prevent the bringing of the action in the name of the obligee on the relation of the parties beneficially interested."

This language of the court clearly means that an individual who has suffered damage by reason of the breach of an official bond may bring suit on relation of the obligee against the principal and the sureties named in the bond. As stated, the bond of a notary public runs to the governor as obligee. In the *Dahl* case, the bond ran to the state of Wisconsin as the obligee.

I have not been able to find any Wisconsin case where a plaintiff sued on relation of the governor, but I have no hesitation in saying that a suit may be commenced in his name on relation of the person who has suffered damage in the breach of a notary public's bond. It is also my opinion that the action may be brought in the name of the person injured, without the express authority of the governor. The action may be entitled about as follows: The Governor of the State of Wisconsin, on relation of ———-(party damaged), Plaintiff, against The A— Company of New York, a corporation, Defendant.

In your complaint you should make the proper allegations, showing the execution of the bond and the filing of the same, and the approval thereof by the secretary of state. In order to avoid all question of your authority to bring the action in the manner stated, it might be well for you to secure the express consent of the governor to bring the action on relation of the per-
sons injured and make appropriate allegations in your complaint to that effect.

In your letter you suggest that, as the attorney general of this state, I would be concerned in the prosecution of the proposed actions. I am unable to see where I, as attorney general, am in any wise interested in the bringing of these suits. As the state is not directly interested, it is not my duty to take action on behalf of private persons for the recovery of damages sustained by reason of the breach of a notary public's bond. If demand is made upon me to bring such an action, I would have to refuse.

In addition to the authorities cited, I call your attention to the following: 15 Encyc. of Pl. & Pr. 112; 29 Cyc. 1463; The Governor v. Allen et al., 8 Humph. (Tenn.) 176; Rayby v. Chandler, 8 Ala. 230; Johnson v. Brice, 102 Wis. 575; State v. Pederson, 135 Wis. 31; Prentice v. Nelson, 134 Wis. 456.

Following are cases which support the bringing of an action against the principal and his sureties, in case of the breach of an official bond: Joost v. Craig, 63 P. 840, 131 Cal. 504, 82 Am. St. R. 374; Mahoney v. Dixon, et al., 31 Mont. 107, 77 P. 519; State ex rel. Heikkamp v. Ryland et al., 163 Mo. 280, 63 S. W. 819; Peterson v. Mahon (N. D.), 145 N. W. 596; People ex rel. Curtis v. Colby, 39 Mich. 456; State ex rel. Savings Trust Co. v. Hallen, 165 Mo. App. 422, 146 S. W. 1171. See cases cited in 49 L. R. A. (N. S.) 45.

Bridges and Highways—Counties—Damages—Under subsec. 5, sec. 1317 county is liable for injuries caused by defect in state trunk highway system.

Highway may be closed during construction or repairs.

Traveler on road thus closed may not recover damages even if he sustains injury.

November 6, 1920.

J. P. Smeeker,
District Attorney,
Dodgeville, Wisconsin.

You say in a letter dated November 2, 1920, that a claim is made against Iowa county for damages caused by an alleged defect in a state trunk highway; that said highway was never
adopted by the county board; that at the time of the accident the highway was under construction by the state highway commission, and that signs were posted, at each end of the portion under construction and upon which the accident occurred, notifying travelers that said portion of such highway was closed because undergoing construction.

Upon these facts you submit the following question: Is the county liable for the damages sustained?

This department is of the opinion that the county is not liable under the facts stated. However, counties may be liable for injuries resulting from defects in state trunk highways. Counties are required to adequately maintain all portions of the state trunk highway system:

"5. Claims for damages which may be due to the insufficiency or lack of repair of the trunk system shall be against the county, and sections 1339, 1340, and 1340a of the statutes shall apply to such claims. * * *" Sec. 1317, Stats.

There are two reasons why the county is not liable in this instance: First, the accident appears to be due to construction work rather than defect in the highway, and the traveler, knowing of the construction work, was negligent or assumed the risk when he undertook to travel over it. Second, he had no right to travel the highway. Notices were posted informing him that this road was closed to travel, and the highway commissioner is expressly vested with power to thus interrupt public travel over roads undergoing construction:

"7. The county highway commissioner shall have power, in his discretion, to suspend the right to travel on any highway in process of construction or repair, by posting notices forbidding such travel at each end of said highway, and any one violating his order in that regard shall be guilty of a misdemeanor, and be punished by a fine not exceeding one hundred dollars, and in addition thereto shall be liable for all damages done to such highway by such travel, said damages to be sued for and recovered by the county." Sec. 1317m—6, Stats.

A person who travels a road where the right of travel has thus been suspended has no cause of action if he suffers injury on account of traveling there, but on the contrary, he renders himself liable to a fine and to such damages as he causes to the highway.
Banks and Banking—Taxation—Tax certificate is not evidence of indebtedness, within definition of sec. 2024—9, subsec. 6.

HONORABLE MARSHALL COUSINS,

Commissioner of Banking.

Sec. 2024—9, Stats., provides:

"Upon making and filing of the articles of incorporation the bank shall become a body corporate and as such shall have the following powers:

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

Your letter of November 4 requests an opinion as to whether a tax certificate could be considered an evidence of debt, as that term is used in this particular statute, and if investments by banks in tax certificates are permissible under the law.

You are advised that in the opinion of this department banks may not directly purchase tax certificates, because the same are not evidences of indebtedness, within the meaning of the law.

The question involved is not wholly free from doubt, our court having said in Mariner v. City of Milwaukee, 146 Wis. 605, 609:

"Taxes are debts due to the government which a property owner has no more right to withhold than the most sacred debt of a private nature."

But this distinction is to be taken between a tax and a tax certificate: a tax may be a debt, but the tax certificate is evidence of the sale of the land to satisfy that debt. The statute covering the matter of tax certificates—sec. 1140—recites the sale of land, and provides for recording the certificate issued in the office of the register of deeds. In the opinion of this department a tax certificate would partake more of the nature of an evidence...
of title in real estate than it would of an evidence of indebtedness. *Keller v. Hawk*, 91 Pac. 778, 779, 19 Okla. 407, is authority for the proposition that a "tax certificate" does not pass title to the land, but is a written certification by the county treasurer of the facts as to the sale of real estate, and is the legal evidence on which the purchaser is entitled to a deed or the redemption money, and prima facie evidence of the correctness of the facts recited therein.

The power of the bank to invest in real estate is specifically set forth in sec. 2024—19, which provides that a bank may purchase, hold, and convey real estate, for the purposes therein enumerated only. The third subdivision provides for purchase at sale on judgments, decrees or mortgage foreclosures, but it contains no provision for purchase of tax certificates.

Nothing in this opinion is to be construed as holding that a bank may not make loans upon tax certificates as security.

Bridges and Highways—Counties—County may not pay or assume municipality’s share of cost of bridge erected pursuant to sec. 1321a.

November 8, 1920.

E. S. Jedney,

*District Attorney,*

Black River Falls, Wisconsin.

By letter of October 29, 1920, you ask to be advised as to the distribution of the cost of constructing a bridge in the town of Melrose, Jackson county, under sec. 1321a, Stats.

That section provides for the construction at the joint expense of the state, counties and municipalities, of bridges more than 475 feet long across meandered streams:

"(a) Where such bridge is located wholly within one municipality or is constructed by a municipality alone, such municipality shall pay one-third the cost thereof. Any municipality situated within five miles of such bridge may contribute towards the cost and maintenance thereof a sum not to exceed one-sixth thereof. Such sum may be accepted by the municipality or municipalities building such bridge and may be used to apply towards it or their share of the cost of the bridge.

"(b) When such bridge is located between two municipalities and is constructed by them jointly, then said municipal-
ities shall pay together one-third thereof to be borne by each in proportion to the equalized valuation of each as fixed by the last county board, and if said municipalities are in different counties, each shall then pay one-sixth thereof.

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

"(d) The state shall in all cases pay one-third of the cost of constructing such bridge." Subsec. 6, sec. 1321a, Stats.

In the erection of a bridge pursuant to said section the county may contribute only so much toward the cost of construction as is authorized therein. The county in such a case has no power to take over or pay the bonds which a town may have issued for that purpose and in that way have the county pay two-thirds of the cost of the bridge. The shares which may be and must be contributed by the state, the county and the municipality in operations under sec. 1321a are definitely fixed by the language of that section.

You say that the reason proceedings were instituted by the town of Melrose for the construction of the bridge in question under said section is that the town authorities had been advised that no other statute authorized a state contribution toward the project. The contemplated bridge is to replace one which now spans the Black River and which is located about one mile south of the village of Melrose. This bridge is on and forms part of the Jackson county system of prospective state highways, and also on the state trunk highway system. There is one other provision of statute which authorizes the use of state funds for the construction of a bridge at that point in advance of the improvement under federal aid. Subsec. 1, sec. 1317m—5, Stats., provides:

"* * * In case the county board shall determine that any portion of the county system of prospective state highways shall be constructed by the county and state, upon county initiative, the county shall, subject to the provisions of subsection 1a of this section, contribute not less than sixty per cent and the state not more than forty per cent of the cost thereof."
Counties—Public Health—Dental Clinics—Public Officers—
County board may not establish dental clinic.

November 8, 1920.

MRS. MARY P. MORGAN, Director,
    Bureau of Child Welfare,
    State Board of Health.

Your letter of November 5 contains the inquiry as to whether
a county board of supervisors can legally appropriate money to
support a free dental clinic for the county.

You are advised that it is beyond the power of a county
board to do so. As was said in VIII Op. Atty. Gen. 33:

"Under the well-known rule, as laid down in several cases
decided by the supreme court of this state, a county board of
supervisors has only such powers as are expressly granted by
statute, or necessarily implied therefrom. This rule is discussed
in the case of Meinzer v. Racine, 68 Wis. 241; and in the case of
Frederick v. Douglas County, et al., 96 Wis. 411, the rule is laid
down that counties owe their creation to the general statutes of
the state and that the statutes confer upon them all the powers
they possess, prescribe all the duties they owe, and impose all
liabilities to which they are subject."

Nowhere among the enumerated powers of a county board,
which are found in sec. 59.07, Stats., is any authority granted
for establishing free dental clinics.

Counties—Tuberculosis Sanatoriums—Joint County Institutions—County which has erected and maintained tuberculosis sanatorium may make arrangement whereby adjoining counties purchase interest in such building and make joint county institution out of it.

November 10, 1920.

D. K. ALLEN,
    District Attorney,
    Oshkosh, Wisconsin.

The county of Winnebago several years ago erected a tuberculo-
sis sanatorium and has maintained it at all times since. The
building and equipment are now used to only a part of their
capacity. You suggest that an arrangement might possibly be
made whereby two adjoining counties would purchase an interest in the building and make a joint county institution out of it. You state that you find no authority in the statutes for this proceeding, and request an opinion as to whether sec. 46.20, Stats., or any other statute, will permit the county to sell to the two counties named an interest in the institution in question, so that it may thereafter be maintained and operated as a joint county institution.

You are advised that, in the opinion of this department, sec. 46.20, subsec. (9), may properly be interpreted so as to authorize the transfer of an interest in the existing institution to the two counties named. This subsection of the section provides:

"At any time after the organization of any such institution, any additional county or counties may join in the support and conduct thereof upon payment of such equitable proportion of the original cost of its establishment, and any joint county may withdraw upon such terms, as may be agreed upon among the county boards of the counties interested; and thereupon the board of trustees of such institution shall be reorganized, in such manner as may be determined by the county boards of the participating counties, to conform to the provisions of subsection (4)."

"A literal reading of the section would plainly authorize such action. It is in the broadest possible terms, providing that "at any time after the organization of any such institution," not restricting it to the organization of a joint institution.

Consideration of the purpose which the legislature undoubtedly had in mind confirms the propriety of such interpretation. The object of the law clearly is to make possible the establishment of institutions of the character specified, it being doubtless thought that if several counties joined, structures of a more commodious and up-to-date character would be possible than if the entire burden were confined to a single county.

If a proper and suitable building were available, certainly there could be no disadvantage, and there might be great advantage, in purchasing, rather than building, such an institution.

Assuming that within the plain letter of the statute two counties jointly constructed a tuberculosis sanatorium, or hospital, subsec. (9) provides that either one of the counties

"may withdraw upon such terms, as may be agreed upon among the county boards."
After such withdrawal, the entire ownership would be vested in a single county. When so reduced in ownership to one county, then additional counties beyond all question could be admitted.

It is not believed that it is necessary to so interpret the law as to restrict the possibility of joint ownership to cases where the building shall have first been jointly constructed. On the contrary, it is thought that the law should be so construed as to further the manifest legislative policy.

Restaurants and Hotels—Words and Phrases—Owner—

Hotel is not subject to regulation under rent regulation act.

Lessor of residential property who occupies portion thereof for residential purposes is an "owner," within meaning of law; property so occupied by him is not rental property or subject to regulation.

November 10, 1920.

WALTER H. BENDER, Director,

Department of Rent Regulation,

Railroad Commission.

The question has arisen whether "hotels" are rental property, within the meaning of the rent regulation act (ch. 16, laws of the special session of 1920), and you request from this department an opinion upon the matter.

This department is fully persuaded that hotels do not fall within the scope of regulation intended by this law. A superficial examination of the act itself strongly rebuts the probability that hotels were intended to be included.

Sec. 1 of the act declares the existence of an emergency with reference to "housing conditions." "Housing conditions," in the plain, ordinary acceptation of those terms, would not be construed as having anything to do with hotels.

It is further set forth that unjust, unreasonable, and oppressive agreements for the payment of rent and for rental service have been made, and are now being exacted by landlords from tenants. In ordinary business parlance, one does not speak of paying his rent at a hotel, nor is the occupant of a room at a hotel referred to as a tenant. The legislature has frequently referred to individuals having occasion to resort to the accommo-
dations provided by a hotel, and as appears from sec. 3344 and
secs. 1725 to 1727m, inclusive, the ordinary term employed is
that of "guest."

Following out the same thought, hotels as such have been the
subject of regulation, notably by the provisions of the statutes
just referred to. "Hotel" is a term of pretty well defined sig-
nificance, whose general meaning, giving no regard now to finer
distinctions and ramifications, is well understood. At least, it
is a term that produces as definite a mental conception as does
the expression, "tenement house," "apartment house," "flat
building," or "duplex building." We find that each of these
expressions is used in subd. (a), subsec. 1, sec. 2 of the act, and
had it been intended to include hotels among buildings to be
regulated by your department, the inference is irresistible that
the legislature would have inserted that word. As it is, a hotel
is subject to regulation, if at all, under the provisions of subd.
(c), subsec. 1, sec. 2 of the act. This language occurs after the
enumeration by subd. (a) of "any tenement house," etc., al-
ready noted, and the enumeration by subd. (b) of "any build-
ing or part thereof rented or hired for office purposes":

"(c) Any building not included in paragraphs (a) and (b)
of this subsection and no part of which is occupied by the
owner thereof for residential purposes, rented or hired for resi-
dential purposes, or any part of such building or land appur-
tenant thereto."

In "the common and approved usage of the language" (sec.
4971, Wis. Stats.), "any building * * * rented or hired
for residential purposes" would not be taken as the equivalent
of a hotel, and a hotel can be incorporated into the act only by
a somewhat strained construction and interpretation.

The characteristics of a hotel have been the subject of judi-
cial discussion by our own court in the recent case of Huntley
v. Stanchfield, 169 N. W. 276, 168 Wis. 119. In that case the
court described the method by which the business of one of the
parties was conducted, as follows, p. 122:

"* * * They conducted this business in the following
manner: (1) having a fixed rate of charges per day; (2) having
the guests register as is done in the hotel business; (3) main-
taining an office and a lobby; (4) maintaining a parlor for the
common use of guests; (5) keeping the building open to the
public generally; (6) accommodating transient guests."
Commenting upon this description, it was said, p. 124:

"* * * As heretofore shown, the character of defendants' business and the manner in which they conducted it show they were offering their accommodation to the public as hotels do and that it constitutes a hotel business in the modern legal sense."

In Humbard v. Crawford, 105 N. W. 330, the following definition is quoted from Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198, where it was said:

"* * * The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without previous agreement for accommodation, and without any previous agreement as to the duration of their stay, marks the important distinction between an hotel or inn and a boarding-house."

And further quotation is made from Schouler's Bailments, p. 288 (2d ed.)

"* * * An inn is a house whose keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment, while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode."

"Residential purposes," as used in this act, is intended to distinguish usage, on the one hand, for office purposes, and on the other, to distinguish from use for hotel purposes, or transient purposes. Beckling v. McKinstry, 185 Fed. 842, 843, cited in 4 Words & Phrases, Second Series, 350, emphasizes the distinction between a resident and a transient. Many definitions are quoted, among others from Town of New Haven v. Town of Middlebury, 63 Vt. 399, 21 Atl. 608, 610:

"The word 'transient' is the opposite of 'resident.' The latter describes a person at rest in a town, while the former describes him in his passage through or across it."

You state further:

"There is an attempt now being made by some owners of property in this city which would otherwise be rental property to escape the operation of the Act by denominating their pro-
perty ‘hotel property’ and giving it as many of the characteristics of an ordinary hotel as possible.”

Exceptional occupants of a hotel lose their transient character, and through long continued occupancy give their abode the characteristics of a settled legal residence. In such case no reason is apparent why the hotel building to that extent, and as to such patrons, does not take on a character which brings it within the terms of regulation of your department. In other words, where a building is used partly for “residential purposes,” and partly for hotel purposes, to the extent that it is used for residential purposes, it is subject to regulation; so far as used for purely hotel purposes, it is not.

This construction is deemed warranted by having particular regard to the language of subd. (c), subsec. 1, sec. 2, already quoted, which expressly makes the law applicable to “any part of such building” “rented or hired for residential purposes.”

This conclusion obviates the necessity of undertaking a hard and fast determination as to the exact line of demarcation in character between a building used for hotel purposes and one used for residential purposes. The same building at one and the same time may be partially subject to regulation and partially excluded from regulation, and the predominant character of its use is not the test of whether it is subject to regulation or not, but the test is whether it is used for residential purposes at all.

A holding out by a proprietor of willingness to receive transient guests as to even a majority of rooms, under the terms and conditions that govern the operation of a hotel, as above set forth, would not remove the balance of his rooms from regulation by your department. To the extent that the building was actually and in good faith used for hotel purposes, it would cease to be subject to regulation; but to the extent that it was employed for residential purposes, it would continue subject to regulation. In like manner, to the extent that any hotel proper came to be “rented or hired for residential purposes,” it would cease to possess the characteristics of a hotel, and become subject to regulation.

You present a second question in the following language:

“The second question arises under the same subparagraph. We are confronted with many cases where an ordinary build-
ing is rented and a very few rooms, say two or three, are occupied by the tenant and the tenant then sublets either furnished or unfurnished (generally the former) the remaining rooms in the building, usually on the plan of one room to each subtenant. The question arises as to whether we have jurisdiction over a situation such as this to fix and determine the rentals to be charged the subtenants by the sublandlord who actually lives in the building. It would seem that the answer to this question depends upon whether the word 'owner' as used in subparagraph in question is used in its technical sense as referring to the one possessing an estate in the property in question or whether it is used in its more general sense as referring to the one entitled to the immediate possession and control of the property in question."

Subsec. 2, sec. 2 follows:

"'Owner' means any person, firm or corporation which is a lessor or a sub-lessee, or any other person, firm or corporation entitled to receive rent or charges for the use or occupancy of any rental property or any interest therein, or the agent of such person, firm or corporation."

Under elementary and settled principles of statutory construction, force, meaning, and effect must be given to all of the provisions of this act. The word "owner" and the words "rental property" are obviously used in the same sense in subsec. 1 and in subsec. 2 of this section. "Rental property," as used in subsec. 2, having just been defined as including only buildings,

"no part of which is occupied by the owner thereof for residential purposes," and "owner" being expressly defined to include a "lessor or a sub-lessee," etc., it would clearly be an absurd result to hold that the property expressly excluded by the earlier section was brought within the purview of the act by the later section.

The matter will perhaps be clearer if, in lieu of the word "owner," as the same appears in subd. (c), subsec. 1, the words, "lessor or sub-lessee" were substituted, so that the definition would read:

"Any building * * * no part of which is occupied by the lessor or sub-lessee thereof for residential purposes."

It will be noted that sec. 2 is in the broadest possible language. It says:
"The following terms, as used in this act, are defined as follows: * * * ."

There is no restriction or limitation saying that the terms are so defined when used in the body of the act, and no language to indicate an intention to exclude the application of the definition, even in the interpretative portion of the statute itself. In this situation, to cite but a single authority, the rule stated in Sutherland on Statutory Construction, Vol. II, sec. 576, is controlling:

"Any provision in a statute which declares its meaning or purpose is authoritative. Whether it relates to the object of a whole act, or of a single section or of a word, it is a declaration having the force of law. It is binding on the courts, though otherwise they would have understood the language to mean something different."

Were the construction to be given to the law otherwise doubtful, there is an additional consideration which is deemed to be decisive. It is of course an elementary proposition that needs no citation of authority that where two constructions of a statute are possible, one of which would render it constitutional, and the other unconstitutional, that construction is to be preferred which establishes the constitutionality of the law. In the present case, a construction which would exempt the owner of an ordinary dwelling house, using the term "owner" in its restricted proprietary sense, from regulation in letting one or more furnished rooms, and which subjected another individual doing exactly the same thing in exactly the same sort of a house, who did not own the premises but had leased the same, to such regulation, would throw very serious doubt upon the constitutionality of this portion of the law. The owner of a home, in the situation supposed, is not subject to regulation. Whether an attempt at such regulation, in view of the language of the court in Bonnett v. Vallier, 136 Wis. 193, 195, h. n. 18, would be constitutional, may well be doubted.

But whatever led the legislature to exempt from regulation the actual proprietor of such a building, it is difficult to perceive any possible ground for distinction between his case and the case of a person, himself a tenant, who occupies a portion of a building for a home and rents out such rooms as are not required for the use of his family. The test of classification has
often been emphasized. It is perhaps as well stated in the case of *State v. Savage*, 184 Pac. 567, as anywhere else. It was there said, p. 569:

“If the statute applies only to one class of persons, and imposes upon them duties not common to others, there must exist in the relations to such persons to the state, to the public, or to individuals some reasonable ground of distinction sufficient to show that the classification is not merely personal and arbitrary; else there will be a denial of the equal protection of the law. [*Citing cases.*]

“The general principle seems to be that if legislation, without good reason and just basis, imposes a burden on one class which is not imposed on others in like circumstances or engaged in the same business, it is a denial of the equal protection of the laws to those subject to the burden and a grant of immunity to those not subject to it.”

Had the legislature attempted to make the test of regulation, or nonregulation, of two individuals engaged in doing exactly the same thing dependent upon the element of proprietorship of the premises devoted to the business in which they were engaged, a court might well be warranted in saying, in the language of *State ex rel. Owen v. Donald*, 161 Wis. 188, 195:

“This discrimination is wholly arbitrary; there is no legitimate classification on which it can rest.”

See also, as to the tests of a proper classification: *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 438-439; *Mehlos v. Milwaukee*, 156 Wis. 591, 605; *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.*, 144 Wis. 386, 399; *Northwestern Mut. Life Ins. Co. v. State*, 163 Wis. 484, 491; *Wisconsin Assn. of Master Bakers v. Weigle*, 167 Wis. 569, 575.

The correctness of the view herein set forth is strengthened by the fact that, even in the absence of legislative definition or the necessity of avoiding constitutional infirmity, the term “owner” has been construed as broad enough to include a tenant, as well as an actual proprietor.

*Texas Bank & Trust Co. v. Smith*, 192 S. W. 533, h. n. 1:

“The term ‘owner’ as generally used, signifies one who has the legal rightful title, but as used in [*citing statutes*], declaring a paramount lien for water furnished lands for irrigation, the term includes both the owner of the title and tenants in possession.”
Texas Bank & Trust Co. v. Smith, Beaumont Irr. Co. v. McDonald, 195 S. W. 617, h. n. 1:

"* * * The word 'owner,' though it primarily means the owner of the fee, includes also a person having a possessory right to the land."

See also: B. & O. R. Co. v. Walker, 16 N. E. 475, 480, 45 Ohio St. 577; Peterson v. Johnson, 132 Wis. 280.
And in Merrill R. & L. Co. v. Merrill, 119 Wis. 249, it was said, after citing numerous cases, p. 254:

"* * * Thus it appears very clearly that the word 'owned' is not a technical term; that it is a general expression to describe a great variety of interests, and may vary in significance according to context and subject matter."

Appropriations and Expenditures—Allotments—Public Officers—Pharmaceutical Association—Allotment to state pharmaceutical association out of appropriation to state pharmacy board subject to general rules governing appropriations.

November 11, 1920.

Honorable Merlin Hull,
Secretary of State.

Sec. 20.46 appropriates:

"All moneys collected or received by each and every person for or in behalf of the state board of pharmacy shall be paid within one week after receipt into the general fund, and are appropriated therefrom for the execution of the functions of the board. Of this there is allotted:

"* * *

"(3) One thousand five hundred dollars, to the state pharmaceutical association."

Sec. 20.78 provides:

"All appropriations made by law from state revenues for any department, board, commission, or institution of the state, or any society or association receiving state aid are made on the express conditions that such department, board, commission or institution, society or association, as the case may be, pays all moneys received by it into the state treasury within one week of receipt, and conforms with the provisions of sections 14.31, 14.32 and 20.77 of the statutes, both as to appropriations of its
own receipts, and as to appropriations made by the state from state revenues.''

Your letter of November 10 contains the inquiry as to whether this allotment of $1,500 may be paid in a lump sum to the state pharmaceutical association, or whether the same is subject to the provisions of sec. 20.78.

You are advised that in the opinion of this department there can be no question but what such association must comply with all the requirements of sec. 20.78, before it is entitled to receive any part of the appropriation. The mere fact that it is in form an allotment from an appropriation to another department is wholly immaterial. Within the scope and the purpose of the law, it is, to all intents and purposes, an appropriation to the state pharmaceutical association and stands on the same footing as if made directly to it.

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Agriculture—Live Stock—Fact that domestic animals die from hydrophobia, standing alone does not sufficiently establish that death has been occasioned by a dog or by dogs.

November 13, 1920.

James Murray,
District Attorney,
Fond du Lac, Wisconsin.

The facts are not stated with perfect clarity in your letter of November 11, 1920. You submit three cases, the first being one in which you say a dog bit a horse, and that the dog also bit another dog that died of hydrophobia. You do not state whether the dog and the horse in question were owned by the same or different persons, nor do you state whether the horse in question died of hydrophobia. In this situation, no answer to your question can be given.

The second case which you present is apparently one where cattle are affected with hydrophobia, and you have at present no evidence as to the source or origin of the disease.

In this situation, you are advised that, as a matter of scientific information, hydrophobia may result without the direct or necessary intervention of a dog at all. A wolf or a skunk, or even a hog, may give a bite which will result in the development of
the disease. This being so, the mere establishment of the fact that a domestic animal has died from hydrophobia is not sufficient to establish any liability against the county or any certainty that the damage was the result of a dog’s bite. Furthermore, in such a case there would be nothing to show but what the injury might have been the result of a bite inflicted by a dog owned by the owner of the animals which have been lost.

Your third case is that of a farmer who owned a dog that was brought to his place on May 28, and there seems to be good reason for believing that this dog inflicted damage upon the animals of the farmer, which resulted in their death.

You will note that the last sentence of sec. 1630 provides:

"1. * * * Before any claim shall be allowed by the county on account of damages done by dogs, the claimant shall furnish satisfactory proof that the damage was not done in whole or in part by any dog owned, kept or harbored by him."

Under this section the burden of proof is placed upon a claimant to demonstrate the innocence of his own dogs by satisfactory proof. "Satisfactory proof" has been a subject of frequent definition, and without exhausting the cases upon the subject, it is sufficient to say that it contemplates that degree of proof which is necessary to establish a cause of action in favor of the plaintiff in an action for fraud. M., St. P. & S. S. M. R. Co. v. Railroad Commission, 136 Wis. 146, 166.

This consideration as to proof of operation applies to all three of the situations which you have presented.

Appropriations and Expenditures—Public Officers—Attorney General—Appropriation to attorney general of moneys for "any expense actually necessary to the prosecution or defense" of a state case does not authorize advancing money for payment of the salary and expenses of members of a commission appointed by decree of the supreme court of the United States to fix the boundary between Wisconsin and Minnesota.

November 15, 1920.

Honorable J. G. D. Mack,
Madison, Wisconsin.

Pursuant to the communication submitted by you under date of November 12 and various oral discussions of the matter, this
department has felt constrained to re-examine the entire question of the liability of the state, under the terms of the decree in the action of Minnesota v. Wisconsin which led to the appointment of yourself and associates as commissioners for the determination of the boundary between the two states.

As noted in a letter of October 18, 1920, to the Honorable S S. Gannett, the decree found in 252 U. S. 273, 283, contains this language:

"Within thirty days counsel may present a proper decree for carrying this opinion into effect. The costs will be equally divided between the States."

In that letter it was assumed that sec. 20.08, subd. (2), Stats., making an appropriation to the attorney general, was sufficiently broad to authorize the payment of expenses incurred in carrying out the decree of the court. This letter was written upon the theory and assumption, as set forth in a subsequent letter of October 25, that the work and services to be rendered and the expenses incurred by the commission would be pursuant to the decree, and that such commissioners would, as provided in sub-

sec. 9,

"make a report of their proceedings under this decree as soon as practicable on or before the 1st day of May, 1921, and shall return with their report an itemized statement of services performed and expenses incurred by them in the performance of their duties."

It was stated in the letter of October 25 that the state was without power to advance a lump sum—for instance, $3,000 a month—in the absence of some express legislative provision.

Having considered the matter quite fully, the following considerations and conclusions are submitted for your information.

Sec. 2, art. VIII, Const., provides:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law. No appropriation shall be made for the payment of any claim against the state except claims of the United States and judgments, unless filed within six years after the claim accrued."

Sec. 2940m specifies certain cases in which costs against the state may be paid. These cases relate solely to actions in circuit court.
Noyes v. State, 46 Wis. 250, expressly considers the question of the liability of the state for costs awarded by the supreme court of the United States, and it was there said, p. 252:

"On what ground of authority the supreme court of the United States assumed to render judgment for costs against the state in its sovereign capacity, in the case of Morrill, it is difficult to conjecture. The judgment may not improbably have gone upon mere misprision of the clerk. Be that as it may, it is very certain that no statute of this state gives any authority to this court to render judgment for costs against the state in a criminal prosecution; and that this court has no jurisdiction to render such a judgment, even were it so ordered by the mandate of the supreme court of the United States. The jurisdiction of this court must come by the constitution and laws of the state. The federal supreme court cannot confer it; though it may, in cases involving federal questions, control its exercise."

And again, pp. 253-254:

"It is unnecessary to express any opinion on the effect of the judgment for costs of the federal supreme court. It is sufficient to hold that it is not a just claim against the state, within the meaning of the statute conferring jurisdiction on this court of actions against the state."

In Sandberg v. State, 113 Wis. 578, 589, it was said in general language:

"The judgment for recovery of costs against the state is erroneous. No court is authorized to render judgment for costs against the sovereign state, in absence of statute giving express authority. U. S. v. Barker, 2 Wheat. 395; U. S. v. Ringgold, 8 Pet. 150, 163; Stanley v. Schwalby, 162 U. S. 255, 272; State v. Smith, 52 Wis. 134. We find no statute giving such authority. The doubt expressed by Ryan, C. J., in Noyes v. State, 46 Wis. 250, 252, whether general cost statutes might apply against the state in civil actions is readily resolved by reference to the rule that general statutes are not to be construed to include, to its hurt, the sovereign."

In the case of Wisconsin v. Duluth, decided in October, 1877, and reported in 96 U. S. 379, the supreme court of the United States dismissed a bill of the state of Wisconsin with costs. Without making a detailed examination of the statutes as they existed at that time, it is deemed significant that, in order to bring about the payment of these costs, it was considered necessary, by ch. 110, laws of 1879, to appropriate the sum of $1,302.54
to the attorney general, to pay a judgment for costs in the
supreme court of the United States, in the case of the state of
Wisconsin against the city of Duluth, et al."

A further consideration of the provisions of sec. 20.08, subd.
(2), permitting

"the payment of expenses incurred by the attorney-general
in the prosecution or defense of any action for any abstract of title, clerk of court's fees, sheriff's fees, or
any other expense actually necessary to the prosecution or de-
fense of such cases,"

has led this department to doubt whether this section contains
any specific authority for the payment of the expenses of the
boundary commission. The same would constitute such appro-
priation only if it came within the phrase,

"any other expense actually necessary to the prosecution or de-
fense of such cases."

It seems doubtful whether the salary and expense of commis-
sioners appointed by the supreme court of the United States
could be classified as an expense necessary to the prosecution
or defense of this case. In the judgment of this department it
is rather an expense incident to the carrying out of the decree
of the court. The prosecution and defense of the case has been
carried to the point of judgment, and the expense now under
consideration is an expense of carrying into execution the
judgment of the court. The matter is not wholly free from
doubt, but it has been a rule of construction of this department
of long standing that, in case of doubt, the same should be re-
solved against an appropriation and in favor of the public
treasury.

This conclusion is not at all to be taken as holding that there
is no ultimate liability on the part of the state for the payment
of the costs in the present action. It is to be taken as deciding
merely that no present authority exists in any officer of this
state to make payment of any sum of money under the terms of
the decision of the court. Under the language of the supreme
court of the United States, in the case of Virginia v. West Vir-
ginia, 246 U. S. 565, there would seem to be little doubt as to
the power of the court to enforce its decree, including the li-
ability for costs.

This department is impressed with the view that the abstract
question of law involved is more or less of an academic one; that the sole question is one of procedure, and no doubt has ever been entertained as to the entire want of power to advance payments upon account as the work in question was being conducted, the theory of this department being that payment could only be made after the work and services had been rendered, the expenses incurred, and the same reported to the supreme court of the United States and approved by it.

The further view is now entertained that the orderly and regular method of procedure requires a legislative appropriation to meet the expense involved. A large number of boundary cases have been litigated in and decided by the supreme court of the United States, and to date no question has ever arisen upon the matter of payment by the respective states of their portion of the expense arising therefrom; and no doubt is entertained but what the legislature will promptly recognize its moral obligation and make all appropriations necessary to meet the situation. The present attorney general of the state will be governor at the time when the next legislature is in session, and therefore particularly interested in the proper disposition of this matter of litigation.

If the state of Minnesota has funds available for making pro rata payments during the progress of the work of the commission, there would seem to be no good reason why it might not advance funds from time to time, until the legislature of Wisconsin was in session and able to grant affirmative authority.

Mothers’ Pensions—Prisons—Parole—Fact that husband sentenced to penal institution for one year or more is paroled after such sentence does not take away right of his wife to apply for relief under mothers’ pension act.

November 17, 1920.

M. J. Paul,

District Attorney,

Berlin, Wisconsin.

A husband has been sentenced to Waupun for two years, immediately put out on parole, and his earnings are turned over to his wife. The amount of the same is not sufficient to sup-
port her and her five children. You inquire whether, under the provisions of sec. 48.33, subd. (5), she is entitled to make application for support under this section.

You are advised that the section expressly provides that, in case the children are dependent upon the mother, in a case among others where the husband has been sentenced to a penal institution for one year, she may make application for support. No exception is made to cover a case where the husband has been paroled.

No reason is apparent to this department why, under the circumstances stated, the county court in its discretion may not grant assistance.

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**Dairy and Food—Buttermakers’ Licenses**—One who engages in manufacture of whey butter is buttermaker within definition of sec. 1410b—2 and must have license therefor.

November 18, 1920.

Dairy and Food Commission.

Two questions are presented by your letter of November 17 and the communication of the district attorney of Polk county presented therewith, arising out of an action brought by the state against a cheesemaker employed at a cheese factory for making butter without a license.

The first question involves the construction of sec. 1410b—1, which reads:

"1. For the purposes of this section the terms ‘buttermaker’ and ‘cheesemaker’ shall respectively mean and include a person employed or who may be employed in any butter or cheese factory who has charge of and supervision over the actual process of manufacturing butter or cheese, and shall not include a person employed in a butter or cheese factory for the purpose of aiding or assisting in the manufacture of such product. This act shall not affect a person making up a product produced on his own farm."

The matter for determination is whether "the actual process of manufacturing butter," as the words are used in that section, includes the manufacture of whey butter, so-called.

This department is of the opinion that it does. "Butter" is defined by sec. 4601—4a, subsec. (8), as follows:
“Butter is the clean, nonrancid product made by gathering in any manner the fat of fresh or ripened milk or cream into a mass, which also contains a small portion of the other milk constituents, with or without salt or added coloring matter, and contains not less than eighty-two and five tenths (82.5) per cent of milk fat.”

Prior to the enactment of sec. 4607d—3 this department had occasion to consider the question as to whether, as the law then stood, the fat of milk obtained from whey might be lawfully used in the manufacture of butter, and by an opinion to the dairy and food commissioner under date of February 27, 1914, found in III Op. Atty. Gen. 264, it was expressly, ruled that it was

“proper to use this so-called whey cream in the manufacture of butter under the present provisions of our statute.”

Doubtless, the result of such ruling was in part responsible for the enactment of sec. 4607d—3. This section describes the product required to be labeled thereunder as “butter manufactured in whole or in part from whey cream.” It indicates no intention to revise the preexisting definition of butter or the meaning of that term, but merely indicates that, in the judgment of the legislature, sound public policy required that a particular type of butter should be labeled “whey butter.” As the law stood prior to its enactment, very clearly an individual employed to manufacture this product was engaged in making butter, and required a license therefor. Further and more particular reference to this particular type of product certainly cannot be held to have exempted the buttermaker from the provisions of the license law.

Having reached the foregoing conclusion, it becomes unnecessary to consider the other proposition raised or suggested, as to whether a licensed cheese factory may under such license make up all its by-products under its general permit to make cheese.

This may or may not be so. No ruling is made upon the subject. But whether correct or not, it is wholly immaterial, for the specific offense in the present case is not the operation of a butter factory without a license, but the activity of a buttermaker without such license.
Appropriations and Expenditures—Public Printing—Maps—
Appropriation to highway commission of money for distributing railroad and highway maps did not repeal by implication prior law for charging expense of printing same to appropriation of railroad commission, especially in view of statute providing that two appropriations for same purpose shall be considered supplementary.

November 22, 1920.

BOARD OF PUBLIC AFFAIRS.
Sec. 35.84 provides:

"Immediately after the receipt of public printing by the superintendent of public property he shall make distribution therefrom as follows:

"* * *

"(13a) To each member of the legislature at each regular session thereof, one hundred highway wall maps of Wisconsin, one hundred highway pocket maps of Wisconsin, and one hundred mounted railroad wall maps of Wisconsin."

Sec. 20.49, subsec. (5), contains this short paragraph:

"On July 1, 1919, not to exceed twenty-five thousand dollars for carrying out the purposes of subsection (13a) of section 35.84 of the statutes."

This latter section is quoted in your letter of November 17, 1920, in which, in effect, you inquire whether this appropriation of $25,000 is one for the exclusive use of the state highway commission. Your inquiry is not susceptible of intelligent answer without taking into account other statutory provisions and the history and relation of the two provisions already noted in connection therewith.

Our consideration of the problem of statutory construction involved must commence with a view of the statutory provisions as they existed prior to the 1919 session of the legislature. Turning to the statutes of 1917, we find that no provision was therein made for the distribution of highway maps, apart from their sale as provided by subsec. 14, sec. 1313. So that it may properly be said that, so far as the question of distributing highway maps to the state legislature was concerned, the statutes were blank. It is a matter of common knowledge that the practice of distributing railroad maps in that way was one of long
standing, and the statutes of 1917 contained a number of provisions upon the subject.

Sec. 35.84, subsec. (13), contained this proviso:

"* * * Upon written requisition of any member of the legislature, the railroad commission shall deliver, by mail or otherwise, one copy to each person designated by such member to receive the same; provided, however, that not more than one hundred such copies shall be so delivered by the commission upon the requisition of any one member for each regular session of the legislature."

which, it may be noted, was stricken out by ch. 541, laws of 1919, which created subsec. (13a), sec. 35.84, already quoted.

Sec. 35.92, subsec. (10), Stats. 1917 (which is preserved in the statutes of 1919), provided:

"The cost of printing the railroad map of Wisconsin shall be charged to the proper appropriation for the railroad commission."

Sec. 35.31, subsec. (2), then provided:

"The railroad commission shall purchase upon competitive bids, to be filed with and approved by the printing board, a metal plate for the printing of a railroad map of the state, and shall, quadrennially, present to the printing board a requisition for the printing of railroad maps therefrom, and the printing board shall thereupon procure the printing of such number thereof unmounted and such number thereof mounted on muslin and provided with rollers as are required for distribution by subsection (13) of section 35.84."

This remains upon the statute books now as then, except for the insertion of the words, "stone or," prior to "metal plate," which was made by sec. 37, ch. 703, laws of 1919, and the change of "quadrennially" to "biennially, on or before June first of such year," which was inserted by ch. 549, laws of 1919.

Sec. 20.51, subsec. (1), made an appropriation of $170,000, beginning July 1, 1918, to the railroad commission "for administration and the execution of its general functions." The payment for and the distribution of railroad maps was thus fully and completely covered by the statutes of 1917.

The progressive changes made by the 1919 legislature may be summarized as follows:

Ch. 541, laws of 1919, caused to be stricken out of sec. 35.84,
subsec. (13), the provision already noted, and enacted sec. 35.84, subsec. (13a). This act carried with it no appropriation whatever, and, so far as railroad maps were concerned, purported to do nothing more than to move the provision for their distribution to legislators from sec. 35.84 (13) to sec. 35.84 (13a). The other provisions noted above remained upon the statute books as theretofore, so that railroad maps for delivery to members of the legislature were chargeable to the general appropriation to the commission after the enactment of ch. 541, the same as prior thereto. It is irrelevant to the present inquiry to determine whether any provision for printing highway maps of the character intended for legislative distribution was made. It is probable that no such provision was made.

This ch. 541 was originally introduced as Bill No. 245, A., and apparently, as introduced, contemplated the entire elimination of railroad maps, and the substitution of the distribution of highway maps; but the provision for distributing railroad maps was restored prior to its final adoption and approval, which took place on July 10, 1919.

The law having been so modified, the next stage in the development of the situation is found in the enactment of ch. 609, laws of 1919, which purported to be

"An Act to amend subsection (5) of section 20.49, relating to highway maps and making an appropriation,"

and which contained the proviso:

"On July 1, 1919, not to exceed twenty-five thousand dollars for carrying out the purposes of subsection (13a) of section 35.84 of the statutes."

It was by the enactment of this law, if at all, that the preparation of the railroad map ceased to be chargeable to the general appropriation to the railroad commission and became chargeable to the appropriation then made.

This department is of opinion that ch. 609 did not operate to repeal those provisions of the law which theretofore made the printing of all railroad maps chargeable to the general appropriation of the commission. First of all, the act itself purports to relate only to highway maps and make an appropriation. Secondly, there is no repealing clause in ch. 609 and nothing to indicate an intention to supersede other provisions.
The language of our supreme court in the case of Ward v. Smith, 166 Wis. 342, 344, is extremely pertinent:

"* * * In that situation there are a few familiar principles which point the way to a correct conclusion as to whether the later enactment was intended to supersede such section. If the question suggested must be answered in the affirmative, it is upon the ground of implied repeal: Repeals of that nature are not favored. State ex rel. Milwaukee v. Milwaukee E. R. & L. Co. 144 Wis. 386, 395, 129 N. W. 623; Madison v. Southern Wis. R. Co. 156 Wis. 352, 146 N. W. 492. If no purpose to repeal the existing law by a new enactment is clearly indicated, the court should, if possible, give effect to both. In other words, it must not be supposed that the legislature intended, by the later statute, to repeal the prior one, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject and therefore displace the prior statute."

Applying this principle to the present case, we find that it is peculiarly one where the court should give effect to both enactments. The provisions relative to printing the railroad map were numerous and detailed, and there is nothing to suggest an intention that they should be disturbed.

In addition to this general principle of statutory construction, the legislature has been at pains to lay down the following rule for our guidance, by sec. 20.77, subsec. (4):

"In case more than one appropriation is made by law to or for any state officer, department, board, commission or other body, or for any purpose, such appropriations shall, unless otherwise specifically provided, be construed as supplementary to and not in exclusion of any other appropriation to or for the same officer or body or for the same purpose."

The most that can be said, then, is that sec. 20.49, subsec. (5), appropriated $25,000 for carrying out the purposes of subsec. (13a), sec. 35.84; that sec. 35.92, subsec. (10), provided that, so far as the purpose of sec. 35.84 involved the printing of railroad maps, such purpose was to be met out of the proper appropriation for the railroad commission. The rule of construction being applied would make the two appropriations supplementary and not in exclusion of one another.

Subsequent legislation during the same session merely serves to confirm this view.
Ch. 664, laws of 1919, by sec. 2, provided:

"(20.51) (3) On July 1, 1919, not to exceed fifteen thousand dollars, for expenses incurred in printing the Wisconsin railroad map, including the cost of the stone;"

the result of this section being to transpose the expense of printing railroad maps, including the maps for legislative distribution, from the general appropriation to the railroad commission, and making the specific appropriation of $15,000 therefor.

Were there any doubt as to the situation created by the enactment of ch. 609, the same would be removed by ch. 664, which provides in general terms for the printing of the Wisconsin railroad map.

This department therefore concludes that, as they now appear upon our statutes, the appropriation in sec. 20.51, subsec. (3), and the appropriation of sec., 20.49, subsec. (5), supplement one another, to the extent that, if the $25,000 appropriated by sec. 20.49, subsec. (5), is more than sufficient to print the highway maps therein referred to, it is available for printing railroad maps, in so far as the same are intended for distribution by members of the legislature.

Your second inquiry, as to whether the appropriation is broad enough to make the same available both for the printing and distribution of highway maps, is deemed sufficiently answered by subsec. (10), sec. 35.92, which provides:

"The cost of printing the railroad map of Wisconsin shall be charged to the proper appropriation for the railroad commission."

So that the cost of such distribution is made expressly chargeable to the appropriation charged with the cost of the printing of the map.

In conclusion, it should be noted that, in the preparation of this opinion, a prior opinion of this department, dated May 28, 1920,* rendered to the railroad commission, has not been overlooked. That opinion was written in response to a request from the railroad commission for an opinion as to which body was called upon to order the railway maps to be distributed, as provided for in subsec. (13a), sec. 35.84. It was assumed in the request for the opinion that such maps were

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"to be paid for out of the appropriation to the highway commission provided for by subsec. (5), sec. 20.49."

No consideration was given in that investigation to a determination of the point involved in the present inquiry. In so far as anything in such opinion conflicts with the conclusion herein stated, the same is expressly modified and withdrawn.

**Criminal Law—Espionage Act—Public Officers—Vacancies—Words and Phrases—Meaning of "infamous crime" considered.**

Statute granting right of action for emoluments of office in case vacancy is created by conviction of crime and reversal of such conviction on appeal, not being retroactive in terms, does not apply to case of vacancy arising out of conviction prior to enactment of law and where conviction has been reversed subsequent thereto.

November 23, 1920.

H. N. B. Caradine,
District Attorney,
Monroe, Wisconsin.

On the 7th day of August, 1918, J. M. Becker, county judge of Green county, was convicted of a violation of the so-called espionage act. The statutes of Wisconsin, as they then stood, contained the provision, applicable to the office of county judge as well as others:

"Every office shall become vacant on the happening of either of the following events:

"(5) His [the incumbent's] conviction of any infamous crime or of any offense involving a violation of his official oath." Sec. 17.02, Stats. 1917.

Upon such conviction and under date of August 30, 1918 (VII Op. Atty. Gen. 510), a ruling was made by the attorney general:

"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."

Pursuant to such opinion, a successor to Mr. Becker was appointed and inducted into office.
Ch. 362, laws of 1919, renumbered sec. 17.02 to be 17.03, and rewrote subsec. (5) thereof so as to read:

"His conviction by a state or United States court of and sentence for treason, felony or other crime of whatsoever nature punishable by imprisonment in any jail or prison for 'one year or more, or his conviction by any such court of and sentence for any offense involving a violation of his official oath, in either case whether or not sentenced to imprisonment. A vacancy so created shall in no case be affected by a stay of execution of judgment. Reversal of the judgment against such officer shall forthwith restore him to office, if the term for which he was elected or appointed has not expired, but, in any event, shall entitle him to the emoluments of the office for all the time he would have served therein had he not been so convicted and sentenced; but pardon shall not restore him to office or entitle him to any of the emoluments thereof."

A claim has now been filed by the said J. M. Becker for compensation

"for the balance of said term of office to which he had been chosen and qualified, for the months of September, October, November and December of the year 1918, and for the whole of the year 1919, a period of one year and four months, and has been deprived of the emoluments thereof, and by virtue of the statutes of Wisconsin in such case made and provided is now entitled to the emoluments of the office for all the time he would have served therein had he not been so convicted and sentenced,"

and you request to be advised as to the validity of such claim.

At the time that the opinion referred to was rendered, no consideration was given as to the meaning of "infamous crime." Apparently, it was assumed that the test thereof was the same as was laid down in Ex Parte Wilson, 114 U. S. 417, being where the statute under which the conviction took place authorized the court to award infamous punishment, that is, imprisonment for a term of years at hard labor. The correctness of this conclusion may be doubted, in view of the considerations next herein to be noted.

The present section found its predecessor in ch. 11, sec. 2, subsec. 5, Rev. Stats. 1849, which read:

"His conviction of any infamous crime, or of any offense involving a violation of his official oath."
Art. III, sec. 2, Const., contains the provision:

"* * * Nor shall any person convicted of treason or felony be qualified to vote at any election unless restored to civil rights."

Art. XIII, sec. 3, contains the provision:

"* * * No person convicted of any infamous crime in any court within the United States, and no person being a defaulter to the United States, or to this state, or to any county or town therein, or to any state or territory within the United States, shall be eligible to any office of trust, profit, or honor in this state."

In the index to the statutes of 1849, these two constitutional provisions appear in the same grouping with the predecessor of the present sec. 17.03, indicating that "infamous crime" and "felony" were treated as equivalents.

Sec. 15, art. IV, Const., confers upon members of the legislature privilege from arrest "in all cases except treason, felony and breach of the peace."

In the case of State ex rel. Isenring v. Polacheck, 101 Wis. 427, the court said, p. 431:

"* * * The word 'felony' in the provision of the constitution quoted must be limited to such offenses as were felonies at the time the constitution was adopted. Jackson v. State, 81 Wis. [127] 131; Klein v. Valerius, 87 Wis. [54] 60, 61. We must hold that the offense charged does not come within the exception named in the constitution."

And the possibility is therefore suggested that the term, "infamous crime," as that phrase was employed in the constitution and in the statute adopted practically contemporary therewith, may be restricted in its meaning to such an offense as was an infamous crime at common law.

U. S. v. Sims, 161 Fed. 1008, 1012, quotes approvingly from the case of Sylvester v. State, 71 Ala. 17:

"'An infamous crime was regarded as comprehending treason, felony, and the crimen falsi.'"

This department has considered the question whether a violation of the espionage act constituted a felony, and reached the conclusion that it did not.* That it does not constitute treason,

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within the constitutional definition, is equally apparent. The definition of crimen falsi is equally exclusive of this offense. Words & Phrases, p. 1741.

Without more extended investigation this department is not now prepared to say that conviction under the espionage act would constitute conviction of an "infamous crime," within the meaning of the statute. If this were true, then, in contemplation of law, the act of the claimant in absenting himself from the office was a voluntary abdication thereof. The mere information or notice to vacate, given him by the governor, would not be sufficient to work an ouster, or warrant him in vacating the office without a contest.

The foregoing conclusion may or may not be tenable, but seemingly more decisive considerations would render resort thereto wholly unnecessary. As has been pointed out above, the statute at the time of claimant's conviction contained no provision for restoring to office or payment of the emoluments of office to an individual convicted, and whose sentence was reversed upon appeal. When claimant was convicted of the offense, he automatically lost all right to the office, and to the compensation provided for the discharge of its functions.

As was stated in McKannay v. Horton, 91 Pac. 598, 601:

"* * * No man has a property right in an office paramount to the public interest. He has a property right in the salary and emoluments of an office while he is capable of discharging and actually discharges its duties; but when, by his fault or misfortune, he is no longer able to render the service, the public interests demand that he shall give way to some one who can. An official who is declared insane is simply unfortunate; but he ceases to be an official. An innocent man who is unjustly convicted of a felony is doubly unfortunate; but the fact that he may by means of an appeal ultimately succeed in establishing his innocence does not entitle him in the meantime to hold on to a public office which he is no more capable of serving than if he were insane. The law allows an appeal from a conviction of felony because, so far from being against the public interest, it is promotive of the public interest that a person accused of crime should have every reasonable opportunity of vindicating his innocence. But, if the person so convicted is the incumbent of a public office, these considerations do not weigh in favor of retaining him in that position pending an appeal."

The language of sec. 17.03 as rewritten is purely prospective. It states:
"Any public office shall become vacant upon the happening of either of the following events."

There is nothing to suggest that its operation shall be retroactive.

In this situation, clearly, the statute conferred upon individuals that might thereafter come within the class occupied by claimant a new right, and the language of the supreme court in the case of Read v. Madison, 162 Wis. 94, 100, is in point:

"Statutes conferring new rights are generally held not to have a retroactive effect unless such intention is fairly expressed or clearly implied." (Citing a large number of cases.)

Among the cases cited by the court in that opinion is one which contains language even more precisely in point. Keeley v. G. N. Ry. Co., 139 Wis. 448, involved a situation where, at the time of a negligent injury causing death, the damages recoverable were limited by statute to $5,000. Subsequently, and before the trial, an amendment was passed, increasing the limit to $10,000, and the court said, p. 454:

"It was not a mere change in remedy, but to all practical purposes it created a new right of action. If it created a new right and did not merely change the remedy, it is not applicable to prior transactions. This is familiar law."

Quinn v. C., M. & St. P. R. Co., 141 Wis. 497, states this principle in head note 1:

"A law giving, under specified circumstances, a right of action for damages to particular surviving relatives of a person when his death has been caused by actionable negligence of another, does not apply to wrongs antedating the law though death resulted therefrom subsequently."

And, commenting upon the decision in Keeley v. Great N. R. Co., 139 Wis. 448, 121 N. W. 167, said, p. 500:

"It was substantially held that the law not only did not, but could not, legitimately, have a retroactive effect; that rights growing out of a wrong must relate to the happening of the wrong itself."

And continued, in words that characterize the present situation, p. 501:

"The statute is not by its terms retroactive. If it were ambiguous on that point it would, on general principles, have
to pass successfully the test of strict construction to be held retroactive in intent (Vanderpool v. La Crosse & M. R. Co. 44 Wis. 652, 663), and particularly so since it is somewhat penal in character, though, of course, not classifiable as a penal law, strictly so called. Then, again, the decision referred to and the result here is within the principle that the legislature cannot, if it would, pass a law creating new obligations based on past wrongs or acts, though it may provide new remedies for existing situations."

This principle of law, in the absence of anything whatever to indicate that the statute was intended to apply to a case that existed prior to its enactment, would seem to settle the matter adversely to claimant.

* * * *

Public Lands—Taxation—Drainage Assessments—Special assessment may not be imposed by drainage district upon lands owned by state.

November 23, 1920.

HONORABLE MATT LAMPERT, Chief Clerk,
Land Department.

Your letter of November 12 presents the question of whether lands owned by the state are liable to assessment for cost of construction under sec. 1379—18, Stats., the same being the drainage act.

You are advised that, in the opinion of this department, there is no language in sec. 1379—18 sufficiently broad to include the state of Wisconsin. It provides for assessment upon any particular lands or corporations.

As was said in an opinion of this department:

"* * * Our supreme court has frequently held that 'general statutes are not to be construed to include, to its hurt, the sovereign.' Sandberg v. State, 113 Wis. 578, 589; Milwaukee v. McGregor, 140 Wis. 35, 37; State v. Milwaukee, 145 Wis. 131, 135.' II Op. Atty. Gen. 836, 838.

It has likewise frequently been ruled that state lands are not subject to taxes or assessments, either special or general. A drainage assessment is nothing more than a special assessment for benefits.

It will be noted, moreover, that the legislature deemed it necessary, by sec. 1379—18b, to provide:
"County lands in any proposed district may be assessed by benefits and assessed for construction and awarded damages the same as other lands."

The next section relates specifically to state lands, and is as follows:

"Section 1379—18c. In case it is necessary to run a drain across state lands, the commissioners of public lands shall on petition of the commissioners in writing grant permission to do so."

The legislature therefore had before it the subject of state lands, but did not see fit to provide that they should be liable to assessment.

We find nothing at variance with the conclusion herein expressed, in the opinion of the supreme court in In re Door County Drainage District, 179 N. W. 581.

Mothers’ Pensions—Where mother’s pension is granted to widow and dependent children of policeman and subsequent allowance is made from police pension fund, mother’s pension may be discontinued prior to expiration of year.

Payments from police pension fund are form of "public assistance" and automatically terminate right of widow to receive pension under terms of statute.

November 23, 1920.

James Murray,
District Attorney,
Fond du Lac, Wisconsin.

A policeman with a wife and children contracted pneumonia and died as a result. Application was made by his widow for a pension, pursuant to the provisions of sec. 925—52n, and sections following. The question was raised as to whether the illness of the deceased was contracted while he was on duty. The hearing and decision upon this application were delayed for this reason, and pending the decision thereof, the widow made application for and was granted a pension under the provisions of sec. 48.33.

Subsequent to the grant of the mother’s pension it was decided by those in charge of the police pension fund that she came
within the conditions which entitled her to relief from that fund, and she was granted an allowance of $50 per month for the future, and paid a lump sum at that rate from the date of her husband's death. The amount of such pension or allowance, in the judgment of the board of child welfare provided for in sec. 48.33, subd. (2), is sufficient for the support and maintenance of the mother and her children.

You now inquire whether, under these circumstances, the court may discontinue or modify the original allowance made as a mother's pension. Of course, such aid could be discontinued at the end of the first year. We take it, therefore, that your inquiry is intended to ascertain whether or not the power exists to discontinue or modify such pension prior to the expiration of the first year.

You are advised that, under such circumstances as you have detailed, such power exists.

This conclusion results from a consideration of all the provisions of the statute, and the manifest purpose and intention of this form of public aid.

Sec. 48.33 provides that the board of child welfare to be appointed by the county judge may

"recommend discontinuance and reductions in aid and generally to act, consult and confer with each other and the court relative to any and all problems relating to families to be aided and as to the best methods of carrying out the provisions of this section economically and efficiently."

It would therefore seem that the legislature intended that the pension should be carefully graduated, so as to meet the needs and requirements and best interests of a dependent mother and her children. Clearly, in a case where the mother married an individual possessed of considerable property within a month or two months after the granting of the pension, or where, through the death of some distant relative, she suddenly and unexpectedly came into possession of a competence, the reason for granting support to her would be at an end, and with the end of such reason, under an intelligent administration of the law, the support itself should end. The statute was not intended to encourage waste or profligacy, but aid is to be expended economically and efficiently.

Apart from these general considerations, which would be suf-
sufficient as a matter of independent reasoning to warrant the conclusion that aid should be terminated when no longer required, we find that sec. 48.33, subd. (6), contains the proviso:

"* * * Such aid shall be the only form of public assistance granted to the family and no aid shall continue longer than one year without reinvestigation."

That aid derived from the police pension fund was a form of "public assistance," within the meaning of the statute, seems so plain as to require no citation of authority. This being so, as soon as such grant was made, the right of the mother to receive any portion of the mother’s pension would automatically terminate.

As was said in an opinion of this department, found in V Op. Atty. Gen. 554:

"* * * She is entitled to it only during the time her status is such as to bring her within the terms and requirements of the law. * * * when she changes her status so that she would not be entitled to original aid she forfeits her right to the aid which she was previously enjoying."

That opinion related to discontinuance of aid where more than a year had expired, but the reasoning of the case is none the less applicable.

The use of the language, "no aid shall continue longer than one year without reinvestigation," suggests that such aid might be discontinued. The section is a limitation upon the power to grant aid, not a limitation upon the power to discontinue aid granted.

Corporations—Public Utilities—In investigation of reasonableness of rentals by commission statute does not contemplate that notice shall be given to all occupants of rental property under investigation.

WALTER H. BENDER, Director,
Department of Rent Regulation,
Railroad Commission of Wisconsin.

Sec. 5, ch. 16, laws of the special session of 1920, provides:

"The commission upon its own motion may, or upon complaint shall, proceed with or without notice to investigate whether the
rent, charge, or other terms or conditions for the use or occu-
pancy of rental property or the service in connection therewith
are reasonable and just. But no order affecting any such rent,
charge, terms, conditions or service or act complained of shall
be entered by the commission without a formal public hearing.
Complaints may be made by or on behalf of any tenant; and
may also be made by any owner except where the tenant is in
possession under a lease or other contract, the term specified in
which has not expired, and the reasonableness and justness of
which has not been determined by the commission. Notices of
complaints and of the time and place of hearings thereon shall
be given by the commission as provided in sections 1797m—44
and 1797m—45."

Sec. 1797m—44 provides:

"The commission shall, prior to such formal hearing, notify
the public utility complained of that a complaint has been made,
and ten days after such notice has been given the commission
may proceed to set a time and place for a hearing and an in-
vestigation as hereinafter provided."

Sec. 1797m—45 provides:

"The commission shall give the public utility and the com-
plainant, if any, ten days' notice of the time and place when
and where such hearing and investigation will be held and
such matters considered and determined. Both the public
utility and complainant shall be entitled to be heard and shall
have process to enforce the attendance of witnesses."

You state correctly that this section implies that notice need
only be given to the landlord where the proceeding is com-
menced by the commission on its own motion, but add that, in
view of the direct and peculiar interests which the tenants have
in your decision and the fact that you are modifying the ex-
isting specific contract to which the tenant is a party, you feel
some doubt as to your power to fix rentals without making the
tenants parties, and ask for advice upon this point.

It is the judgment of this department that, in conducting
hearings of the character specified, the tenants need not be made
parties. It is respectfully suggested that neither you nor the
commission are modifying the existing specific contract, as you
phrase it. On the contrary, the law has already abrogated all
such contracts, by sec. 3, where it provides:

"All rents, charges, or other terms or conditions for the use
or occupancy of rental property and all services in connection
therewith shall be reasonable and just, and every unreasonable or unjust rent, charge, or other term or condition for the use or occupancy of rental property or service in connection therewith is prohibited and declared unlawful."

It is of course wholly unnecessary to refresh your mind as to the fundamental theory of this and similar statutes which do not contemplate the exercise of legislative power, but which commit to you the duty of ascertaining and disclosing the particular rate, charge, classification, or service which is unreasonable. From the day that this rent regulation bill was enacted, all rentals in the city of Milwaukee took on an indeterminate character.

Your long familiarity with procedure before the railroad commission makes you perfectly aware of the fact that it is not the practice, when the commission investigates rates on its own motion, or even when it investigates rates and practices upon petition, to give individual notice to every single patron of the utility, this, doubtless, by reason of the fact that our court has never accepted the proposition that any vested right existed in the user of a public utility—the passenger or shipper, in case of a carrier, the subscriber, in the case of a telephone—to the service of such instrumentalities.

This proposition was argued at length in the brief of the state in the case of Attorney General v. Wisconsin Telephone Company, 169 Wis. 198, but both the utility and the railroad commission law proceed upon the theory that these various individuals are not necessarily made parties to proceedings, either before the commission or in court.

No provision is made for appeal by a shipper from a decision of the interstate commerce commission, so that we find, all the way along the line, that no sanction has as yet been given to the proposition that the patron of a public utility has a property right in the service of such utility. A tenant by the law was automatically deprived of his right to service at contract rates and henceforth is entitled to service only at reasonable rates, which may be raised or lowered by the commission without his being made a party to the proceeding.

No effort has been made to cover the subject in any sort of detail, and what has been written above is largely by way of suggestion, in the belief that the soundness of the views expressed would commend themselves at once to you when your
attention was directed thereto. If you feel any further doubt in
the matter, we shall be glad to have the benefit of your sug-
gestion, and consider it further.

It would seem that the only proposition that could raise any
doubt is the novelty of the conception that a tenant has passed
into the same category with other patrons of public utilities.

_Bridges and Highways—Municipal Corporations—Villages—_

Territory sought to be incorporated does not become village
until order of court is recorded.

Tax levied by county and apportioned to town for construc-
tion of bridge on county system of prospective state highways,
prior to such incorporation, is collectable from properties lo-
cated in newly incorporated village.

November 24, 1920.

L. W. Bruegger,
_District Attorney,_
Kewaunee, Wisconsin.

At the annual meeting of the town of Casco, in Kewaunee
county, held on April 6, 1920, a motion or resolution was
adopted, in the following language:

"Moved and carried that the town board shall be authorized
to build all necessary bridges under the state and county aid
bridge laws, and petition the county and state for aid."

In accordance with this resolution of the town meeting the
construction of a bridge was authorized by the county board,
and a contract, or contracts, therefor let during the month of
August, 1920. It is understood that, pursuant to the provisions
of sec. 1317m—5, subsec. 1a, the county board has by resolution
provided that a portion of the cost of the improvement, amount-
ing to $5,700, shall be assessed as a special benefit against the
town of Casco.

You state in your letter of November 10 that subsequent to
the resolution adopted by the town,

"proceedings were taken by a portion of the town of Casco to
incorporate into the village of Casco and the incorporation was
completed on or about the 21st day of June, 1920."
Your letter of more recent date indulges in the same assumption that the contract for the construction of the bridge was in fact let after the date of the incorporation of the town. This assumption of fact on your part is, in the judgment of this department, erroneous. The statute specifically provides when a village shall be deemed incorporated. This provision is found in sec. 61.10. It is there said:

"* * * Such territory shall, from the time of the recording of the order of the court aforesaid in the office of the register of deeds, be deemed a body corporate by the name specified in such order."

Independent investigation of the matter at the office of the secretary of state discloses that the order of the court in the present case was recorded in the office of the register of deeds for Kewaunee county on September 17, 1920. Consequently, the village did not come into existence until that date.

The situation, therefore, differs from that which you have assumed, with respect to the time when the corporation came into existence, and it is believed is ruled by a prior opinion of this department, found in I Op. Atty. Gen. 73:

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

You will note that sec. 61.17 provides only for the apportionment of taxes levied for town purposes, which confirms the view that taxes levied for other purposes must be used for the purposes for which they have been authorized.
Agriculture—County Fairs—Appropriations and Expenditures—Public Officers—County Board—Existence of county agricultural society does not prevent purchase of real estate by county board as site for county fair, if price thereof does not exceed $8,000.

Terms of resolution considered and held to make appropriation.

November 26, 1920.

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

The county board of Burnett county has adopted two resolutions that follow:

"Resolved that a committee of three viz. Charles Bakker, Philip Kuhnly and Isaac Lundquist, be and hereby are appointed by the county board of Burnett county, in annual meeting assembled, to be known and designated as the county fair committee of Burnett county. Said committee is hereby directed to purchase in the name of the county, suitable grounds to be used for county fair purposes. Said grounds shall consist of not less than thirty-five acres within the village limits of Webster in said county or said grounds may be located outside of the said village provided it lay along some public highway so that the entrance thereto may be placed not more than one mile from the public school building in said village of Webster. Said committee is hereby directed to grant, in the name of the county, the use of said county fair grounds to some agricultural or other similar society for county and industrial fair purposes and exhibition, as provided in sec. 59.69, Wis. Stats. The county treasurer of said county is hereby directed to pay for said tract out of funds provided for said purpose upon order of said committee, signed by the county clerk, and countersigned by the county chairman. Provided further, that not more than eight thousand dollars shall be expended for said fair grounds. Should a vacancy occur in said committee, the same shall be filled by the county chairman by appointment.

"Resolved, that the sum of eight thousand dollars be, and is hereby levied against the taxable property of the county to be used for the purchase of county fair grounds for Burnett county, Wisconsin, as set forth in the preceding resolution."

Your communication to this department calls attention to the fact that a fair has been held by the Burnett County Agricultural Society at Grantsburg, in Burnett county, for approxi-
mately 25 years, during which time it has been receiving state aid. You call attention to the provisions of sec. 1460, Stats., which provides for the manner of organizing county agricultural societies, and restricts such organizations to "not more than one in each county."

Sec. 20.61, subsec. (11), Stats., provides for the payment of state aid to but one society, association, or board in each county.

Sec. 59.69, Stats., contains this provision as to the powers of county boards:

"Lands upon which to hold agricultural and industrial fairs and exhibitions may be acquired by county boards, as follows:

"(1) In counties containing less than three hundred thousand population, by purchase, but not exceeding in value eight thousand dollars unless the expenditure is first approved by the electors of the county as provided in this subsection; and the board may grant the use thereof from time to time to agricultural and other societies of similar nature for agricultural and industrial fairs and exhibitions."

Your letters raise the question, first, as to whether, construing these provisions of the statutes together in the light of existing conditions, the county board has power to pass a resolution appropriating money and levying a tax for the purchase of land in the village of Webster. Second, you ask if the resolutions quoted constitute a valid appropriation of moneys for the intended purpose.

You are advised that, in the judgment of this department, there is nothing contained in the provisions of sec. 1460 inconsistent with the enactment of this resolution. The only restriction upon the power of the county board is that they may not purchase land exceeding in value $8,000, without a vote of the qualified electors of the county. It does not appear that the moneys heretofore expended by the county for the purchase of lands, together with the amount now appropriated, will exceed $8,000. Consequently there is nothing to prevent the purchase of land as contemplated and the appropriation of money therefor.

Subsequent to its acquisition the question might well arise as to whether the use of the same could be granted to any agricultural society other than the Burnett County Agricultural Society, above mentioned. But you will note that the use of such premises is not restricted to agricultural societies, but it
is provided that the same may be granted to other societies of similar nature for agricultural and industrial fairs and exhibitions. It may be a very foolish expenditure of money for the county to thus acquire lands where the primary purpose for which they might be used is already adequately supplied. But with the wisdom or folly of county legislation, as with state legislation, the court may not concern itself. It is purely a question of power, and not of policy. This being so, the county board might make the appropriation questioned.

Answering the further inquiry of your letter, it is the opinion of the department that the county board has effectively made such appropriation. The elements of a valid appropriation are well formulated by the supreme court of Indiana, in the case of Ristine v. Indiana, 20 Ind. 328, 338, in these apt words:

"Appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be an authority from the Legislature given at the proper time, and in legal form, to the proper officers to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the State."

At page 339 it said somewhat more concisely that it was authority

"without further legislative direction, to apply the general fund in the treasury to the payment of those claims."

Tested by these considerations, the resolution in question clearly makes an appropriation, when it employs the following language:

"* * * The county treasurer of said county is hereby directed to pay for said tract out of funds provided for said purpose upon order of said committee, signed by the county clerk, and countersigned by the county chairman."

In the case of State v. Hull, 178 N. W. 255, decided by our supreme court, words much less definite were held a sufficient appropriation by the circuit court for Dane county, and upon appeal the supreme court inferentially sustained the reasoning of the lower court by disposing of the matter without consideration, notwithstanding that the point was fully presented and argued.
Indigent, Insane, etc.—Legal Settlement—Statute contemplates residence of one whole year in any town, village or city in order to establish legal settlement.

November 27, 1920.

Board of Control.

Sec. 49.02 specifies the manner in which a legal settlement may be acquired. It provides:

"Legal settlements may be acquired in any town, village, or city so as to oblige such municipality to relieve and support the persons acquiring the same in case they are poor and stand in need of relief, as follows:

*(4) Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; * * *

You will therefore note that the rule as to residence, in case of acquisition of legal settlements, differs from the rule as to acquiring the right to vote. As stated, a residence of ten days in a precinct is sufficient to confer the right of suffrage therein, but apparently nothing less than a full year is sufficient to "gain a settlement" under the law.

If, then, the individual in question had no residence in this state prior to coming to Wisconsin, and has never resided in any town, village or city for "one whole year," she has acquired no legal settlement since coming to the state.

Contracts—Public Officers—Town Board—Sec. 4549 does not prohibit member of town board from entering into contract with county state road and bridge committee for construction of road or bridge in his town.

November 27, 1920.

E. S. Jedney,
District Attorney,
Black River Falls, Wisconsin.

Sec. 1317m—5, subsec. 8, provides:

*(3) The powers and duties of the county committee shall be as follows:

*(e) To enter into such contracts, in the name of the county,

85—A. G.
and to make such arrangements as may be necessary for the proper prosecution of such construction and maintenance of highways and bridges as is provided for by the county board. The county state road and bridge committee shall be the only committee representing the county in the expenditure of county funds in constructing or maintaining, or in aiding in constructing or maintaining any roads or bridges within the county."

Subsec. 8, subd. (4), of the same section provides:

"The town chairman of each town in which state aid road or bridge construction is performed shall be ex officio a member of the county committee and shall act with such committee on all matters affecting such construction in his town, provided the town has voted a portion of the cost thereof."

We assume that a contract is contemplated to be made pursuant to these sections. One of the prospective bidders upon such contract is a member of the town board of the town in which the work is to be done, but not the chairman of such board. You inquire whether a contract can be legally awarded to such member of the town board, in view of the provisions of sec. 4549, Stats.

You are advised that, in the judgment of this department, there is nothing in the provisions of sec. 4549 which would render such contract invalid. The provisions of such section, so far as pertinent, render it a criminal offense for

"any member of any town board" to "have, reserve or acquire any pecuniary interest * * * in any purchase or sale of * * * property * * * or in any contract, proposal or bid * * * in relation to any public service * * * made by, to or with him in his official capacity or employment, or in any public or official service."

The present contract would not be made by, to or with this member of the town board in his official capacity, or in any public or official service by him, and hence is not prohibited by the statute. Were the contract made by the town board of which he is a member, or if the chairman of the town sought to enter into the contract with the committee of which he is a member, then a different situation would be presented.

The foregoing conclusion is in accord with an opinion of this department, rendered June 4, 1914, III Op. Atty. Gen. 748.
Corporations—Quorum—Votes authorized to be cast by mail under provisions of sec. 1786c—12 may not be counted in determining a quorum under sec. 1786c—12a nor under sec. 1749.

November 30, 1920.

Edward Nordman, Director,
Division of Markets.

Sec. 1786c—12a provides that under certain contingencies in the case of cooperative associations,

"the stockholders present at such meeting, if equal in number to ten per cent or more of the total number of the 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."

Your inquiry of November 29 is directed to the ascertaining of whether votes by mail may be counted in making up the quorum, or whether ten per cent of the stockholders must be present in person.

You are advised that, in the judgment of this department, the ten per cent requirement of sec. 1786c—12a must be met by the actual presence in person or by proxy of the number of stockholders specified.

As is said in Hill v. Town, 138 N. W. 334, 337:

"All of the authorities agree that the requirements of a statutory quorum are mandatory."

An examination of sec. 1786c—12 shows that the right to vote by mail at a stockholders' meeting is not intended to be construed as equivalent with the actual presence of all persons so seeking to vote. On the contrary, a vote may be cast by mail only in case the stockholder

"has been previously notified in writing of the exact motion or resolution upon which such vote is taken, and a copy of same is forwarded with and attached to the vote so mailed by him."

With the right to vote by mail so limited, it is clearly apparent that, if the statutory requisites of a quorum were otherwise met, much business might be transacted at such a meeting in which the stockholder seeking to vote by mail might not participate. No provision is made in the voting statute for casting a vote by mail for the choice of officers of the meeting, and there
is nothing to indicate any intention that a person seeking to cast such a ballot shall be counted as present.

The situation finds its analogy in the case of *In re Kaufman*, 179 Fed. 552, 554, where it was said, in construing the provisions of the statute relative to the election of a trustee in bankruptcy and in determining whether creditors were present or not:

"* * * The creditors are not to be counted as present simply because their claims have been allowed. In order to be present they must attend in person or by duly authorized agent or attorney, and those creditors who do so attend constitute the meeting, whether they constitute a majority in number and value of the claims allowed or not. Loveland, sec. 106."

So, in the present case, stockholders are not to be counted as present simply because they have the right to vote under specified conditions upon a specific resolution.

You likewise inquire whether, under the provisions of sec. 1749, votes by mail may be considered in computing the quorum requirement. This section provides:

"* * * The members owning a majority of the stock in stock corporations and a majority of the members of other corporations shall constitute a quorum at any meeting of such stockholders or members and be capable of transacting any business thereof, except when otherwise specifically provided by law or by the articles of organization of the corporation."

For the reasons already set forth it must be held that votes cast by mail are not to be taken into account in determining a quorum under this section.
Criminal Law—Homicide—Where A beats and bruises B with a club and it can be shown that B did not die from the blows alone but as a result of exposure while in a weakened condition because of being beaten to unconsciousness, A is guilty of homicide.

December 1, 1920.

J. R. Pfiffner,
District Attorney,
Stevens Point, Wisconsin.

In your communication of November 18 you state that you desire an opinion on the following matter:

"Apparently in a drunken orgy, A beats and bruises B with a club. B is found dead as a result, either of the beating, or of a combination of the beating, alcoholism and exposure from lying unconscious exposed to the elements after the beating. The doctors state it is impossible to tell whether B died from the result of the beating alone, or from a result brought about by exposure to the cold after the beating."

You submit the following question: Is A guilty of murder or manslaughter, if it can be shown that B did not die as a result of his blows alone, but as a result of exposure, while in a weakened condition and unable to care for himself because of being beaten to unconsciousness?

In 21 Am. and Eng. Encyc. of Law, 2d ed. 94–95, the rule is thus stated:

"But when the supervening cause of death results from the defendant's act as a natural consequence, the act, though operating mediately, is yet as much the efficient cause of death as if death had resulted directly from it. Thus although a wounded man may die from strangulation produced by an attempt to administer restoratives to him, or from a surgical operation honestly believed to be necessary, or from chloroform administered to facilitate such operation, or from an accident occurring during its performance, or from fever, blood poisoning, or other disease resulting from the wound, yet as death from any such cause is directly referable to the original injury, this is to be regarded as the juridical cause of death."
"The Length of the Chain of Causation, or the unexpected character of the issue, is not material provided the events of which the chain is composed follow in natural sequence, unbroken by any extraneous circumstance. If the original act inflicts a wound, and the wound produces a fever, and the fever causes delirium, and in such delirium the wounded man stabs himself or tears open his wound, and dies in consequence; or the wound causes congestion of the brain, and the wounded man is overcome in an unfrequented spot, and dies from exposure to the elements, this though an unexpected, is yet a natural sequence of events, and the fact that the perpetrator of the primary act could not have foreseen the ultimate consequence does not affect his liability for it."

In 21 Cye. 700 the same principle is stated in somewhat different language. There are a great many cases cited in both these authorities on these various propositions stated in the rule. The one case which is almost parallel to the ease submitted by you is that of Kelley v. The State, 53 Ind. 311. This is a well considered ease and with reference to the principle of law under consideration the court said, 316–317:

**But the question has been long since carefully settled in England and America. Hawkins, in his Pleas of the Crown, vol. 1, p. 118, says:**

"In what cases a man may be said to kill another; not only he who by a wound or blow, or by poisoning, strangling, or famishing, etc., directly causes another’s death, but also in many cases, he who by wilfully and deliberately doing a thing which apparently endangers another’s life, thereby occasions his death, shall be adjudged to kill him."

**In Hale’s Pleas of the Crown, vol. 1, p. 428, it is said:**

"But if a man receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet, this is murder or manslaughter in him that gave the stroke or wound, for that wound, though it were not the immediate cause of his death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is causa causati."

"In the reign of Charles II., Edward Rew was indicted for killing Nathaniel Rew, his brother, and, upon the evidence, it was resolved, that if one gives wounds to another, who neglects the cure of them, or is disorderly, and doth not keep rule which a person wounded should do; yet, if he die, it is murder or manslaughter, according as the case is, in the person who gave the wounds, because if the wounds had not been, the man had not
died; and, therefore, neglect or disorder in the person who received the wounds shall not excuse the person who gave them.

J. Kel. 26.

"According to the principles laid down by these ancient authorities, as applicable to this case, if Kelly, as charged, inflicted the wounds upon Herron, and they were fatal, of which he died; or if they were dangerous in themselves, though not necessarily fatal, and the wounds caused the congestion of the brain, of which Herron died; or if the congestion of the brain caused his exposure to the inclemencies of the weather, by which he died; it must be held that Kelley, by the infliction of the wounds, caused the death of Herron. And these principles are fully supported by a continuous line of authorities, since they were first laid down as law. We cannot, therefore, depart from so well established a rule. Regina v. Minnock, 1 Crawf. & Dix C. C. 537; Nixon v. The People, 2 Scam. 267; Regina v. Holland, 2 Moody & Rob. 351; Commonwealth v. M’Pike, 3 Cush. 181; McAllister v. The State, 17 Ala. 434; State v. Baker, 1 Jones N. C. 267; The Queen v. West, 2 Car. & K. 784; Parsons v. The State, 21 Ala. 300; State v. Scott, 12 La. An. 274; Dillon v. The State, 9 Ind. 408; Commonwealth v. Hackett, 2 Allen, 136."

I believe the above authorities will help you in this matter. I am constrained, in view of the above authorities, to answer your question in the affirmative.

Public Officers—Vacancies—Words and Phrases—Infamous Crime—Meaning of "infamous crime" considered.

Statute granting right of action for emoluments of office in case vacancy is created by conviction of crime and reversal of such conviction on appeal does not apply in case of vacancy arising out of conviction prior to enactment of law, where conviction has been reversed subsequent thereto.

December 2, 1920.

H. N. B. CARADINE,
District Attorney,
Monroe, Wisconsin.

Supplementing the opinion rendered under date of November 23,* as to the validity of a claim therein described, filed on behalf of John M. Becker, formerly county judge of Green county, this

*Page 529 of this volume.
department desires to submit the following statement of its conception of the law.

As was fully set forth in that opinion, the right of Mr. Becker to be restored to the office of county judge or to recover its emoluments must be tested by the law as it stood on the 7th day of August, 1918. At that time there appeared upon the statutes sec. 17.02, subsec. (5), providing for vacancy in office upon conviction of an infamous crime or an offense involving a violation of official oath. As has been pointed out, grave doubt exists as to whether the crime of which claimant was convicted was an "infamous crime," within the meaning of this statute. This doubt is confirmed upon consideration of the provisions of art. XIII, sec. 3, Const., which provided:

"* * * No person convicted of any infamous crime in any court within the United States, and no person being a defaulter to the United States, or to this state, or to any county or town therein, or to any state or territory within the United States, shall be eligible to any office of trust, profit, or honor in this state."

"Eligible" has repeatedly been construed to include capacity of holding an office, as well as capacity to be elected to office, and the statute noted and discussed undoubtedly used the expression, "infamous crime," in the same sense in which that term was employed in the constitution. And in the constitution it was, in the judgment of this department, used in the sense in which that term was employed at common law. The statute, therefore, was probably merely declaratory of results that would have followed had the statute never been passed. In other words, under the provisions of the constitution, conviction of an infamous crime would have rendered any person, automatically, incapable of continuing in office. This statute was originally adopted as subsec. 5, sec. 2, ch. 11, Rev. Stats. 1849.

In addition to the provisions of sec. 17.02, subsec. (5), there was found upon the statute books on August 7, 1918, sec. 4935, Stats. 1917, which provided:

"Whenever any convict sentenced by any court of this state or of the United States to be punished by imprisonment in the state prison shall, at the time of conviction and sentence, hold any office under the constitution and laws of this state such office shall be deemed vacated from the time of his commitment to
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said prison; but if the judgment against said convict shall be reversed on a writ of error he shall be restored to office, with all its rights and emoluments; but if pardoned he shall not by reason thereof be restored to office."

This section, as a matter of history, first appeared as sec. 24, ch. 477, laws of 1852, and with minor variations was found continuously included in the statutes up to the session of 1919, which, in ch. 362, consolidated the same with sec. 17.02, subsec. (5), and renumbered it 17.03, subsec. (5).

It is apparent upon a reading of the statute that it contemplates vacancy only in case the individual or convict therein described has actually been committed to prison. It may well be that the legislature sought to make a distinction between the consequences that were to follow conviction of an infamous crime and the consequences that should follow conviction of a less odious crime, and considered that in the latter case, unless the individual was actually rendered physically incapable of discharging the duties of his office, which would result from his confinement in prison, there was no reason why he should not continue in the discharge of its functions and in the receipt of its emoluments. Claimant very clearly cannot bring himself within the scope of this particular section, for the reason that, as the record in federal court discloses, no commitment was ever issued in this case.

It is by no means certain that the benefit of sec. 4935, of restoration to office with all its rights and emoluments, necessarily accrued to a person convicted of an infamous crime, referred to in sec. 17.03, subsec. (5). Its literal reading would confine restoration to office to "said convict," meaning convicts actually committed to state prison.

Assuming, however, that claimant in the present instance was able to bring himself within the provisions of either of these statutes; assuming that he was convicted of an infamous crime, and that such conviction resulted in vacating his office; assuming further that the benefits of sec. 4935 accrued to him, or, in the alternative, assuming that he came within the provisions of sec. 4935, this department is of opinion that such section created no cause of action in favor of the claimant.

As noted, sec. 4935 provides that the convict "shall be restored to office, with all its rights and emoluments." This language follows a statutory declaration that the office "shall be deemed
vacated," under sec. 4935, and that the office "shall become vac-
cant," as expressed in sec. 17.02. Continuance of a vacancy
may be interrupted by placing in office or restoring to office an
incumbent thereof, but so far as the officer rendered ineligible
by statute or constitutional provision is concerned, manifestly he
cannot be eligible and ineligible at the same time. There can
be no such thing as a vacancy and an incumbency of a given
office by him at one and the same time. Either he is in office,
or he is out. If out of office for a given period of time, no
human agency or legislative fiat can successfully declare that he
was an occupant of the office or restore him to the office after the
expiration of the period of vacancy.

Vacancy, as a status, is insusceptible of alteration ex post
facto. It can be altered prospectively only. This being so, a
person restored to office is restored to such office only so far as
the present and the future are concerned. This is a truism in
the law of mandamus. Mandamus will not lie to restore a per-
son to office after his term of office has expired. No legislation
can restore a person to office after the expiration of a term of
office.

In the present case, the term of office to which Mr. Becker was
originally elected expired on January 5, 1920. The reversal of
his sentence was not entered for many months following.

The correctness of this construction of the statute is em-
phasized by the fact that in the revision of 1919 it was deemed
necessary by specific language to provide:

"** * * Reversal of the judgment against such officer shall
forthwith restore him to office, if the term for which he was
elected or appointed has not expired, but, in any event, shall
entitle him to the emoluments of the office for all the time he
would have served therein had he not been so convicted and
sentenced; * * *"*

Prior to this legislation, a person whose conviction was re-
versed upon appeal was entitled to be returned to office and to
receive pay for the balance of his term only. There is nothing
in the revision of 1919, as already noted, which makes it appli-
cable to claimant.

The foregoing summarizes very briefly the conclusions of this
department, after extended investigation. It is deemed proper
to suggest that the question of whether or not claimant aban-
Donated the office is a question of fact, which under well settled rules must be determined as such. The foregoing is confined to a consideration of claimant's right to recover under the provisions of sec. 4935 and sec. 17.03, subsec. (5). Whether claimant has a right of recovery, independent of these statutory provisions, is not herein sought to be determined. Opinion thereon has not been requested.

Contracts—Public Officers—Register in Probate—Sec. 4549 does not prohibit register in probate from soliciting surety bonds from county officers other than himself, unless he has been constituted agent for transaction of such business on behalf of county.

December 3, 1920.

T. H. Sanderson,
District Attorney,
Portage, Wisconsin.

Your letter of November 18 presents the inquiry as to whether the register in probate of the county court may solicit the business of underwriting surety bonds for the county officers of your county. You suggest that the determination of this question depends upon whether or not he is an officer, agent or clerk of the county, and also on whether a surety bond is a "thing in action," or related to "any public service."

Assuming that the register in probate is an officer, agent or clerk of the county, and that a surety bond is a "thing in action," you are advised that, in the judgment of this department, sec. 4549 does not prohibit the transaction of the business in question. The provisions of that section pertinent to the inquiry are as follows:

"'Any officer, agent or clerk * * * of any county * * * who shall have * * * any pecuniary interest * * * in any * * * sale of any * * * thing in action * * * made by, to or with him in his official capacity or employment, or in any public or official service * * * shall be punished by imprisonment in the county jail.'"

The solicitation of surety business by the register in probate from some other county officer, even though the premium is paid from county funds, is not a contract or sale made by, to or
with such register in probate in his official capacity or employment.

The vice aimed at by the statute is that of permitting a public official to be upon both sides of a transaction, or to appear in a transaction in the dual capacity of public officer and private bargainer. The law does not contemplate his entering into contracts inconsistent with his discharge of duty as a public official.

Sec. 692, Stats. 1917, under which various decisions of the court were made and several opinions of this department rendered, has been repealed.

You are therefore advised that it is only in cases where the county officer decides upon the question on behalf of the county that he is incapacitated from entering into a contract. Were he a member of a committee appointed to arrange for issuing surety bonds, he could not act as agent for the surety company. But where he exercises no official influence in determining where the insurance shall be placed, sec. 4549 does not prohibit his seeking to obtain such insurance.

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**Education—Vocational Education—Taxation—Common council of city may be compelled to provide funds for building operations of local board of industrial education.**

No authority exists for creation of reserve fund for building purposes, but city may issue bonds for such purpose.

Mandamus is proper remedy for compelling common council to levy necessary tax for such schools.

December 4, 1920.

**HONORABLE JOHN CALLAHAN, Secretary.**

**State Board of Vocational Education.**

I have your letter of December 2, in which you state that the local board of industrial education at Kenosha, Wisconsin, is having some difficulty with the common council of that city in the matter of providing funds for vocational education, and you submit four questions which have arisen, and upon which you desire my opinion, which questions read as follows:

1. Where additional quarters are needed for vocational school purposes, can the council be compelled to provide a building for that work in addition to funds for operation?
2. Where the local board of industrial education wishes to create a reserve fund to be used for building purposes, can the council be compelled to levy the amount called for by the local board provided the total amount called for is not in excess of one and one-half mills?

3. Where reserve fund for building purposes is created, may the local board of industrial education increase such reserve fund from year to year until the amount is large enough, or must the amount so raised in excess of the amount needed for operation be spent on the building each year?

4. Where the common council refuses to place in the tax levy the amount called for by the local board of industrial education, what action should the local board pursue in order to secure the amount asked for?

Sec. 41.16, subd. (1), Stats., reads as follows:

"The local board of industrial education of every city, village or town shall report to the common council, or in case of cities having commission form of government to the commission, or to the village or town clerk at or before the first day of September in each year, the amount of money required for the next fiscal year for the support of all the schools established or to be established under sections 41.13 to 41.21 in said city, village or town, and for the purchase of necessary additions to school sites, building operations, fixtures and supplies."

I also call your attention to the provisions of ch. 22, laws of 1920, Special Session, which amends sec. 41.16, subd. (3). This chapter is rather lengthy, and I will not attempt to quote it in this letter.

In these two provisions of the statutes I believe we will find the answers to the first three questions submitted by you.

According to the provisions of sec. 41.16, subd. (1), the local board of industrial education is required to report to the common council of a city the amount of money required for the next fiscal year for the support of all the schools established under secs. 41.13 to 41.21 in said city and for the purchase of the necessary additions to school sites and building operations. It gives direct authority to the local board to require the common council to furnish the funds for such additional quarters as may be needed for vocational school purposes. The language of the section cited refers not only to the support of schools established, but also to schools to be established, and of course, to establish
schools of this kind it is necessary to have funds in order to defray the cost of building operations. While there is nothing in the language quoted which would require the city to provide a building, it does require the city to provide funds with which a necessary site may be purchased and funds with which suitable buildings may be erected, provided, of course, the amount required is within the limitations provided by law for tax levies for such purposes. With the exception noted, your first question must be answered in the affirmative.

I am unable to find any authority by which the local board of industrial education may create a reserve fund to be used for building purposes. Unless the law specifically so provides, I believe it is the policy that no municipality may levy a tax upon the taxable property therein for the express purpose of creating a reserve fund. Ch. 22, laws of 1920, Special Session, provides a scheme for a bond issue which, if carried out, will provide suitable buildings for such schools. Your second question must be answered in the negative.

What is said in the foregoing paragraph also applies to your third question, and it too must be answered in the negative. A local board of industrial education has no authority to build up a reserve fund for building purposes. The policy of the law is opposed to the creation of reserve funds in the treasury of a municipality, as it imposes unnecessary tax burdens upon the taxpayers. There must be some express authority by which such a reserve fund may be created and built up.

In answer to your fourth question, the usual remedy resorted to for compelling a common council which refuses to levy a tax for the amount reported by the local board of industrial education for the purposes of supporting all schools established or to be established under secs. 41.13 to 41.21, or for the purchase of necessary additions to school sites, or for building operations, is by writ of mandamus. By this writ the common council and the proper officers of the city may not only be ordered, but compelled, to levy the amount of tax required, providing, of course, that the same does not exceed the limitations provided by law.
Bonds—Public Officers—State Treasurer—Form, conditions and execution of official bond of state treasurer discussed.

December 7, 1920.

Honorable Henry Johnson,
State Treasurer.

I have your letter of December 6, enclosing three separate official bonds, each in the sum of $100,000, each of which you have executed as principal. The first of said bonds is dated November 30, 1920, and is executed by the Maryland Casualty Company as surety. The second is dated December 3, 1920, and is executed by the American Surety Company of New York as surety. The third of said bonds is dated December 3, 1920, and is executed by the Fidelity & Casualty Company of New York as surety.

As I understand it, you desire to tender these bonds to the governor for approval and for filing in the executive office, as required by sec. 14.07, Stats., as and for your official bond as the treasurer-elect of the state of Wisconsin, for the term beginning January 3, 1921. You desire an approval of these bonds as to form and execution.

I call your attention to the provisions of sec. 14.04, Stats., relating to official bonds, which reads as follows:

"(1) The secretary of state, treasurer and attorney-general shall each furnish a bond to the state, at the time he takes and subscribes his oath of office, conditioned for the faithful discharge of the duties of his office, and his duties as a member of the board of commissioners of the public lands, and in the investment of the funds arising therefrom, and, in the case of the secretary of state, conditioned also for the faithful discharge of his duties as auditor. The bond of each of said officers shall be further conditioned for the faithful performance by all persons appointed or employed by him in his office of their duties and trusts therein, and for the delivery over to his successor in office, or to any person authorized by law to receive the same, of all moneys, books, records, deeds, bonds, securities and other property and effects of whatsoever nature belonging to his said offices.

"(2) Each of said bonds shall be subject to the approval of the governor and shall be guaranteed by resident freeholders of this state, or by a surety company as provided in section 1966—33. The amount of each such bond, and the number of sureties thereon if guaranteed by resident freeholders, shall be
as follows: Secretary of state, twenty-five thousand dollars, with sufficient sureties; treasurer, one hundred thousand dollars, with not less than six sureties; and the attorney-general, ten thousand dollars, with not less than three sureties."

Sec. 14.05, Stats., reads as follows:

"The bond of the treasurer shall extend to the faithful execution of the duties of the office of treasurer until his successor is elected and fully qualified; and, if he elects to give bond guaranteed by a surety company, the cost thereof and of any additional bond required of and furnished by him and so guaranteed shall be borne by the state and shall be paid out of the appropriation to the treasury department, if the cost thereof does not exceed one-fourth of one per cent, per annum, of the amount of said bond."

Sec. 14.06, Stats., reads as follows:

"The attorney-general shall renew his bond in a larger amount and with additional security, and the treasurer shall give an additional bond, when required by the governor."

From the foregoing you will note that your bond as state treasurer must be conditioned as follows:

For the faithful discharge of the duties of his office;
His duties as a member of the board of commissioners of public lands;
In the investment of the funds arising therefrom;
For the faithful performance of all persons appointed or employed by him in his office of their duties and trusts therein;
For the delivery over to his successor in office or to any person authorized by law to receive the same, of all moneys, books, records, deeds, bonds, securities and other property and effects of whatsoever nature belonging to his said office.

According to sec. 14.04, subd. (2), above quoted, your bond as state treasurer is fixed by law at $100,000; and sec. 14.05 specifies in what manner your bond may be guaranteed by a surety company.

According to sec. 14.06, you should give an additional bond "when required by the governor."

The manner in which the governor may order you to give an additional bond is specified by sec. 14.16, which reads as follows:

"The governor shall require the treasurer to give additional bond, within such time, in such reasonable amount not exceeding
the funds in the treasury, and with such security as he shall
direct and approve, whenever the funds in the treasury exceed
the amount of the treasurer's bond; or whenever the governor
deems the treasurer's bond insufficient by reason of the insol-
ven cy, death or removal from the state of any of the sureties, or
from any other cause.'"

The determination of the governor to require of you an addi-
tional bond should be in writing, and in such suitable form as
will make an official record to be filed in his office.

Ch. 19, Stats., prescribes the form of official oath and of the
official bond of every public officer in the state of Wisconsin.
Sec. 19.01, subd. (2), reads as follows:

"Every official bond required of any public officer shall be in
substantially the following form:

"We, the undersigned, jointly and severally, undertake and
agree that ———, who has been elected (or appointed) to
the office of ———, will faithfully discharge the duties of his said
office according to law, and will pay to the parties entitled to
receive the same, such damages, not exceeding in the aggregate
—— dollars, as may be suffered by them in consequence of his
failure so to discharge such duties.

"Dated ————, 19——

(Principal)

(Surety)

"Any further or additional official bond lawfully required of
any public officer shall be in the same form, and it shall not af-
te ct or impair any official bond previously given by him for the
same or any other official term."

The legislature of 1919 revised the laws relating to official
oaths and bonds for the purpose of securing uniformity. I
know of no provision in the statutes which excepts the treasurer
from using the form of official bond as prescribed by said ch.
19.

In order that the legislative scheme may be complied with, it
is my opinion your official bond should comply substantially
with the aforesaid statutory form. Of course, it will be necessary
for you to insert the conditions which are specifically required
by sec. 14.04 and in the language and verbiage there given. The
bonds which you have submitted do not contain all the condi-
tions required by law and do not follow the language as used in
the section above referred to.

36—A. G.
I notice that every one of the bonds you have submitted contains the following paragraph:

"IT IS DISTINCTLY UNDERSTOOD AND AGREED, That the surety shall only be liable hereunder for such proportion of the total loss sustained by the State of Wisconsin for any failure or neglect of the principal, and all persons employed by him in his said office, embraced within the terms of this bond, as the penalty of this bond shall bear to the total amount of the bonds furnished by the said Principal in favor of the State of Wisconsin, and in no event shall the surety be liable hereunder for any sum in excess of the penalty of this bond."

I find no provision in the statutes which permits a surety company to limit its liability in the manner stated in the clause above quoted. Certain it is that resident freeholders who sign a bond of this character may not lawfully limit their liability in this manner, and I find no authority by which a surety company may execute an official bond as surety and thus limit its liability.

I am unable to approve of the bonds you have submitted for the following reasons:

1. They are not in the form prescribed by law;
2. They are not conditioned as required by law;
3. The conditions in the bonds do not follow the language used in the law;
4. The limitation upon the liability of the surety is without authority of law;
5. The additional bond required by the governor should bear some designation showing that the same is in pursuance to such requirement.

Bridges and Highways—City and village which maintain their bridges are nevertheless liable to county bridge taxes levied under state and federal aid laws.

December 8, 1920.

STATE HIGHWAY COMMISSION.

The state aid highway law (secs. 1317m—1 to 1317m—15) authorizes the levying of county taxes to defray the cost of the construction of bridges on the county system of prospective state highways and to construct or aid in constructing all bridges in
the county. The federal aid law (secs. 1312 to 1317) makes provision for a state trunk highway system and authorizes the levying of county taxes to defray the cost of constructing and maintaining such highways, including the bridges thereon. You ask to be advised whether or not cities and villages which maintain their own bridges are liable to such county taxes levied pursuant to the statutes before mentioned.

It is the opinion of this department that all taxing districts and all taxable property within the county are subject to those county bridge taxes.

Your inquiry is prompted by the fact that sec. 1319, Stats., has a provision which exempts cities and villages which are required by law to maintain their own bridges from taxes levied pursuant to the last named section and a further provision which denies supervisors from cities and villages the right to vote upon petitions for aid under sec. 1319. The effect of these provisions just referred to is limited strictly to proceedings under said section. They do not afford a general exemption to any city or village from highway bridge taxes. This was the ruling in an opinion given the district attorney of Chippewa county, April 15, 1920.* It was then said:

"* * * You are advised that exemption from a county bridge tax is found in sec. 1319, and this exemption applies only to bridges constructed under that section. County taxes which result from the erection of bridges under the state aid or federal aid acts follow the general rule and are to be levied on all the taxable property of the county." (P. 189.)


Taxation—Gross receipts from sale of tickets at boxing exhibition do not include amount received for federal tax.

December 9, 1920.

STATE ATHLETIC COMMISSION,
Milwaukee, Wisconsin.

In your communication of December 7 you refer to an opinion by this department to your commission, dated February 26,

*Page 187 of this volume.
1918, construing subsec. 3, sec. 1636—241, Stats. In that opinion it was held that gross receipts from the sale of tickets of admission at a boxing exhibition included the entire amount paid by the purchaser to the club, including the amount paid by him to cover the federal tax.

You state that, following rulings of the federal internal revenue department subsequent to that opinion, some of the clubs have continued making and selling their tickets for even amounts including war tax, as for example, $1.00, $2.00, etc., and with a statement printed on the ticket, for example, in the case of a $2.00 ticket, in the following form:

<table>
<thead>
<tr>
<th>Established price</th>
<th>$1.81</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax paid</td>
<td>.19</td>
</tr>
</tbody>
</table>

$2.00

You say that this detailed statement is printed on the ticket in fine print, and the figures $2.00 are printed in large print, in compliance with the ruling of your commission that tickets shall have the prices plainly printed thereon.

You now inquire what is the correct basis upon which the state tax of five per cent should be computed. Should it be computed on the amount paid for the ticket, plus the war tax, or on the total receipts of the sales of tickets, not including the war tax?

Subsec. 3, sec. 1636—241 provides as follows:

"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."

Under this statute a tax of five per cent of the total gross receipts from the sale of tickets of admission to such boxing or sparring match or exhibition must be paid to the state.

The federal statute on the tax on admissions to exhibitions is found in 40 U. S. Stats. at Large 1120, sec. 800, and reads thus:
"(a) That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 700 of the Revenue Act of 1917—

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission; * * *

Sec. 802 in the same volume, p. 1121, reads in part thus:

"That every person (a) receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 800 or 801 from the person making such payments, * * *

Under these provisions it clearly appears that the tax is paid by the person purchasing the ticket and not by the person who sells the ticket and gives the exhibition. The amount paid by the purchaser for federal tax can, therefore, not be counted or added to the amount of money received for the sale of tickets. It is not a part of the receipts from the sale of tickets of admission. The federal statute makes the person who sells the tickets the agent of the government for the collection of the tax, and such payment to him is not a part of the receipts received for the sale of tickets.

As the law now reads, we are constrained to hold that the gross receipts for the sale of tickets do not include the amount received for federal tax.

Marriage—Licenses—In affidavit attached to application for marriage license legal conclusion should be omitted.

December 9, 1920.

State Board of Health.

You have submitted to me a question which was raised by M—H— of Oshkosh, concerning a statement in the form of an affidavit attached to an application for a marriage license, which has been prepared by your department. The part criticised is the statement:

"* * * that Chapters 218 and 539 of the laws of 1917 have been complied with."
566 OPINIONS OF THE ATTORNEY-GENERAL

It is a fact that in ordinary cases none of the provisions of chs. 218 and 539 are required to be performed prior to the application for the marriage license, and a statement that said provisions have been complied with can, therefore, not be technically correct.

I believe that part of the affidavit had better be left out. The parties making the application are not, as a rule, versed in the interpretation of statutes, and it will embarrass a great many laymen to swear to a statement of that kind. The affidavits should state only facts that the applicant can definitely answer and should not state a legal conclusion.

Employment Agencies—Separate license must be secured for branch office operating employment agency.

INDUSTRIAL COMMISSION.

You have submitted to this department a question predicated upon the following statement of facts:

An employment agent, duly licensed by your commission, pursuant to sec. 2394—86, Stats., has made application to open a branch office in the same city in which his present office is located. You state that in connection with this application the question arises whether this employment agent must pay a second license fee if this application is granted. You state that licenses which have been granted to employment agencies by the commission have always specified precisely the location of the agency, because sec. 2394—93, Stats., makes it the duty of your commission to determine whether the premises for conducting an employment agency are fit for such use.

The law authorizing the establishment of public employment agencies necessarily contemplates that there be a place or office where unemployed can go for the purpose of securing employment. The law makes it your duty, as you suggest, to determine whether such premises are fit for such use, in each specific case.

I believe it is a reasonable interpretation of the statute to hold that if branch offices are opened, even in the same city, another license fee should be paid therefor. Otherwise the payment of one license fee might be held to be sufficient to operate any num-
ber of branch offices in the same city, and, by combination, the agents might all operate under one license. I have looked over the statutes carefully, and I find nothing that would militate against an interpretation such as I have suggested. You are therefore advised that a second license fee must be paid by the applicant in question.

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**Education—Taxation**—County school tax should be levied on taxable property in all cities, towns and villages.

County superintendent's tax should not be levied against property in city having its own city superintendent of schools.

December 10, 1920.

FRANK W. CALKINS,

*District Attorney,*

Wisconsin Rapids, Wisconsin.

I have your letter of December 3, in which you request my opinion as to the construction of sec. 1074, Stats., as to whether or not the county board may assess cities having a board of education, superintendent of schools, etc., for their proportionate share of school taxes for county purposes; or, in other words, is such city liable for its proportionate share of county school taxes, under said section?

Sec. 1074, subsec. 1, reads as follows:

"The county board shall also, at such meeting, determine by resolution the amount of taxes to be levied in their county for county purposes for the year, and also the amount to be raised by tax in each town for the support of common schools, for the ensuing year, which shall not in any town be less than the amount apportioned to such town in the last apportionment of the income of the school fund; and by separate resolution adopted by majority of the members of the board not prohibited from voting thereon by section 39.05, determine the amount of tax to be levied to pay the compensation and allowances of the county superintendents of schools and designate therein the cities exempt from taxation therefor."

You will note that this section requires the county board to determine the amount to be raised by tax in each town for the support of the common schools for the ensuing year, and by a separate resolution to be adopted by a majority of the mem-
bers of the board not prohibited from voting thereon by sec. 39.05, the amount of tax to be levied to pay the compensation and allowances of the county superintendent of schools and designate therein the cities exempt from taxation therefor.

I call your attention to a portion of sec. 39.05, which reads as follows:

"* * * Every city having a board of education, a superintendent of schools or other board or officer vested with power to examine and license teachers and supervise and manage the schools therein shall be exempt from the provisions of this section and all provisions relating to county superintendents of schools, except so far as required to make reports to the county superintendent of the district in which such city is situated; and the electors of such city shall have no voice in electing such county superintendent, and the supervisors from such city shall have no voice in the county board in determining or providing the compensation or allowance of, or any matter relating to, such county superintendent; nor shall any tax be levied on such city to pay any part of such compensation or allowances."

I also call attention to the provisions of sec. 39.04, subd. (8), which reads as follows:

"All supervisors representing only cities or wards of cities or districts in cities having an independent system of schools supervised by an independent city superintendent are excluded from any participation in the deliberations of the supervisors of any superintendent district had with reference to the manner of directing the administration of its school affairs, nor shall any tax be levied in any such city to pay any part of the salary, expenses, printing or postage of such county or district superintendent, or the salary of the clerk for such superintendent, or the per diem and expenses of the members of the board of examiners for common school diplomas."

According to the sections above quoted, your inquiries should be answered as follows:

What is known as the county school tax should, according to sec. 1074, be levied uniformly upon all the cities, villages and towns in the manner in sec. 1074 prescribed, while the county superintendent's tax should be levied upon all the cities, villages and towns in the county except in cities having a board of education, a superintendent of schools or other board or officer vested with power to examine and license teachers and supervise and manage the schools therein.
In this connection I call your attention to an opinion of this department addressed to George F. Merrill, district attorney of Ashland county*, in which you will find a construction of portions of secs. 39.04 and 39.05.

Bridges and Highways—Public Officers—County Board—Members of the county board and other persons are eligible to election as members of the county state road and bridge committee created by subsec. 8, sec. 1317m—5.

December 15, 1920.

THORWALD P. ABEL,
District Attorney,
Sparta, Wisconsin.

Members of the county board are eligible to membership on the county state road and bridge committee created by subsec. 8, sec. 1317m—5, Stats.

And persons not members of the county board are likewise eligible.

These propositions are thought to be clearly established by the statute itself. The chairman of the county board is expressly made eligible to serve as a member of that committee, even where the chairman has been delegated authority to appoint the committee. The chairman of each town, who is ex officio a member of the county board, is also ex officio a member of such committee when it deals with road construction in his town. The statute says the committee is composed of "persons," and makes no reference to "members of the board" in that connection, and that fact is deemed to be highly significant.

It is even more significant, and seems to me controlling, that the committeemen are chosen at the annual meeting of the board for the term of one year. The annual meeting convenes in November, and formerly the term of every member of the county board expired the following spring. Under the existing statutes the terms of many members of the county board expire on May 1. No distinction can be made as to the eligibility to this committee between members of the county board whose terms will

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expire in May and members whose terms continue for a year or
two beyond that time. Then, too, the chairman of the county
board, who is beyond question eligible to this committee, may be
succeeded as chairman at any time after May 1. Sec. 59.05,
Stats. Nothing in the statutes suggests that the term of a com-
mitteeeman is at all dependent on his term as chairman or mem-
ber of the county board.

The pertinent parts of the statute creating said committee
are the following:

"(1) Each county board, * * * at each succeeding an-
urnal meeting * * * shall by ballot elect, or by resolution in-
struct 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. Such commit-
tee shall be known as the county state, road and bridge commit-
tee, * * * * The members of such committee shall be reim-
ursed 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 per-
formance of their duties as is paid to members of other county
board committees." with a maximum limitation.

"(4) The town chairman of each town in which state aid
road or bridge construction is performed shall be ex officio a
member of the county committee and shall act with such com-
mittee on all matters affecting such construction in his town,
provided the town has voted a portion of the cost thereof." Subsec. 8, sec. 1317m—5.

The conclusions above announced were not reached without
careful consideration of sec. 960, Stats. This section renders
members of the county board ineligible during the term for
which elected to any office, the election or appointment to which
is vested in the county board. Sec. 960, Stats., does not apply to
the committee under consideration.

Sec. 960 is a general provision relating to eligibility to town
and city, village and county offices; subsec. 8, sec. 1317m—5 is
a special statute relating to a particular committee. The first
named statute had long been in existence when the last cited
statute was enacted. By well settled canons of statutory con-
struction, a later or a special statute prevails over a general or
an earlier one, when their provisions are in conflict. And we
have, in addition to those ancient rules of interpretation, a stat-
utory rule which is applicable and leads to the same conclusion. Sec. 960 occurs in ch. 64ce, Stats., and sec. 1317m—5 is found in ch. 64f. In the construction of the statutes of this state, it is provided by sec. 4972:

"(14) If the provisions of different chapters of these statutes conflict with or contravene each other the provisions of each chapter shall prevail as to all matters and questions growing out of the subject matter of such chapter.

"(15) If conflicting provisions be found in different sections of the same chapter the provisions of the section which is last in numerical order shall prevail unless such construction be inconsistent with the meaning of such chapter."

I believe the general practice that has prevailed since such a committee was provided for has been in accordance with this opinion.

Banks and Banking—Under sec. 2024—14 no person may act as director of bank unless he is resident of state of Wisconsin.

December 15, 1920.

Honorable Marshall Cousins,

Commissioner of Banking.

In your letter of December 15 you refer me to that part of sec. 2024—14, Stats., which provides that directors of banks shall be residents of Wisconsin. You state that X is a director in two Wisconsin banks; that he was born in Wisconsin and for a number of years spent all of his time within the state; that about eighteen years ago he was elected director of the bank at Ladysmith, and about fourteen years ago as director of a bank at Rice Lake; that this was before the provision in said sec. 2024—14 was enacted; that Mr. X now has extensive property interests in Wisconsin, owns a farm of some 257 acres located near Poskin, Barron county; that he also has business interests in Minneapolis and is required to spend a portion of his time in that city; that he owns no real estate in Minneapolis nor in Minnesota; that all his real estate holdings are in Wisconsin; and that for convenience Mrs. X has been residing in Minneapolis, and the election officials of that city consider Mr. X as a voter there; that at the present time, owing to the require-
ments of that branch of Mr. X's business located in Minneapolis he has divided his time, about one quarter of it to his Wisconsin affairs, and the remainder of the time in Minneapolis.

You inquire whether the word "residents" as used in said sec. 2024—14 is applicable to Mr. X.

Said sec. 2024—14 contains the following:

"The affairs of the bank shall be managed by a board of not less than three directors, all of whom shall be residents of the state of Wisconsin, and a majority of whom shall be residents of the county or adjoining counties in which such bank shall be located."

From the statement in your letter, it would seem that there is no question but that Mr. X's residence is in Minneapolis, outside of the state of Wisconsin. He has his permanent home there and votes in said city. I have talked to Mr. X, who has explained the situation to me, and I find that he has no permanent home in the state of Wisconsin. I am therefore constrained to hold, under the clear provisions of this statute, that he is not a resident of this state and therefore cannot legally be elected a director of a Wisconsin bank nor hold said position.

Agriculture—Veterinary Surgeons—One who has practiced veterinary medicine and surgery continuously for space of ten years or more prior to Jan. 1, 1909, cannot practice without license.

M. J. Paul,

District Attorney,

Berlin, Wisconsin.

In your communication of December 9 you refer me to sec. 1492c—7, and you inquire whether it is possible for a man to have a license granted to him under this section who has been in the practice of veterinary medicine and surgery in this state continuously for a space of ten years or more prior to January 1, 1909.

Said section provides:

"Every unlicensed person who was engaged in the practice of veterinary medicine and surgery in this state continuously for
a space of ten years or more prior to the first of January, 1909, may continue such practice without examination, providing such person produces indorsements of his qualifications as a skilled and competent veterinary physician and surgeon, subscribed and sworn to by two hundred and fifty freeholders and owners of live stock residing in the county in which such veterinarian lives, and provided further that such person makes application for license to the department of agriculture within thirty days after the passage and publication of this act, and upon the payment of three dollars for his first license, and annually thereafter causing his name and residence to be registered by the said department which shall keep a book for that purpose.'"

Sec. 1492e—14 provides:

"Any person who shall practice veterinary medicine or surgery or any branch thereof in this state without being annually registered or without license herein provided shall be punished by a fine of not less than twenty dollars or more than one hundred dollars or less than thirty days or more than ninety days in the county jail or both, for each and every offense. *

You will note that it is necessary to have a license and be registered in this state as a veterinary surgeon before any person can practice as such. You will also note that those who were in practice at the time of the passage of this act could secure a license without examination if they made application within the thirty days after the passage and publication of the act. Those who have failed to make application within the thirty days have, of course, lost the right to secure a license without an examination, and it is expressly provided that they cannot practice without a license without incurring the penalty of the law. I am therefore constrained to hold that no person now can secure a license without an examination.

Public Officers—County Board—Parliamentary Procedure—An oral motion when adopted by a county board or city council becomes a resolution.

December 16, 1920.

A. R. Janecky,
District Attorney,
Racine, Wisconsin.

Referring to our recent telephone conversation, I am now of the opinion that some views expressed in the opinion rendered
by this office to your predecessor on January 23, 1918, relative to the manner in which the power of the county board may be exercised, must be modified, and I am led thereto by a study of the decisions of our court in Green Bay v. Brauns, 50 Wis. 204, and Meade v. Dane County, 155 Wis. 632, to which you called my attention.

In the opinion referred to, it was said, after referring to the creation of a committee which was charged with the selection of a superintendent of the poor farm, and after quoting sec. 652, Stats. of 1917:

"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." VII Op. Atty. Gen. 40, 42.

Supreme court decisions were cited there which tend to support the conclusion then reached, but the cases cited above were overlooked, and those cases support a contrary rule.

The language of sec. 652 quite literally requires that the powers of the county board can be exercised only by "a resolution or ordinance," and of course the courts are bound by the statutes, but the supreme court says that

"when an oral motion is adopted by the common council it becomes a resolution" (155 Wis. 632, 642); and of course all are bound by what that court says a statute means.

In Green Bay v. Brauns, 50 Wis. 204, 207, the court said:

"... We suppose, however, when this oral motion was adopted by the common council it became a resolution or order of that body, ..."

Therefore, I suppose that when the motion to refer the selection of a superintendent of the poor farm was adopted by the county board, "it became a resolution of that body."

I think, however, it may be said that the provisions of the Madison and the Green Bay charters do not express the manner in which the powers of the common council shall be exercised with the same strictness and definiteness that sec. 652 declares the manner in which the powers of the county board shall be
exercised. The city charters specify manners in which the councils may exercise their authority, whereas sec. 652 is not a grant or specification of modes of exercising the power of the county board, but a most explicit prohibition against the exercise of power in any manner other than by ordinance or resolution.

Yet, when due allowance is made for these differences of legislative expression, the fact still remains that the court has twice declared quite clearly that an oral motion, when adopted by a legislative body, has then become a resolution.

Loans from Trust Funds—Application by school district for loan from state trust fund "for the purpose of repairing schoolhouse and erecting schoolhouse" cannot receive approval of land commissioners.

December 16, 1920.

Honorable Matt Lampert, Chief Clerk,
Commissioners of Public Lands.

In re Application of School District No. 2 of the town of Lake in Marinette county for loan of $6,000 from the state trust funds.

This application was some time ago submitted to this department for an opinion. According to the application and according to the terms of the resolution upon which it is based, the purpose of this loan is "for the purpose of repairing schoolhouse and erecting a new schoolhouse." There is nothing in the proceedings from which it may be determined that the electors had knowledge of the amount intended to be borrowed for the purpose of repairing schoolhouse and of the amount which was intended for the purpose of erecting a new schoolhouse, and there is nothing in the record of the proceedings connected with this application which authorizes the school district board to make application for $6,000 solely for the purpose of erecting a new schoolhouse.

According to sec. 25.01, Stats., the commissioners of public lands are authorized to invest the funds under their control to school districts "to be used in erecting school buildings or teacherages, in the purchase of teacherages, teacherage sites, school house sites or
school play grounds, or in refunding their indebtedness, and for other purposes authorized by law." Subd. (3).

Sec. 40.09 specifies the powers of school meetings, and subd. (5) thereof reads as follows:

"To vote such tax as the meeting shall deem sufficient to purchase or lease a suitable site for a schoolhouse or teacherage, to build, hire or purchase a schoolhouse or teacherage and to keep in repair and furnish the same with the necessary fuel and appendages."

From the foregoing sections it is evident that it was the scheme of the legislature that school districts should vote a tax for the purpose of keeping in repair their school buildings, and nowhere are school districts authorized to borrow money from the state trust funds or from any other source for such a purpose.

According to the decision of the supreme court in the case of Neacy v. Milwaukee, 142 Wis. 590, it is evident that a proceeding by a municipality which authorizes its officers, in the same resolution or other proceeding, to borrow money for a legal and an illegal purpose, without specifying definitely how much of said borrowed funds is to be used for the legal purpose and how much thereof is to be used for the illegal purpose, cannot be sustained in law.

For the reasons stated this application cannot receive the approval of this department.

Contracts—Corporations—Public Officers—County Board—Committee on County Poor—Corporation engaged in grocery and meat business cannot make legal contract with county for furnishing provisions when its president is member of county board and also of committee on county poor.

December 16, 1920.

Ralph E. Smith,
District Attorney,
Merrill, Wisconsin.

I have your letter of December 13, in which you submit a question which is predicated upon the following statement of facts:
“X is a member of the county board representing the third ward, of the city of Merrill. At the organization of the county board he was appointed chairman of the committee on county poor. The committee on county poor has the supervision and charge of the county home which is under the immediate supervision of the poor commissioner. The committee on county poor meet monthly to audit the bills for the operation of the county home and also to audit bills for groceries and provisions furnished to poor people outside of the county home.

“Mr. X is also president of the X Meat & Grocery Co., which is engaged in the grocery and meat business. He owns and controls the majority of the stock, to all intents, purposes and effects. The business practically is his own.

“Since becoming chairman of the committee on county poor the X Meat & Grocery Co. has furnished the county home with groceries and provisions of various kinds, and they have also furnished groceries and provisions to persons supported by Lincoln county. These bills have been audited, as I said before, by the committee, of which Mr. X is chairman.”

You state that complaint has been made to you that this practice is improper and illegal, and you have informed X of that fact and that he has stated to you that he believes that in view of the fact that the provisions were furnished by a corporation in which he was interested and not by himself, his acts were not forbidden by sec. 4549, Wis. Stats. Mr. X is a member of the county board and as such is instrumental in making the contract for the supplies in question. He also passes upon the claims as chairman of the committee.

You inquire whether, under the circumstances, the X Meat & Grocery Company may legally furnish to the county groceries and provisions, while Mr. X is a member of the county board and chairman of the committee on county poor.

This is in violation of sec. 4549, Wis. Stats. In an official opinion by this department, under date of October 29, 1918, it was held that a stockholder of a corporation is interested in its contracts, and if an officer of a city the contracts of such corporation with the city are void. VII Op. Atty. Gen. 597. See also Op. Atty. Gen. for 1906, 742, and Op. Atty. Gen. for 1912, 766, and other opinions referred to on page 768. See also Menasha Woodeware Co. v. Winter, 159 Wis. 437, 451, 452.

An opinion by this department directly in point is one rendered on March 18, 1915, IV Op. Atty. Gen. 205, in which it was held that a contract between a corporation, a stockholder
of which is a member of the county board, and the county is void, and it makes no difference that the corporation is a public utility.

Your question must therefore be answered in the negative.

December 17, 1920.

HONORABLE MARSHALL COUSINS,
Commissioner of Banking.

The business of transmitting money to foreign countries is regulated by secs. 2014—200 to 2014—206.

No person except a bank or a trust company, life insurance, express or telegraph company, or a million-dollar domestic corporation shall engage in the business of transmitting money abroad

"without first having obtained a certificate of authority to transact such business from the commissioner of banking. Such certificates shall expire on December thirty-first following their issue, and may be renewed annually." Sec. 2014—200.

Every applicant for such certificate of authority is required to file with you a $5,000 fidelity bond, with sureties to be approved by you, as a condition of obtaining such authority. Sec. 2014—202.

You submit this question: Does the liability of a surety on such bond terminate one year after the expiration of a license issued to the principal?

"SECTION 2014—204. Any person who suffers by the default of the principals named in the bonds filed with the commissioner of banking in the transmission of money to foreign countries, may sue upon said bonds in any court of competent jurisdiction and recover thereon the amount that it shall be proven he has lost or suffered by said default; provided that suit shall be begun within one year after the date of such default. *

The rights of persons for whom such business is transacted and the time within which such rights must be asserted are
quite explicitly defined by the statute, and, of course, those rights measure the extent and duration of the surety’s liability. However, the answer to your question depends somewhat upon the phraseology of the bond. If the terms and conditions of the bond confine or limit the liability to a specified calendar year and to liabilities arising from the receipt of moneys by the licensee during the time the principal or obligor named in the bond has a certificate of authority to engage in such business, then the utmost time to which the surety’s liability can extend is one year beyond the termination of the license or certificate to transact such business. Of course what was just said applies to liabilities which have not been sued on within the year. The commencement of an action during the year preserves the liability of the surety in favor of the plaintiff indefinitely and till such time as the plaintiff shall have received satisfaction. Unless action is begun within the year following the expiration of the certificate, the surety’s liability is at an end, where the terms of the bond are such as are above specified. The result might be different if the bond were a continuing one or were not limited by its terms to a particular year.

Banks and Banking—Company in question is violating sec. 2024—50 by using word “bank” in connection with its business in Wisconsin.

December 17, 1920.

HONORABLE MARSHALL COUSINS,
Commissioner of Banking.

With your letter of December 14 you submitted correspondence relative to the S— Bank S— Company. In said correspondence it appears that the S— Bank S— Company is organized under the laws of the state of Illinois. It appears that its object is to secure business for the savings departments of banks by the sale of certificates which are redeemable after an account has been held by the depositor for a period of twelve months.

You inquire whether sec. 2024—50, Stats., is being violated by this company in using the word “bank” in its name.
Said sec. 2024—50 reads thus:

"No person, copartnership or corporation engaged in the banking business in this state, not subject to supervision and examination by the commissioner of banking, and not required to make reports to him by the provisions of this chapter, shall make use of any office sign at the place where such business is transacted, having thereon any artificial or corporate name or other words indicating that such place or office is the place or office of a bank, nor shall such person or persons make use of or circulate any letterheads, billheads, blank notes, blank receipts, certificates, circulars, or any written or printed or partly written and partly printed paper whatever having thereon any artificial or corporate name, or other word or words, indicating that such business is the business of a bank. It shall be unlawful for any person, copartnership or corporation to use the word 'bank,' 'savings bank,' 'banking,' or 'banker' or the plural of any such words, in any other business or in connection with any other business than that of the business of banking as defined and authorized under the provisions of this chapter. Any person or persons violating any of the provisions of this section, either individually or as an interested party in any copartnership or corporation shall be guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than three hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than sixty days nor more than one year, or by both such fine and imprisonment."

In an official opinion, VIII Op. Atty. Gen. 750, it was held that a foreign corporation which uses the word "bank" as part of its name cannot be licensed under sec. 1770b. In said opinion it was said, p. 751:

"* * * The statute strikes in two directions. The first sentence of it provides that only those corporations which are under the supervision of the commissioner of banking and required to make reports to him can engage in the banking business in Wisconsin, and at the same time, use any name which indicates that its place of business is a bank or use any written or printed matter that may indicate that its business is banking. This part of the statute bars every foreign corporation which has the word 'bank' for a name or for part of its name from doing banking business in Wisconsin. On the other hand, if a foreign corporation that has the word 'bank' in its name seeks to do other business than banking, it is arrested by the sentence of this section."

"* * * It shall be unlawful for any person, * * * to use the word "bank," * * * in any other business or in
connection with any other business than that of the business of banking as defined and authorized under the provisions of this chapter.'

"So that it matters not whether a foreign bank, assuming that it has the usual form of name, intends to do a banking business or some other business in Wisconsin; the prohibition against its admission is as specific and plain for one kind of business as for the other."

Under the plain language used in this statute, I am constrained to hold that the S— Bank S— Company is violating said sec. 2024—30 in using the word "bank" in connection with its business in Wisconsin.

_Bonds—Counties—Insurance—_County board has no authority to agree with surety company to pay premium in excess of one-fourth of one per cent for bond of county treasurer, under provisions of secs. 1966—38 and 59.13, subd. (3).

December 18, 1920.

D. K. Allen,
_District Attorney_,
Oshkosh, Wisconsin.

In your letter of December 16 you state that the amount of the bond of the county treasurer of Winnebago county is $100,000, that bids have been advertised for and that the lowest bid for this bond by surety company is $375. You call attention to see. 1966—38 of the statutes which provides:

"The state, any county, * * * 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. * * *"

You also call attention to subd. (3), sec. 59.13, Stats., which provides in part:

"In the case of the county clerk, county treasurer and county abstractor the county board may by resolution require them to furnish bonds guaranteed by surety companies and direct that
the premiums therefor, agreed upon between the board and the companies, be paid out of the county treasury."

You ask whether these two sections can be so reconciled that the county can properly pay a premium amounting to more than one-fourth of one per cent of the amount of the bond.

I can see no conflict in the two sections. They must be read together, and there is no difficulty in reading them together and in giving force and effect to each. The county board is authorized to require them to furnish bonds guaranteed by a surety company and direct that the premium therefor, agreed upon between the board and companies, be paid out of the county treasury. But, the county board is not authorized to agree upon a premium larger than the maximum fixed by sec. 1966—38, that is, one-fourth of one per cent per annum. In my opinion the county board cannot pay a premium upon these bonds in excess of that amount.

You also ask whether these bonding companies have filed their rates with the insurance commissioner or any other authority at Madison and what those rates are and whether the companies are bound by these rates in submitting bids for bonds.

I have not found any provision of the statutes requiring these bonding companies to file with the insurance department, or any other department, their rates. Some of the surety companies have sent to the insurance department their so called manuals. Not all surety companies have done this. I do not know which surety companies you have received the bids from, but as there is no requirement for filing their rates, and no provision of law, so far as I have found, limiting the charge they can make to the rates found in their manuals, there would be nothing to prevent their charging a different rate than what might be found in such manuals. For that reason I have not looked up the rates to be found in such manuals as have been sent to the commissioner of insurance.
Appropriations and Expenditures—Public Printing—Blue Book—Terms ‘printing and distributing’ blue book, as used in sec. 20.11, subd. (5), do not include preparation of material for blue book.

December 20, 1920.

STATE PRINTINGBOARD.

Your communication of December 16. calls attention to the provisions of sec. 20.11, which provides:

"There is appropriated from the general fund to the printing board:

"* * *

"(5) Annually, beginning July 1, 1913, such sums as may be necessary for printing and distributing the Wisconsin blue book."

You likewise call attention to sec. 35.24, which contains the provision:

"It is the duty of the printing board to compile and prepare biennially printer's copy for a book to be denominated 'Wisconsin Blue Book,' * * * "

It appears that the board has engaged an editor for the purpose of preparing the blue book, and an opinion is desired as to whether or not the salary of such editor may be paid out of the appropriation contained in sec. 20.11, subd. (5), quoted.

You are advised that, in the opinion of this department, such expense of preparation can not be charged to this appropriation.

It will be noted that the appropriation is ‘for printing and distributing’ the Wisconsin blue book. This term is not broad enough to authorize the employment of a person to prepare such printing. But slight reflection is required to make this evident.

Subd. (3) appropriates such sums as may be necessary for all public printing. If the construction which you suggest were correct, this provision would be broad enough to authorize the payment of salaries in the department of the attorney general, for instance, in so far as the same had to do with the preparation of opinions, cases, and briefs that were ultimately printed. The mere fact that the preparation of the material for the blue book is entrusted to the printing board does not alter the situation. It is incumbent upon the board to prepare the material that goes into the blue book out of the general appropriation made to the board.
Appropriations and Expenditures—Public Officers—Railroad Commission—Payments made by public utilities to state treasurer under subsec. 3, sec. 1797m—60, Stats., are not added to appropriation made to railroad commission.

Railroad Commission.

The law provides for investigations to be made by you of rates and services of public utilities upon complaint of consumers and others. If upon such investigation the rates or charges are found to be unjust, discriminatory or otherwise in violation of law, the commission shall fix reasonable rates and charges and if the investigation disclose that any practice or service on the part of the utility is unreasonable, insufficient, preferential or otherwise in violation of law, it shall order what is reasonable in the premises.

Whatever, as a result of such investigation, the utility is found at fault and any rate, practice or service is in violation of the public utilities act,

"the public utility found to be at fault shall pay the expenses incurred by the commission upon such investigation." Sec. 1797m—47.

This provision as to costs is repeated and amplified in sec. 1797m—60, and subsec. 3 thereof is as follows:

"Whenever, upon an investigation made under the provisions of sections 1797m—1 to 1797m—109, inclusive, the commission shall find that any rate, toll, charge, schedule or joint rate or rates is unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of sections 1797m—1 to 1797m—109 inclusive, or that any measurement, regulation, practice, act or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of any of the provisions of sections 1797m—1 to 1797m—109, inclusive, or it shall find that any service is inadequate or that any service which can reasonably be demanded cannot be obtained, the commission shall ascertain and declare and by order fix the expenses incurred by the commission upon such investigation and shall by such order direct such public utility to pay to the state treasurer within twenty days thereafter such expenses so incurred."

Based upon these statutes, you submit the following inquiry, under date of December 14, 1920:
"When these sums are so paid are they available for use as a part of the railroad commission's appropriation without an express act of the legislature appropriating them for this purpose?"

Your question is answered in the negative. This department sees no escape from the conclusion that costs so paid into the state treasury do not become part of the appropriation made to the railroad commission by sec. 20.51. That section makes a definite, fixed appropriation for the administration and execution of the commission's functions. The statute is explicit that the expenses incurred by the commission in such investigations, when charged against a public utility, shall be paid into the state treasury. The order must direct such public utility "to pay to the state treasurer within twenty days thereafter such expenses so incurred."

There being no express direction as to the state fund to which the payment shall go, it is thought that the moneys so paid become part of the general fund in the state treasury.

No reason is perceived why the provision of the constitution as to disbursing state moneys is not applicable:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law. * * *" Sec. 2, art. VIII, Wis. Const.

In an opinion to the state forester on a similar question, it was said by this department:

"Nowhere do I find any authority under which it may be held that an appropriation may be implied in the absence of a declaration by the legislature in some express terms to the effect that money is appropriated or shall be paid to or received by some designated person or for some designated purpose. Even were such authority available, under the settled rule of this department, I should be constrained to rule against any appropriations from the state treasury unless the authority for the appropriations is or may be made clear and express." II Op. Atty. Gen. 10, 13.

Upon inquiry at the office of the secretary of state we are informed that there is no precedent for holding that costs, taxed by a state department or in any court proceeding in favor of the state, where such costs are paid into the state treasury, are added to any appropriation unless expressly so declared by statute. Many of the departments and commissions receive or
collect moneys which are paid into the state treasury. Numerous instances can be found in the statute where such moneys are added to some appropriation, and among those examples the following are cited: secs. 20.10, 20.12 (2), 20.17 (31), 20.20 (12), 20.44 (6) to (12), 20.49 (5), (6), (8), 20.54, 20.55 (6), 20.565, 20.57 (4) and (9), 20.59, 20.60 (4), 20.61 (9), 20.77, and 20.785.

The pains to which the legislature has gone of indicating when moneys paid into the treasury shall be added to an appropriation, indicate the legislative understanding of this matter. There is no doubt as to the legislative understanding that such moneys are not added to the appropriation by implication or by any general rule of law, but can only be added through express declaration of legislative intent to that end.

You will observe that in the appropriation to your department, subsec. (2) makes provision whereby all inspection fees received from the owners of water powers and paid into the general fund are added to the appropriation for executing the commission’s functions relative to water powers. Under a very familiar rule of statutory construction, this expression of such addition as to one item of appropriation to the commission excludes the addition of fees or costs to other items of the appropriation to the commission.

It may be added to the foregoing that the practice which has obtained in the administration of your department from the beginning quite clearly shows what has been the understanding there in regard to this question. Heretofore no addition has been thought to have been made to the express appropriation through or under sec. 1797m—60.
Normal Schools—Public Lands—Taxation—State must pay taxes on lands purchased after tax lien attached.

Such taxes should be collected by county treasurer and paid by commissioners of public lands in manner provided by sec. 1149a.

No interest or fees should be paid by state.

December 21, 1920.

Honorable Clough Gates, Member,
Board of Regents of Normal Schools,
Superior, Wisconsin.

In your letter of November 13 you state that on September 6, 1919, the normal school board purchased from William B. Paton a lot but that he retained the houses thereon, and that a dispute arose as to the liability for the taxes assessed and that eventually Mr. Paton paid that portion of the taxes assessed against the houses, while the portion of the taxes assessed against the lots remained unpaid and delinquent and were so returned to the county treasurer of Douglas county, and that that official sold the same at a tax sale in June, 1920, and issued tax certificates Nos. 2,185 and 7,447. Presumably one of said certificates represents the regular tax and the other represents some special assessment. It seems that you have had some negotiations with the county treasurer of Douglas county and with the chief clerk of the commissioners of public lands relating to these items of delinquent taxes, and that you have been advised that the statement of delinquent taxes issued by the county clerk of Douglas county should be referred to the attorney general for some action.

In an opinion dated April 29, 1920,* given to the Hon. William Kittle, secretary of the board of normal regents, I had occasion to consider the question as to the liability of the normal school regents, the commissioners of public lands or of the state for the taxes against said Paton property. From said opinion it appears that the board of regents purchased said property on or about the 6th day of September, 1919; that at said time the tax lien for the taxes of 1919 had attached, and according to the opinion of the supreme court in the case of Petition of Wausau Investment Co., 163 Wis. 283, the said property was not exempt

*Page 224 of this volume.
from taxes for that year. I also called attention to the case of
*State v. Guaranteed Investment Co.*, 163 Wis. 292, and 166 Wis.
111

In said opinion I also called attention to the provisions of sec.
1149a, par (a), Stats., which reads as follows:

"It shall not be lawful for any county, city or village treas-
urer to sell any lands which shall have been acquired by the
state after the taxes become a lien thereon. When such lands
shall have been returned delinquent to the county treasurer he
shall certify to the commissioners of public lands a description
thereof together with the amount of taxes charged against each
separate description. The commissioners of public lands within
ten days after the receipt of such certificate from the county
treasurer shall consider the question of whether such taxes are
just and legal, and if they so find shall order the same paid.
They shall transmit a certified copy of their order to the secre-
tary of state, and upon his audit and warrant drawn upon the
state treasurer the amount of said taxes shall be paid out of the
appropriation provided for carrying out the purposes of this
section."

According to the above it was unlawful for the county treas-
urer of Douglas county to sell said property after the taxes had
become a lien thereon, and it was the duty of the county treas-
urer to certify to the commissioners of public lands a description
thereof, together with the amount of taxes charged against the
same. Thereupon it became the duty of the commissioners of
public lands, within ten days thereafter, to consider the certifi-
cate of the county treasurer and determine whether such taxes
are just and legal, and if they so find, it is their duty to make an
order that the same be paid.

I notice that in the statement of delinquent taxes certified by
the county clerk he has added interest and fees to the amount of
delinquent taxes charged against the property in question. In
certifying to the commissioners of public lands the description
of said property and the amount of tax thereon, he should not
add interest or fees. Any items for interest or fees should be
canceled by the county board of Douglas county.
Constitutional Law—Public Lands—Law allowing purchasers of state lands certain credits for improvements having been held unconstitutional by attorney general and later repealed by legislature, holder of land contract issued while said law was in effect cannot make claim for credit for improvements made against balance now due on said contract.

Honorable Matt Lampert, Chief Clerk,
Commissioners of Public Lands.

Some time ago you submitted to this department for an opinion and for instruction, a claim made by John Klehn a holder of Certificate No. 357, covering the SW 1/4 of SW 1/4—28—38—5, Lincoln county, for credits upon the balance due to the state upon said certificate for improvements made to the lands so purchased under contract. According to the affidavit filed by Mr. Klehn, he became a purchaser of the lands described in said certificate on December 31, 1912; that said certificate was issued pursuant to the provisions of sec. 209, Wis. Stats., as amended by ch. 452, laws of 1911; that in 1913 Mr. Klehn made improvements by constructing about 450 rods of barbed wire fence; that in 1920 he built a dwelling house thereon, also constructed some more fencing, also built a log tool shed, also built a hay shed. In his affidavit he itemizes the quantity of wire, fence posts, lumber, sash, windows, building paper and other supplies from which said improvements were made. Mr. Klehn demands that under his certificate the commissioners shall cause an appraisal of said premises to be made, to ascertain the actual value of the improvements made, so that he may receive credit therefor as provided by the terms of said ch. 452, laws of 1911.

It appears from the correspondence you had with R. T. Reinhold, an attorney residing at Tomahawk, Wisconsin, and who has been conducting the negotiations on behalf of Mr. Klehn, that you called attention to the fact that ch. 452, laws of 1911, was repealed by ch. 597, laws of 1913, at least as to those provisions of said ch. 452 which provided for an allowance of credit for improvements made by a purchaser under said act upon the amount due on contracts of purchase.

In an opinion given to the commissioners of public lands by Hon. L. H. Bancroft, then attorney general, on June 3, 1912, involving the construction of ch. 452, laws of 1911, he questioned
the constitutionality of all the provisions of said act, which provided for credits for improvements made by purchasers of state lands. See Op. Atty. Gen. for 1912, 659.

In an opinion rendered September 27, 1911, to the chief clerk of the commission is of public lands, Mr. Bancroft held ch. 452, laws of 1911, in so far as it provides for credits being allowed the purchaser of school lands for improvements made by him, to be unconstitutional. See I Op. Atty. Gen. 89.

In another opinion, rendered by Hon. Walter C. Owen, then attorney general, to the chief clerk of the land office, under date of February 24, 1913, I Op. Atty. Gen. 583, he also came to the conclusion that the provisions of ch. 452, laws of 1911, so far as they relate to allowing to purchasers of public lands credits for improvements made, were unconstitutional.

It is evident that after these opinions by the attorney general, the legislature of 1913, by ch. 597, repealed the provisions of the act of 1911 deemed unconstitutional.

You are advised that as the act under which Mr. Klehn makes claim for credit for improvements was unconstitutional, he cannot, now that the said act has been repealed, make any claim for such credits, and none should be allowed.

Counties—County Board—Insurance—Subd. (4), sec. 59.07 authorizes county board to insure county buildings in mutual company.

T. P. Abel,
District Attorney,
Sparta, Wisconsin.

By letter of December 18, 1920, you submit this question: Can the county clerk, the county board, or any committee of the county board, legally commit the county to a membership in a mutual insurance company, by which the county would become liable for the losses of other counties and various individuals?

The statute empowers the county board to insure the county property but gives no hint that such insurance must be in an old-line company.

"The county board of each county is empowered at any regular meeting to:
“(4) Build and keep in repair the county buildings and cause the same to be insured in the name and for the benefit of the county; and in case there are no county buildings, to provide suitable rooms for county purposes.” Sec. 59.07, Stats.

The statutes provide as well for assessment or mutual insurance corporations as for nonassessment or old-line insurance corporations. Mutual town insurance companies are authorized to insure schoolhouses, town halls and churches, and cheese factories and creameries, as well as private property. No reason is perceived why the power to the county board to insure the county property should be restricted by construction to insurance in nonassessment companies. You are advised that it is the opinion of this department that the county board may contract for such insurance in a mutual insurance company.

As indicating the legislature did not intend to confine the county to old-line insurance, your attention is called to sec. 1978d, which authorizes the county board to avail itself, in behalf of the county, of the state insurance, for public buildings. If the county board is making a study of the insurance problem and there is doubt or division as to what policy it ought to pursue, it would not be amiss if you called the board’s attention to the statutory provision for state insurance.

Indigent, Insane, etc.—Military Service—Soldiers’ Bonus—Adjudication of insanity is prima facie proof of incapacity to transact business. The presumption is that an inmate of a state hospital for the insane is incompetent to cash or negotiate a draft.

December 22, 1920.

Board of Control.

You say in a letter dated December 14, 1920:

“One F—— M—— was convicted of a felony by the superior court of Dane county and sentenced to the central state hospital for the insane. M—— is an ex-service man, and a draft has just been issued to him by the state for $288.67 in payment of bonus under ch. 667, laws of 1919. M—— is still an inmate of the central state hospital for the insane. M—— has a wife and three or four children.

“The report of the superintendent of the central state hospital
for the insane shows that he is a mental defective and in all likelihood he will never be restored to a normal mental condition."

Upon those facts you ask for the opinion of this department as to whether M—— can indorse the draft and dispose of the money derived from it as he chooses.

You express no opinion about his mental capacity to transact ordinary business. It is legally possible to be a "mental defective" and still be able to do ordinary business, but the fact that he has been committed as a patient or inmate of a state hospital for the insane raises the legal presumption, that he is incompetent to attend to his business affairs. The courts uniformly hold that less mental strength is required for making a will than for doing ordinary business, and yet it was lately said by our supreme court:

"The adjudication of insanity and the commitment to the hospital for the insane would establish at least a prima facie incapacity for making a will while such adjudication of insanity is in force." Estate of Staab, 166 Wis. 587, 592.

Upon that authority and the facts as stated by you, it is the opinion of this department that your question must be answered in the negative. We think that Mr. M—— is not competent to legally indorse or negotiate said draft.

As to the policy of the legislature in granting this bonus, we are not at all certain that it was intended that the money should be used for the "personal comforts and pleasures" of the soldier, wholly apart from and without regard for the necessities of the soldier's wife and children. There is no reason to doubt that Mr. M——'s necessities and comforts are reasonably cared for by the state at the institution to which he has been committed.

Taxation—Interest derived from highway bonds authorized by sec. 1317m—12, if received by resident, constitutes taxable income.

December 22, 1920.

S. G. DUNWIDDIE,
District Attorney,
Janesville, Wisconsin.

Replying to your letter of December 20, 1920, you are advised that interest received by a citizen of Wisconsin upon highway
bonds owned by him constitutes taxable income and is properly made the basis for levying income taxes against him.

Such has been the ruling of the tax commission, which is vested with the general administration of the tax laws.

Counties are authorized, by sec. 1317—12, to raise money for the improvement of public highways "by issuing nontaxable semiannual interest payment coupon bonds."

This exemption is thought to be confined to property taxation. The income tax is not a property tax but a personal tax. State ex rel. Sallie F. Moon Co. v. Wis. Tax Com., 166 Wis. 287, 290.

Property may be exempt from property taxation and yet the income of that property made the measure of an income tax against the recipient of the income. St. John's Military Academy v. Larsen, 168 Wis. 357; St. John's Military Academy v. Edwards, 143 Wis. 551.

Agriculture—Fish and Game—Dams—Parties who raise level of lake to new and illegal level may be liable for damages caused by breaking of dam during freshet.

Conservation Commission.

You have submitted the following to this department as a basis for an official opinion:

"A number of sportsmen in Langlade county wish to place a dam at the mouth of Post Lake to raise the water to its original level, the outlet of the lake having been dug out some time ago, lowering the water in the lake. It is the wish of the sportsmen to place a dam at the outlet and raise the water to its original level. The question arises—Supposing the dam should during a freshet go out and cause damage to the farm lands below, would the sportsmen who built the dam be responsible for the loss? It is understood that the construction of this dam should be satisfactory to the conservation commission. The parties owning lands surrounding the lake have signed a petition asking that the water in the lake be raised."

It is impossible to give you a definite answer on the facts submitted. You do not state how long the lake has been at its low-level mark, or what time the outlet of the lake was dug out. If the lake has been lowered and has not been in that condition

December 23, 1920.

Conservation Commission.
for the last twenty years, then the legal level of the lake is the level as it existed prior to the lowering of the outlet, and if parties interested replace the dam to raise the water to its legal level, they will not be liable for any damages if the dam has been constructed in such a way that they cannot be accused of being negligent and of not having used all necessary precautions to prevent the breaking of the dam.

A different situation arises if the new level of the lake is the legal level. Our supreme court has held in a number of decisions that the changing of the level of the lake from its natural level to a higher level and maintaining it at such high level for twenty years will make the high level the legal level of the lake. I take it that the reverse is also true, that is, if the level of the lake is lowered to a new level it will have to be maintained at that low level for twenty years before it can be said that such low level is the legal level of the lake.

If in this particular case the new level should be the legal level of the lake, then anyone raising it to another or illegal level will, I believe, be liable for any damages that may be caused by his acts, and if the dam should break out during a freshet, I think under those circumstances he would be liable for damages.

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**Indians—Taxation—Illegal Taxes—Statute of Limitations—**

Lands held by U. S. in trust for Indians are exempt from taxation.

Towns, not counties, are liable for refund of illegal taxes.

Claim must be made within one year.

No action may be based upon voluntary payment of illegal tax.

December 23, 1920.

G. H. Dawson,

District Attorney,

Crandon, Wisconsin.

I have your letter of December 10, in which you state that at the November session of the county board of Forest county, a petition was presented by certain Indians for a refund of taxes paid by them on lands held in trust for them by the United States government. According to a copy of said petition, it
Opinions of the Attorney-General

appears that these tax payments cover the years 1902 to 1911, both inclusive. There is, however, one item, the first on the list, covering the taxes of 1918. From your letter it further appears that all of said taxes were paid to the town treasurer of the town in which the lands are situated, except in two instances, where the tax was paid to the county treasurer after the lands were returned delinquent, but before sale.

From your examination of the questions involved you have come to the following conclusions:

1. That the levy and collection of these taxes by the towns were illegal and void, the lands not being subject to taxation at the time of the assessment.

2. That the taxes having been paid to the town treasurers, before the lands were returned as delinquent, the claim for a refund, if any, should be made against the town so collecting the tax, and not against the county, and you cite sec. 1164, Stats.

3. That after the expiration of six years from the payment of the taxes, the county board has no authority to act in the matter, even though the claim might not be barred at law.

You state that the county board has requested an opinion as to these matters, to be submitted to them at the adjourned session to be held in the latter part of January, and as the matter is of considerable importance, you desire an expression from me as to whether you are correct in your conclusions as above stated and what course the board should be advised to take in reference to said petition.

Sec. 1038 reads in part as follows:

"The property in this section described is exempt from taxation, to wit:

(1) That owned exclusively by the United States or by this state; * * *".

The title to the lands in question is still in the United States. Such being the fact, they are exempt from taxation in the state of Wisconsin. Your first conclusion is correct.

Sec. 1164, subsec. 1, reads as follows:

"Any person aggrieved by the levy and collection of any unlawful tax assessed against him may file a claim therefor against the town, city, or village, whether incorporated under general law or special charter, which collected such tax in the manner prescribed by law for filing claims in other cases, and if it shall appear that the tax for which such claim was filed or any part
thereof is unlawful and that all conditions prescribed by law for the recovery of illegal taxes have been complied with, the proper town board, village board, or common council of any city, whether incorporated under general law or special charter, may allow and the proper town, city, or village treasurer shall pay such person the amount of such claim found to be illegal and excessive. If any town, city or village shall fail or refuse to allow such claim, the claimant may have and maintain an action against the same for the recovery of all money so unlawfully levied and collected of him. Every such claim shall be filed; and every action to recover any money so paid shall be brought within one year after such payment and not thereafter."

This section prescribes the manner in which a person aggrieved by the levy and collection of an unlawful tax may recover the same. It is evident that the petitioners have mistaken their remedy. They should have made application to the towns to which the said illegal taxes were paid. Every claim therefor should have been filed and every action to recover any money so paid should have been brought within one year after the payment thereof. This is a special limitation, in absence of which the six-year statute of limitations would have applied. Your second and third conclusions are correct.

There is nothing in the statement of facts which would indicate that the said payments of taxes were made under objection or under protest, but I can fairly assume that no objection or protest was made at the time these taxes were collected. I call your attention to the decision of our supreme court in the case of State ex rel. Marshall v. Usley Bank v. Leuch, 155 Wis. 499, where our court has held that by the voluntary payment of a tax all right to bring action to recover it back or question its legality is waived, in the absence of coercion, fraud or mistake of fact. It is my opinion that under this construction of the law the signers of the petition to the county board have waived any claim or right of action against the towns in which such taxes were paid. Certainly there is no law under which the petitioners may make a claim against or recover against the county for illegal taxes paid by them.
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Public Lands—State may make application for patent to any swamp lands omitted from original list. Land office should cooperate with conservation commission in looking up state’s interest in certain lands.

December 23, 1920.

Honorable Matt Lampert, Chief Clerk,
Commissioners of Public Lands.

By direction of the commissioners of public lands you submitted to this department the letter and notice of one Ralph M. Du Bois, United States transit man, department of interior, dated August 15, 1920, wherein he claims that certain lands near Big Lake, in sections 13, 14, 23 and 24, in township 43 north, range 8 east, were omitted from the original survey, and that a survey of these lands is contemplated, and that by said notice, thirty days is allowed to the state of Wisconsin as owners of adjoining property, to show cause before the commissioner of the general land office, tending to show why these lands should not be surveyed and disposed of as public lands of the United States.

You have made a tracing from the original plat of said lake and of lots 1 and 2 in section 23-43-8, which the state owns, and from which it appears that the lands so adjoining lots 1 and 2 are swamp lands, and you suggest that the state may have a claim thereon under the act of congress approved September 28, 1850, 9 U. S. Stats. at Large 519.

As I understand it, pursuant to said act of congress approved September 28, 1850, the secretary of the interior has made out lists and plats of all swamp lands in the state of Wisconsin, and upon the request of the governor of this state, said swamp lands have been patented to the state. If, however, any such lands have been omitted, the governor of this state may make claim, under said act, for said lands, and if the claim is allowed, a patent from the United States to the state of Wisconsin will be issued.

I am not advised whether lots 1 and 2, mentioned in your letter, constituted a part of said swamp land grants. Neither am I definitely advised whether there are any other lands around Big Lake, in the sections above mentioned, which might be considered as swamp lands. I suggest that you call the attention of the conservation commission to this notice and that, in coop-
eration with said conservation commission, you cause an examination to be made of the lands adjoining said lots 1 and 2 and ascertain the situation thereof, and if it is found that these lands are swamp lands, that the attention of the governor be called thereto, and that application be made to the secretary of the interior for a patent of said lands, or that such other steps be taken as the laws of the United States may permit, to acquire the title to said lands on behalf of the state.

Automobiles—Taxation—Automobile purchased June 17, 1920, should not be placed on assessment roll for that year. If so placed, board of review may correct error; if not corrected, tax may be paid under protest and recovered under sec. 1164.

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

In your letter of December 16 you inquire whether an automobile which was purchased on the 17th day of June, 1920, can be put on the assessment roll for the year 1920, and if it is put on, what steps must be taken to avoid paying the tax.

Personal property purchased on the first of May or prior thereto must be placed upon the assessment roll. If it is purchased thereafter it will go on the assessment roll of the year following. If, however, an assessor places an automobile or any other personal property on the assessment roll which was not owned by the man to whom it is assessed until after the first of May, then the party may have the assessment roll corrected by the board of review, and if that body fails to correct it, the tax may be paid under protest, under sec. 1164, and thereafter an action can be maintained to recover it.
Public Officers—Register of deeds is entitled to be supplied with office equipment at county expense, whether paid by fees or on salary basis.

December 24, 1920.

M. J. Paul,
District Attorney,
Berlin, Wisconsin.

Your letter of December 22 contains this statement and inquiry:

"The register of deeds of this county is on a strictly fee system, no salary being provided for him, and the question has arisen,—
"If the register of deeds is on a strictly fee system, is he entitled to supplies, such as stationery, letter heads, ink, pens, typewriter ribbons, and supplies used in his office, from the county, or must he supply these personally?"

Sec. 59.07 provides:

"The county board of each county is empowered at any legal meeting to:

"* * *

"(7) Prescribe the form and manner of keeping the public records of the county in any county office and the accounts of the several county officers; and provide all books, stationery, blanks, safes, furniture, telephone service, fuel and lights necessary for the discharge of official business in the offices of the county clerk, clerk of the circuit court, register of deeds, treasurer, sheriff, county judge, and in counties having a population of two hundred fifty thousand or more, of the county surveyor."

There is no exception made in this case, and no distinction drawn between an officer on a fee basis and one on a salary basis.

You are therefore advised that the register of deeds is entitled to supplies, such as you mention. "Stationery" would include these articles. See Downing v. Hinds County, 36 So. 73, 84 Miss. 29; Crook v. Commissioners' Court of Calhoun Co., 39 So. 383, 144 Ala. 505.
Courts—Public Officers—Clerk of Circuit Court—Salary of clerk of circuit court when fixed by county board is in lieu of all fees.

December 24, 1920.

M. J. Paul,
District Attorney,
Berlin, Wisconsin.

You state in your letter of December 22:

"At the November meeting in 1919, the county board passed the following resolution:

"That from and after Jan. 1st, 1921, the salary of the clerk of the circuit court of Green Lake county shall be $600 annually, such salary to include compensation for all fees for attendance at court for payment of deputies, and for charges against the county for services rendered by him for the county."

You inquire:

"Is the clerk of the circuit court working under the above resolution entitled to the fees enumerated in section 59.42?"

Sec. 59.15, Stats., provides:

"(1) The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who 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, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions:

"(d) Compensation received by the clerk of the circuit court for work done for the United States government or for congress."

Subd. (5), sec. 59.15 clearly would not relate to the situation which you have in mind, because that relates to cases where the fees are fixed after election or appointment. Hence, the answer to your question is that the clerk of your circuit court is not entitled to any of the fees enumerated in sec. 59.42.
Indians—Indian Reservations—Public Lands—Sale of certain swamp lands of state on Lac Court Oreilles Indian reservation discussed.

December 28, 1920.

HONORABLE MATT LAMPERT, Chief Clerk,
Commissioners of Public Lands.

By direction of the commissioners of public lands you have referred to this department for an opinion and for instruction the correspondence conducted between members of the land commission and Clarence E. Wise, of Hayward, Wisconsin, and relating to the proposed purchase by said Clarence E. Wise from said commissioners of the following described lands: NE\(\frac{1}{4}\); NE\(\frac{1}{4}\); 12–39–8; NE\(\frac{1}{4}\); NE\(\frac{1}{4}\); 24–40–8.

From said correspondence it appears that the said descriptions lie in the Lac Court Oreilles Indian reservations and that the title to the first description is still in the United States and that the apparent title to the second description is in the state of Wisconsin, the same having been derived from the federal government under the swamp land act of September 28, 1850. Of course, the state has absolutely no interest in the first description and cannot entertain any proposition for the sale of the fee thereof or of the timber thereon.

As I understand it, under the provisions of sec. 24.09, subd. (2), it is at present the settled policy of the commissioners of public lands to withhold from sale all public lands belonging to the state. The commissioners may, however, under said section, in the public interest, offer certain state lands, such as the above, for sale according to law.

As noted above, the second description is within an Indian reservation. Since the decision of the United States court in the case of United States v. J. S. Stearns Lumber Co., 245 U. S. 436, and the case of State of Wisconsin v. Franklin K. Lane, Secretary of Interior, 245 U. S. 427, there is some doubt as to the legality of the state’s title to said description. Until the state’s title in such lands has been confirmed by the United States courts, or until this department after a careful examination of the federal statutes and federal court decisions has concluded that the state’s title is good, it is my opinion that no proposition for the sale of such lands should be entertained by the commissioners of public lands. This department has here-
tofore, in an opinion found in VII Op. Atty. Gen. 171, held that the state has no good title to swamp lands within the boundaries of the Bad River Indian reservation and the Menominee Indian reservation.

According to some of the correspondence, it appears that the Wisconsin-Minnesota Light & Power Company is contemplating the construction of a large dam across the Chippewa River, which dam, it is said, will submerge said description of land and thereby render valueless whatever standing timber there may be thereon. In view of this statement, I suggest that the land office cooperate with the conservation commission and ascertain the situation of said lands and as to the probability of said lands being submerged by the construction of said dam; also, ascertain the amount of standing timber thereon and make an appraisal of the value of both the land and timber. When these facts are laid before the commission it will be in position to determine whether the sale of the standing timber or the sale of the land or the sale of both will be beneficial to the state; or, if required by the legislature, the commissioners can make an intelligent report of all such facts.

Public Health—Contagious Diseases—One tearing down or mutilating placard placed on house where person is sick with contagious disease named in sec. 1416—3 may be prosecuted under sec. 1416—12.

December 30, 1920.

Dr. C. A. Harper,
State Health Officer.

In your communication of December 14 you state that the board of health desires an opinion regarding secs. 1416—3 and 1416—14, Wis. Stats. You direct my attention to the latter part of the former section, which prohibits the mutilation or destruction of notices posted by the health officer of a town, village or city. Said section also mentions certain contagious and infectious diseases. The latter section repeals all provisions in conflict with the same.

You state:

"The question which arises in the mind of this department is whether or no the health officer of a community becoming cog-
nizant of any one of the specified diseases places a notice in or on the premises of an individual and that individual or some other unauthorized person tears down and destroys the same, can we proceed under the penalty provided in 1416—12 and prosecute that individual, or is it necessary that other provisions of the health law be complied with before we are able to proceed?"

Sec. 1412m—1 contains the following:

"** All homes or places of residence where a disease is found to exist which is designated by the state board of health as contagious and dangerous to the public health, shall be placarded by the health officer during the time when the disease is present in the home, and until the disinfection of patient and premises."

Sec. 1416—12 provides:

"Any person who shall violate any of the provisions of sections 1416—1 to 1416—14, inclusive, and any person who, without written authority from the commissioner of health or health officer shall remove, or cause to be removed any placard placed upon premises or apartments which are or have been occupied by persons sick with any of the diseases mentioned in section 1416—1, upon conviction thereof, shall be fined not less than five dollars nor more than one hundred dollars or by imprisonment in the county jail for not less than five days nor more than ninety days."

The infectious or contagious diseases enumerated in sec. 1416—3 are also enumerated in sec. 1416—1 and the published rules of the state board of health declare all such diseases mentioned in both secs. 1416—1 and 1416—3 to be dangerous and contagious diseases. It therefore follows that anyone who shall mutilate or tear down any notices can be prosecuted under sec. 1416—12. Such person comes within the express wording of said section.
Public Health—Slaughterhouses—The slaughtering of animals on a vacant lot does not make said lot a slaughterhouse within contemplation of sec. 1418.

December 30, 1920.

State Board of Health.

In your communication of December 17 you have submitted a statement given to you by H. W. Rudow, district attorney for Dunn county, which you submit as a basis for an opinion to wit,

"At the village of Knapp, one Dave Lynch, is engaged in the business of slaughtering hogs and cattle; he has been at this for about a month; he conducts the business on a vacant lot which faces on two streets, one being the main street; he is not using any buildings in connection but is in the open in plain view of the public and dwelling houses, children going and coming from school passing by see him killing and butchering. He is doing this work for others, charging them so much a head.

"I find nothing in the statutes covering the case and assume that it must come under your jurisdiction and your regulations; if it does, it should be given immediate attention; some of the citizens are highly incensed."

You state that since a slaughterhouse is not used by Mr. Lynch in connection with his business, it is questionable whether the provisions of sec. 1418 apply in the case, and you ask to be advised relative to this matter.

Sec. 1418 prohibits the erection and maintenance of any building for a slaughterhouse at a place within one-eighth of a mile of any public highway, dwelling house or a building occupied as a place of business, and makes the violation thereof a misdemeanor and provides a penalty. Under the statement of facts submitted, I am satisfied that a conviction could not be secured under sec. 1418.

A slaughterhouse has been defined as a house in which animals are slaughtered. Ford v. State, (Ind.) 14 N. E. 241, 244.

The term, "business of slaughterhouse," as used in the statute has been construed as meaning the business of slaughtering animals for sale, and that it does not matter whether it is carried on in a house or shed or on his own property or on leased property, or whether he sells his own animals or those of others. Thibaut v. Hebert, (La.) 12 So. 931.

A criminal statute must be strictly construed against the state, and, in view of that fact, I am constrained to hold that under the facts stated, sec. 1418 is not violated.
I find no other statute applicable, and the only question to consider for you is whether the facts are such as to make it a public nuisance. This is a matter for you to ascertain after a thorough investigation of the facts. It will depend upon all the surrounding circumstances and the frequency with which the animals are slaughtered.

It may be well to have this statute amended by the next legislature so as to include a statement of facts as presented in this case. It is even more objectionable to have animals slaughtered in full view of the public than it is to have it done in a house or shed.
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