ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee .................. from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee .................. from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva ........... from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison .................. from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point .......... from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh .................... from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay .................. from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee ................. from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown ................. from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Delloná ................ from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam ................. from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point ........... from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend ............... from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc ........... from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison ................. from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau ................ from Jan. 7, 1895, to Jan. 2, 1899
EMMETT R. HICKS, Oshkosh .................. from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT, Neillsville ........ from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT ........................... 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
WILLIAM J. MORGAN, Milwaukee ............... from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison ........................ from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay ................ from Jan. 3, 1927.
ATTORNEY GENERAL'S OFFICE

HERMAN L. EKERN. Attorney General
C. A. ERIKSON Deputy Attorney General
JOSEPH E. MESSERSCHMIDT Assistant Attorney General
MORTIMER LEVITAN Assistant Attorney General
FRANKLIN E. BUMP Assistant Attorney General
T. L. McINTOSH Assistant Attorney General
FRED C. SEIBOLD Assistant Attorney General
SUEL O. ARNOLD Assistant Attorney General
MICHAEL J. DUNN, JR.* Assistant Attorney General
A. T. TORGE Examiner of Abstracts
HERBERT H. NAUJOKS Legal Investigator

*Appointed February 2, 1926.
Banks and Banking—Public Officers—Board of deposits may designate different interest rate to be paid by working banks from that required of other banks.

January 1, 1926.

BOARD OF DEPOSITS.

In compliance with your resolution requesting an opinion on the question of whether the state board of deposits may designate a different rate of interest to be paid by depositories having checking accounts (working banks) from that required to be paid by other depositories, we submit the following:

Sec. 14.45, Stats., provides:

"The board of deposits shall from time to time fix the rate of interest to be paid by said depositories upon state moneys deposited with them and cause notice thereof to be published in the official state paper. The rate of interest, until changed by said board, shall be two and one-half per centum per annum."

In State v. McFetridge, 84 Wis. 473, 509, the court said:

"* * * The deposits under consideration (assuming that there was no other legal objection to the making thereof) were regularly made by the treasurer, in his official capacity as such, for the benefit of the state, and could only be drawn on his official draft. The authority to contract for interest on such deposits is as broad as the right to make them, for the statutes contain no special restriction in the matter of such interest." (Italics ours.)
In *State v. Johnson*, 186 Wis. 59, 66, the court said:

"Prior to the year 1891 the treasurer, as held in the *State Treasury Cases* (*State v. Harshaw*, 84 Wis. 532, 54 N. W. 17; *State v. McFetridge*, 84 Wis. 473, 54 N. W. 1, 998; and *State v. Sawyer*, 84 Wis. 532, 54 N. W. 17), was a practical insurer of the funds coming into his possession in his official capacity. In that year ch. 273 of the Laws of 1891 was passed, which authorized the creation of the state depositories, and which relieved the state treasurer from liability upon compliance with the law. That law, with a few changes, has been continued and carried into our present statutes. In order that the security of the state funds might be assured, the legislature has seen fit to create ample machinery designed to bring knowledge to the members of the state board of deposits of the actual condition of these depositories from time to time."

The purpose of the legislation in 1891 was to place the control of the designation of depositories, the amount of the deposits, and the interest to be paid, in the hands of the board of deposits instead of the treasurer. No intention is discernible to prevent the state board of deposits from exercising the same broad power which the state treasurer had in the contracting for interest to be paid on state deposits.

The distinction between a checking account and ordinary deposits was recognized by the legislature in sec. 14.46, which provides in part:

"* * * However, the amount at any time on deposit with any depository shall not exceed its actual paid-up capital, nor one-half of the penalty of the bond filed by it, nor the amount prescribed by the board of deposits, if any be prescribed; provided, that for checking accounts such deposits may be made to the amount of the paid-up capital and surplus."

If the legislature had intended that all depositories should pay the same rate of interest, it would have so stated affirmatively. As the law now reads, no restriction against reasonable classification of deposits, together with corresponding reasonable interest rates, can be spelled out of the law. The fact that the determination was left with the board of deposits shows the legislative intent to have a flexibility in the interest rates.

A restriction against different interest rates would be decidedly unreasonable in view of the common commercial practices. All banks pay interest on savings accounts; very few pay interest on checking accounts. If the state is to have a checking
account—and such an account is an absolute necessity—it cannot expect the same interest on such account that it receives on its nonactive accounts.

It follows, therefore, that the board of deposits may designate a different interest rate to be paid by working banks from that required of other banks.

ML

Public Lands—Taxation—Real property purchased by state after first Monday in August of any year is subject to taxes for that year.

January 2, 1926.

Board of Control.

You state that you are in receipt of a bill from a county treasurer requesting payment of taxes in the amount of $513.05, which are levied upon lands owned by the state, for the year 1921. The land in question was purchased by the state on October 26, 1921. You inquire if the taxes should be paid by the former owner or if they should be cancelled from the records of the county treasurer, since they are on lands owned by the state.

Sec. 70.06, Stats., provides in part:

"* * * Real property may be assessed at any time between the first day of May and the time of the sitting of the board of review for such district."

Sec. 70.46, Stats., provides in part as follows:

"(2) Such board shall meet annually on the last Monday of June at its town, city or village clerk's office, provided that in towns it may meet at the place where the last annual town meeting was held. In cities the board shall meet on the first Monday of July in each year. A majority shall constitute a quorum.

"* * * (6) After the assessors shall have laid before the board of review their assessment roll of real estate with the sworn statements and valuations of personal property and bank stock, as provided by section 70.47, the board of review shall remain in session one day from ten o'clock A. M. until four o'clock P. M. for taxpayers to appear and examine such assessment roll, sworn statements, and valuations and be heard in relation thereto; and upon reasonable cause being shown therefore, shall hold at least one adjourned session upon a subsequent day, and said board shall be presumed to be in session each day
until final adjournment is made unless adjournment is made to a particular date."

Sec. 70.50 provides:

"Except in cities of the first class the assessor shall, on or before the first Monday in August annually, deliver the assessment roll so completed and all the sworn statements and valuations of personal property to the clerk of the town, city or village, who shall file and preserve the same in his office."

Our supreme court in the case of Petition of Wausau Investment Company, 163 Wis. 283, has held that the status of property as to its taxability is determined as of any time between May 1st and the first Monday in August. We quote from the opinion, p. 290:

"Lands which had been deeded to the state prior to the first Monday in August in any year were unquestionably owned exclusively by the state and exempt from taxation for that year, and this is so even if such lands were incumbered by a mortgage or purchase-money lien. On the other hand, lands which were not deeded to the state at that date, but were simply included in one of the void contracts of sale, were not exclusively owned by the state and cannot be held to be exempt from taxation for that year. It follows that when the state thereafter obtained title in fee to such lands the tax liens thereon were not extinguished."

You are therefore advised that the former owner of the land is not liable for the taxes and that they should not be cancelled from the records of the county treasurer. They are properly a lien upon the land and should be paid by the state.

CAE

Prisons—Paroles—First offender sentenced to state prison for general indeterminate sentence may be paroled after serving minimum of his sentence.

January 2, 1926.

BOARD OF CONTROL.

You have submitted a certificate of conviction and sentence of one A. submitted to you by the warden of the state prison, and you inquire whether this man, so committed, can make application for parole if he has served the minimum of his sentence. Mr. A. was convicted of the crime of embezzlement and sentenced to imprisonment in the state prison for a period of not less than three months and not more than three years. The sentence was
dated October 29, 1925, and has been imposed under the statute as amended by ch. 359, Laws 1925. Sec. 359.07 as contained in said ch. 359 reads in part thus:

"The sentence of any convict found guilty of treason, murder in the first degree as defined by law, rape, kidnapping, or of any crime the minimum penalty for which is fixed by statute at twenty years or more, to imprisonment in the state prison, shall be for a certain term of time. In all other cases the sentence shall be for a term not less than one year and shall be for a general or indeterminate term not less than the minimum nor more than the maximum term of imprisonment prescribed by law for the offense. In imposing the maximum term, the court may fix a term less than the maximum prescribed by law for the offense * * * ."

Sec. 57.06 as amended reads:

"(1) The board of control, with the approval of the governor, may, upon ten days' written notice to the district attorney and judge who participated in the trial of the prisoner, parole any prisoner convicted of a felony and imprisoned in the state prison or in the house of correction of Milwaukee county who, if sentenced for less than life, shall have served at least one-half of the term for which he was sentenced, not deducting any allowance of time for good behavior, or who, if sentenced for life, shall have served thirty years less the diminution which would have been allowed for good conduct, pursuant to law, had his sentence been for thirty years, or who if he is a first offender and is sentenced for a general or indeterminate term, shall have served the minimum for which he was sentenced not deducting any allowance for time for good behavior."

It does not appear in the certificate of conviction nor in your correspondence whether Mr. A. is a first offender. If he is a first offender and has never before been convicted of a criminal offense, then under the last sentence in the above statute he may be paroled, as indicated in said sec. 57.06, but if he is a repeater or has been convicted before, and therefore is not a first offender, it will be necessary for him to serve one-half of the term for which he was sentenced. In this case I direct your attention to the wording of sec. 359.05, which provides that a sentence to the state prison for a general indeterminate term of not less than the minimum nor more than the maximum by the court "shall have the force and effect of a sentence of the maximum term subject to the power of actual release from confinement by the board of control," etc.

JEM
Indigent, Insane, etc.—Feeble-minded—Patient adjudged feeble-minded and committed to state institution may have re-examination on question of feeble-mindedness before proper tribunal.

Board of Control.

Attention G. C. Haas, Secretary.

In your recent letter you inquire whether patients adjudged feeble-minded and committed to a state institution can be ordered to a court for a rehearing as to feeble-mindedness.

Sec. 52.02, subsec. (1), Stats., declares in part:

"Except as otherwise provided, sections 51.01 to 51.11, 51.17 and 51.19 shall govern the examination, commitment and custody of feeble-minded, epileptic, and idiotic persons; but all commitments of such persons shall be to one of the institutions named in section 52.01."

Sec. 51.11 relates to the re-examination of persons adjudged insane, and subsec. (1) thereof provides:

"Except as otherwise provided in sections 51.22, 357.11 and 357.13, any person adjudged insane by any court, tribunal or officer having lawful authority so to adjudge, or restrained of his liberty because of his alleged insanity, may on his own verified petition or that of his guardian or some relative or friend have a retrial or re-examination of the question whether such person is sane or insane before the judge of any court of record of the county in which such person resides or in which he was adjudged insane."

It should be noted that sec. 52.02, subsec. (1), expressly includes, among others, sec. 51.11 as governing the examination, commitment and custody of feeble-minded persons. Sec. 51.11, subsec. (1), provides for a retrial or re-examination of any such person before "the judge of any court of record of the county in which such person resides or in which he was adjudged insane."

Your question must, therefore, be answered in the affirmative.

CAE
Prisons—Prisoners—Convict sentenced to state prison while on parole cannot be deported under federal warrant which states that prisoner is to be deported at expiration of his sentence.

January 2, 1926.

BOARD OF CONTROL.

Attention A. W. Bayley, Assistant Secretary.

In your letter of December 11, you state that one W was convicted of the crime of larceny and sentenced to one year in the state prison. W was born in Germany and had been in the United States one and one-half years prior to his conviction. You state that a warrant issued by the federal authorities, and now held by the Wisconsin state prison, recites that W is to be deported at the expiration of his sentence.

The question you ask is:

"If a parole were granted this man by this board, can the federal warrant be issued against him and can this man be deported at once?"

Sec. 57.06 relates to paroles from the state prison. Subsec. (2) thereof provides:

"No such prisoner shall be paroled until it shall appear, to the satisfaction of said board, that some suitable employment has been secured for him; and the paroled prisoner, shall at least once each month render a written report to said board giving such information as may be required by the board, which shall be approved by the person in whose employment the prisoner may be at the time."

Subsec. (3), sec. 57.06, provides:

"Every such paroled prisoner remains in the legal custody of the state board of control and may at any time, on the order of the board, be imprisoned in said prison or said house of correction; and shall be imprisoned whenever found exhibited in any show or exhibition. A certified copy of said order shall be sufficient authority for any officer executing it to take and convey the prisoner to the institution from which he was paroled, and all officers shall execute such order in the same manner as a warrant for arrest, but any such officer may, without order or warrant, whenever it appears to him necessary in order to prevent escape or enforce discipline, take and detain the prisoner and bring him before the board for its action."

Under the provisions of sec. 57.06, Stats., the sentence of a paroled prisoner is not vacated, set aside or ended. Nor is the
paroled prisoner a free man, since "every such paroled prisoner remains in the legal custody of the state board of control" (sec. 57.06 (3)). It is, therefore, clear that the sentence of a paroled prisoner does not end or expire until such prisoner has performed all of the conditions of the parole and has served the full period of his sentence. And, the board of control has no authority to commute any sentence. See art. V, sec. 6, Const.; X Op. Atty. Gen. 868.

This view is in accord with the weight of authority. In a note in L. R. A. 1915F, 531, it is said:

"The parole intended by most of these statutes does not end the sentence, and, whatever may be the theory of the parole on general principles, those granted under most statutes do not even suspend the sentence. The prisoner is not a free man while out on parole, and he continues to serve time on his sentence until the expiration thereof."

In 20 R. C. L. 578, the text writer states:

"* * * A parole does not pardon the prisoner; he still remains in legal custody. A parole is not a vacation of the sentence imposed nor, is it a commutation of the punishment. It suspends the execution of the penalty, and temporarily releases the convict from imprisonment on conditions which he is at liberty to accept or reject. Although the prisoner is conditionally released, the sentence is not set aside, nor the offense expiated. He is still under the supervision of the parole board, and subject to be remanded to prison if he fails to perform or violates the conditions of the parole."

It appears that the warrant issued by the federal authorities states that W is to be deported at the expiration of his sentence. A parole does not end or vacate the sentence. Hence, if W were paroled, he could not be deported, under this warrant, until he had fulfilled all the conditions of such parole and has served the full period of his sentence.

Your question must, therefore, be answered in the negative. CAE
Courts—Execution against Person—Body execution may be issued against defendant on judgment for damages based upon injury to property.

January 2, 1926.

Lawrence J. Brody,
District Attorney,
La Crosse Wisconsin.

You have presented an affidavit and a blank body execution submitted to the clerk of the circuit court of your county for his signature. You state that the judgment was one recovered in an action for the negligent and careless driving of an automobile, which appears to be the fact from the affidavit and the wording of the execution. You inquire whether a body execution should issue in this case.

Sec. 272.09 provides:

"If the action be one in which the defendant might have been arrested, as provided in chapter 264, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court after the term of an execution against his property unsatisfied in whole or in part."

It appears from the affidavit and execution that an execution against his property has been returned unsatisfied. Ch. 264, Stats., contains the following here pertinent provision:

"When arrest may be made. (1) The defendant may be arrested as hereinafter prescribed in the following cases:

"(a) In an action for the recovery of damages on a cause of action not arising out of contract, where the defendant is not a resident of the state or is about to remove therefrom or where the action is for an injury to person or character, or for seduction, or for criminal conversation, or for injuring, or for wrongfully taking, detaining or converting property, * * *." Sec. 264.02.

This action is one not arising out of contract, and is for damages and injuring property. It falls under the express provision of the above-quoted statutes, that the body execution under the facts stated may be issued.

JEM
Appropriations and Expenditures—Refunds—Oil Inspection—
Inspection fees erroneously paid for inspection of fuel oil may be
recovered from state under sec. 20.06, Stats., if said refund is
approved in writing by governor, secretary of state, state treas-
urer, and attorney general.

T. J. Cunningham,
Supervisor of Oil Inspectors.

You state that last April your department suspended inspec-
tion of fuel oil, including distillates, and the charging of inspec-
tion fees on the same. Previous to that time such oils of a cer-
tain gravity and above were inspected. Because inspections
have been suspended, a certain oil company demands a refund
of fees paid for inspection of furnace oil in 1924 and 1925. You
desire an opinion whether the company is entitled to such re-
fund.

Under sec. 168.13, which is part of ch. 168 of the Wisconsin
statutes covering the illuminating oils, this chapter contains a
provision for the inspection of various kinds of oil. Said sec.
168.13 contains the following:

"* * *Nor shall this chapter be construed to apply to
crude petroleum, gas oil or fuel oil; but the terms gas oil and
fuel oil shall not be construed to include kerosene, gasoline, ben-
zine, naphtha, power distillate, motor spirits or any other like
products of petroleum by whatever name called."

It is believed that this provision in the statute did not
exempt fuel oil and distillate from inspection, because it
provided that the term "fuel oil" shall not be construed to in-
clude the enumerated oils or "any other like products of
petroleum by whatever name called." For that reason your
department did inspect fuel oil. A careful examination of this
statute, however, necessitates a different construction to be
given to it. It is provided here that "fuel oil shall not be con-
strued to include kerosene, gasoline, benzine, naphtha, power
distillate, motor spirits or any other like products of petroleum
by whatever name called." Here we have the enumeration of
specific terms followed by generic terms, under the maxim of
statutory construction noscitur a sociis and the rule of statutory
construction known as ejusdem generis. This latter rule provides
that when general terms follow specific words, they take their
meaning from the latter and are presumed to embrace only
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things of the kind designated by them. 26 Am. and Eng. Encyc. of Law, 2d ed., 609.

The specific terms here enumerated, kerosene, gasoline, benzine, naphtha, power distillate, and motor spirits are a different kind of oil than fuel oil, and the general words “or any other like product of petroleum” must be construed to be limited to oils similar to those enumerated, and do not include fuel oils nor distillate, as the term “power distillate” does not include other distillates.

In view of this construction of the statute it appears apparent that the former inspection was erroneous and that fuel oil has been inspected because of this error. The question then confronts us: Are the parties who paid the inspection fees entitled to recover said fee which was paid under a mistake of law?

Sec. 20.06 provides:

“Refunds. 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:

"* * *

“(2) Moneys paid into the state treasury in error; but no such refund shall be made except upon the written approval of the governor, secretary of state, state treasurer, and attorney-general.”

Under this provision of the statute I am of the opinion that the person or company who paid the inspection fee erroneously collected is entitled to the refund, but such refund cannot be made without the written approval of the governor, secretary of state, state treasurer, and attorney general.

JEM
Automobiles—Drunken Auto Drivers—Bridges and Highways—Law of Road—Penalty provided for in sec. 343.182, Stats., for offense of driving automobile while intoxicated is controlling over same provisions in sec. 85.08, and amendment adding subsec. (4) to sec. 85.22, authorizing change to prohibit defendant from driving automobile for period of not less than one year must be construed as addition to penalty prescribed in said sec. 343.182.

January 2, 1926.

M. S. King,
District Attorney,
Wisconsin Rapids, Wisconsin.

You have referred me to two sections of the Wisconsin statutes covering the offense of driving an automobile while intoxicated, and you inquire which section should govern in an action against a person for the offense of driving an automobile while intoxicated. You refer me to sec. 85.08, subsec. (1), which prohibits, among other things, a person from driving an automobile while intoxicated. Sec. 85.22, subsec. (1), provides for the penalty for the violation of sec. 85.08. Sec. 343.182, formerly sec. 4416b, specifically prohibits a person from driving an automobile or other motor vehicle while intoxicated.

An opinion was rendered on May 29, 1924, by this department in which the very question submitted by you was considered, and it was held that sec. 4416b prohibiting drunken persons from driving an automobile and providing a penalty embraces the law on the subject instead of sec. 85.08 and is controlling over the provisions on the same subject in secs. 85.08 and 85.22. XIII Op. Atty. Gen. 302. This opinion was subsequently affirmed in another opinion in the same volume on page 411.

Since said opinion was given the legislature of 1925, by ch. 430, amended sec. 85.22 by adding thereto a new subsection, numbered (4), which provides as follows:

"Whenever any person is adjudged guilty of having driven an automobile, motor vehicle, motor truck, motor delivery wagon, automobile bus or other similar motor vehicle while intoxicated, the court in addition to imposing a fine or jail sentence, or both, may make and enter an order prohibiting such person from driving any motor vehicle of any kind for a period of not more than one year from the date of the making of the order."
This amendment should have been added to sec. 343.182, formerly sec. 4416b. I believe in view of the former opinion of this department and the fact that the amendment contained in said subsec. (4), sec. 85.22, is really an addition to the penalty rather than a change in the severity of it, the statute must be construed to leave the punishment for the offense the same, except that it now also authorizes the court to prohibit the defendant from driving an automobile for a period of not less than one year.

You are therefore advised that it is my opinion that the penalty prescribed in sec. 343.182 is the one that is controlling and that said penalty and the provision contained in subsec. (4), sec. 85.22, are in pari materia and must be construed together, so that in effect the penalty prescribed for driving an automobile will be that contained in those two provisions.

JEM

Criminal Law—Rape—In alleging and proving offense under sec. 340.47, Stats., it is not necessary to allege and prove force and that act was against will of female, as she is not capable in law of giving consent.

THEODORE A. WALLER,
District Attorney,
Ellsworth, Wisconsin.

You have referred me to sec. 340.47, Stats., and you state that you have a defendant of the age of 34 years who is the alleged father of an illegitimate child whose mother is of the age of 17 years. The father has left the state, but without any intention of abandoning the child which is yet unborn. The father has not been advised at any time as to the situation, but merely left because his family removed from Wisconsin. You state that you do not believe that the father is guilty of any offense under sec. 340.46 because the element of force being absent, he could, therefore, not be brought back under said statute. The question presented is whether an offense has been committed under sec. 340.47.

You are right in your conclusion as to the provision under sec. 340.46. The facts, however, bring the case within the purview of sec. 340.47. It is there provided:
“Any person over eighteen years of age who shall unlawfully and carnally know and abuse any female under the age of eighteen years shall be punished by imprisonment in the state prison not more than thirty-five years nor less than one year, or by a fine not exceeding two hundred dollars; * * *.”

The father in question is over 18 years of age, and the mother is less than 18 years.

It is held that if the prosecutrix is under the age of consent she in conclusively incapable of consenting, and the want of consent need not be alleged or proved. Proper v. State, 85 Wis. 615, 631; State v. Erickson, 45 Wis. 86. Our court has also held that carnal knowledge and abuse of a female under the age of consent is rape, without showing the presence of force and that the act was against her will. See Fizell v. State, 25 Wis. 364.

You are therefore advised that the father in question is guilty of the offense under sec. 340.47, and that he may be brought back to this state on requisition for said offense.

JEM

Trade Regulation—Trading Stamps—Coupons freely distributed which, together with 89¢, entitled holder to purchase of fountain pen is not violation of any statute.

January 5, 1926.

RAYMOND E. EVRARD,
District Attorney,
Green Bay, Wisconsin.

You state that a drug store in your city, through a representative or agent of some fountain pen concern, distributed throughout the city of Green Bay numerous coupons reading as follows:

“This coupon and 89¢ will entitle you to the purchase of a fountain pen at such and such a drug store.”

You ask to be advised as to whether this is in violation of our law. I know of no law that this violates. It comes squarely within the opinion rendered by this department in VIII Op. Atty. Gen. 820. In order to be a violation of the trading stamp law the coupon must be given in connection with the sale of merchandise. Under your statement of facts the coupon is distributed free. This does not violate the trading stamp statute. Neither is there a violation of any lottery law as there is no element of chance in the transaction.

JEM
Indigent, Insane, etc.—Old-Age Pensions—Pension can be granted only when conditions prescribed in sec. 49.22, Stats., have been satisfied. Applicant who has not lived continuously in county in which he makes application for fifteen years immediately preceding application is not entitled to pension. Sec. 49.31, subsec. (1), Stats., does not bar applicant from receiving pension.

John A. Lonsdorf,
District Attorney,
Appleton, Wisconsin.

The material facts presented in your letter of November 27 are as follows:

1. An applicant for an old-age pension is over seventy years of age. He has resided in the state of Wisconsin for the past fifteen years. During the last four years he has lived in the city of Appleton. Prior to the time he established a residence in Appleton his business as a railroad man required that he eat his noon-day meal in Appleton. During this period his lodging and sleeping place was at Hilbert, Calumet county. You inquire whether the applicant is entitled to an old age pension under the provisions of sec. 49.22, Stats.

2. The applicant has been incapacitated for approximately six months, without relatives to contribute to his support and without an income. During this six-month period a fraternal organization, which under its by-laws was not required to do so, voluntarily provided the applicant with clothing, fuel and shelter. You inquire whether the provisions of sec. 49.31, subsec. (1), bar the applicant from receiving the old age pension.

1. Your first question is answered in the negative. Sec. 49.22 prescribes the conditions upon which an old age pension may be granted. One of the conditions is that the applicant must have resided in the county in which he makes application "continuously for at least fifteen years immediately preceding the date of application, but continuous residence in the state and county shall not be deemed to have been interrupted by periods of absence therefrom if the total of such periods does not exceed three years." Subsec. (3), par. (a), sec. 49.22.

2. Under the statement of facts, the applicant has not resided in your county for fifteen years immediately preceding the date of application. He has resided in your county only during the
last four years. Previous to that time the applicant resided in Calumet county. The applicant therefore has not satisfied the statutory requirements and for that reason an old-age pension cannot be granted to him.

2. Your second question is answered in the negative. Sec. 49.31, subsec. (1), Stats., provides as follows:

"During the continuance of the pension no pensioner shall receive any other relief from the state or from any political subdivision thereof except for medical and surgical assistance."

You will note that the statute applies only to a pensioner during the period for which he is receiving the pension. Under your statement of facts the applicant is not now receiving relief from "the state or any political subdivision thereof." Consequently, the provisions of this section do not bar the applicant from receiving a pension.

SOA

_Criminal Law—Intoxicating Liquors—Affidavit which gives hearsay testimony only and does not state facts upon which affiant’s belief is based, is not sufficient to support search warrant._

You state that you are doubtful of the validity of the search warrant issued in a recent local case in view of the decision of our court in the Baltes and Davis cases, the warrant being based and issued on the following written sworn testimony of Messers. Parkinson and O. A. Stevenson:

"That they had been asked by reputable citizens to search the premises of D; that he sold liquor and had it in his possession at all times; that by further questioning they (the applicants) are satisfied that D does sell liquor. Further that D’s premises had been searched about June, 1925, and intoxicating liquor was found in his possession at that time."

It appears that the officers then went to the D residence with the search warrant issued on the above affidavit and found no one at home; that shortly thereafter the defendant’s wife appeared, and then on the southwest corner of defendant’s
premises they found a one-gallon jug of moonshine liquor, about six inches from the lot line, hidden in the weeds. You ask my opinion as to the legality of the search warrant.

The trouble with the affidavit is that the affiants do not state facts upon which to base their belief. The statements of reputable citizens are mere hearsay, and the affiants do not give the facts upon which, by further questioning, they became convinced that D had liquor. Under the Baltes case this seems necessary. I am in doubt whether the court would uphold the search warrant under the circumstances. It is a border line case. The extremely strict construction that our court has placed upon the statutes leads me to believe that the above sworn testimony does not quite reach the requirements.

JEM

Counties—Prisons—Jails—Expense for board and keep of prisoners in county jail under commitments for violating city ordinances is to be paid by county and cannot be recovered from city.

January 12, 1926.

HAROLD E. STAFFORD,
District Attorney,
Chippewa Falls, Wisconsin.

You state that the city of Chippewa Falls prosecuted and convicted certain persons for violations of a city ordinance. The offenders were confined in the county jail. The county sheriff presented bills to the county for the board of these prisoners. You ask whether the county can recover that expense from the city. You state that the city attorney cites Op. Atty. Gen. for 1912, 663 and VI Op. Atty. Gen. 692, ruling that the city is not liable. You cite X Op. Atty. Gen. 307, which rules that the city is liable.

X Op. Atty. Gen. 307 relied upon the cases of Nickell v. Waukesha County, 62 Wis. 469 and Waukesha County v. Village Waukesha, 78 Wis. 434. But such cases involved the liability of a village, and the liability of a village was expressly provided for by statute, just as it is now. Sec. 61.63, subsec. (2), provides that prisoners confined in the county jail for violation of village ordinances shall be “kept at the expense of such village.”

There appears to be no similar statute relating to cities. In the absence of some statutory imposition of liability I must
agree with the earlier opinions, that the city is not liable. See *Sonoma Co. v. Santa Rosa*, 102 Cal. 426, 36 Pac. 810; *Tippecanoe Co. v. Chissom*, 7 Ind. 688; *Strafford Co. v. Dover*, 61 N. H. 617; *Strafford Co. v. Somersworth*, 38 N. H. 21; *Merrimack Co. v. Concord*, 30 N. H. 299; *People v. Columbia Co.*, 67 N. Y. 330.


FCS

_Navigable Waters_—Title to unsurveyed island in Star Lake is in state.

Elmer S. Hall, Commissioner,
Conservation Commission.

In your letter of November 3 you state that a question has arisen regarding the title to an island in Star Lake, located in sections 10 and 11, township 45 north of 7 west, Bayfield county.

Section 11 was conveyed to the state of Wisconsin in trust for railroad purposes by government patent dated July 6, 1863. The patent described section 11 as follows: All of section 11, containing 519.70 acres. Reference to the field notes of Daniel E. Norton, the government surveyor who surveyed section 11 in 1858, disclosed that the E\(\frac{1}{2}\) of section 11 contains 320 acres, and the N\(\frac{1}{2}\) of the NW\(\frac{1}{4}\) contains 80 acres. Star Lake is situated partly in the S\(\frac{3}{4}\) of the W\(\frac{1}{2}\) of section 11. The S\(\frac{1}{2}\) of the NW\(\frac{1}{4}\) is fractional and is described by the surveyor as lot 1 containing 32.80 acres and lot 2 containing 31.18 acres. The S\(\frac{1}{2}\) of the SW\(\frac{1}{4}\) is also fractional and is described by the surveyor as lot 3 containing 23.12 acres and lot 4 containing 32.60 acres. The shore of Star Lake was meandered by the surveyor. The total acreage in section 11 is, according to the field notes, 519.70 acres.

The state of Wisconsin conveyed to the Chicago, St. Paul, Minneapolis and Omaha Railway Company, by state patent dated February 14, 1884. The patent described section 11 as follows: NE\(\frac{1}{4}\) of the NE\(\frac{1}{4}\), S\(\frac{1}{2}\) of the NE\(\frac{1}{4}\), NW\(\frac{1}{4}\) of the NW\(\frac{1}{4}\), S\(\frac{1}{2}\) of the NW\(\frac{1}{4}\), the S\(\frac{1}{2}\) of section 11, containing 439.70 acres. The NE\(\frac{1}{4}\) of the NW\(\frac{1}{4}\), and the NW\(\frac{1}{4}\) of the NE\(\frac{1}{4}\) were not included in the conveyance from the state to the railway company. Probably these two descriptions were
conveyed direct to the railway company by a United States patent, although no proof can be furnished to substantiate this conclusion.

The acreage conveyed by the state to the railway company as stated in the state patent, was 439.70 acres. The acreage conveyed by the United States government to the state was 519.70 acres. The acreage thus conveyed by the state to the railway company was 80 acres less than the acreage conveyed by the United States to the state.

The state conveyed to the railway company the $\frac{1}{2}$ of the NW$\frac{1}{4}$, and the $\frac{1}{2}$ of section 11. As already stated, the $\frac{1}{2}$ of the NW$\frac{1}{4}$ is a fractional subdivision described by the United States surveyor as lots 1 and 2. The $\frac{1}{2}$ of section 11 is also a fractional subdivision, the W$\frac{1}{2}$ of which is described by the United States surveyor as lots 3 and 4. In view of the description in the state patent, and in view of the acreage stated in the patent, it is the opinion of this department that the railway company took title only to the low water mark of Star Lake according to the government survey.

The island to which you refer has an acreage of less than four acres, and was not surveyed by the United States surveyors. There was no mistake made by the surveyors in not surveying this island for the reason that the United States surveyors had instructions from the United States land department to survey only such islands the acreage of which was 21 acres and upwards. Whitaker v. McBride, 197 U. S. 510, 513.

It is impossible to determine whether the island in question existed at the time of the government survey. There is nothing to indicate that the United States government intended to convey this island to the state of Wisconsin when the patent to the state was granted. It is immaterial as far as title in the state is concerned whether this island was included in the conveyance from the United States government for the reason that by an act of congress, approved August 22, 1912, 37 U. S. Stats. at Large 324, all unsurveyed and unattached islands in inland lakes north of the township line between townships 33 and 34 were conveyed to the state for the purpose of forest reserves. Of course, if the state did not receive title to these islands at the time the government patent was issued the state could not have conveyed it to the railway company. The island, however, was not included in the conveyance from the state to the rail-
way company for the reason that the railway company obtained title to section 11 only to the water's edge of Star Lake.

It was early held in this state that the title of a riparian owner on a navigable stream extends to the center or thread of the stream. *Jones v. Pettibone*, 2 Wis. 308; *Willow River Club v. Wade*, 100 Wis. 86, 97. A riparian owner on a navigable lake, however, takes title only to the water's edge. The title to the bed of a navigable lake remains in the state. *Willow River Club v. Wade*, 100 Wis. 86, 97; *Mendota Club v. Anderson*, 101 Wis. 479, 492. The riparian owner on a navigable lake, therefore, does not by virtue of his riparian ownership obtain title to islands in such navigable lake.

It is the opinion of this department, therefore, that the title to the island in question vests in the state.

SOA

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*Education—Tuition*—Pupil living in high school district who has completed course of study offered by such high school cannot attend high school maintaining teachers' training course and have his tuition paid by town in which he resides. XI Op. Atty. Gen. 562 cited and followed.

January 15, 1926.

John C. Callahan,

Superintendent of Public Instruction.

In your letter of December 18 you state that a pupil residing in a high school district has finished the course of study furnished by the high school in the district. The pupil desires to take a teachers' training course which is maintained by a high school in another high school district. You inquire whether if such pupil attends the high school offering the teachers' training course, such high school may collect tuition from the town in which such pupil resides.


In the latter opinion this department held that a person residing in a free high school district cannot, under sec. 40.53, Stats., enter a free high school of another district after finishing the course offered in his own, and have the tuition paid by the town, village or city of his residence.

The pupil to whom you refer resides in a district maintaining a high school. Consequently, under the opinion in XI Op. Atty.
Gen. 562, the pupil cannot attend the high school maintaining the teachers' course and have the tuition paid by the town in which he resides.

SOA

Corporations—Public Utilities—Taxation—Provisions of sec. 76.28, subsec. (1a), Stats., do not apply to city

January 15, 1926.

JOHN C. CALLAHAN,
Superintendent of Public Instruction.

In your letter of December 29 you inquire whether subsec. (1a), sec. 76.28, Stats., applies to a city.

This section provides as follows:

"In all counties having a population of fifty thousand or less, fifty per cent of the amount of taxes received by any town or village from the state treasurer on account of the assessment of any street railway, light, heat, power or conservation company shall be retained by the treasurer thereof for general town or village purposes, and the remaining fifty per cent shall be equitably apportioned by the town board or village trustees to the various school districts or parts of school districts in which the property of such company is located, in proportion to the amount which the property of such company within each school district bears to the total valuation of the property of such company in the town or village or part thereof; provided, that no such school district shall in any event receive more than the actual cost of operating and maintaining its school."

The section above quoted does not in express terms apply to a city.

Bill No. 430, A., as originally framed applied to a town, city and village. Substitute Amendment 1, A., to Bill No. 430, A., was, with but a few minor changes, enacted into sec. 76.28, subsec. (1a), by ch. 423, Laws 1925. In view of the history of this statute the language must be taken to indicate an intent on the part of the legislature to exclude a city.

It is, therefore, the opinion of this department that the provisions of sec. 76.28 (1a) do not apply to a city.

SOA
Appropriations and Expenditures—Highway Commission—
Taxation—Motor Vehicle Fuel Tax—Appropriation provided in
subsec. (8), sec. 20.49, Stats., is prospective and cannot be used
to defray expenses incurred prior to January 1, 1926.

A. L. Devos,
District Attorney,
Neillsville, Wisconsin.

The material facts presented in your letter of December 22
are as follows:

Ch. 11, Laws 1925, provides for a motor vehicle fuel tax.
Subsec. (8), sec. 20.49, provides for the distribution of the tax
to cities, towns and villages. Some of the towns in your county
expended money during the past summer in anticipation of
this tax and are now requesting the county to pay to them for
such expenditures the sums out of the motor vehicle fuel tax
which are available. You inquire whether the appropriation
provided for in subsec. (8), sec. 40.29, may be used to reimburse
the towns, villages and cities for expenses incurred prior to
January 1, 1926.

Subsec. (8), sec. 20.49, appropriates on January 1, 1926, to
towns, villages and cities certain sums for the improvement of
public roads and streets within their respective limits. As a
general rule, appropriations are prospective, and in the absence
of a statutory provision making them retroactive, they will be
presumed to be entirely prospective. There is no provision in
sub-sec. (8), sec. 20.49, indicating that the appropriation is to
be retroactive. It is the opinion of this department, therefore,
that the appropriation provided in subsec. (8), sec. 20.49, is
prospective and cannot be used to defray expenses incurred
prior to January 1, 1926.

SOA
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Public Health—Basic Science Law—Chiropractors are only persons who were lawfully engaged in this state in treating sick without being registered or licensed in Wisconsin at time of enactment of basic science law; they are only persons who may now be registered without examination in compliance with conditions of sec. 147.09, Stats. Midwives, chiropodists and masseurs were registered and need not take examination.

January 15, 1926.

PROF. M. F. GUYER, Secretary,
Basic Science Board.

You state that a question of the interpretation of sec. 147.09 has come before your board, and that you would like a legal opinion of the exact meaning of said section. Such section reads thus:

"Any person who, on February 1, 1925, was regularly licensed or registered in the state of Wisconsin to treat the sick need not be registered under the basic science law. Any person who, on February 1, 1925, was not registered or licensed in the state of Wisconsin to treat the sick, but nevertheless on that date was lawfully engaged in this state in treating the sick, shall be registered upon presenting to the board, within sixty days after this section goes into effect, an application therefor, with sufficient and satisfactory evidence that he was, on such date, lawfully engaged in this state in treating the sick, and is of good moral character, and upon the payment of a registration fee of five dollars. The certificate shall recite registration solely as a person who, February 1, 1925, was lawfully engaged in this state in treating the sick. Such certificate shall be in force only when filed with the county clerk in the manner provided in section 147.14."

You refer especially to the second sentence and you state that as a board you have held that this can refer only to chiropractors, since they are the only people, other than persons regularly licensed or registered in the state of Wisconsin to treat the sick, who were in fact lawfully engaged in this state in treating the sick, at the time when the law was enacted. You state that the legality of the chiropractors' practice is manifest from the legislative enactment as contained in sec. 147.07, Stats. 1923, subsec. (3), which reads:

"Reputable practitioners of chiropractic may practice their profession in this state, if they do not hold themselves out as registered or licensed, and conspicuously display in the places
where they practice a sign containing in large and legible type: 'Not registered or licensed in Wisconsin.'"

You state that any other person treating the sick is supposed to have been registered with or have been licensed by the Wisconsin state board of medical examiners, and you refer to sec. 147.14, Stats. 1925, which reads:

"No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, without a license or certificate of registration from the state board of medical examiners, except as otherwise specifically provided by statute, * * *.""

You also state that midwives, chiropodists and masseurs, if they were operating legally, were already registered with the medical board and were, together with physicians and surgeons, exempt as previous practitioners who need not be examined. See secs. 150.01 to 150.06, 154.01 to 154.06, and 147.01 to 147.05 and 147.17, Stats.

You also state that the irregular cases which are perplexing you most are X-ray specialists and various cults such as "Naprapaths," etc., which, you state, have no recognition under the laws.

I have carefully considered this statute and I have been forced to the conclusion that your position is well taken. I do not believe that the statute, as enacted, is susceptible of any other interpretation. If it be true, as contended, that the law makers intended to provide for regulation and registration of the so-called "irregulars," still I am satisfied that they did not intend that they should be registered without an examination. The law requires them to pass the regular examination in order to be empowered to practice their profession. To be exempt from examination the law expressly provides, as above quoted, that the person must have been lawfully engaged in this state in treating the sick.

Sec. 147.01, subsec. (1), par. (a), provides:

"To 'treat the sick' is to examine into the fact, condition, or cause of human health or disease, or to treat, operate, prescribe, or advise for the same, or to undertake, offer, advertise, announce, or hold out in any manner to do any of said acts, for compensation, direct or indirect, or in the expectation thereof."
These irregulars do not, in my opinion, bring themselves within the purview of this provision. You are therefore advised that chiropractors are the only ones that come under the class who were not registered to treat the sick at the time the statute was enacted, but who, nevertheless, on that date were lawfully engaged in treating the sick, and that they may be registered without an examination on complying with the conditions provided in sec. 147.09.

JEM

Criminal Law—Second Sentences—Prisons—Parole—Prisoner convicted of felony and sentenced on August 7, 1925, to serve indeterminate sentence of one to three years in state prison and who on December 8, 1925, was sentenced for another felony to state prison for indeterminate term of one to two years, such sentence to commence on December 8, 1925, is eligible for parole December 8, 1926.

A. W. Bayley, Secretary,
Board of Control.

The material facts presented in your letter of December 29 are as follows:

M—K—and P—P—were convicted and sentenced on August 7, 1925, to the Wisconsin state prison for a term of one to three years on a charge of uttering false paper. On December 7, 1925, they were released from the state prison and taken to the city of Portage, where they were tried and convicted of the offense of uttering false and spurious checks, and were sentenced to serve a term of not less than one year nor more than two years, the term to commence on the 8th day of December, 1925, at noon of said day.

You state that under the provisions of subsec. (1), sec. 57.06, K— and P— would have been eligible to parole if the second sentence had not been imposed. You inquire whether the sentence imposed on December 8 prolongs their time for parole until one year from that date.

The situation you present raises the question as to whether the two sentences run concurrently or whether they are cumulative. It is the opinion of this department that after December 8, 1925, the two sentences run concurrently. The date on which
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the second sentence was to begin was definitely fixed by the judge—December 8, 1925.

Under the provisions of subsec. (1), sec. 57.06, the board of control is given the power to parole any prisoner convicted of a felony and imprisoned in the state prison who shall have served at least one-half of the term for which he was sentenced. Under the provisions of this section these men will be eligible for parole on December 8, 1926.

SOA

Criminal Law—Requisition may be granted for return to this state of father charged with crime of abandonment of child under sec. 4587c, Stats. 1923 (351.30, Stats.), where such father has been divorced from mother and where father is charged in divorce decree with payment to mother of certain sum for support of child.

January 16, 1926.

HONORABLE JOHN J. BLAINE,
Governor.

You have submitted to this department for approval requisition papers in the case of State of Wisconsin v. W—H—, who stands charged in the district court of Milwaukee county with the crime of abandonment of child, under the provisions of sec. 4587c, Stats. 1923 (sec. 351.30, Stats.).

It appears that said defendant W—H— was married to J—H— in June, 1920, and that the issue of said marriage is one child born January 26, 1921. The wife obtained a divorce on the grounds of cruel and inhuman treatment on October 9, 1924. The divorce decree provided that the husband, W—H—, should pay for the support of his said child the sum of five dollars per week.

In II Op. Atty. Gen. 326, it was held by this department that willful failure to make payments of alimony for the support of a minor child constitutes abandonment, under the provisions of sec. 4587c, Stats. 1923 (sec. 351.30, Stats.). In VII Op. Atty. Gen. 198, it was held that the failure to pay alimony to his former wife, as required by a decree of divorce, does not constitute an offense under sec. 4587c, and requisition for his return from another state would not be granted.

In Watke v. State, 166 Wis. 41, the court held that a judgment of divorce, providing that the divorced husband should pay a
said sum monthly to his former wife as alimony for the support of his minor child is not such a modification of his legal obligation to support the child as to free him from the penalties prescribed by sec. 4587c, Stats., for failure to provide such support.

Upon the authority of the case last cited, it is the opinion of this department that this requisition should be granted.

The application for a requisition is hereby approved as to form.
SOA

Indigent, Insane, etc.—Old-Age Pensions—Applicant for old-age pension is eligible to receive pension provided he has lived in this state forty years, last five of which have immediately preceded application.

Absence of two years does not bar applicant for old-age pension under provisions of sec. 49.22, subsec. (3), Stats.

Value of property of applicant for old-age pension must be determined by county judge before whom application is made.

January 16, 1926.

Lawrence J. Brody,
District Attorney,
La Crosse, Wisconsin.

In your letter of January 12 you submit the following questions for an opinion:

"A" has lived in La Crosse county for fifty years, except that he has established a residence and lived in another state for ten years between 1910 and 1920 so that his total period of residence in this state is more than forty years, and continuously between the period from 1920 to date. Is he entitled to a pension under the law?

"B" has resided in the county for more than fifteen years, excepting that he moved to another state and resided there for two years, but returned and established a residence in this state more than two years ago. Does this two years' absence deprive him of a right to an old-age pension under sec. 49.22, subsec. (3) (a)?

"C" owns a homestead in which he resides valued at two thousand dollars. Will an income of five per cent be computed on the value of this property and deducted from the amount he can receive for a pension? In case the above property is mortgaged would the amount of the mortgage debt be deducted in computing its value?"
Sec. 49.20 authorizes a county to establish a system of old-age pensions. Sec. 49.21 provides that the amount of the pension shall be fixed in accordance with the conditions in each particular case, but that in no case shall the pension granted exceed such amount which when added to the income of the applicant, including income from property, shall exceed a total of one dollar a day.

Sec. 49.22 prescribes the conditions upon which a pension may be granted. Subsec. (3), sec. 49.22, provides:

"An old-age pension may be granted to an applicant who:

"* * *

"(3) Has resided in the state and county in which he makes application:

"(a) Continuously for at least fifteen years immediately preceding the date of application, but continuous residence in the state and county shall not be deemed to have been interrupted by periods of absence therefrom if the total of such periods does not exceed three years, or,

"(b) Forty years, at least five of which have immediately preceded the application;

"(c) Provided, that absence in the service of the state of Wisconsin or of the United States shall not be deemed to interrupt residence in the state or county if a domicile be not acquired outside the state or county."

Subsec. (2), sec. 49.23, provides that no pension shall be granted to a person "if the value of his property or the value of the combined property of husband and wife living, together exceeds three thousand dollars."

Sec. 49.24 provides:

"The annual income of any property which is not so utilized as to produce a reasonable income, shall be computed at five per cent of its value."

Applying the law to the various questions raised, we answer as follows:

1. "A" is entitled to receive the pension for the reason that he has lived in this state for forty years, the last five of which have immediately preceded the application. Sec. 49.22, subsec. (3).

2. "B" is entitled to a pension for the reason that he has lived in the county continuously for more than fifteen years. The absence of two years does not exclude him from receiving the pension. Sec. 49.22 (3).
3. It is impossible to state what definite amount "C" may receive. The amount of pension must be fixed in connection with "C's" circumstances. The total amount of such pension must not exceed one dollar a day. Sec. 49.21.

Under your statement of facts it is assumed that "C's" property is unproductive within the meaning of sec. 49.24. Under secs. 49.21 and 49.24 five per cent of the amount of property, that is, five per cent of two thousand dollars, must be taken into consideration in determining whether the pension granted exceeds one dollar a day. There is nothing in the statutes to warrant deducting from the value of the property the amount of the mortgage thereon. However, the matter of the determination of the value of the applicant's property should be determined by the county judge. This department expresses no opinion as to the value of the property.

SOA

Appropriations and Expenditures—Highway Commission—Bridges and Highways—Appropriation made by county board of county having population of 250,000 or more to cities and villages in such county may be made only for improvement of streets which form connections between portions of state trunk highway system.

January 18, 1926.

HIGHWAY COMMISSION.

In your letter of December 30 you inquire whether the county board of a county having a population of 250,000 or more may appropriate any portion of the state aid funds allotted to the county and to the cities and villages within such county under the provisions of subsec. (9), sec. 20.49, Stats., for construction on streets that are not portion of the state trunk highway system.

Subsec. (9), sec. 20.49, Stats., appropriates to the state highway commission:

"On July 1, 1926, and annually thereafter, for the improvement of the state trunk highway system, and the county trunk highway systems, the amount remaining after the amounts appropriated under subsections (1) to (8) have been set aside. This amount shall be allotted in the manner provided by subsection (9) of section 84.03."
Subsec. (9), sec. 84.03, Stats., provides that the highway commission shall first set aside from the amount appropriated for the improvement of the state trunk highway system by subsec. (9), sec. 20.49, a sufficient amount each year so that the federal aid allotted to the state for the years 1922 to 1925 shall be received. The remainder shall be allotted by the highway commission to the counties in the state. Twenty per cent of the allotment to each county shall be set aside for the improvement of the county trunk highway system. The remainder shall be expended in the improvement of the state trunk highway system. Subsec. (9), sec. 84.03, Stats., contains the following provision:

"* * * The county board of any county having a population of two hundred and fifty thousand or more, may appropriate any portion of the state aid funds allotted to such county under this subsection to the cities and villages within such county for street construction."

It is under the latter provision that your question arises. It will be noted from the other provisions of subsec. (9), sec. 84.03, Stats., that the legislature constantly provided that the allotment to counties should be used on the state trunk highway system. It should also be noted that the appropriation, subsec. (9), sec. 20.49, Stats., was made "for the improvement of the state trunk highway system, and the country trunk highway system." The legislature did not expressly give the county board of a county having a population of 250,000 or more the power to appropriate money to be used for street construction on streets not forming portions of the state trunk highway system.

It is the opinion of this department, therefore, that the language used in subsec. (9), sec. 20.49, Stats., and in subsec. (9), sec. 84.03, Stats., indicates a legislative intent that the funds appropriated should be used only for the improvement of the state trunk highway system. Consequently, in counties having a population of 250,000 or more appropriation may be made by the county board only for such streets as are portions of the state trunk highway system.

SOA
Education—Industrial Education—Nonresident tuition fees provided for in sec. 41.19, Stats., may be collected from town, city or village by bringing action of mandamus to compel proper officials to allow claim.

January 20, 1926.

GEO. P. HAMBRECHT, Director,
Board of Vocational Education.

In your letter of January 11 you present a question as to the procedure to be followed in collecting nonresident tuition fees under the provisions of sec. 41.19, Stats. You state that a board of vocational education has charged tuition fees for nonresident pupils. The clerks of the towns in which the nonresident pupils reside have been notified in accordance with the provisions of sec. 41.19, but the tuition charges have not been paid.

Sec. 41.19 provides as follows:

"The local board of industrial education is authorized to charge tuition fee for nonresident pupils not to exceed fifty cents per week. On or before the first day of July in each year the secretary of the local board of industrial education shall send a sworn statement to the clerk of the city, village or town from which any such person or persons may have been admitted. This statement shall set forth the residence, name, age and date of entrance to such school, and the number of weeks' attendance during the preceding year of each such person at the school. It shall show the amount of tuition which the town, city or village is entitled to receive on account of each and all such pupils' attendance. This statement shall be filed as a claim against the town, village or city where such pupil resides and allowed as other claims are allowed."

The statute provides that the tuition fees charged by a board of industrial education shall be certified to the town, city or village from which the pupil has been admitted. The statute also provides that the town, city or village shall allow the tuition claim in the same manner as other claims are allowed. The duty thus prescribed for the officials of a town, village or city is a mere ministerial duty which if not performed may be enforced by an action of mandamus.

SOA
Minors—Child Protection—County cannot be charged for maintenance of child committed permanently to state school at Sparta under provisions of sec. 48.07, Stats.

January 22, 1926.

T. W. Andresen,
District Attorney,
Medford, Wisconsin.

In your letter of December 17 you inquire whether under the provisions of sec. 48.07, Stats., a county may be charged $4.00 a week for the maintenance of a child who has been permanently committed to the state public school at Sparta. You state that in your opinion a county may not be charged for such maintenance where the commitment is permanent.

This department concurs in your opinion. Subsec. (1), sec. 48.07, provides that a child may be temporarily committed to the state school. Subsec. (3), sec. 48.07, provides:

"During such period of probation the county shall be liable for the reasonable expense of the maintenance of such child, such expense to be at the rate of four dollars per week, * * *.

Subsec. (3) further provides:

"The superintendent of the state public school shall charge to each of the several counties, in a book to be provided by him for that purpose, the said sum of four dollars per week for the care and maintenance of each such child in the state school for each of the said counties; * * *.

There is in the statute no authority for charging a county with the maintenance of a child committed to the state school at Sparta, except as provided in subsec. (3), where the commitment is temporary. In case the child is permanently committed, the county cannot be charged for the maintenance of such child. SOA.
Building and Loan Associations—Teacher acting as agent for building and loan association must furnish bond.

Building and loan association has no power to receive deposits to be accumulated until sufficient for stated monthly payments.

Building and loan association cannot relieve in advance certain class from payment of fines.

January 22, 1926.

Dwight T. Parker,
Commissioner of Banking.

Attention C. P. Diggles, Building & Loan Supervisor.

You have forwarded to this office the draft of a plan of the North Shore Building and Loan Association, Shorewood, Wisconsin, for a proposed thrift club to be operated in the schools in connection with their association. You ask whether a building and loan association can operate such a plan in connection with their association.

The substance of the plan as outlined by the secretary of the association in a letter to you is:

“Our general idea, more detailed in the enclosed pages, is to have the students of our schools who desire to participate in the Thrift organization, become members in the regular way, with their parent as guardian or trustee. Certificates and pass books will be issued to all such members. To meet the school’s demand for a weekly Thrift Day, we have suggested that savings of the children be turned in each week, as advance accumulation toward the necessary amount for their next month’s dues. These amounts would be passed in to the teachers in sealed envelopes bearing the child’s name, number, and amount supposed to be enclosed, as verified by the child’s parent before coming to school. The teacher would list these without opening the envelopes, reporting the amounts specified on the envelopes. All envelopes would be passed on to the principal, and from him to the superintendent, who would turn them over to the association with a summary report. The secretary would then record the partial advance payments in a subsidiary record, and the first of the following month would take out the necessary monthly payments and enter in the pass books and other records the same as if the payments had been made individually and in one lump sum. In all other respects, the plan would be the same as that followed with any other members, except possibly by showing more leniency as to fines if the total contribution prior to the first six days of the month is not sufficient in individual cases to meet the monthly payment required for the number of shares subscribed.”
It is to be noted that: (1) the school system is used for the collection of the dues; (2) the teachers, principal and superintendent act as agents for both pupil and association; (3) the weekly savings are not credited in the pass book until the amount totals the necessary monthly payments; (4) leniency will be shown in the collection of fines.

No opinion is expressed on whether the school system can be used in connection with a savings plan which results in the placing of such savings in any particular association or institution.

Sec. 215.27, Stats., provides in part:

"Every person appointed or elected to any position requiring the receipt, payment, or custody of money or other personal property belonging to a building and loan association, shall, within thirty days after such appointment or election, give a bond in some good and responsible corporate surety company, in such sums as the directors shall require and approve."

The proposed plan makes agents of the teachers, principals and superintendent, and since these persons are required to receive, pay over and have custody of money belonging to the association, they must give the bond prescribed in sec. 215.27, Stats.

The weekly savings are kept on deposit by the association until enough money accumulates for the necessary monthly payment. From the time that the weekly savings are received at the association until they are credited in the pass book for the monthly payment, the association is accepting and holding money for deposit; and this the association has not the power to do.

Sec. 215.26, Stats., provides that the by-laws of each association must specify: "* * * the fines for nonpayment of any sum due or for other defaults or violation of rules; * * *

The law is not settled in regard to the power of an association to remit or condone the fines in certain cases. In Handley v. Farmer, 29 Beav. 362, 368, the master of the rolls said:

"As to the cards and omissions to charge the Plaintiff with the fines, it amounts to nothing, for if the directors omitted to perform their duty, it cannot prejudice the other shareholders, because if he pays too little the others will have to pay the deficiency. He therefore cannot have his mortgage delivered up until the fines have been paid."
See also *Wilson v. Upper Canada Building Society*, 12 Grant Ch. (U. C.) 206.

In *People v. Lowe*, 117 N. Y. 175, 22 N. E. 1016, it was held that the remission of fines and penalties was in the discretion of the directors; but that case involved the remission of fines in a particular instance and is not authority for an agreement in advance to relieve an entire class from the payment of fines.

In *Leahy v. The National Building & Loan Association*, 100 Wis. 555, 565, the court said:

"The fundamental idea of a building and loan association is mutual profit sharing. Its business necessarily is confined to its own members. Its object is to raise a fund to be loaned to its members. Each shareholder, whether a borrower or non-borrower, participates alike in all profits earned, and alike must assist in bearing the burden of expenses and losses. Such associations are the only ones that can issue their capital stock before it is paid for. The member makes his application, receives his stock, and agrees to pay for it in monthly instalments at a fixed rate. In case of default, he is subject to fine, which goes into the general profit fund for all alike."

An agreement in advance not to collect fines for a certain class of members of a building and loan association would give that class an undue and unfair advantage at the expense of other members; and such a policy would be contrary to the fundamental idea of the association.

For the reasons above indicated, a building and loan association cannot operate a thrift club in accordance with the submitted plan.

ML

*Charitable and Penal Institutions—Counties*—County board may adopt resolution under sec. 49.16, Stats., repealing former resolution adopted under sec. 49.15.

Sec. 49.14 does not restrict power of county board under sec. 49.16.


January 22, 1926.

*WILLIAM H. STEVENSON,*

*District Attorney,*

Richland Center, Wisconsin.

The material facts presented in your letter of January 16 are as follows:
Your county has a population of less than 250,000, and maintains a county poor house. At the annual meeting of the county board of your county in 1923, a resolution was adopted under the provisions of sec. 49.16, Stats., repealing the resolution formerly adopted under the provisions of sec. 49.15, Stats., abolishing all distinction between county poor and town, village, and city poor of your county. You refer to an opinion given by this department on December 15, 1925 (XIV Op. Atty. Gen. 579), to Harold C. Smith, district attorney of Jefferson county.

You inquire whether the county board had the power to adopt the resolution in 1923, and suggest that under the opinion referred to the county board had no authority to adopt the second resolution.

Subsec. (1), sec. 49.14, authorizes "each county, whether having abolished the distinction between county poor and town, village or city poor or not" to "establish a county poorhouse for the relief and support of the county poor." Subsec. (2), sec. 49.14, provides in part as follows:

"In all counties whose population is less than two hundred and fifty thousand such poorhouse shall be governed pursuant to sections 46.18, 46.19, and 46.20; and the trustees and superintendent of the poorhouse shall also have charge of all county poor relief outside the poorhouse, * * *.

Sec. 49.15, Stats., provides that a county board may "abolish all distinction between county poor and town, village and city poor in such county and have the expense of maintaining all the poor therein a county charge." Sec. 49.16, Stats., provides that any county having adopted a resolution under the provisions of sec. 49.15 may "repeal said resolution; and thereafter the poor of such county shall be supported in the same manner as if such distinction had never been abolished."

It is the opinion of this department that the county board of your county had the power to adopt a resolution under the provisions of sec. 49.16, repealing the resolution theretofore adopted under the provisions of sec. 49.15. Sec. 49.16 expressly gives the county board such power.

The provisions of sec. 49.14 do not restrict the power of the county board under sec. 49.16. Subsec. (1), sec. 49.14, gives a county board the power to establish a county poorhouse even though the county board has not abolished the distinction be-
tween county, city, village, and city poor under the provisions of sec. 49.15. Subsec. (2), sec. 49.14, provides that the trustees and superintendent of the poorhouse shall have charge of all county poor relief outside the poorhouse. The trustees and superintendent, however, have charge only of the county poor outside the poorhouse. The care of the town, village, and city poor is charged to the town boards, village trustees, and common councils under the provisions of sec. 49.01. The trustees and superintendent of the poorhouse have charge of all poor in the county only in case the county board has adopted a resolution under the provisions of sec. 49.15. It will be noted that sec. 49.15 specifically provides that after such resolution has been adopted the expense of maintaining all the poor in the county is charged to the county.

In the opinion to which you refer it was held that the trustees and the superintendent of a poorhouse in a county having a population of 250,000 or less, had charge, under subsec. (2), sec. 49.14, Stats., of all county poor relief outside the poorhouse. The opinion, however, does not hold that the trustees and superintendent are charged with all poor relief. Consequently under that opinion the town, village, and city poor must still be taken care of by the town boards, village trustees, and common councils, as provided in sec. 49.01, Stats.

SOA

Insurance—Automobile dealer must be licensed as insurance agent where, pursuant to contract between Indiana agency corporation acting for licensed insurance company and finance corporation acting under arrangement with manufacturer, such dealer includes insurance premium with price of automobile and application for insurance is transmitted to Indiana agency corporation through finance corporation, which lends unpaid part of purchase price to purchaser. Such dealer must receive entire commission, which can only be divided with licensed agents in Wisconsin.

January 28, 1926.

W. STANLEY SMITH,
Commissioner of Insurance.

You have requested an opinion as to whether the methods of a certain insurance company in the transaction of insurance of
automobiles in favor of a finance or acceptance company can be permitted as in conformity with the laws of this state. The files which you submit consist of a letter of January 6, 1926, by the secretary of the insurance company describing the plan and this is accompanied by a 5-page document entitled: “Endorsement for Master Fire and Theft Contract Covering Retail Offerings Discounted.” The letter also refers to a form of statement to be made by the purchaser of an automobile, and to a form of conditional sales contract, copies of which are attached to the letter. The files do not contain a copy of the insurance policy or of the contract between the insurance company and the acceptance corporation or the manufacturer. It does not appear whether or not the company has attempted to transact this business in this state or whether the transaction of business upon this plan has been prohibited by an order of the commissioner in this state.

These omissions are, however, immaterial in that it clearly appears that the business cannot be lawfully transacted as proposed under this plan in the state of Wisconsin.

It appears that the insurance company and its agents are licensed in this state. It has appointed as an agent an agency corporation in Indiana. Through this agency corporation it has contracted with a security or acceptance corporation to insure automobiles sold by a certain manufacturer. The purchaser executes a conditional sales contract for the unpaid part of the purchase money and this contract is sold by the local automobile dealer to the acceptance corporation. The purchaser agrees to keep the automobile purchased by him insured for not less than the total of the balance set forth in the conditional sales contract, and to keep this insurance in force until the debt is fully paid.

On the sale of an automobile in Wisconsin the dealer includes the premium for the insurance with the price of the automobile, and, after applying the cash payment of the purchaser, the unpaid balance is settled for by the conditional sales contract. This is transmitted to the acceptance corporation, which thereupon makes application to the Indiana agency corporation for the insurance. The policy is sent by the agency corporation to a licensed agent of the insurance company in Wisconsin for countersignature and delivery to the purchaser. The acceptance corporation remits the full premium to the agency corporation,
which transmits this premium to the insurance company, less its commission.

It is urged in the letter of the insurance company in support of this plan, that:

"First, the dealer through his endorsement with recourse of the conditional sales contract signed by the purchaser, whereby he guarantees the fulfillment of such contract on the part of the purchaser, takes the position of one of the assured in the policy of insurance as issued by the agent of the insurance company in Wisconsin;

"Second, the application for the insurance is not taken by the dealer from the purchaser, but is made by him as an assured to the agency corporation through the medium of the acceptance corporation, which latter buys the conditional sales contract from the dealer;

"Third, the premium for this insurance is transmitted by the purchaser in his original cash payment to the acceptance corporation;

"Fourth, the dealer does not in any way whatsoever, and this statement is unqualified, receive from the agency corporation or the acceptance corporation or the insurance company, either directly or indirectly, compensation of any character."

The foregoing claims cannot be substantiated upon the facts with regard to the plan as set out in the document submitted. The dealer sells the automobile and the insurance to the purchaser as one transaction. The purchaser has no dealings with anyone representing the insurance company except the dealer. His arrangement for the insurance is made through the dealer, he pays his premium to the dealer and the only time he comes in contact with any other representative of the insurance company is when the policy is delivered or mailed to him by a resident agent who merely countersigns the policy in Wisconsin. The dealer necessarily makes a profit out of the combined sale. This plainly constitutes his compensation. The dealer thus plainly comes within the provision of the Wisconsin statute, sec. 209.05, defining as an insurance agent a person "* * * who solicits insurance * * * or transmits an application for a policy of insurance, other than for himself, * * * who makes any contract for insurance, or collects any premiums for insurance, or in any manner aids or assists in doing either, * * * unless it can be shown that he receives no compensation for such services. * * *." The manner in which the premium is transmitted by the local agent of the insurance com-
pany, the dealer, to the insurance company is immaterial. The claim that the dealer is not an agent because he is an assured, has no merit. At the most, the dealer is in no better position than any mortgagee. The purchaser has bought and paid for this insurance and he has bought it through the dealer who, of course, is in the business for the profit he can make out of it.

The dealer must, therefore, if he transacts this business, be a licensed agent of the insurance company. The dealer must also receive the full commission paid upon this insurance unless he divides it with some other local licensed agent. No part of this commission can be divided with any agent not a resident of Wisconsin. See sec. 207.01, subsec. (2), par. (e). The plan does not contemplate the licensing of the dealer as a local agent, and in this respect is therefore clearly not within the Wisconsin law.

Any attempt to make the dealer and the Indiana acceptance corporation agents of the insured purchaser and thus make the Indiana agency the first point of contact between the insurance company and the insured purchaser is not alone contrary to the fact, but is contrary to the entire spirit of the insurance laws of this state. The long established legislative policy of this state requires that insurance shall be written by local agents dealing directly with the purchaser of the insurance. It contemplates that the person taking the application and receiving the premium payment shall occupy an expert advisory position and be in direct contact with the insured. The only person occupying such a relationship to the purchaser under the proposed plan is the dealer. It is obvious that the proposed plan seeks to avoid the bona fide agent and that the proposed countersignature of the policy is a mere subterfuge. I believe the foregoing is in full accord with the recent decision in the Chrysler case and am of the opinion that the business may not be lawfully transacted in Wisconsin under the proposed plan.

In view of the conclusions reached, it is not necessary to discuss other questions which may be raised with regard to this plan.

HLE
Bonds—Bridges and Highways—Limitation on amount of bonds issued for highway improvement purposes by county under provisions of par. (c), subsec. (1), sec. 67.04, Stats., does not apply to county bonds for improvement of state trunk highways issued under provisions of secs. 67.13 and 67.14.

January 29, 1926.

EARL J. PLANTZ,  
District Attorney,  
Antigo, Wisconsin.

You state that the assessed valuation of the taxable property in Langlade county for the year 1925 was $24,188,583; that the county has no bonded indebtedness.

You inquire whether the county may lawfully issue highway improvement bonds in the sum of $500,000 under the provisions of secs. 67.13 and 67.14.

The answer is in the affirmative. The only limitation upon the amount of bonds that may be issued under these sections of the statute is that the total indebtedness of the county must not, with the bonds issued, exceed 5% of the assessed valuation. The 1% limitation contained in par. (c), subsec. (1), sec. 67.04, applies only to bonds issued under the provisions of that section, and does not apply to bonds issued under the provisions of secs. 67.13 and 67.14. Since the limitation on the amount of indebtedness that may be incurred by the county, based upon the figures stated by you, is upwards of $1,200,000, and since the proposed issue of bonds may be issued under the provisions of secs. 67.13 and 67.14, being for the improvement of a state trunk highway, bonds issued by the county pursuant to regular proceedings preliminary thereto, including the submission to and approval by the electors of the county, will be valid.

FEB
Public Officers—Town Clerk—Taxation—It is duty of town clerk to prepare tax roll and deliver it to town treasurer. When after such delivery errors are discovered in tax, it is duty of town clerk, under sec. 70.73, subsec. (2), Stats., to correct such errors, and this duty may be enforced by action of mandamus.

Town board has no power to employ anyone to perform duties of town clerk except under sec. 70.72, Stats.

January 29, 1926.

TAX COMMISSION.

With your letter of January 23 you submit a letter addressed to your department from a town chairman. The material facts contained in this letter are as follows:

The clerk of the town has delivered the tax roll with the warrant annexed to the town treasurer. The town treasurer and the town board have examined the roll and have found that it contains many errors. The town treasurer and the town board wish to have the roll corrected before the taxes are collected. Sec. 70.73, subsec. (2), Stats., is referred to. The town chairman suggests that there is no use in asking the clerk to make the corrections because it is probable that $\frac{2}{3}$ of the items in the tax roll are incorrect. The total amount of the tax roll is much less than the amount levied and is less than the amount stated in the warrant to the town treasurer. The town board desires to have a new roll made out, and they wish to be advised to whom the expense for making out a new roll may be charged, to the town clerk or to the town.

Sec. 70.65 provides that from the assessment roll the town clerk shall make out a tax roll. Subsec. (3), sec. 70.66, provides in part as follows:

"Upon receipt of the certificate of apportionment from the county clerk, each town and village clerk, * * * shall separately calculate and carry out opposite to each valuation in the tax roll the amount required to be raised upon such valuation, for state taxes, county taxes, school district taxes, town or village taxes and all other taxes * * *. Said several amounts shall be entered in the tax roll in separate columns showing the purpose for which each amount is to be raised in such form as shall be prescribed by the tax commission."

The duty to make out the tax roll in the form provided by subsec. (3), sec. 70.66 is mandatory.

Sec. 70.68 provides that the tax roll, together with the warrant attached, shall be delivered to the town treasurer.
After such delivery of the tax roll, the town clerk has no further duty to perform except such as may be provided in subsec. (2), sec. 70.73. After the tax roll has passed from the possession and control of the town clerk to the possession and control of the town treasurer, all authority to change has been exhausted, except in so far as power by statute has been preserved to do so. State ex rel. Rowe v. Krumenauer, 135 Wis. 185.

The town treasurer has no authority to investigate or correct any errors in the tax roll of the warrant. His office is purely ministerial, and his sole authority is to execute the warrant as it is prepared by the town clerk. The treasurer is not responsible for the mistakes of the town clerk. His warrant as prepared by the town clerk protects him against such mistakes. Stahl v. O'Malley, 39 Wis. 328. Whenever corrections are to be made in the tax roll after it has passed from the possession and control of the town clerk into the possession and control of the town treasurer, they must be made in accordance with the provisions of subsec. (2), sec. 70.73, which provides as follows:

"Whenever after delivery of the tax roll to the treasurer it shall be discovered that any city, town or village clerk in making out the tax roll has made a mistake therein in entering the description of any real or personal property, or the name of the owner or person to whom assessed, or in computing or carrying out the amount of the tax, the clerk with the consent of the treasurer at any time before the treasurer is required to make his return of delinquent taxes, may correct the name of the taxpayer, the description of property or errors in computing or carrying out the tax to correspond to the entry which should have been made on the tax roll before delivery to the treasurer. If any such corrections shall produce a change in the total amount of taxes entered in the tax roll, the clerk shall make corresponding corrections in the warrant annexed to such roll. The clerk shall enter a marginal note opposite each correction, stating when made, which shall be signed by the clerk and treasurer."

The application of this statute has been aptly expressed by our supreme court:

"The obvious intention of the legislature in the passage of ch. 134, Laws of 1905, was not to cover a case like the one before us, but a case, as clearly indicated by the language of the act, where, after delivery of the tax roll to the treasurer, it shall be discovered that a mistake has been made in entering the description of any real or personal property, or in the name of the
The language used by the court in the above case, if not directly, at least inferentially, indicates that it is the duty of the town clerk to make corrections in the tax roll after it has passed into the hands of the town treasurer. Ch. 134, Laws 1905, is now subsec. (2), sec. 70.73, of the statutes of 1925. There is, however, a provision in subsec. (2), sec. 70.73, which raises a question as to whether it is the absolute duty of the clerk to make a correction in the tax roll after it has passed from his hands. The statute provides that the clerk may "with the consent of the treasurer" make the necessary corrections. In *State ex rel. Rowe v. Krumenauer*, 135 Wis. 185, 191, the court said:

"* * * The question of whether or not the treasurer had any discretion in the matter, or whether he was bound to consent to the change, might be an interesting question and one which we do not decide."

The town clerk, however, takes his office *cum onere*, and it is his duty to make out the tax roll of the town. *Mulvaney v. Town of Armstrong*, 168 Wis. 476. The mere preparation of the tax roll and ascertaining the tax is purely ministerial. 3 Cooley Taxation (4th ed.) 2346-2347; *State ex rel. Blaine v. Erickson*, 170 Wis. 205. It is the duty of the town clerk to prepare the tax roll in the manner provided by statute, and if he refuses to perform that duty it may be enforced by an action of mandamus. *State ex rel. Blaine v. Erickson*, 170 Wis. 205.

In view of the fact that it is the duty of the town clerk to prepare the tax roll, and in view of the further fact that under subsec. (2), sec. 70.73, Stats., he has the power to make the necessary corrections, it is the opinion of this department that such corrections must be made by the town clerk. The duty to make these corrections may be enforced by an action of mandamus. It is, of course, fundamental that before a public officer can be compelled by mandamus to perform an act, the duty must be clear and the act within his power to perform. *State ex rel. Rowe v. Krumenauer*, 135 Wis. 185. There is nothing in the statement of facts which indicates that the town treasurer
is unwilling to allow the town clerk to make the necessary corrections. In fact, the inference is from the facts that the town treasurer is not only willing to have the corrections made, but desires to have them made before the taxes are collected. Since the correction of the tax roll is a merely ministerial act, mandamus is a proper remedy.

The town board has no authority to employ a person to perform the duty of the town clerk. *Mulvaney v. Town of Armstrong*, 168 Wis. 476. There is one exception to this established rule which is contained in sec. 70.72, Stats., which provides as follows:

“Whenever a reassessment or reassessments of taxes shall hereafter be ordered in any town, the town board of such town may employ such additional clerical help for the purpose of preparing the tax roll upon such reassessment as in its judgment shall be necessary.”

The facts as stated by you do not bring the case under the provisions of sec. 70.72, and for that reason the town board cannot employ a person to perform the clerk’s duties.

SOA
Education—Teachers' Retirement Act—Death benefit provided for by sec. 42.50, Stats., is payable to estate of deceased member of state retirement system who dies after death of previously designated beneficiary without having made another designation.

February 3, 1926.

R. E. LOVELAND, Secretary,
State Retirement System.

From your request and the accompanying documents, the following facts appear:

November 23, 1921, I. C. D., a member of the state retirement system, designated her mother, C. D., as the beneficiary for the death benefit as provided by sec. 42.50, Stats.; February 13, 1923, said designated beneficiary died intestate, and letters of administration were granted on her estate; July 6, 1925, the said member, I. C. D., died without having appointed another beneficiary, but whether she died testate or intestate and whether letters testamentary or of administration have been granted on her estate does not appear; F. D. has made claim for the death benefit, asserting that he is the brother and sole heir of the deceased member.

You submit the question of whether the amount of the death benefit should be paid to the estate of the deceased designated beneficiary or to the estate of the deceased member; the answer is: to the estate of I. C. D., the deceased member.

The designated beneficiary, C. D., having predeceased the member, the designation lapsed, and the member not having made another designation, the death benefit is payable to her estate under the express provisions of the statute above mentioned. Payment should be made only to the executor of the will of I. C. D., if she died testate, or to the administrator of her estate if she died intestate. Duly authenticated copies of letters testamentary or of administration, as the case may be, should be required to be filed with the application for payment.

FEB
Automobiles—Insurance—Insurance laws are not violated by making of joint application to insure dealer and purchaser of automobile when such application goes to local agent in Wisconsin who receives entire premium and commission and when no compensation is paid to dealer.

February 3, 1926.

W. STANLEY SMITH,
Commissioner of Insurance.

I have your request of today for an opinion on the following state of facts:

It is proposed that, in the sale of automobiles of a certain manufacturer where payment is not made in full, the unpaid part of the purchase price, when the dealer so desires, will be carried by an acceptance corporation which requires that insurance in a specified insurance company be carried on the automobile pledged to secure the loan. Under this arrangement blank applications for use in procuring the insurance are to be furnished to the dealer with instructions, upon making a deferred payment sale, to have the application signed both by himself and by the purchaser and then to forward it to a local agent of the insurance company located within the state of Wisconsin. This agent will prepare and return the policy to the purchaser. The premium will be paid to the local agent and remitted by him to the company, less his commission. The policy will be written to cover the interest of the purchaser, the dealer and the acceptance corporation, as their interests may appear at the time of loss, if any. Losses will be reported to and settled by the insurance company representatives in Wisconsin. The dealer will in no way be compensated for his part in this plan.

There is in my opinion nothing in the plan as above stated which conflicts with the insurance laws of Wisconsin.

HLE
Agriculture — Counties — Agricultural Agent — Contract between county and county agent is not void simply because appropriation for county’s share of expense was not appropriated at one time.

February 9, 1926.

Grover M. Stapleton,
District Attorney,
Sturgeon Bay, Wisconsin.

You inquire as to the legality of a contract existing between Door county and its county agent, E. G. Bailey. The facts given by you are that at the annual meeting of the county board for the year 1923 a resolution was passed by your county board which reads thus:

"Resolved, that Door county does hereby abolish and revoke the office of county agricultural representative, sometimes referred to as county agent, as authorized by section 59.87 of the Wisconsin statutes, and the county committee of agriculture is hereby instructed to allow all contracts now existing with such county agricultural representative to lapse and not to renew the same.

"We, the undersigned electors of Door county, Wisconsin, do hereby request that the proposed ordinance set forth above be adopted without alteration by the county board of Door county, or be referred without alteration to a vote of the electors of said county."

At the time when this resolution was passed the county agricultural representative had a contract which expired on June 30, 1925. At the annual meeting in 1924 the following report of the committee of agriculture was adopted:

"We recommend the following budget for the year January 1, 1925, to December 31, 1925:
For county agent's salary................................. $1300.00
Expense account........................................... 1300.00

Total.......................................................... $2600.00

"We further recommend that a new contract be executed with the county agent at the termination of the present contract."

The report of the finance committee levying a tax of $2600 for the county agent was also adopted. Subsequent thereto a new contract was entered into with the county agent for a two-year period, beginning July 1, 1925. At the annual meeting in
1925 the report of the finance committee levying a tax of $2600 for a county agent was adopted. It also appears that at no time did the county board appropriate money for a period of two years for the county agent. It seems to be the universal custom to appropriate the money needed for the county agent annually.

You submit the following questions:

"1st: Did the adoption of the resolution by the county board of 1923 abolish the office?
2d: Did the adoption of the report of the agricultural committee in 1924 establish the office?
3d: Is the contract executed July 1, 1925, with the county representative legal?"

From your statement of facts it appears not only that the county board has now appropriated money needed for the county agent for the first year of the two-year period, but that by the last action of the board the appropriation was also made for the second year, so that at present there is a legal appropriation of the money needed for the two years covering the last contract with the county agent.

In an official opinion by this department, XI Op. Atty. Gen. 106, it was held that under sec. 59.87, subsec. (3), Stats., the county board had no power to make financial provisions for a county agricultural representative for a shorter period than two years. Said statute refers to the work of the agricultural representative and gives the county board the power "to raise, by tax levy or otherwise, for periods of not less than two years each, such moneys as may be deemed sufficient to cover the share of the county in such work."

In that opinion the question was raised before the second appropriation covering the second year had been made. In this case, however, the question of the legality of the contract has not been raised until after the appropriation covering the full two-year period has been made. I am satisfied that now all infirmities in the contract with the county agent that existed by reason of the fact that the appropriation did not cover the full two years have been corrected by the action of the county board in the last session, appropriating the balance of the money needed. I believe it is now too late to raise the question of the illegality of the contract. The county agent, I understand, has acted under the contract and has performed his duty as county
agent up to this time. Your third question must therefore be now answered in the affirmative.

In answer to your first and second questions I will say that the action of the county board at its annual meeting in 1924 in adopting the recommendation of the committee on agriculture to the effect that a new contract be executed with the county agent at the termination of his then existing contract must be construed as re-establishing the office of county agent if it could be held that the resolution passed at the annual meeting of the county board in 1923 abolished the office of county agent. Whether the office can be abolished after the same has once been established, in view of the decision of our court in the case of Northern Trust Company v. Snyder, 113 Wis. 516, 532; State ex rel. Williams v. Sawyer County, 140 Wis. 634, and Holt Lumber Company v. Oconto, 145 Wis. 500, it is not necessary here to decide in view of the action of the county board at the annual meeting in 1924.

JEM

Taxation—Taxes on income of years prior to 1924 (back taxes) assessed in 1925 are not subject to personal property offset.

Taxes on income of years prior to 1924 (back taxes) assessed in 1925 must be apportioned between state, county and taxing district, in accordance with provisions of sec. 71.19 as it now exists.

February 10, 1926.

You submit the following questions for an official opinion:

1. Are the taxes on income of years prior to 1924 (back taxes) [assessed in 1925] subject to personal property tax offset?

2. Are the taxes on income of years prior to 1924 (back taxes) [assessed in 1925] to be divided between the state, county, and taxing district on the percentages provided in chapter 57, laws of 1925?

You call attention to sec. 6, ch. 446, laws of 1925, which provides as follows:

“This act and chapter 57 of the laws of 1925 shall apply to the taxable income for the year 1924 or for any fiscal year ending during the year 1925 and annually thereafter.”
1. Your first question is answered in the negative.

Personal property taxes are not entitled to be offset against income except for the year in which the income tax is paid. *State ex rel. Eisenlohr & Bros. v. Dickinson*, 166 Wis. 501; *State ex rel. S. Heymann Co. v. Lyons*, 183 Wis. 126. The tax commission has nothing to do with the personal property tax offset against income taxes. The offset is to be made by the tax collector *at the time of the payment* of the taxes. *State ex rel. S. Heymann Co. v. Lyons*, 183 Wis. 126. Sec. 71.21, Stats., which provided for the personal property tax offset, was repealed by ch. 57, laws of 1925, so that at the time the income taxes assessed in 1925 became payable the right to such offset had been abolished; hence, no offset may be allowed by the collector.

2. Your second question is answered in the affirmative.

Taxes on income of years prior to 1924 (back taxes) assessed in 1925 must be apportioned between the state, county, and taxing district on the percentages provided by the law existing at the time of the apportionment, which is sec. 71.19, subsec. (1), embracing the amendment made by said ch. 57, and which reads as follows:

“All income taxes collected in cash shall be divided as follows, to wit: Forty per cent to the state, ten 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 70.61, 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. The same shall be remitted and accounted for in the same manner as the state and county taxes collected from property are remitted and paid, except that income taxes returned delinquent shall not be charged to the county nor credited to the town, city or village returning the same.”

I am clearly of the opinion that section 6, ch. 446, laws of 1925 (quoted above immediately following the statement of your questions), was not intended by the legislature to change, and does not change, the rule of the decisions referred to in the answer to the first question; and I am equally clear that it was not intended to provide, and does not provide, for a basis of apportionment to state, county, and towns, cities and villages of portions of income taxes assessed in 1925 on back income different from the portions assessed on current income. The apportion-
ment statute says that "all income taxes collected" shall be divided in the proportions stated, plainly requiring the division to be made in accordance with the statutory rule in force at the time of the collection of the taxes and not with that which may have been in effect when the income was received or assessed.

**Charitable and Penal Institutions—Courts—Public Health—Venereal Disease**—Municipal court of Green Bay has right to sentence person to industrial home for women at Taychedah for treatment who is guilty or refuses to be treated for communicable venereal disease.

February 11, 1926.

**Board of Control.**

You have sent me two copies of commitments made to the industrial home for women, and you inquire whether the commitments are properly made under the Wisconsin statutes. The one commitment is on September 17, 1925, by the municipal court at Green Bay, Honorable Carlton Merrill presiding as judge, in which one A, a female, was charged with the offense of having on the 9th day of September, 1925, at the city of Green Bay, in said county and state, unlawfully and willfully being infected with it, a venereal disease, and refusing to be treated therefor. She was sentenced to the Wisconsin industrial home for women for a period not to exceed the time beyond which the disease is no longer infectious or communicable, or beyond the time when other provisions satisfactory to the state board of control are made for suitable treatment.

The other commitment is similar in its purpose, sentencing another person, by the same court, the Honorable N. J. Monahan, judge presiding.

I am informed that the commitment was made under the provisions of sec. 143.07, subsec. (5), which reads thus:

"Any such person [meaning one afflicted with a communicable venereal disease] who thus ceases or refuses treatment may upon complaint, be committed by the judge of any court of record to any county or state institution where proper care and precautions will be provided upon proof. Complaint shall be made by an officer of the state board of health and notice given the person complained against. Commitment shall con-
Opinions of the Attorney General 53

tinue until the disease is no longer communicable, or until other provisions satisfactory to the state board of health are made for treatment, the certificate of the officer making the complaint being prima facie evidence of either."

I have carefully considered this statute and I see no escape from the conclusion that it does authorize a commitment to the state institution in question for the purpose stated in the commitment. I understand that the institution has facilities for treating such diseases of its inmates. If it is deemed poor policy to permit such sentences, then the matter should be presented to the legislature for proper direction to the trial courts in such matters.

JEM

Oil Inspection—Oil inspection laws do not apply to petroleum products used at National Soldiers’ Home in Milwaukee.

T. J. Cunningham, Supervisor of Oil Inspectors.

February 11, 1926.

You desire an opinion as to whether the state oil inspection laws apply to petroleum products used at the National Soldiers’ Home in Milwaukee, which is United States property. You direct my attention to an opinion by Judge Walter C. Owen, as attorney general, on June 24, 1913, II Op. Atty. Gen. 583, in which he held that the oil inspection laws do not apply to oil used by the federal government on its Indian reservations. In said opinion Judge Owen said:

“One of the fundamental rules of the law is that no general law shall be construed as applying to the government unless it is expressly so stated in the law itself. Another rule is that the United States cannot be brought into court without its consent.

“In my opinion, the laws relating to inspection of products of petroleum do not apply to products of petroleum owned and used by the federal government, upon the Indian reservations within this state."

The above opinion is decisive of the question submitted by you. I find no change in the law which would make it necessary for me to give an opinion different from that given by Judge Owen. You are therefore advised that the inspection laws of Wisconsin do not apply to the petroleum products used in the
National Soldiers Home in Milwaukee by the federal employees. Your department has no authority to inspect the oil nor collect any fees under the said statutes from the federal government or its employees.

JEM

**Bonds**—Approval of proceedings under ch. 67, Stats., and certification of bonds by attorney general will be withheld where there are material inconsistencies in clerk's certificates and copy of record certified.

Ballot used at election for submission to electors of initial resolution for bond issue adopted by village board must embody copy of resolutions, as required by sec. 67.05, subsec. (5), par. (a), Stats.

Required statements of value of taxable property and of bonded indebtedness should be made part of body of form of bond.

Attorney general's certificate is no part of bond form.

Levy of tax should be substantially in language of statute, sec. 67.05, subsec. (10).

February 11, 1926.

P. L. Kingman,
Village Clerk,
Gilman, Wisconsin.

Re $15,000 village of Gilman 5% electric distribution system bonds.

I have examined the certified copy of the record of the proceedings preliminary to the issue of the above described bonds, submitted to the attorney general by you through the Second Ward Securities Company of Milwaukee, pursuant to direction of the village board.

The proceedings cannot be approved by the attorney general for the following reasons:

1. The record is so inconsistent and uncertain as to fact and time of the several steps which may have been taken in the course of authorizing the issue as to make it impossible to determine, with any reasonable certainty, that the statutory requirements have been met up to the time of the resolution of the village board prescribing the form of bond and the attempted levy of the tax.
(a) The certificate of the clerk is to the effect that the initial resolution was adopted by the village board at a regular meeting on January 11, 1926, and following the adoption of the resolution that the clerk was instructed to post notices of a special election for the submission of such resolution to the electors of the village for approval on January 22, 1926; while the body of the record shows that such resolution was adopted by the board at an adjourned regular meeting on December 14, 1925, and the clerk then directed to call a special election for December 28, 1925, and the notice of the special election in the record shows that it was for an election to be held on December 28, 1925.

(b) An affidavit of the clerk in the record is to the effect that he posted the notices of special election on January 12, 1926, but this affidavit is sworn to on January 6, 1926—six days before the time posted.

(c) The certificate of the clerk states that the special election was held on January 22, 1926, and that 31 votes were cast in favor of the resolution and 3 votes were cast against it; while an affidavit of the clerk in the record, sworn to on December 30, 1925, states that the election was held on December 28, 1925, at which a total of 62 votes were cast, of which 50 votes were for and 12 against the resolution, and the report of the inspectors and clerks of the election in the record is in accordance with the statements contained in the last mentioned affidavit.

(d) The record does not contain a copy of the ballot used at the election, nor does it show that such ballot embodied a copy of the initial resolution, as required by sec. 67.05, subsec. (5), Stats.

2. The form of bond shown by the record to have been adopted by the village board on January 22, 1926 (which form, by the way, recites that the special election was held on December 28, 1925), has a statement at the head of the value of the taxable property in the village according to the last (1925) assessment thereof for state and county taxes (and here it may be noted that the initial resolution contains a statement of such values for the years 1920 to 1924, inclusive, but not of the year 1925) and of the aggregate existing bonded indebtedness; but such statements are not referred to in the body of the bond. The statement at the head of the bond should either be embodied in the body of the bond or made a part of it by reference.

The form of the attorney general's certificate, made a part of the bond form, is defective; but this is unimportant, as the form of this certificate is furnished for printing on the bonds if and
when the proceedings are approved; it has no proper place in the resolution adopting a bond form.

3. The resolution levying the tax, while it may be sufficient, does not follow the statutory language of sec. 67.05, subsec. (10). It is safer to follow the statutes strictly, and the levy should be in substantially the following form:

"There is hereby levied on all the taxable property of the village of Gilman a direct annual tax sufficient in amount to pay, and for the express purpose of paying the interest on said bond as it falls due and also to pay and discharge the principal thereof at maturity."

If the defects outlined in division 1 of this opinion exist only in the separate bond record book or in the transcript of that record, and do not in fact exist in the proceedings themselves, the bond records can be corrected, and the certified copy also corrected to show the actual proceedings; in that event, the matter referred to in divisions 2 and 3 of the opinion above can be remedied by action of the village board. On the other hand, if amendments and corrections to the record in accordance with the actual facts of the procedure will not show compliance with the statutory requirements, I can see no way out of the situation except the beginning and carrying through of a new proceeding.

I am sending a duplicate of this opinion to the Second Ward Securities Company of Milwaukee, from whom the record was received.

FEB
Bankruptcy—Taxation—Tax deeds issued on certificates of sales of lands for delinquent taxes are not void because of fact that owner of lands is in bankruptcy at time of tax sales or of issue of tax deeds, nor because notice of application for deeds is not given to mortgagee or his assignee; tax deeds may be voidable at suit of trustee in bankruptcy or of mortgagee or his assignee against grantee in tax deeds because of such irregularity, but, under express provisions of secs. 75.12 and 75.22, Stats., such irregularities do not go to groundwork of tax, and county board is not authorized to cancel tax deeds or refund amounts paid by purchasers at tax sales.

February 12, 1926.

WARREN B. FOSTER,
District Attorney,
Hurley, Wisconsin.

You state that a corporation owning certain lands in your county went into bankruptcy about a year ago; that taxes assessed against said lands were returned delinquent and the lands duly sold at the tax sales and certificates of sale issued to the purchasers in prior years; that the county clerk had no notice of the bankruptcy proceedings and in August, 1925, issued tax deeds on the tax sales and certificates of three years previous; that the lands were encumbered by mortgage, and that the assignee of the mortgage filed an affidavit with the county clerk prior to the issuing of the tax deeds stating that he was the owner of such mortgage, but that such affidavit was not the *lis pendens* provided for by sec. 75.12; that the applicant for the tax deeds did not make affidavit showing the service of notice of his application upon such assignee of the mortgage; that the county clerk evidently overlooked the affidavit filed by the assignee of the mortgage, and tax deeds were issued to him as of unencumbered and unoccupied lands; that the county clerk has asked you for an opinion and instructions; that in your opinion the tax deeds are void both because of being issued after the bankruptcy of the owner of the lands and also because there was no service of notice of the application for the tax deeds to the assignee of the mortgage.

You ask whether the tax deeds are void, and if so, whether there is anything the county board can do to rectify the matter.
On the statement of facts, I am of the opinion that the tax deeds are not void, although they may be voidable at the suit of the trustee in bankruptcy or of the assignee of the mortgage under a showing of facts which do not appear in your statement, and that there is nothing that the county board may do in the matter.

Sec. 75.22, Stats., providing for the cancellation because of invalidity of tax sales and conveyances and the refunding of the money paid for tax certificates, subsequent charges, and taxes, contains the following provision:

"* * * But no sale, certificate, or conveyance shall be deemed invalid within the meaning of this section, by reason of any mistake or irregularity in any of the tax proceedings not affecting the groundwork of the tax, nor shall any county be liable to pay or refund any moneys by reason of any such mistake or irregularity."

If any of the tax certificates or the tax deeds should not have been issued because of the pendency of bankruptcy proceedings and the appointment and qualification of a trustee in bankruptcy entitled to the possession of all property of the bankrupt as an officer of the court, so that the trustee's right to redeem from the delinquent taxes or tax sales was not cut off (see I Op. Atty. Gen. 588, which is probably the opinion referred to in expressing your own opinion), the issuing of a deed is clearly a mistake or irregularity not going to the groundwork of the tax itself, and the county board therefore has no power to cancel the deed or refund any amounts paid. Assuming that the trustee in bankruptcy may, in a proper suit, obtain a judgment setting aside the tax deeds, it would doubtless be only on condition of the payment of at least the amount of the delinquent taxes, interest and charges due and unpaid at the time he qualified as trustee, on which the deeds are based. As to the assignee of the mortgage, the filing of the affidavit referred to did not require notice to be given of the application for the tax deeds, since there seems to be no provision of the statutes for the filing of such an affidavit; what requires notice to be given, is, by the express provision of sec. 75.12, Stats., when the assignment is recorded in the office of the register of deeds and such record shows the post office address of such assignee. But whether the affidavit was sufficient to require such notice or not, the irregu-
larity does not go to the groundwork of the tax so as to authorize the county board to cancel the deeds and refund the amounts paid by the purchasers of the certificates or his assignee.

In the case of suit by either the trustee in bankruptcy or the assignee of the mortgage to set aside the tax deeds because of the irregularities referred to, if they exist, the action and judgment would be against the grantee in the tax deeds, and not against the county. If the grantee in the tax deeds should have given notice to the assignee of the mortgage, and the deeds are set aside for want of such notice, he cannot recover anything from the county. See the last sentence of sec. 75.12.

Counties—Borrowing—Resolution of county board authorizing temporary loan for purpose of paying current expenses in amount not exceeding ten per cent of current tax levy, adopted at annual meeting within few minutes of adoption of resolution making tax levy, is valid authorization of loan as being in substantial compliance with requirements of sec. 67.12, subsec. (7), Stats.

William M. Stevenson,  
District Attorney,  
Richland Center, Wisconsin.

You state that the county board of Richland county, at the annual meeting held in November, 1925, by a vote of 19 to 1, two members being absent and not voting, passed a resolution authorizing the borrowing of a sum of money not exceeding 10% of the tax levy of 1925 for county purposes, for the purpose of paying current expenses of the county, all sums borrowed to be repaid with interest on or before the 15th day of February, 1926; that a few minutes after the adoption of that resolution, the board by a unanimous vote of all members present, two being absent, adopted a resolution levying the annual tax for county purposes in the sum of $203,464.66; that a notice signed by a taxpayer has been served upon the chairman of the county board and the county clerk not to borrow any money by virtue of the resolution first above referred to.

Your question is, whether the first resolution, since it was adopted in point of time of day prior to the 1925 levy, authorizes
the temporary borrowing of an amount not exceeding 10% of the 1925 tax levy thereafter, but at the same sitting of the board, adopted.

The question is answered in the affirmative.

The statute, sec. 67.12, under which the action of the board was taken, reads as follows:

"(7) TEMPORARY BORROWING BY COUNTIES. At any legal meeting a county board by a yea and nay vote of at least two-thirds of its members-elect may borrow money and issue county orders therefor to pay current expenses at the times and in amounts and manner specified as follows:

(a) In counties having two hundred thousand inhabitants or more, on or after the first day of July in any year, a sum not exceeding twenty per centum of the last tax levy for county purposes, such money to be repaid with interest at the agreed rate on or before the fifteenth day of February then next following.

(b) In other counties, at any time after taxes have been levied in any year, a sum not exceeding ten per centum of the last tax levy for county purposes, and payable with interest as provided in paragraph (a)."

In my opinion the two actions of the board authorizing the temporary loan and levying the annual tax for county purposes must be read and construed together as contemporary actions of the board. The actual making of the loan, if it is made, will be subsequent to the levying of the tax on which it is based. The obvious intent of the board was to authorize a temporary loan in compliance with the provisions of the statute quoted above, and I am clearly of the opinion that the fact that the adoption of the resolution authorizing the loan preceded by a few minutes the adoption of the resolution levying taxes for county purposes does not make the first resolution void. The records and proceedings of the county board are to be liberally construed with a view of arriving at the real intent. Hark v. Gladwell, 49 Wis. 172; Burgess v. Dane County, 148 Wis. 427.

FEB
Prisons—Parole—Prisoner convicted of felony and sentenced to state prison and thereafter duly transferred to state reformatory becomes eligible to parole under sec. 57.07, Stats., as inmate of state reformatory.

February 19, 1926.

BOARD OF CONTROL.

You state that one “A,” being a first offender, was sentenced to the state prison for a general indeterminate sentence, the minimum being three months; that in conformity with the provisions of sec. 54.07, subsec. (2), he was transferred from the Wisconsin state prison to the Wisconsin state reformatory. You inquire whether he will now be eligible for parole after having served three months, or whether he should become eligible to consideration for parole under the rules applicable to inmates of the Wisconsin state reformatory. You also note that the statutes do not provide a definite time when inmates of the Wisconsin state reformatory become eligible to consideration for parole, but that the minimum time for such consideration has been determined by your board to be nine months, and the direct question is whether “A” is eligible to consideration for parole from the Wisconsin state reformatory at the end of three months or at the end of nine months.

Under sec. 57.06 the board of control is authorized to parole a “prisoner convicted of a felony and imprisoned in the state prison * * * who if he is a first offender and is sentenced for a general or indeterminate term, shall have served the minimum for which he was sentenced not deducting any allowance for time for good behavior.”

Under your statement of facts “A” was convicted and sentenced to the state prison but is not now imprisoned in the state prison. This statute requires imprisonment in the prison in order to be subject to the provisions of sec. 57.06.

Sec. 57.07, subsec. (1), provides:

“The state board of control may parole any inmate in the state reformatory, industrial home for women, industrial school for boys, or industrial school for girls, whenever suitable employment has been secured for such inmate, and his past conduct for a reasonable time has satisfied said board that he will be law abiding, temperate, honest, and industrious.”

“A” is an inmate of the state reformatory and therefore comes under the above provision of the statute. You are there-
Labor — Public Health — Plumbers’ Licenses — Journeyman plumbers’ license granted to indentured plumbing apprentice who has two more years under his apprentice contract gives apprentice same privileges as same license gives to one of same age who is not indentured.

February 19, 1926.

Board of Health.

You have directed my attention to ch. 145, sec. 145.03, subsec. (3), Stats., under which the state board of health has adopted rules governing examination and licensing of journeymen plumbers. Under these rules applicants who pass a satisfactory examination are granted a journeyman plumber’s license as provided for by law, and which privileges them to work as journeymen plumbers under the supervision of a master plumber in any village or city in this state where licenses are required.

You also direct my attention to ch. 106, Stats., relating to the indenturing of apprentices, which law is administered by the industrial commission and under which plumbing apprentices less than twenty-one years of age are indentured for five years. You also state that for the purpose of carrying out the intent and purpose of this law the industrial commission during the year 1918, after a conference with master and journeymen plumbers, and upon their advice and approval, formulated a form of contract and working rules of apprenticeship for plumbing in Wisconsin. You state that a master plumber employing both apprentices and journeymen plumbers asked this department for a rule on the following question which you submit to this department:

"Is an indentured plumbing apprentice after he has served three years and has been granted a journeyman plumber’s license pursuant to satisfactory examination by the state board of health authorized to perform under the supervision of a licensed master plumber the work of a journeyman without either a licensed master or other licensed journeyman being physically present on the building or at the place where such installation of plumbing is being made? In other words, does a license so
issued to the indentured apprentice after serving three years entitle the holder thereof to all the privileges accorded a licensed journeyman plumber?"

Your question must be answered in the affirmative. There is no difference in a journeyman license given to a minor under twenty-one years who is not indentured and one given to an indentured journeyman plumber under twenty-one years of age.

JEM

Agriculture — Wisconsin Horticultural Society — Commissioner of agriculture must advise as to manner of expending and accounting for state moneys appropriated to Wisconsin State Horticultural Society. Secretary of society must make yearly report to governor of transactions thereof.

February 19, 1926.

Frederic Cranefield, Secretary,

Wisconsin Horticultural Society,

Madison, Wisconsin.

In your letter of February 1 you inquire whether the state department of agriculture has any control over the affairs of the Wisconsin State Horticultural Society.

Sec. 93.08, Stats., provides that the Wisconsin State Horticultural Society is a body corporate by that name. Subsec. (14), sec. 93.07, imposes on the commissioner of agriculture the duty "to advise as to the manner of expending and accounting for state moneys appropriated to * * * the Wisconsin Horticultural Society." Sec. 93.09 provides that the secretary of the society shall make, as of June 30th of each year, a report to the governor of the transactions thereof. These sections, as far as I have been able to discover, are the only provisions which relate to supervision and control of the Wisconsin Horticultural Society by state departments.

SOA
Education—Tuition—In determining tuition to be charged to town, city or village, under sec. 40.53, Stats., no deduction can be made for absence except where such absence is continuous for school month.

February 19, 1926.

R. M. Orchard,
District Attorney,
Lancaster, Wisconsin.

In your letter of January 29 you inquire whether in determining the amount of tuition to be charged to a town, city of village, under the provisions of sec. 40.53, Stats., any deduction should be made for absence due to sickness or other causes.

Subsec. (4), sec. 40.53 provides:

"On or before the first day of July in each year the secretary of the free high school board shall make a sworn statement to the clerk of the city, town or village from which any person may have been admitted to said free high school, setting forth the residence, name, age and date of entrance to such school, and the number of months' attendance during the preceding school year, of each person as admitted from such city, town or village."

The secretary of the high school board is charged with the duty of preparing a statement to the clerk of the town, city or village in which the nonresident pupil resides, setting forth the number of months' attendance during the preceding school year. This provision clearly relates to the actual number of school months during which the nonresident pupil attended the high school. If a pupil attends school any portion of any school month, that month must be counted. Where the absence is continuous for a school month, such school month cannot be counted. It is apparent that the legislature intended that the tuition should be charged on a monthly basis. Otherwise it would have imposed upon the high school district the duty to report the actual number of weeks or the actual number of days during which such nonresident pupil attended the high school. A month, for the purpose of determining the amount of tuition to be charged, is a whole month or any part thereof during which the nonresident pupil attended high school.

SOA
Building and Loan Associations—Corporation cannot, under provisions of sec. 215.22, Stats., appoint trustee for express purpose of investing its funds by acquiring and holding paid-up stock in building and loan association.

February 19, 1926.

Dwight T. Parker,
Commissioner of Banking.

You ask for a construction of our building and loan association laws covering the following questions:
1. Can a corporation be a member of a building and loan association?
2. If not, can it own paid-up stock in its own name?
3. If not, can it pay for such stock and have it issued to an individual as trustee?

You say that that is being done in this state.

Building and loan associations are corporations. Sec. 215.02, Stats., says they may be organized and operated under the general corporation laws of the state except as otherwise provided.

Sec. 215.07 provides that they shall have power among other things, to make loans and issue stock to members on such terms and conditions as are provided in the by-laws and may exercise all powers necessary and proper to carry out the purposes of their organization, which is defined to be, by sec. 215.01, for the purpose of raising money to be loaned among its members. Standard Savings Association v. Aldrich, 163 Fed. 216; 9 C. J. 934.

Sec. 215.08 authorizes the issuance of two kinds of stock to its members: first, installment stock evidencing a loan by the association to the member to enable him to build a home and to pay for it in installments; second, cash or paid-up stock, which can only be done when the demand for legitimate loans exceeds the income of the association. That is in the nature of an emergency provision and the law expressly provides that when sufficient funds are available, such stock shall be paid up and retired. That special provision was no part of the original plan of building and loan associations but was added to the law by ch. 156, laws of 1899.

Sec. 215.20 says any person of full age and sound mind may become a member in the manner provided in the by-laws but no person can become owner in his own name or in the name of
another of shares of installment stock exceeding $20,000 nor paid-up stock exceeding $10,000.

Sec. 370.01, subsec. (30), says the word "person" when used in the statutes shall extend and be applied to bodies corporate unless plainly inappropriate. I think sec. 215.20 shows a very clear legislative intent that the statutory definition of the word "person" should not apply to members in a building and loan association. Persons of full age and sound mind, could not apply to corporations and these corporations seem to have realized that fact for, you say, they have acquired and held the stock in the name of an individual as trustee. That practice has, no doubt, grown out of the provisions in sec. 215.22 which provides:

"An administrator, executor, guardian or trustee, authorized to invest trust funds, may acquire and hold paid-up stock"

not exceeding the amount so specified in sec. 231.32, and it says they shall have the same rights as other members except the right to hold office.

Does that use of the word "trustee" authorize the creation of a trust in that manner for the express purpose of evading the law which was evidently intended to prevent corporations from being members of such associations? If that can be done, then a corporation could create as many trustees as it wished, and each such trustee could hold the full amount of stock authorized by the law, and it would all be owned and controlled by the same corporation, which I think would practically nullify the whole purpose and scheme of the building and loan association laws. A corporation is a mere creation of the law. It has such powers as the law gives it and a building and loan association is a specific kind of corporation organized for the particular purpose authorized by law. Sundheim, Building and Loan Associations, 3; Thompson on Building Associations, 3.

It is held that in the absence of an enabling law authorizing it, a corporation or a joint stock association cannot be a member of a building and loan association. 4 Am. & Eng. Ency. of Law 1028; 9 C. J. 932; Kadish v. Garden City Equitable L. Assn., 151 Ill. 531, 38 N. E. 236; North America Building Association v. Sutton, 35 Pa. St. 463, 78 Am. Dec. 349.

It was held in the case of Standard Savings Assn. v. Aldrich, 163 Fed. 216, that because the object of a building and loan asso-
ciation was to loan the funds contributed by the members for the purpose of building and improving homesteads, one building and loan association could not become a member in another association.

That, of course, is based upon the original plan and purpose of a building and loan association, to provide funds for persons to build homes and pay for them in small monthly payments. A corporation has no use for a homestead and so would not be within the plan or scope of the building and loan association law. That seems to have been recognized by the corporations you refer to because they have not attempted to acquire the stock, or become members of the association only through a trustee assuming to have that right under the provisions of sec. 215.22. But I do not think the use of the word “trustee” in sec. 215.22 would authorize a corporation to appoint a trustee for the sole purpose of doing indirectly what the corporation could not do directly. I think the word “trustee” as there used was intended to refer to general trustees occupying a similar position as administrators, executors or guardians, for they are used together, none of which could be appointed for the particular purpose of evading the law.

For these reasons, I think each of your questions should be answered in the negative.

TLM

Indigent, Insane, etc.—Minors—Dependent child may be legally sentenced by county court to Homme Orphans Home of Wittenberg, Wisconsin.

February 19, 1926.

Grover M. Stapleton,
District Attorney,
Sturgeon Bay, Wisconsin.

You ask to be advised whether Homme Orphans Home, of Wittenberg, Wisconsin, is an institution to which a dependent child may be committed by the county court under sec. 48.07, Stats. This statute provides that the child may be committed to some suitable state or county institution as provided by law "or to the care, custody and guardianship of some incorporated association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent or neg-
lected children." You state that you have been advised that other children have been committed to this home from other counties, and you inquire whether it is within the authority provided for in this section.

I have been informed that the Homme Orphans Home of Wittenberg is an institution operated by the Norwegian Lutheran Church of America, duly incorporated. I am of the opinion that under the provisions of this statute, which in my opinion should be liberally construed, a sentence by the county court of a child to the Homme Orphans Home is authorized.

JEM

Public Health—Dentistry—One who does not possess statutory requirements cannot be examined for license to practice as dental hygienist under sec. 152.07, subsec. (2), Stats. No certificate may be issued to dental hygienist of another state, unless that state grants reciprocal privilege to dental hygienists of this state.

DR. S. F. DONOVAN, Secretary,
Board of Dental Examiners,
Tomah, Wisconsin.

The material facts presented in your letter of February 8 are as follows:

A woman who has previously resided in the state of Washington has applied to the board for a license to practice as a dental hygienist. She is a high school graduate and has completed two years of college work. She has had seven years' experience in a dental office in Washington and has practiced as a dental hygienist in that state. Previous to 1923 the state of Washington did not require a dental hygienist to be a graduate of a dental hygienist school. Since 1923 the requirements for a dental hygienist have been similar to the requirements in this state. There is no reciprocal privilege extended to dental hygienists by the state of Washington. You inquire whether your board may examine the woman who has applied for a license.

Subsec. (2), sec. 152.07, Stats., provides:

"* * * An applicant shall be examined upon payment of ten dollars and filing proof satisfactory to the board, that he has a general education equivalent at least to a two-year course
beyond that of the eighth grade and that he is a graduate of a reputable training school for dental hygienists having a course of not less than one year of eight months.” (Italics ours.)

The woman who has applied for a license to practice as a dental hygienist is not a graduate of a reputable training school for dental hygienists.

Subsec. (6), sec. 152.07, provides:

“Whenever any other state requiring a preliminary education of dental hygienists not less than Wisconsin, shall grant to dental hygienists of this state reciprocal privilege of practicing the board of dental examiners shall, upon payment of ten dollars issue a certificate to an applicant who shall in lieu of examination furnish proof, satisfactory to the board, that he has been duly licensed and lawfully and reputably engaged in practice as a dental hygienist in such other state for at least two years next preceding the application.”

Under your statement of facts the state of Washington has not extended reciprocal privileges to dental hygienists practicing in this state.

In view of the statutory provisions above quoted, the answer to your question is apparent. Your board cannot examine the woman under the provisions of subsec. (2), sec. 152.07, for the reason that she is not a graduate of a reputable training school for dental hygienists. Neither can the board issue a certificate under the provisions of subsec. (6), sec. 152.07, for the reason that the state of Washington does not extend reciprocal privileges to dental hygienists practicing in this state.

SOA

Peddlers—Village has no authority to adopt ordinance providing for licensing of hawkers and peddlers except under provisions of sec. 129.22, 129.23, and 129.24, Stats.

February 20, 1926.

GEO. W. MEGGERS,
State Treasury Agent.

The question raised by your letter of February 3 is whether a village may adopt an ordinance providing for the licensing of hawkers and peddlers.

Sec. 129.07, Stats., provides:

“Nothing in sections 129.01 to 129.24, inclusive, contained shall be construed as prohibiting or in any way limiting or inter-
fering with the rights of any city or village to further license hawkers, peddlers or transient merchants to trade within the corporate limits thereof where authority to do so is conferred upon them by law."

In II Op. Atty. Gen. 611 (1913), it was held that unincorporated villages and towns are not authorized to require peddlers' licenses except on days of public assemblage under secs. 1584g, 1584h and 1584i, Stats. 1911 (secs. 129.22, 129.23 and 129.24, Stats. 1925). The basis of that opinion was a holding that village boards had not the power to prescribe and require licenses of hawkers and peddlers except under the limited authority conferred by secs. 1584g, 1584h and 1584i, Stats. 1911 (secs. 129.22, 129.23 and 129.24, Stats. 1925).

There has been no subsequent legislation which justifies any departure from the former opinion of this department. It is held, therefore, that a village has no authority to adopt an ordinance providing for the licensing of hawkers and peddlers except under the provisions of secs. 129.22, 129.23 and 129.24, Stats. 1925.

ML

Building and Loan Associations—Building and loan association cannot issue certificate in alternative. Certificate in alternative would be construed as joint certificate, requiring both signatures for redemption, unless by-laws provide otherwise.

Association remains liable if certificate in alternative is paid to one party without other's consent, unless provided otherwise by by-laws.

By-laws may provide for redemption of joint stock certificate by either party without consent of other.

Dwight T. Parker, Commissioner of Banking.

Attention C. P. Diggles

In your letter of January 19 you submit three questions relative to building and loan stock certificates.

Question No. 1:

"In case a certificate was made out to 'John or Mary Doe, or the survivor of either,' could either of the parties redeem the certificate without the signature of the other?"
Sec. 215.21, Stats., provides in part:

“When shares shall have been issued in the name of two persons, or their survivor, the right to vote upon such shares at any meeting of the association shall be no greater than if the shares were held by an individual. Upon the death of either the association shall be liable only to the survivor.”

Shares in a building and loan association are not like certificates of deposit or banking accounts, nor are they like shares in an ordinary corporation. They are indicia of membership in an organization. Ordinarily, a membership in an organization cannot be in the alternative—that is, either John Jones or Mary Jones cannot be a member: both must be members or neither. The section above quoted, however, permits the issuance of shares in the name of two persons or their survivor; and this is the only permissible divergence from the ordinary rule. It follows, therefore, that a building and loan association has no authority to make out a certificate to “John or Mary Doe, or the survivor of either.”

In private papers “* * * and and or are readily convertible words according to the sense required by the context; * * *.” The Attorney General v. The West Wisconsin Railway Company, 36 Wis. 466, 486. The power to make a certificate in the alternative being lacking, the word “or” in the certificate would undoubtedly be construed as “and.”

Withdrawals from a joint deposit in a bank require the authority of all depositors. Gish Banking Co. v. Leachman, 163 Ky. 720, 174 S. W. 492, L. R. A. 1915 D, 920. The same rule would undoubtedly apply to a building and loan certificate.

Necessarily, then, in the case of a certificate made out to “John or Mary Doe, or the survivor of either,” if both are alive, neither could redeem the certificate without the signature of the other, unless provided otherwise by the by-laws.

Question No. 2:

“In case the certificate, made out in this manner, was paid to either party, would the association be released from all liability in case the second party claimed the certificate was paid without the other’s consent?”

Since, as indicated in the answer to Question No. 1, a certificate made out in the alternative, both parties being alive, requires both signatures, if the association paid either party
without the consent of the other it would not be released from all liability, unless provided otherwise by the by-laws.

Question No. 3:

“In order that a joint stock certificate might be issued which would permit of either party redeeming the certificate without the consent of the other, what wording would you suggest being used in said certificate?”

There seems to be no legal objection to a provision in the by-laws permitting either party to a joint stock certificate to redeem without the consent of the other.

ML

Building and Loan Associations—Insurance — Agreement whereby building and loan association collects premiums for insurance company is contrary to law.


Dwight T. Parker,
Commissioner of Banking.

Attention C. P. Diggles.

You submit an agreement between a building and loan association and an insurance company, and you ask whether that plan conflicts with the opinion given by this department to you on October 5, 1925. In that opinion it was held that building and loan associations, being corporations, cannot be licensed as agents to collect insurance premiums. In the agreement that you submit par. 2 provides as follows:

“2. PREMIUMS. Premiums for the insurance provided under the above formula are to be paid by the Member to the Association monthly. On the first day of each month the Association shall pay to the Company through the Milwaukee, Wisconsin, Branch Office, designated for that purpose by the Company, all premiums previously unreported which the Members shall have paid to the Association.”

It is obvious that the building and loan association is to collect the premiums and therefore the agreement submitted cannot legally be entered into.

ML
Contracts—Land Contracts—Public Officers—Register of Deeds—Land contract which purports to be acknowledged before instrument is signed is recordable. Register of deeds can be compelled to accept such instrument for recording.

February 20, 1926.

LEWIS W. POWELL,
District Attorney,
Kenosha, Wisconsin.

You ask whether the register of deeds should accept for recording a certain land contract which was acknowledged nearly a month before it appears to have been signed; and whether the register of deeds could be forced to accept such instrument for record.

Sec. 235.45, Stats., 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. 59.51, Stats., provides in part:

"The register of deeds shall:

"(1) Record or cause to be recorded in suitable books to be kept in his office, correctly and legibly all deeds, mortgages, maps, instruments and writings authorized by law to be recorded in his office and left with him for that purpose."

It is apparent that the land contract is recordable and that the register of deeds has the duty to record it, provided it is "acknowledged" within the meaning of the statute.

In Yorty v. Paine, 62 Wis. 154, 161-162, a tax deed was executed on February 5, 1881, but the certificate of acknowledgment was dated February 5, 1880. The court said:

"The apparent mistake in the date of the certificate of the acknowledgment of the deed does not affect the validity of the deed, nor is the acknowledgment so defective in that respect as to prevent the same from being lawfully recorded. Chase v. Whiting, 30 Wis. 544."

In Chase v. Whiting, 30 Wis. 544, 549, the deed was dated, but the year of the execution of the acknowledgment was omitted. The court said:
It might be fair to presume, perhaps, under the circumstances, that the acknowledgment was of even date with the deed, or what purports to have been the time of its execution and delivery (see Carpenter v. Dexter, 8 Wallace, 513, and Brooks v. Chaplin, 3 Vt., 281), but at all events it must be assumed to have taken place before the recording of the deed, for otherwise it could not have been properly received and recorded.” (Italics ours.)

The law seems settled, therefore, that the land contract was entitled to recording, notwithstanding the fact that it was acknowledged before signed.

Since the duty of recording instruments authorized by law to be recorded is “a clear and absolute one imposed by law” (State ex rel. Fire & Rust Proof C. Co. v. Icke, 136 Wis. 583, 586), the performance of that duty can be compelled by mandamus.

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**Taxation**—Refund of excess soldiers’ bonus surtax under sec. 71.27, Stats., can be made by state treasurer only where such excess payment was made within six years next preceding date of certificate of tax commission.

Fred R. Zimmerman, 
Secretary of State.

The material facts presented in your letter of February 8 and accompanying papers are as follows:

On December 13, 1919, the Worden-Allen Company paid an excess soldiers’ bonus surtax on its income for the year 1918. Under date of January 18, 1926, the Wisconsin tax commission, in accordance with the provisions of sec. 71.27, Stats., certified to the state treasurer that the Worden-Allen Company had on December 13, 1919, more than six years prior to the date of the certificate, paid an excess soldiers’ bonus surtax. You inquire whether the secretary of state may refund the amount of overpayment to the Worden-Allen Company.

Sec. 71.27, Stats., provides as follows:

“Whenever it shall be certified to the state treasurer by the Wisconsin tax commission as to corporations, joint stock companies and associations or by the proper assessor of incomes as to copartnerships, individuals or fiduciaries that excess payment has been made for the soldiers’ bonus tax or soldiers’ educational
surtax or teachers' retirement fund surtax within six years next preceding the date of such certificate, then the said state treasurer shall within five days after receipt of such certificate draw an order against the fund in the state treasury into which such excess was paid, reimbursing such payor for the amount of such excess payment so certified. Provided, however, that after January 1, 1927, such excess payments of surtaxes may be certified only for the period during which corrections in assessments may be made under sections 71.10 and 71.11."

The terms of the statute are clear and unambiguous and therefore not open to construction. The state treasurer may refund excess payments only when it shall be certified to him by the tax commission that excess payment has been made for the soldiers' bonus tax "within six years next preceding the date of such certificate." This requirement is jurisdictional and must be strictly construed. The excess payment was not made within six years preceding the date of the certificate and for that reason no refund can be made.

It is stated in the letter attached to your request that the tax commission discovered this overpayment on January 31, 1924. At that time sec. 37.259 which as amended became sec. 71.27, Stats. 1925, provided that refunds might be made where the excess payment occurred during the last preceding three years instead of during the last preceding six years as now provided. It is suggested it was the duty of the tax commission immediately upon the enactment of the 1925 statutes to certify the refund to the state treasurer. The statute, however, imposes no such duty on the tax commission. The legislature quite naturally intended that no action should be taken by the tax commission until a proper request was made. No request for the refund was made until after the six-year limitation in sec. 71.27 had expired. Consequently the Worden-Allen Company is now in no position to raise any question as to the duty of the tax commission.

SOA
Criminal Law—Public Officers—Malfeasance—Street foreman and street laborer who became interested in contract of city to haul tiles and unlawfully use employees of city to aid in performing contract while being paid by city for their services are violating sec. 348.28, Stats., and are guilty of malfeasance. They may also be guilty of obtaining money under false pretenses and of false swearing.

Street laborer should be charged in separate count in complaint of being guilty as accessory before facts.

February 24, 1926.

BYRON J. CARPENTER,
Assistant District Attorney,
Stevens Point, Wisconsin.

You state that you have been appointed assistant district attorney of Portage county for the purpose of investigating and prosecuting a possible criminal action based upon the following facts:

“One A was employed by the city of Stevens Point as street foreman and B was employed by said city as a laborer, and while so employed they contracted with the city water department (a commission operating the water system in said city) to haul pipe used in laying mains by the said water department.

“A made a verbal contract with the water department by the terms of which it was provided that the said pipe was to be hauled at the rate of $2.00 a ton. B was acquainted with the terms of said contract.

“A and B continue to work for the city of Stevens Point and while so employed began work on their private contract. They personally performed their proper duties to the city.

“Investigation has shown that the labor used on said private contract job were men employed by the city for street work and were paid their wages by said city; that B received from the said city wages for a man and team which was used on the private contract job whereas it should have been used on street work. A as street foreman had charge of the city labor and the men used on the private job were placed at said work by A and as aforesaid, A charged their pay for their work to the said city and were not paid wages by A.

“B claims that although he was a partner that he had no knowledge of the facts but admits he received from A about $200, his share of the profits made on the private contract. The city paid for labor and the use of the team about $600.

“It so happens that the pay roll was made up at the dictation of A although no written document showing this exists and the
clerk who made up the pay roll is now dead, but A admits that the pay roll existing is correct and was made by his dictation."

You state that you are unable to ascertain the particular section of the statute violated and wish this department would advise you as to what the offense is that A and B committed, and the section of the statute violated, and give any suggestions as to the form of the complaint.

The section violated is 348.28, and provides thus:

"Any officer, agent or clerk of the state * * * or city therein, or in the employment thereof, * * * who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner * * * in any contract * * * in relation to any public service * * * or who shall * * * do any other act in his official capacity, or in any public or official service not authorized or required by law * * * shall be punished * * *.”

A and B have violated this statute in that they have performed an act in their official service which is not authorized by law, as they have used employes of the city for their private benefit. *State v. Cleveland, 161 Wis. 457.* B may not be guilty of this if under the facts he did not know that this was being done. The complaint should have a count charging them with performing an act not authorized by law while officers, agents and employes of the city. It may be necessary for you to allege in one count that B is guilty as an accessory before the fact of this charge. Under the case of *Karakutza v. State, 163 Wis. 293,* it is necessary to so charge him if you intend to prove that he is such accessory. After all the facts are disclosed, one or both of these parties may be guilty of obtaining money under false pretenses and of false swearing; in that case it would be advisable to make separate counts of these separate offenses in the information filed after a preliminary hearing has disclosed all the facts.

JEM
Mothers' Pensions—Mother of two children whose second husband refuses to support her and her children, although able to do so, is not entitled to mother's pension.

R. H. Fischer,
District Attorney,
Shawano, Wisconsin.

You inquire whether a woman divorced from her husband having two minor children of the necessary age, and who re-marries and now has a husband capable of supporting her and the children can receive a pension under the provisions of the mothers’ pension law, sec. 48.33, subsec. (5).

Mother's pension is given on certain conditions. The statute provides that the mother must be a widow "or the wife of a husband who is incapacitated * * * or of a husband who has been sentenced to a penal institution * * * or of a husband who has continuously deserted her * * *.”

The woman in question is a married woman, and her husband is not incapacitated, nor has he been sentenced to a penal institution, and he has not deserted her. Your question must be answered in the negative. She does not come under the conditions prescribed in the statute. See V Op. Atty. Gen. 336.

Mothers' Pensions—Mother or grandparent may acquire right to mother's pension after residence for one year in county irrespective of fact that she has received aid as pauper during such time.

John A. Lonsdorf,
District Attorney,
Appleton, Wisconsin.

You submit the following questions:

1. "Can a woman with several children receiving mother's pension from one county by moving to another county and residing there more than a year, while still receiving mother's pension in the former county, gain a new legal settlement in the latter county for purpose of poor aid as provided by section 49.02 (4)?"
2. "Does the fact that she receives mother's pension while so residing in the foreign county bring it within the purview of clause of that section 'but no residence of a person in any town, village or city while supported therein as a pauper shall operate to give such person a settlement therein?'"

Your questions imply that it is necessary for a mother to have acquired a legal settlement in a county before a mother's pension can be given to her by that county. There is no provision in the law requiring a mother to have a legal settlement as a condition precedent to the granting of a mother's pension. Sec. 48.33, subsec. (5), Stats., contains the following provisions:

"* * * The mother or grandparent or such other person must have resided in the county in which application is made for aid for at least one year prior to the date of such application; * * *"

So it has been held by numerous decisions of this department that the jurisdiction to grant mothers' pensions depends upon residence—not legal settlement. See XI Op. Atty. Gen. 887, and opinions of this department referred to therein, and a later opinion in XII Op. Atty. Gen. 205.

Your first question, therefore, must be answered in the affirmative, provided all the other conditions in the statute are present.

In view of the answer given to the first question and the above observation on the law, the second question need not be answered, as it is not relevant.

JEM
Public Officers—Vacancies—School Districts—School District Treasurer—Upon failure of school district treasurer to qualify within fifteen days after his election by furnishing good and sufficient bond, office of school treasurer became vacant.

Such officer-elect who performs duties of school treasurer is de facto officer.

Vacancy in office must be filled by town clerk.

Appointee of town clerk becomes district treasurer upon his qualifying and furnishing good and sufficient bond.

February 24, 1926.

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

The material facts presented in your letter of February 9 are as follows:

One K was elected treasurer of a joint school district at the annual meeting of the district. K failed to furnish a bond within fifteen days after his election. The director and clerk did not fill the vacancy within ten days after the expiration of the fifteen-day period allowed to K in which to qualify. K assumed the duties and acted as treasurer. Thereafter K furnished a bond which was refused by the director and clerk on the ground that they did not know the surety and that the amount of the bond was insufficient. On October 23 K furnished a new bond and K maintains that the director and clerk approved the bond. No notification was ever given K by the director and clerk that the bond had not been approved. On November 23 the town clerk appointed one P as treasurer of the district. P furnished a bond signed by the director. Subsequently, on January 19 or 20, the town clerk again appointed P as treasurer, and he has now furnished a good and sufficient bond.

You inquire whether K or P is the treasurer of the school district.

Subsec. (1), sec. 40.19 provides:

"The treasurer shall within fifteen days after his election or appointment execute and file an official bond, in the amount, as nearly as can be ascertained, of all the moneys of the district to come into his hands, with sufficient sureties approved by the director and the clerk. * * *"

Under the statement of facts K did not qualify within the statutory period. An officer-elect having failed to qualify, a
vacancy was caused in his office. VIII Op. Atty. Gen. 18, X Op. Atty. Gen. 572, XII Op. Atty. Gen. 7. This is in accordance with sec. 17.03, which provides that a public office shall become vacant upon the happening of the following events: Subsec. (7), Sec. 17.03, Stats., provides as follows:

"The neglect or refusal of any person elected or appointed or re-elected or reappointed to any office to take and file his official oath or to execute or renew his official bond, if required, or to file the same or either thereof in the manner and within the time prescribed by law."

Subsec. (1), sec. 17.26, provides that vacancies in school district boards shall be filled as follows:

"In boards the members of which are elected at the annual school district meeting, by appointment by the remaining members of the boards within ten days after the vacancy occurs. If the vacancy is not so filled, the town, village or city clerk, and in case of joint district, the clerk of the town, village or city in which the schoolhouse is situated, shall fill such vacancy by appointment. * * * Any person so appointed shall hold office until the next annual meeting at which meeting the electors shall fill such vacancy for the residue of the unexpired term."

Under the facts the vacancy caused through failure of K to furnish a sufficient bond was not filled by the director and clerk. Consequently it then became the duty of the town clerk in which the school house is located to appoint a treasurer.

The town clerk appointed P as school treasurer on November 23, but P failed to qualify for the reason that he did not furnish a sufficient bond. Subsequently the town clerk again appointed P as treasurer, who then proceeded to furnish a sufficient bond. During the period from the time that K was elected as treasurer until the time P qualified as treasurer, K was a \textit{de facto} officer. During all this period, however, there was a vacancy. As soon as P was appointed and qualified, he became the legal treasurer of the district.

To answer your specific question, P is the legal treasurer of the school district.

SOA
Fish and Game—Green Deer Hides—Search—State prohibition officers are not deputy conservation wardens under sec. 29.07, Stats., and have no authority to search buildings for wild animals, hides, or carcasses or parts thereof without search warrant therefor.

Green deer hide is inadmissible in prosecution for unlawful possession thereof if it was unlawfully obtained from defendant.

Green deer hide is inadmissible in evidence in prosecution for illegal possession thereof if it was found by state prohibition officers while lawfully or unlawfully searching premises for intoxicating liquors.

February 24, 1926.

Harold E. Stafford,
District Attorney,
Chippewa Falls, Wisconsin.

On January 25 you inquired of the state conservation commission whether a green deer hide, found by state prohibition officers while searching, without warrant, a barn on the same lot but not attached to a building occupied as a saloon which is being operated under a license for the sale of nonintoxicating liquors, is admissible in evidence in a prosecution of the saloon keeper for illegal possession of a green deer hide.

Under sec. 29.05, subsec. (6), Stats., the state conservation commission and its deputies may search any building, except a dwelling house, without a search warrant whenever they have reason to believe that wild animals, carcasses or parts thereof are to be found therein.

Sec. 29.07 provides that all sheriffs, deputy sheriffs, coroners and other police officers are ex officio deputy conservation wardens. A state prohibition agent is not a deputy conservation warden within the purview of sec. 29.07, is not a police officer within sec. 165.01, subsec. (1), par. (e), so as to come within the terms of sec. 29.07, and is authorized by sec. 165.01, subsec. (2), par. (h), to make arrest and serve process in the same manner as sheriffs only under the provision of and, as I would construe it, for violations of ch. 165, Wis. Stats.

Not being deputy conservation wardens, the state prohibition officers lawfully or unlawfully searching the premises aforementioned for intoxicating liquors could not take possession of a green deer hide and turn it over to the district attorney to be
used as evidence in the prosecution for the illegal possession thereof.

Evidence taken from the defendant unlawfully and without a search warrant is inadmissible in a prosecution against him, being in violation of his rights under sec. 8, art. I, Const. Hoyer v. State, 180 Wis. 407; Jokosh v. State, 181 Wis. 160; Allen v. State, 183 Wis. 323.

In conclusion, it is my opinion that a green deer hide is inadmissible as evidence in the prosecution for illegal possession thereof if the green deer hide is found by and seized by state prohibition officers lawfully or unlawfully searching the premises aforementioned for intoxicating liquors.

MJD

Public Officers—Justice of peace has no authority to sentence defendant to pay fine with costs and serve term in jail, imprisonment to commence at certain definite future date.

February 26, 1926.

Theodore A. Waller,
District Attorney,
Ellsworth, Wisconsin.

On January 11, 1926, you inquired whether a justice of the peace had authority to sentence a defendant in a criminal action to pay a fine with costs and to serve a ten-day term in jail, the imprisonment to commence at a certain definite future date.

A justice of the peace has no authority to impose sentence and then stay proceedings except for legal cause such as in the instance of appeal; he cannot suspend its execution. In re Webb, 89 Wis. 354. After sentence has been pronounced in a criminal case, the court cannot as a matter of leniency to the defendant suspend indefinitely its execution, nor can it suspend the sentence or decree that it commence at a future date unless the defendant has instituted proceedings for a writ of error or has been ordered by the court to serve two sentences, one to commence at a future date after the expiration of the first sentence or after the defendant has been pardoned.

Therefore, my conclusion is that the justice of the peace has no authority to sentence a defendant to pay a fine with costs and serve a term of ten days in jail, the imprisonment to com-
mence at a certain definite future date. If this portion of the sentence of the justice of the peace is void, the recognizance would seem to be ineffective after the expiration of the time defendant would have served had he commenced serving the sentence on the date it was pronounced, and there would thus be no right of action against his sureties.

MJD
Public Officers—County Judge—De Facto Officer—Under special acts passed with reference to county court of La Crosse county, justice of peace appointed by county judge during his last illness may be de facto officer after death of county judge and his act cannot be questioned in any collateral proceeding. He is not, however, de jure officer.

March 3, 1926.

LAWRENCE J. BRODY,
District Attorney,
La Crosse, Wisconsin.

You state that the Honorable John Brindley, formerly county judge of your county, died on February 11 of this year. During his last illness and pursuant to ch. 129, laws of 1897 and acts amendatory thereto, he had appointed a certain justice of the peace to act in his stead. You inquire whether this justice of the peace can continue to perform the duties of the county judge or whether his authority ipso facto ceased upon the death of such county judge.

Chapter 129, laws of 1897, provides, in part, that criminal jurisdiction is conferred upon the county court of La Crosse county, and that such court “shall have and exercise all the jurisdiction, authority, power and rights given by law to justices of the peace in criminal actions.” It further provides that if by reason of absence, sickness or temporary disability the county judge is “unable to perform his duties, he may, by order in writing to be filed in said court, call in any court commissioner of said county to act in his stead.”

Chapter 13, laws of 1899, amending ch. 129, laws of 1897, provides, in part, that such county judge may “call in any justice of the peace in said county to act in his stead,” and such justice of the peace, it is provided, shall possess all the powers and shall perform all the duties imposed upon said county judge by the act.

Sec. 17.03, Stats., provides, in part, that any public office shall become vacant upon the death of the incumbent. Under the above provision the former county judge had power to do as he did, namely, to call in a justice of the peace to act in his stead during his illness. When the former county judge died, the office of county judge became vacant. Sec. 17.03, Stats. The question to be determined, therefore, is whether the justice of the peace...
after the death of the county judge is a de jure officer, a de facto officer, or a mere usurper.

A de jure officer is one who holds his office “rightfully; of right; lawfully; by legal title.” 1 Bouvier’s Law Dictionary (3d rev.) 768. Clearly, the justice of the peace is not a de jure officer, because the office of county judge became vacant upon the death of the former county judge.

There remains to be considered the question whether the present incumbent, that is, the justice of the peace, is a de facto officer or a mere usurper. Lord Holt in Parker v. Kett, 1 Lord Raymond 658, 12 Mod. 467, defined a de facto officer as “one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.” This broad definition received the sanction of the full King’s Bench in Rex v. Bedford Level, 6 East. 356, 367, and it is said by Butler, C. J., in the leading case of State v. Carroll, 38 Conn. 449, 465, that it “has never been questioned since in England.” The American view on this subject is in general in accord with the English view. State v. Carroll, 38 Conn. 449; Brown v. Lunt, 37 Me. 423; Howard v. Burke, 248 Ill. 224; Petersilea v. Stone, 119 Mass. 465; Ekern v. McGovern, 154 Wis. 157; In re Woolcott, 163 Wis. 34.

In Ekern v. McGovern, 154 Wis. 157, 220–221, Justice Marshall states:

“* * * A person may be a de facto officer and have no real title at all to the place he assumes to have the right to. If one is in possession of an office, performing its duties, and entered by right or such claim of right as not to be classible as a usurper, * * * he is, as a general rule, de facto what he claims to be.”

The official acts of a de facto officer are valid as to the public and third persons and cannot be attacked in a collateral proceeding. In re Woolcott, 163 Wis. 34; In re Burke, 76 Wis. 357; State v. Bartlett, 35 Wis. 287; State v. Bloom, 17 Wis. 521.

The reason for this ruling rests upon grounds of public policy and is for the protection of the public. In re Woolcott, 163 Wis. 34.

I am of the opinion, therefore, that the present incumbent, namely, the justice of the peace, is in possession of the office of county judge performing its duties under color of right, and that
he is a *de facto* officer. His acts, therefore, are valid as to the public and third persons, and cannot be questioned in any collateral proceeding.

CAE

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**Appropriations and Expenditures—School Board Members—Public Officers—School District Clerk**—Sec. 40.21, subsec. (1), Stats., provides for payment of compensation to school district clerk.

Expenses incurred by members of school board is consulting attorney as to legality of special school meeting must be borne by them and cannot be charged to school district.

March 5, 1926.

John W. Kelley,
District Attorney,
Rhinelander, Wisconsin.

The material facts presented in your letter of February 19 are as follows:

1. Sec. 40.09, subsec. (18), Stats., provides that at the annual meeting of a school district the electors may vote a tax to compensate the treasurer and director. There is no provision in this section regarding the payment of compensation to the clerk. You inquire whether there is any statutory provision on this subject.

2. A school board in your county was obliged to travel a considerable distance in order to consult an attorney as to the legality of a special school meeting. You inquire whether the school board may lawfully reimburse themselves for the expenses necessarily incurred in consulting the attorney.

1. Sec. 40.21, subsec. (1), Stats., provides for the payment of compensation to a school district clerk.

2. Your second question is answered in the negative. Subsec. (17), sec. 40.09, authorizes the electors of a school district "to give such direction and make such provision as may be necessary in relation to the prosecution or defense of any action or proceeding in which the district may be a party or may be interested."

Unless the electors of a school district make specific provisions for the prosecution or defense of a suit against the school
district the members of the school board have no power to reimburse themselves for expenses incurred in prosecuting or defending an action in which the school district is interested. There is no statutory authority for the members of a school board to reimburse themselves for traveling expenses in the case presented by you. The members of the board take their office *cum onere* and if in the performance of their duties as members of the school board it is necessary to incur expenses, such expenses must be borne by them.

SOA

*Trade Regulation—Trading Stamps—* So-called contract delivered to prospective purchaser which entitles such purchaser to receive photographs upon payment of sum specified in so-called contract does not violate trading stamp law, for reason that so-called contract is not given in connection with sale of goods, wares or merchandise.

March 6, 1926.

J. Q. Emery,

*Dairy & Food Commissioner.*

In your letter of recent date you inquire whether the following scheme is in violation of ch. 134, which provides for the regulation of trading stamps. A salesman sells contracts which entitle the purchaser to certain pictures upon the payment of an additional amount. The contracts are in the following form:

"SPECIAL ADVERTISING CONTRACT

In order to Introduce our regular $15.00 per dozen, New Ivory Toned 7 x 11 Art Panel Pictures as samples shown. We offer twelve pictures on payment of

$1.00 to salesman
$2.00 time of sitting
$5.00 when pictures are finished

SPECIAL:-We will give one 8 x 10 Hand Color Portrait in frame if Contract is used before Dec. 31, 1923.

* * * * * * * * * * * * * * * *

Read Carefully—Only Good as Printed

Contract Good Until

The holder of this contract is entitled to either of the following offers on payment of $1 to representative:
12 4 x 6 French Grey Easles for $3.00 at sitting and $5.00 balance on delivery
12 5 x 7 Old Ivory Booklets for 3.00 at sitting and 8.00 balance on delivery
6 8½ x 13 Artist Proof for 3.00 at sitting and 8.00 balance on delivery

If contract is used within 30 days from date we will give absolutely FREE one of our beautiful large hand colored portraits (value $5.00) suitable for framing.

Date........................................Purchaser........................................
Rep........................................Address........................................

I positively guarantee satisfaction. One contract only can be used by each person.

This contract must be presented at time of sitting.

No Contracts Sold at Studio.”

* * * * * * * * * *

It is the opinion of this department that these so-called contracts do not violate sec. 134.01, subsec. (1), Stats. The material portion of this section reads as follows:

“No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, * * *.”

A scheme in order to come within the purview of the statute must contain two elements: First, a sale of goods, wares or merchandise, second, a giving in connection with such sale of a trading stamp, token, ticket, bond or other similar device.

At the time the so-called contracts are delivered to the prospective purchaser there is no sale of goods, wares or merchandise. At most, the contract is merely an option to the prospective purchaser to procure photographs at certain prices specified in the so-called contract. The sale does not take place until the last payment mentioned in the so-called contract has been made. Since the so-called contracts are not given in connection with the sale of goods, wares or merchandise, the scheme does not violate sec. 134.01.

SOA
Armories—Taxation—Armory owned by unit of Wisconsin national guard which was organized as corporation in 1900 is exempt from taxation under sec. 70.11, subsec. (16), Stats.

March 6, 1926.

RALPH M. IMMELL,
Adjutant General.

In your letter of February 24 you inquire whether the armory owned by the Beaver Dam guards is exempt from taxation. The Beaver Dam guards is a corporation organized in 1900. The corporation is composed of every member in active service of the Beaver Dam unit of the Wisconsin national guard and members who have served eight or more years in the old Beaver Dam unit of the Wisconsin national guard or the new unit. The armory building is occupied by the Beaver Dam unit of the Wisconsin national guard.

It is the opinion of this department that the property is exempt from taxation. Subsec. (16), sec. 70.11, provides that the following property shall be exempt from taxation:

"The armory owned by any regiment, battalion or company of the Wisconsin national guard and used for military purposes by such organization."

The armory is owned by the Beaver Dam unit of the Wisconsin national guard and is used for military purposes by such organization; consequently it is exempt from taxation.

It should be noted that the corporation known as the Beaver Dam guards was organized in 1900. At that time it was necessary in order to hold property, that the members of the national guard unit be organized as a corporation. In 1915 the legislature enacted sec. 21.42, Stats. This section provides that when the organization of a company in the Wisconsin national guard has been perfected, such organization shall constitute a corporate body. Hence, if the Beaver Dam unit of the Wisconsin national guard were now being organized for the first time it would not be necessary for the members to incorporate. The mere fact that the members did incorporate under the general law in effect at the time of such incorporation has no effect so far as the exemption from taxation is concerned.

SOA
Detectives—Ch. 289, Laws 1925, repealing former private detective statute, sec. 175.07, and enacting new statute numbered same, annuls all unexpired licenses issued under former law.

Fee of $200 paid for revoked, unexpired license by new law remains property of state and cannot be refunded.

No license may be issued to private detective who does not maintain office in Wisconsin.

Fred R. Zimmerman,
Secretary of State.

You have submitted a number of questions for an official opinion, which I will take up in their regular order:

"1. Does ch. 289, laws of 1925, annul all licenses that were issued to private detectives in accordance with the provisions of the former law which this chapter repeals?"

Said ch. 289 expressly repeals sec. 175.07, Wis. Stats., which provided for the licensing of private detectives in this state and re-enacted a new section by the same number, 175.07. This new section relates to private detectives, private police, private guards, and provides a penalty. There is no provision in the new law reserving existing rights in any way. It provides that no person shall act or hold himself out as a private detective, private police, or private guard, nor shall any person solicit business or perform any service in this state as a private detective, private police, or private guard, or receive any fees or compensation whatever for acting as such for any person, firm or corporation, without first having obtained the license and filed a bond as provided for in this section.

Subsec. (2) defines more particularly what is included in the term "private detective." Subsec. (3) provides that every person, whether acting in his individual capacity or as agent, servant, or employee of another, shall take out the license provided in subsec. (5). It also exempts certain police officers of state, county, city, town, or village. Subsec. (4) provides that an application must be filed with the secretary of state duly signed and verified by the applicant for such license; in case of copartnership, by all of the individual members of such copartnership; and in case of corporation, by the secretary and manager of such corporation. Said subsection further provides:
"* * * Said application to receive consideration must be approved by the fire and police commission of the city wherein the applicant proposes to conduct his business or by the chief of police in cities where there is no fire and police commission, and in addition thereto by not less than five reputable citizens, freeholders of the county wherein such city is located. All such approvals shall be in writing and shall be acknowledged before an officer authorized by law to take acknowledgments. Such application shall state the age, residence, present and previous occupation of such applicant and the name of the city and particular location in such city where the place of business is to be located, and such further facts as will show the good character, competency and integrity of the applicant. The fire and police commission in those cities where there is a fire and police commission and the chief of police in cities where there is no fire and police commission shall have the right to conduct hearings and make inquiry into the character, competency and integrity of such applicant before approving any application and may compel, by appropriate notice and subpoena, any person or persons to be present at such hearings, and to give testimony under oath, said oath to be administered by any person authorized to administer oaths in the state of Wisconsin. In the event that any person so subpoenaed shall fail to comply with such subpoena, the said fire and police commission, or chief of police, may certify the matter to the circuit court of the county wherein such hearing is held for disposition or punishment by said circuit court."

It also provides that a bond of $10,000 shall be filed by the applicant if a principal owner, and $2,000 if an agent, servant or employe, with the secretary of state.

Subsec. (7) provides that the secretary of state may revoke the license after hearing and upon proper showing being made. There is also a provision that the license shall be issued for a period of no longer than one year.

Subsec. (9) provides that no person, firm or corporation to whom a license has been issued under this section shall maintain an office as a detective or detective agency in any city other than that designated in the license.

Subsec. (10) provides a penalty.

The statute repealed by this act provided for a license for a period of five years from the date of issue, and also provided for the payment of $200. The license under the former law included authorization to not only the holder of the license but also his agents, employes and representatives. The new statute requires an additional license for agents, employes and repre-
sentatives. There are various changes in the law. The bond has been increased from $2,000 to $10,000 for a principal, and the new license requires a bond of an agent, employe or representative of $2,000. There are other changes in the law.

Our court has held, in harmony with the decisions of the majority of other courts, that the mere fact that the license was given for a valuable consideration does not render it irrevocable. 37 C. J. 296, cases cited under note 89. See Bruley v. Garvin, 105 Wis. 625.

The general rule is that all the privileges permitted by a license, and all the protection given thereby, although yet unexpired, are generally canceled and revoked by the repeal of the law which authorizes its grant, unless the license although obtained under the repealed law is such a license as is required by the new law. See 37 C. J. 214; Gherna v. State, 16 Ariz. 344; Pleuler v. State, 11 Nebr. 547; State v. Cooke, 24 Minn. 247; State v. Holmes, 38 N. H. 225; McMillan v. Knoxville, 139 Tenn. 319; Ex Parte Lynn, 19 Texas A. 293. The above authorities all hold that the license is revoked. The only authorities cited for the proposition that when the license obtained under the repeal law is such a license as is required by the new law the rule does not apply is Foster v. Dow, 29 Me. 442. In that case, however, the requirements of the law were identical in both cases. These authorities hold that a license is not a contract within the protection of the constitutional guaranty, but is a mere permit affording protection to the holder, but that the privilege may be revoked by the repeal of the law authorizing the issuance of the license.

I believe your first question must be answered in the affirmative. There is nothing in the law to prevent the general rule to apply that a repeal of the law effects the revocation of the license. Under the new law a new license must be issued each year, and the fee of $200 must be given annually. Had the lawmakers intended that the general rule should not apply they would certainly have made provision for it in this law. They have expressly repealed the former law and re-enacted a new one instead of amending the former law. Had they simply amended the former law, a different rule would probably be applicable. It must be presumed that they intended to revoke the former license.
"2. If the foregoing question is answered in the affirmative what becomes of the fee of two hundred dollars that was paid for a five year license, the term of which has not expired?"

The fee for the license under the former law has been voluntarily paid and remains the property of the state. There is no provision in the law authorizing a refunding of that money.

"(3) May a license be issued to a private detective who does not maintain an office or fixed place of business within this state?"

The provisions of this law, especially the one contained in subsec. (4) as above quoted, requiring the approval of the fire and police commission of the city wherein the applicant proposes to conduct his business seems to indicate that such licensee must have a place of business or office in contemplation of this statute. There is also a provision that the applicant must state the particular location in the city where the place of business is to be located. That this office must be in the state of Wisconsin and cannot be in a city outside of the state is made clear by the provision that it authorizes the fire and police commission in cities, or the chief of police in cities where there is no fire and police commission, to conduct hearings and make inquiry into the character, competency and integrity of such applicant before approving any application and gives such bodies the power of issuing subpoenas to any persons to be present at such hearings and to give testimony under oath. Said oath is to be administered by any person authorized to administer oaths in the state of Wisconsin. These provisions necessitate, in my opinion, a negative answer to your third question. The state of Wisconsin has no authority to pass a law granting powers to police officers or commissioners of cities outside of the state of Wisconsin.

HLE
Elections—Public Officers—City Supervisors—Supervisors for city of Eau Claire shall be elected at same time city officers are elected.

March 8, 1926.

V. M. Stolts,
District Attorney,
Eau Claire, Wisconsin.

You have inquired what the length of the term shall be for supervisors from Eau Claire, and in this connection you are advised as follows:

Sec. 62.09, subsec. (5), par. (b), provides:
"Except as otherwise specially provided the regular term of elective officers except supervisors shall be two years. The term of supervisors shall be one year unless otherwise provided pursuant to paragraph (d) of subsection (2) of section 59.03. The council may by ordinance provide a different term for such officers or any of them, and may provide that the term of one of the aldermen next elected in each ward shall be for one year only and that the terms of aldermen thereafter shall expire in alternate years."

Sec. 59.03, subsec. (2), par. (d), provides:
"Notwithstanding any other provisions of the statutes, a supervisor from a city, city ward, or a part of a city ward, or village or a part of a village, shall be elected by the electors thereof at the same time that city or village officers are elected."

As sec. 59.03, subsec. (2), par. (d), states specifically that notwithstanding any other provision of the statutes, a supervisor shall be elected at the same time that city or village officers are elected, I must conclude that supervisors in Eau Claire shall be elected at the same time the city officers are elected.

But at this time I cannot comply with your request for determination as to whether supervisors in the city shall be nominated under the provision of sec. 5.26 or sec. 5.06, and whether city officers should be nominated in accordance with the provisions of sec. 5.26 or sec. 5.06 because these questions are purely municipal matters, and should be referred to the city attorney.

MJD
Courts—Affidavit of Prejudice—Right of removal and change of venue for prejudice of judge is purely statutory.

In absence of statutory provisions authorizing change of venue for prejudice of judge, judge may disregard such affidavit filed against him and proceed to hear, try and determine issues pending before him.

Judge of county court may call in judge of county court of any other county to preside at action pending before him whenever affidavit of prejudice is filed against him.

K. J. Callahan,
District Attorney,
Montello, Wisconsin.

You have inquired what the judge of the county court of Marquette county shall do in an action pending before him wherein an affidavit of prejudice is filed, said action being beyond the jurisdiction of a justice of the peace.

There is no pertinent provision in ch. 450, laws of 1921, granting civil and criminal jurisdiction to the county court of Marquette county not in the general statutes. The right to a change of venue is purely statutory and this is especially so where the reason sought is the alleged prejudice of the judge. Goyke v. State, 136 Wis. 557; Oborn v. State, 143 Wis. 249.

Where there is no other judicial officer or body before whom the case can be taken for a decision, there being no removal authorized by the statutes, the judge before whom it is brought may hear and determine it. This is true even though he is collaterally or indirectly interested in the controversy. State ex rel. Wickham v. Nygaard, 159 Wis. 396. Ch. 450, laws of 1921, establishing civil and criminal jurisdiction in the county court of Marquette county declares that the judge thereof shall have jurisdiction, powers, etc., of a justice of the peace. However, when the action pending before the judge is such that a justice of the peace has not original jurisdiction thereof, the county judge cannot transfer the action nor remove it to the justice of the peace under the statutes nor through his desire, because a court cannot change the venue in an action pending before it to a court of lesser jurisdiction. State ex rel. Mitchell v. Smith, 14 Wis. 564.

Under sec. 253.07, Stats., a judge of a county court shall call in the judge of any other county court whenever an affidavit of prejudice has been filed against him in probate proceedings.

March 9, 1926.
Sec. 253.11 provides that the county judges may perform all official duties of county judges including holding court in any county other than the one in which they shall have been elected upon the request of the county judge of such other county and while so doing they shall have the same powers as if elected for the county in which they are acting. Though there are no express provisions governing the removal of cases from the Marquette county court when they are of either a civil or criminal nature, recourse may be had to the above mentioned sections. Since sec. 253.11 authorizes the county judge of an adjoining county to come to Marquette county and sit in probate matters and grants him the general powers of the county judge of Marquette county when presiding over the latter county court, it would seem to the writer that he would be empowered to preside in such an action mentioned by you in your letter and noted above.

It is therefore my opinion that, the right of removal and change of venue for prejudice of a judge being purely statutory and inasmuch as there is no statutory provision applicable in this respect, the county judge of Marquette county can hear, try and determine issues brought before him which are beyond the jurisdiction of a justice of the peace irrespective of whether or not an affidavit of prejudice has been filed against him and he may, but is not obliged to call in a county judge of another county court to hear, try and determine the issues therein, the latter county judge having full authority under sec. 253.11 to proceed therein.

MJD

Appropriations and Expenditures—Public Printing—Sec. 20.51, subsec. (3), Stats. 1923, providing for purchase of Wisconsin railroad maps, having been repealed, printing of such maps should be charged to appropriation contained in sec. 20.11, subsec. (3), Stats.

March 9, 1926.

Railroad Commission.

You have inquired whether the railroad commission is charged with the duty of providing maps pursuant to provisions of sec. 35.31, Stats., for distribution under secs. 192.68 and 35.84, subsecs. (13) and (13a), Stats., and, if so, to what appropriation the cost of such maps should be charged.
Under sec. 35.31, subsec. (2), Stats., the railroad commission shall purchase upon competitive bids, to be filed with and approved by the printing board, a stone or metal plate for the printing of a railroad map of the state, and shall, biennially, 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 mounted on muslin and provided with rollers as are required for distribution by subsec. (13), sec. 35.84.

Under sec. 192.68 each railroad company operating in the state shall display one of these maps mentioned above in all waiting rooms at each station on its line and they shall obtain the maps from the railroad commission at not to exceed cost.

Under subsecs. (13) and (13a), sec. 35.84, upon application therefore one copy of each map shall be given to certain bureaus, bodies, libraries, etc., enumerated therein and the railroad commission shall receive as many maps as they require. Subsec. (13a) states that legislators are entitled to fifty mounted wall maps.

Under sec. 20.11, subsecs. (3), the printing board is annually allowed such sums as may be necessary for all public printing and all other printing expenses prescribed by law to be furnished to any state officer or officers or other body and for which there is no other appropriation properly chargeable therewith. Inasmuch as there is no appropriation now available solely for the purpose of these maps, it is my opinion that the railroad commission shall provide maps as heretofore and as stated in the above named statute and the costs thereof shall be charged as stated in sec. 20.11, subsec. (3), Stats.

MJD

Mothers' Pensions—Minors—Child Labor—Court granting mother's pension cannot definitely determine question of whether child is unable to secure permit to work until after permit has been applied for and refused.

March 10, 1926.

GEO. S. GEFFS,
District Attorney,
Janesville, Wisconsin.

You have referred me to the mothers' pension law, sec. 48.33, subsec. (5), Wis. Stats., which describes the dependent children
to be pensioned as "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." You inquire:

"How is the inability to secure a permit to work determined? "Should the court first require the applicant to make application for a permit to work for the child between the ages of fourteen and sixteen, and the allowance for the pension to be granted to such child only when the permit is refused; or is the court authorized to determine for himself whether the particular child is entitled to the permit to work, judging by the child's physical condition, and the family circumstances?"

The mothers' pension is passed upon and determined by a judge of a juvenile court or of a county court of the county in which such child resides.

See subsec. (1), sec. 48.33.

The permit for a child to work is obtained from "the industrial commission, or from a judge of a county, municipal, or juvenile court designated by the industrial commission where such child resides, or from some other person designated by the industrial commission." See sec. 103.05, subsec. (4), subd. (a), Stats.

In sec 103.05, subsec. (6), subd. (c), it is provided:

"The industrial commission or other person designated under the provisions of subdivision (a) of subsection (4) of this section, may refuse to grant permits in the case of children who may seem physically unable to perform the labor at which they are to be employed. They may also refuse to grant a permit if, in their judgment, the best interests of the child would be served by such refusal."

It thus appears that unless the county court has been designated by the industrial commission as a court to grant labor permits to children, such court cannot pass upon the question of whether or not a permit should be given to the child. That discretion is vested in the industrial commission or in such other officer or court as the industrial commission may designate. The court which passes upon the question of whether a mother's pension should be granted is to determine whether the child is unable to secure a permit to work. This is an entirely different question than the question of whether a permit should be granted. I am of the opinion that such court cannot pass upon the question of whether the child is unable to secure
a permit to work until it has tried to secure such permit, and has failed. It is a pure question of fact. The industrial commission or other person designated to pass upon the question has a broad discretion in granting permits. It may take into consideration all the circumstances surrounding the child, its physical condition, and the best interests of the child may all be considered in granting the permit.

So, it is necessary to present all the facts and circumstances surrounding a child to the industrial commission or the person designated to grant the permit before it can be determined whether the child can secure a permit or not. I am strengthened in this conclusion by the fact that a contrary ruling would make it possible to have the court granting the mother's pension find, as a matter of fact, that the child was unable to secure a permit when the industrial commission or some other court or person could immediately thereafter determine that she is entitled to a permit and grant it. I believe this answers your question.

JEM

Peddlers—Drivers of trucks employed by bakery to make house to house canvass selling bread are peddlers and must be licensed.

March 10, 1926.

Geo. W. Meggers,
State Treasury Agent.

The material facts contained in your letter of February 27 are as follows:

A bakery firm in Milwaukee intends to put out sixty-eight wagons in the city, and the drivers of these wagons are to canvass from house to house selling bread. You state that in your opinion each one of these drivers should be licensed as a peddler, and you inquire whether your opinion is correct.

It has been held by this department that one who vends fish from door to door is a peddler, VII Op. Atty. Gen. 356; so also is one a peddler who sells ice cream cones at retail from place to place, Op. Atty. Gen. for 1910, 543; who goes from place to place selling patent articles, V Op. Atty. Gen. 544; who peddles fruit which he has raised, III Op. Atty. Gen. 619; who peddles animal remedies manufactured by himself, II Op. Atty. Gen. 625; and who sells goods from house to house on the installment
plan under a contract which states that the goods are leased merely, but the ultimate purpose of which is in fact a sale, III Op. Atty. Gen. 609.

In *De Witt v. State*, 155 Wis. 249, the court in discussing the question as to who is a peddler said, p. 251:

"* * * The essential thing is that he must do business by going about from place to place selling and delivering merchandise in a retail way to such individuals as he may be able to deal with. While doing that he is a peddler though he may, at the same time, have a business domicile to which he occasionally resorts. It is the method of disposing of the goods which makes the person a peddler. A peddler is simply one who peddles, and any one peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him."

It has been held by this department that a meat dealer having a regular place of business and passing through the country selling meat to regular customers is not a peddler. VII Op. Atty. Gen. 560. In this opinion it was held that there is a distinction between the ordinary peddler and persons who operate as milk dealers and butchers. On pages 560–561 of the opinion it was said:

"In an official opinion rendered by this department (Opinions of Attorney General for 1908, p. 607), it was said:

"* * * * I am of the opinion that the business that is conducted by such dealers as milk peddlers and butchers, who drive about among their customers taking and filling orders and making sales is not within the intent of the peddlers' act, said chapter 490. Such persons are conducting business usually by carrying out prior contracts and, if in doing so, they incidentally make a few additional sales, I am not inclined to hold them within the strict letter of the law as peddlers * * * *.' P. 608.

"In an official opinion rendered by this department under date of April 25, 1917 (Vol. VI, Op. Atty. Gen., p. 253), where a similar question to the one submitted by you was under consideration, it was said:

"* * * The meat dealer in question travels along his route or to his regular customers after he has received orders from a great many of them, which orders he fills, and incidentally sells meat to others along the route, who may not have ordered any meat from him simply because they have no *phones or for other reasons have neglected to do so. I agree with my predecessor in office that such a person is not a peddler
within contemplation of the Wisconsin Hawkers' and Peddlers' Act, secs. 1570 to 1582."

The statement of facts presented by you does not bring the case within the exceptions above referred to. It is the intention of the bakery to have its drivers solicit from house to house presumably for the purpose of acquiring new customers. Certainly the principal object of the drivers is not to furnish bread to the regular customers of the bakery. It is clear, therefore, that the drivers of the wagons are peddlers and as such must be licensed.

SOA

_Criminal Law—Indeterminate Sentences—Prisons—Parole—_

Definite sentence to state prison must be construed under sec. 359.05 as indeterminate sentence, minimum imprisonment provided by statute being minimum sentence and definite sentence being maximum.

March 11, 1926.

**Board of Control.**

With your letter of March 8 you enclose copy of commitment to the Wisconsin state prison of one E. K. The commitment provides for a definite sentence of two years. The crime charged was that of "assaulting house of correction guard." You inquire what effect sec. 359.05 has on the sentence of the court. You also inquire at what time E. K. will be eligible for parole under sec. 57.06.

In XIV Op. Atty. Gen. 384, it was held that under sec. 359.05 a definite sentence by the court must be construed as an indeterminate sentence, the minimum imprisonment provided by statute being the minimum sentence, and the definite sentence being the maximum.

Sec. 57.06 provides for the parole of prisoners convicted of a felony and imprisoned in the state prison or in the house of correction of Milwaukee county. If the prisoner is a first offender and is sentenced for a general or indeterminate term, under subsec. (1), sec. 57.06, he is eligible for parole after he has served the minimum for which he was sentenced. The precise section of the statute which is violated is not given in the commitment. If E. K. is a first offender he will be eligible for
parole after he has served the minimum sentence prescribed by
the statute which was violated. If he is not a first offender he
will be eligible for parole after he has finished serving one-half
of the term for which he was sentenced, which in this case is two
years.

SOA

Trade Regulation—Trading Stamps—Giving and use of con-
tract and coupons for $1.00 as part payment on purchase of
articles designated in contract, articles not being delivered until
holder of contract and coupons pays balance of agreed pur-
chase price or until subsequent holders of coupons received
from him remit $1.00 on all coupons received from him, is in
violation of sec. 134.01, Stats.

March 12, 1926.

Fred R. Zimmerman,
Secretary of State.

You have submitted a contract and coupons which a foreign
corporation proposes to use in the sale of its products in Wis-
consin, and inquire whether their use is in violation of sec.
134.01, Stats., referred to as the trading stamp law.

Sec. 134.01 provides:

“No person, firm, corporation, or association within this state
shall use, give, offer, issue, transfer, furnish, deliver, or cause or
authorize to be furnished or delivered to any other person, firm,
corporation, or association within this state, in connection with
the sale of any goods, wares or merchandise, any trading stamp,
token, ticket, bond, or other similar device, which shall entitle
the purchaser receiving the same to procure any goods, wares,
merchandise privilege, or thing of value in exchange for any
such trading stamp, token, ticket, bond, or other similar device,
except that any manufacturer, packer or dealer may issue any
slip, ticket, or check with the sale of any goods, wares or mer-
chandise, which slip ticket, or check shall bear upon its face a
stated cash value and shall be redeemable only in cash for the
amount stated thereon, upon presentation in amounts aggre-
gating twenty-five cents or over of redemption value, and only
by the person, firm, or corporation issuing the same; provided,
that the publication by or distribution through newspapers, or
other publications, of coupons in advertisements other than
their own, shall not be considered a violation of this section

* * *
The plan of doing business is, briefly: The company issues a contract with 3 coupons attached, upon payment to it of $1.00; the holder of the contract and coupons may then either pay the balance of the agreed purchase price of the desired articles to the company within a stipulated time or may issue the coupons to three purchasers, and as soon as the three purchasers have sent in the coupons with the $1.00 per coupon to the company, the articles desired are to be sent to the original contract and coupon holder without further payment by him. All holders of coupons paying $1.00 receive these contracts with attached coupons. The contract is a receipt for $1.00 and the coupon which the holder forwarded. Neither contract nor coupons have any cash value nor is there any provision in them for a refund. The contract provides:

"The not incorporated Company

Company acknowledges the receipt of One ($1) Dollar from

HOLDER, on account of the purchase of two cartons (20 packages) of any brand of cigarettes listed below which the COMPANY agrees to deliver immediately upon the payment of the balance of Two ($2) Dollars on the purchase price within sixty days from date thereof.

"Being desirous of extending its business the COMPANY makes the following offer, of which the RECEIPT HOLDER may, if he wishes, avail himself in lieu of payment of the balance of the purchase price.

"THE OFFER: The RECEIPT HOLDER shall issue the three coupons attached hereto to three people who desire to purchase a lot of cigarettes. The recipient of each coupon shall immediately remit the same with One ($1) Dollar to the office of the COMPANY and will receive in return therefor a receipt and contract similar in all respects to this one and likewise acknowledging One Dollar payment on account of said cigarettes.

"As soon as all three coupon remittances are received by the COMPANY there will be forwarded to the RECEIPT HOLDER two cartons of any brand of cigarettes listed below without any further payment on his part.

"The same offer applies to all persons contracting for the purchase of said cigarettes; that is, either to remit the Two Dollars balance, or assist the sales of the COMPANY in the manner hereinabove described."
"It is understood and agreed that this sale promotion plan of the COMPANY is by no means imposed upon prospective purchasers. On the contrary, it represents a proposition to them whereby they may obtain two cartons of a standard brand of cigarettes at a considerable reduction in proportion to the results obtained by them in furthering the sales of the COMPANY.

The Company
By Manager
Dated
(Six brands of cigarettes listed.)

The coupons contain the address of the company, serial number, blank space for the name and address of the holder, and the reverse side reads as follows:

"The holder of this coupon undertakes and agrees to immediately send to the Company One ($1) Dollar together with this coupon and will receive in return therefor an original receipt and three coupons, similar in every respect to this one, with contract acknowledging One ($1) Dollar payment on account of the purchase price of two cartons of cigarettes as referred to in the contract, which contract is similar in all respects to the one to which this coupon was attached.

"The above mentioned contract was issued to and he is authorized to issue this coupon to anyone who desires to purchase cigarettes under the plan as covered by our contract. THE COMPANY.
Send Money Order or Check. Cash remittances must be registered."

This plan is clearly prohibited by the trading stamp law, 134.01, Wis. Stats. Trading Stamp Cases, 166 Wis. 613.

An opinion was handed down by this office on October 22, 1925, XIV Op. Atty. Gen. 501, in which it was held:

"Giving of coupons for $1.00 as part payment on account of purchase of lot of hosiery entitling purchaser to send seller sum of $8.00, together with coupon, whereupon receipt and contract are sent, giving purchaser option of receiving $10 worth of hosiery either by sending $6.00 additional, or by selling 3 similar coupons for $1.00 each, upon which $3.00 is remitted by each purchaser, is in violation of trading stamp law."

This contract is clearly void and against public policy. Hubbard v. Freiberger, 133 Mich. 139, 94 N. W. 727; Bank of
Opinions of the Attorney General

Ozark v. Hanks, 142 Mo. App. 110, 125 S. W. 221; Twentieth Century Co. v. Quilling, 130 Wis. 318, 110 N. W. 174.

It is my conclusion that the use of the contract and coupons such as set out above is in violation of sec. 134.01, Stats.

Bonds—Constitutional Law—Municipal Corporations—Home Rule—So-called "home rule" amendment to art. XI, sec. 3, Const., does not enlarge constitutional debt limit which may be incurred by city or village contained in same section.

City which maintains school within its limits as city may not issue bonds for purpose of constructing school houses in amount which, with all other indebtedness of city, exceeds in aggregate five per centum on value of taxable property in city according to last assessment thereof for state and county taxes as fixed by local board of review.

March 13, 1926.

Cyrus C. Thieme,
City Attorney,
South Milwaukee, Wisconsin.

I quote your statement and inquiry as follows:

"South Milwaukee has an existing indebtedness of nearly five per centum of the taxable property therein. The school board is demanding a new building, the estimated cost of which will bring the indebtedness above the five per centum limit.

"I would like to know whether the city can exceed the indebtedness limit of five per centum if the money is to be used for school purposes. Some seem to think that under the home rule amendment together with the interpretation given to it in the Harbach case that the city can exceed that amount.

"If we can exceed the five per centum limit how much further can we go?

"Perhaps I am asking too much of you but I prefer to impose upon you at this time rather than have your office later declare our bonds illegal."

Supplementing the foregoing, you have informed me orally that there is no separate common school or other school district municipality existing wholly or partly within the city, and that the board of education of the city is not especially authorized by law to issue bonds or to levy taxes for school purposes, such powers being exercised only by the city council.
As the contemplated bond issue is one the proceedings in which may be submitted to the attorney general for his approval and certification of the bonds, under the provisions of ch. 67, Stats., your question is one proper to be submitted to the attorney general.

The answer to the question is in the negative.

The so-called home rule amendment to the constitution in no way enlarges the debt-incurring power of a city, nor, in my opinion, does the case of State ex rel. Harbach v. Mayor, etc., of Milwaukee, 206 N. W. 210, to which you refer, contain any intimation that such is the effect of the amendment. In the Harbach case the court simply held that under the constitution and laws of the state, the subject of education, including the repair of the school building within a city, is not a "local affair and government" of the city within the meaning of the constitutional amendment, and therefore that a law increasing the limit of taxation by a city for the repair of school buildings is valid, although it applies to cities of the first class only.

Sec. 3, art. XI, Const., the first two sentences of which include the so-called home rule amendment of 1924, read, so far as material here, as follows:

"Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as shall with uniformity affect every city or every village. The method of such determination shall be prescribed by the legislature. No county, city, town, village, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness * * *."

You will note that the "home rule" grant of power to cities and villages is, by the very terms thereof, expressly made subject to the constitution, and that in the same section and immediately following this grant is the five per cent limitation on the amount of indebtedness which may be incurred by a city or village.

No words of mine can make plainer then does the language of the constitution itself, that no city may incur any indebted-
ness, whether for a school or any other purpose, which, with its existing indebtedness, will in the aggregate exceed five per cent of the amount of the last assessment of the taxable property therein for state and county taxes, which means the valuation as fixed by the board of review of the city. (96 Wis. 73; 97 Wis. 505; 187 Wis. 150.)

The municipal borrowing law, ch. 67, also limits the power of a city to borrow money and issue bonds for the erection of school houses and all other authorized purposes to an amount which, with all other indebtedness of the city, shall not exceed in the aggregate five per cent of such valuation. See subsec. (1), sec. 67.03, and the introductory paragraph and paragraph (b), subsec. (2), sec. 67.04. It is only where there is a school district which is a municipality separate and distinct from the city, although lying partly or wholly within a city, or a board of education especially authorized by law to issue bonds, and having the power to incur indebtedness for its own separate purposes independently of the city, to which the constitutional and statutory limitation upon the total indebtedness which may be incurred by the city, whether for school or other purposes, does not apply. Subsec. (2), sec. 67.03, subsec. (6), sec. 67.04.

Fish and Game—Intoxicating Liquors—Intoxicating liquor found by sheriff at time and on premises being searched under search warrant issued under sec. 29.05, Stats., authorizing search of premises named therein for wild animals, carcasses or parts thereof, is inadmissible against defendant upon his trial for having it in his possession.

Property not named in search warrant may not be seized during search of premises named in warrant.

March 16, 1926.

H. F. DUCKART,
District Attorney,
Ladysmith, Wisconsin.

You have inquired whether intoxicating liquor found at the time premises were searched by a sheriff under a warrant issued under sec. 29.05, Wis. Stats., authorizing the search of premises named therein for wild animals, carcasses or parts
thereof, is admissible in a prosecution for illegal possession of intoxicating liquor.

The officer may not seize property unless it is named in the warrant; if he does otherwise, he is a trespasser and the property seized is inadmissible in evidence in a prosecution against the possessor thereof. It has been held that seizing a letter on the person of the accused, the letter not being described in a search warrant, was unlawful and the letter was inadmissible in evidence, as the rule that the court will take no notice of how a paper offered in evidence is obtained did not apply when the search and seizure was unlawful. *State v. Slamon*, 50 Atl. 1097.

Permission to search a residence for a man who was wanted by the officer, does not give permission to the officer to search for a moonshine still and does not render admissible in evidence the finding of such still during the search. *Veal v. Commonwealth*, 251 S. W. 648.

There is a comprehensive discussion of this doctrine in *People v. Preuss*, 225 Mich. 115, 195 N. W. 684. The officer in this action was armed with a search warrant authorizing a search of the premises named therein for stolen beans. Upon searching the premises, he found no beans but incidentally discovered several gallons of moonshine whiskey and seized the same. The court held, pp. 119, 120:

"If the warrant directs the seizure of a certain kind of property, a seizure of an entirely different kind constitutes the officer a trespasser," *2 R. C. L. p. 709.*

"In order to comply with the constitutional provision regulating the issuance of search warrants, the property to be seized under a warrant must be particularly described therein and no other property can be taken thereunder. The goods to be seized must be described with such certainty as to identify them and the description must be so particular that the officer charged with the execution of the warrant will be left with no description respecting the property to be taken," 24 R. C. L. 714.

"He (the officer) should pursue the directions of the warrant strictly, and ought not to take any goods or articles but those specified; for if he be directed to seize one kind of article and he seizes another, he is a trespasser," Tiffany, Criminal Law * * * p. 362.

"* * * In the instant case a search was necessary to discover the evidence seized. It was ostensibly made under authority of the search and seizure law. Except as he followed the strict mandate of his warrant to search for and seize if found a described quantity of beans the officer was a trespasser upon
those premises. Defendant was not in the house when he made the search. He found no property of the kind he was directed to seize, but in violation of the mandate of his search warrant seized property of entirely different kind which 'constitutes the officer a trespasser' and his seizure unlawful. The evidence so illegally seized in a search of defendant's home was not admissible against him upon his trial for having it in his possession."

It is my conclusion that intoxicating liquor found by a sheriff at the time and on the premises being searched under a search warrant issued under sec. 29.05, Wis. Stats., authorizing a search of the premises named therein for wild animals, carcasses or parts thereof, is inadmissible against defendant upon his trial for having it in his possession.

MJD


March 16, 1926.

H. F. Duckart,
District Attorney,
Ladysmith, Wisconsin.

On November 19, 1925, you submitted a request to this department for an official opinion as to the interpretation of the word "schools" as used in subsec. (1), sec. 39.14, Stats. On December 18, this department advised you that the term "schools" as used in this section referred to educational establishments maintained by district schools and did not refer to separate departments of such establishments.

At the time the opinion was given it was not thought that subsec. (1), par. (d), sec. 20.31, Stats., applied. Upon investigation it was found that the provisions of sec. 20.31 (1) (d) do apply. Sec. 20.31 (1) (d) provides as follows:

"Unless the context or subject matter clearly requires otherwise, the word 'school' where used as a noun in this section shall relate to a public school and shall be construed to be a collective body of pupils assembled in a room or rooms which are wholly or principally under the control, management, direction and instruction of a legally qualified teacher who is wholly or chiefly responsible for the control, management, direction and instruc-
tion of such pupils and whose duty it is to keep a complete and special school register for his room or department."

It will be noted that this subsection is contained in the section of the statutes relating to appropriations for county educational activities. Further, subsec. (1) (d) defines the word "schools" "where used as a noun in this section." This definition, however, is not restricted to sec. 20.31.

Sec. 461r, Stats. 1913, provides as follows:

"The county superintendent of schools of any county or superintendent district may, by and with the consent of the county board, appoint a deputy, provided he has under his jurisdiction not less than one hundred schools." (Italics ours.)

Sec. 461s, Stats. 1913, provides as follows:

"The singular form of the word 'schools' as used in section 461r shall relate to a public school only and shall be construed to be a collective body of pupils assembled in a room which is wholly or principally under the control, management, direction and instruction of a legally qualified teacher who is made wholly or chiefly responsible for the control, management, direction and instruction of such pupils and whose duty it is to keep a complete and special register for such room or department."

Ch. 531, Laws 1915, repealed sec. 461r, Stats. 1913.
Ch. 531, Laws 1915, repealed sec. 698, Stats. 1913, and enacted sec. 698, Stats. 1915. Subsecs. 10 to 16, inclusive, sec. 698, Stats. 1915, were by ch. 578, Laws 1917, renumbered sec. 39.14. This section has been subsequently amended and now appears substantially the same as far as the definition of "schools" is concerned.

The fact that the legislature in 1915 repealed sec. 461r, but did not repeal 461s indicated an intention on their part to carry over into sec. 698, Stats. 1915, the definition of "schools" which applied to sec. 461r. Under the latter section, the county superintendent was authorized to appoint a deputy provided there were under the jurisdiction of the county superintendent not less than one hundred schools. The former section authorized the committee on common schools, provided for in subsec. 2, sec. 704, Stats. 1915, to appoint one supervising teacher to assist the county superintendent in supervising schools. In
counties or superintendent districts having more than one hundred and twenty-five schools, the committee had the power to appoint two supervising teachers. There is every reason to suppose that the legislature intended the same definition of “schools” should apply in the case of supervising teachers as in the case of an appointment of a deputy by the county superintendent.

Ch. 677, Laws 1917, repealed sec. 461s, Stats. 1915. Ch. 168, Laws 1921, created subsec. (1), (d), sec. 20.31, Stats. This latter section is substantially a re-enactment of sec. 461s, Stats. 1915. The apparent intention of the legislature in enacting this latter section was to restore the definition of “schools” which had previously obtained, and to give such definition the same application as in the statutes of 1915.

In accordance with the provisions of subsec. (1) (d), sec. 20.31, Stats., it is the opinion of this department that the term “schools” as used in sec. 39.14, Stats., means “a collective body of pupils assembled in a room or rooms which are wholly or principally under the control, management, direction and instruction of a legally qualified teacher who is wholly or chiefly responsible for the control, management, direction and instruction of such pupils and whose duty it is to keep a complete and special school register for his room or department.”

SOA

Banks and Banking—When a note is left with bank for collection is paid by check and certificate of deposit on collecting bank, and remittance is made by draft, which is dishonored because of insolvency of collecting bank, payee of note has no preferred claim against insolvent collecting bank.

No traceable trust fund results from deposit not increasing assets of insolvent bank.

March 16, 1926.

W. H. Richards,
Deputy Commissioner of Banking.

You submit the claim filed against the Farmers State Bank of Poskin, Wisconsin, by Lars Hedbolm, and you ask whether it should be allowed as a preferred claim. Mr. Hedblom left a certain note with the Farmers State Bank of Poskin for “safe keeping of the note and collection and immediate remittance as and when the same became due.” On November 10, 1925,
the maker of the note paid to the bank the sum of $484 to be applied on the note, this sum being paid by the maker's check on the bank and by the endorsement and delivery of three certificates of deposit issued by the bank. The bank thereupon issued and mailed to Lars Hedblom a draft on the First Wisconsin National Bank of Milwaukee for $484. On November 14, 1925, when the draft was presented for payment it was protested, the Farmers State Bank of Poskin having been closed on November 12, 1925, by the order of the commissioner of banking.

It is urged that a trust was created because (1) the acceptance of a deposit by an insolvent bank gives rise to a trust, and (2) the fund was paid to the bank for a specific purpose and did not become the property of the bank.

In *Perth Amboy Gas Light Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 A. 704, 710, the court said:

"* * * When a depositor deposits a check of another party of the bank in which he deposits, no money actually passes. The transaction is a mere transfer of credit. The bank owed the drawer of the check a certain sum of money. The drawer, by his check, ordered that money paid to the depositor. The depositor presents the check, and, instead of asking for the money, he asks for credit on his account for it. The result is that the bank, by accepting the check, charged it to the drawer and reduced its indebtedness to him just so much, and, by crediting it to the depositor, increased its indebtedness to him just so much. The assets of the bank are not thereby increased, and it would seem impossible to hold that there can be any tracing of the deposit. There is no money or coin mingled with that of the bank, and the depositor cannot say, 'I have handed you money; hand it back to me.' " (Italics ours.)

See also 7 C. J. 730–731.

In *Burnham v. Barth*, 89 Wis. 362, 366, the court said:

"Since the decision of this court in the case of *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, and *In re Plankinton Bank*, 87 Wis. 385, it must be regarded as settled, in this state at least, that in order that the beneficiary or owner of a trust fund may be able to regain it out of the estate of a defaulting and insolvent trustee, he must be able to trace it into, and satisfactorily identify it in, the hands of the assignee or receiver of his estate, or its substitute or substantial equivalent; that when the trust fund has been dissipated, or so confounded and mixed up with the property and estate of the trustee that it cannot be traced or
identified, there remains nothing to be the subject of the trust, and the owner of the fund or property is not entitled to prove for it as a trust debt and obtain a preference over the other creditors of the insolvent estate out of the property to which no part of the trust fund or property or proceeds of it is traceable. The right to so trace trust funds and regain them has, it is held, its basis in the right of property. * * * When the trust fund cannot be identified or traced into some specific estate or substituted property, and the means of ascertainment fail, the trust wholly fails, and the party can only prove as a general creditor."

See also Hyland v. Roe, 111 Wis. 361.

It is unnecessary to determine whether a trust arose in regard to the funds deposited by the maker of the note, for the recovery of such funds depends upon the ability of the owner to trace and satisfactorily identify them. There can be no tracing of the deposit in the present case, because when the maker of the note turned over his check and certificates of deposit he did not increase the assets of the bank. It follows, therefore, that since Mr. Hedblom's claim is not to a traceable trust fund, he is entitled to no preference.

ML

Criminal Law—Fraud on Inkeeper—Words and Phrases—Lodging House—House where rooms are rented to three or more persons at stipulated rental per week, which includes furniture and services necessary to maintain and keep the rooms in orderly condition, is "lodging house" within meaning of sec. 343.402, Stats.

March 17, 1926.

PHILIP F. LAFOLLETTE,
District Attorney,
Madison, Wisconsin.

The material facts presented in your letter of January 23d are as follows:

A person rents rooms to three or more persons at a stipulated rental per week. The right is reserved to accept or decline applicants for rooms. Furniture and all of the services necessary to maintain and keep the rooms in an orderly condition are furnished. You inquire whether the building in question is a "lodging house" within the meaning of sec. 343.402, Stats.
You also inquire whether a different rule obtains if the number of occupants of the rooms is less than three.

Sec. 343.402 provides that any person who obtains a lodging at a lodging house except when credit shall have been given by express agreement, who shall defraud any lodging house, the proprietor or any other person in charge thereof in any transaction arising out of the relationship as guest, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than one year or by a fine of not more than $500 or by both such fine and imprisonment.

A lodging house is a house where lodgings are let. 19 Am. and Eng. Ency. of Law, 2d ed., 520. Under a statute similar to sec. 289.43, which provides that a keeper of a lodging house shall have a lien upon all the baggage and other effects brought into the lodging house by a guest, it has been held that whether a house is a “lodging house” depends upon the relationship arising between the parties at the time the rooms are rented. Linwood Park Company v. Van Dusen, 58 N. E. 576. In this case the court said that the tenant is put into the exclusive possession of his rooms, while the boarder or lodger has merely the use of them without the actual or exclusive possession, which is in the lessor subject to such use.

In Mathews v. Livingston, 86 Conn. 263, the court held that the existence of a lien depends upon whether the relationship arising between the parties in the hiring of the rooms is that of landlord and tenant or that of lodging house keeper and lodger.

“The chief distinction between a tenant and a lodger apparently rests in the character of the possession. A tenant has the exclusive legal possession of the premises, he and not the landlord being in control and responsible for the care and condition of the premises. A lodger on the other hand, has merely a right to the use of the premises, the landlord retaining the control and being responsible for the care and attention necessary.” 31 Am. and Eng. Ann. Cas. 200; Dewar v. Minneapolis Lodge, 155 Minn. 98.

“A lodger is one who has leave to inhabit another man’s house; one who lives in a hired room or rooms in the house of another.” 19 Am. and Eng. Enc. of Law, 2d ed., 520.

Although rent is paid by the month and the rooms are occupied for some months the occupant of such room is, nevertheless, a lodger and not a tenant. Dewar v. Minneapolis Lodge, 155 Minn. 98.
Under the facts as stated the house in question is a "lodging house" within the meaning of sec. 289.43, Stats. This statute is not a criminal statute. Sec. 343.402 is a criminal statute and must be strictly construed. There is, however, no distinction between a "lodging house" under the provisions of sec. 289.43 and the term "lodging house" as used in sec. 343.402. This department is of the opinion therefore, that under the facts as stated by you the house in question is a lodging house within the meaning of sec. 343.402.

The fact that the number of occupants in the house is less than three makes no difference.

SOA

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Counties—County funds not immediately needed and not subject to daily balance and draft at all times, should be invested in bonds or securities as provided in sec. 66.04, subsec. (7), Stats.

March 19, 1926.

FULTON COLLIP,
District Attorney,
Friendship, Wisconsin.

You have inquired whether a county board has power to draw money from county depositories and place it in a bank which is not a county depository but which agrees to pay a higher rate of interest than the regular county depository.

It appears from your request that a county has established a building fund and annually sets aside a set amount from its general fund surplus for said building fund. It has not designated the bank in which it deposits this money as a county depository. It furthermore appears that no date has been determined when this building fund shall be used. This opinion is confined strictly to the investment of such fund.

Under sec. 59.74, subsec. (2), a county board may designate a bank as a county depository. The proposal of the bank to state "* * * the rate of interest the bidder will pay on daily balance and that such deposits and accrued interest will be subject to draft and payment at all times on demand * * *".

Under sec. 59.75, subsec. (1), a county treasurer, as soon as the bond required by sec. 59.74 has been approved and filed, shall deposit in a county depository as soon as received, all
funds that come to him in any capacity in excess of the sum he is authorized by the board to retain, etc. The county treasurer cannot relieve himself of personal liability unless by depositing county funds in a county depository.

Sec. 66.04, subsec. (7), authorizes any county, city, village, town or school district to invest any of its funds not immediately needed, in bonds or securities of the United States or of any county, city, village, town or school district of this state, and to sell or hypothecate the same.

As your county fund is for a particular purpose and no definite time has been named as to when it shall be used, it should be invested as stated in sec. 66.04 (7) because sec. 59.74 (2) is applicable to funds kept for current use and subject to daily balance and draft at all times.

Since it appears that the fund mentioned by you is not to be subject to draft at all times or daily balances, it is my conclusion that it should be invested as provided in sec. 66.04 (7).

MJD

Courts—License to Practice Law—Advertisement containing among other things, “All legal business done promptly and satisfactorily” is in violation of sec. 256.31, Stats., prohibiting practice of law without license therefor.

G. E. OSTRANDER,
District Attorney,
Princeton, Wisconsin.

You have submitted an advertisement which reads as follows:

“When in need of the Services of a Notary Public, call on Mr. B—at the X—State Bank. Also agent for the Commercial Union Assurance Fire Insurance Co. of London, England. Assets over $12,000,000.00. No assessments. Losses promptly paid. All Legal Business Done Promptly and Satisfactory,”

and inquire whether the person named therein has thereby violated sec. 256.31.

Sec. 256.31 is as follows:

“No person shall in any manner hold himself out as an attorney, counselor, lawyer, solicitor, or proctor, or represent
himself either verbally or in writing, directly or indirectly, as authorized to practice law in this state, unless such person is regularly licensed to practice in the courts of this state. The use of the words attorney at law, lawyer, solicitor, counselor, attorney and counselor, proctor, law office, or other equivalent words by any person in connection with his own name or any sign, advertisement, business card, letterhead, circular, notice, or other writing, document or design, the evident purpose of which is to induce others to believe and understand such person to be regularly licensed to practice law in the courts of this state, is a holding out within the meaning of this section. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, or imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment in the discretion of the court."

In *People v. Alfani*, 125 N. E. 671, a somewhat similar advertisement was held to be in violation of the New York penal code. The defendant in that case had a real estate office in the basement of his home, and over the door leading to this office was the following sign:


He testified that the word "Redaction" meant the drawing of legal papers. It appeared that he had given advice on a sale of a business of two investigators of the New York industrial commission, using assumed names and drew necessary papers for the transfer of the business. The New York court said, pp. 672–673:

"By section 270 of the Penal Law it is a misdemeanor for any natural person 'to make it a business to practice as an attorney at law * * * or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, * * * without having first been duly and regularly licensed and admitted to practice law in the courts of record of this
state.’ To practice or to represent as being entitled to practice
law in any manner is prohibited to those not lawyers.

"* * * In Matter of Duncan, 83 S. C. 186, 189, 65 S. E. 210, 211, it is said:

"* * * It is too obvious for discussion that the practice
of law is not limited to the conduct of cases in courts. Accord-
ing to the generally understood definition of the practice of law in
this country, it embraces the preparation of pleadings and other
papers incident to actions and special proceedings and the
management of such actions and proceedings on behalf of cli-
ents before judges and courts, and in addition conveyancing, the
preparation of legal instruments of all kinds, and in general all
advice to clients and all action taken for them in matters con-
ected with the law. An attorney at law is one who engages in
any of these branches of the practice of law.'

"Thornton on Attorneys at Law, in section 69, defines the
practice of law in the same terms.

"In Eley v. Miller, 7 Ind. App. 529, 535, * * * the court
stated:

" 'As the term is generally understood, the practice of law is
the doing or performing services in a court of justice, in any
matter depending therein, throughout its various stages, and in
conformity to the adopted rules of procedure. But in a larger
sense it includes legal advice and counsel, and the preparation
of legal instruments and contracts by which legal rights are
secured, although such matter may or may not be depending in a
court.'

"To the same effect are Barr v. Cardell, 173 Iowa 18, at page
31, and Savings Bank v. Ward, 100 U. S. 195, * * * .
See also, People v. Schreiber, 250 Ill. 345, * * * ; People v.
Taylor, 56 Colo. 441, * * * ."

"To make it a business to practice as an attorney at law, not
being a lawyer, is the crime. Therefore to prepare as a business
legal instruments and contracts by which legal rights are se-
cured, and to hold oneself out as entitled to draw and prepare
such a business, is a violation of the law.

"* * * It is common knowledge, for which the above
authorities were hardly necessary, that a large, if not the greater,
part of the work of the bar today is out of court or office work.
Counsel and advice, the drawing of agreements, the organiza-
tion of corporations and preparing papers connected therewith,
the drafting of legal documents of all kinds, including wills, are
activities which have long been classed as law practice. The
Legislature is presumed to have used the words as persons
generally would understand them, and, not being technical or
scientific terms, ‘to practice as an attorney at law’ means to do
work, as a business, which is commonly and usually done by
lawyers here in this country.”
The defendant’s conviction was sustained:

"Under Hurd's Rev. St. 1909, c. 38, sec. 118a, making it a misdemeanor for one not licensed to practice law, to hold himself out as an attorney, etc., evidence that accused maintained an office, with a stenographer and law library, making collections, preparing conveyances, examining abstracts, performing such services for his clients as are usually rendered by attorneys, and stating to his clients that he was a lawyer, though he did not try cases in courts of record, sustained a conviction; that accused placed the word ‘collection’ before the word ‘attorney’ on his sign and advertisements being immaterial." People v. Schreiber, 95 N. E. 189, 250 Ill. 345 (syllabus).

The courts are zealous in protecting the public from unscrupulous and designing persons seeking to mislead by wiles and artifices. Ignorance and stupidity when the client and attorney are alone and without the supervision of an impartial judge, may create damage which courts cannot thereafter undo. The reason, as stated in People v. Alfani, supra, why preparatory study, educational qualifications, experience, examination, and license by the courts are required is not to protect the bar, but to protect the public. Similar preparation and license are now demanded for the practice of medicine, surgery, dentistry and other callings and the list is constantly increasing as the danger to the citizen becomes manifest and knowledge reveals how it may be avoided.

The use of an advertisement such as indicated above is an indirect holding out of the person named therein—as authorized to practice law in this state, the evident purpose thereof being to induce others to believe and understand such person to be regularly licensed to practice law in this state. I am of the opinion, therefore, that such advertisement is in violation of sec. 256.31.

MJD
Banks and Banking—Taxation—Delinquent Taxes—County treasurer is not authorized by law to credit city treasurer on his return of delinquent taxes for year 1925, amount of taxes assessed but uncollected in prior years against holders of bank stock but not returned delinquent for such prior years.

March 22, 1926.

W. E. Atwell,
District Attorney,
Stevens Point, Wisconsin.

You have submitted for approval a copy of a written opinion given by you to the county treasurer to the effect that the treasurer is not authorized by law to credit a city treasurer on his return of delinquent taxes for the year 1925 the amount of taxes assessed but uncollected in prior years against the holders of bank stock but not returned delinquent for such prior years.

I concur in your opinion.
FEB

Bridges and Highways—Counties—County board is not compelled to grant aid for construction of bridge on application therefor by city to board, although board may, in its discretion, grant such aid; state and county aid may be obtained as to certain classes of bridges under provisions and pursuant to procedure of secs. 87.02 and 87.03, Stats.

March 22, 1926.

Max Van Hecke,
District Attorney,
Merrill, Wisconsin.

You inquire whether there is any provision of law under which the county board is compelled to grant aid to a city on application therefor for bridge construction.

I do not know of any such provision.

The law relating to the construction of bridges, and the manner in which county and state aid may be obtained for such construction are now found in ch. 87, Stats. Sec. 87.01 applies only to town bridges, and this is the only statute I know of which provides for county aid alone. Sec. 87.02 and 87.03 relate to the construction of certain classes of bridges under which
cities may apply to the state highway commission, and if a bridge is ordered constructed by the state highway commission in proper proceedings under said section, county and state aid is provided for.

While the county board may not be coerced in the matter of aiding in the construction of a bridge not falling within the classes of the statute already referred to, it has the power, in its discretion under provision of subsec. (6), sec. 83.03, to construct or improve or aid in constructing or improving any bridge in the county. This discretionary aid, however, is not available for a bridge already constructed. See XIV Op. Atty. Gen. 499, 451.

FEB

Building and Loan Associations—Corporations—Words and Phrases—Corporation appointed as administrator, executor, guardian or trustee, and as such having trust funds in its possession, is authorized to invest such trust funds in paid-up stock in building and loan association under provisions of sec. 215.22, Stats., but word “trustee” as used there means only trustee appointed in some legal proceeding and where investment of trust funds would be incident to administration of trust.

March 23, 1926.

Dwight T. Parker,
Commissioner of Banking.

You have submitted the following question:

“Can any corporation as administrator, executor, guardian, or trustee, authorized to invest trust funds, buy and hold paid-up stock in a building and loan association?”

This question is asked in view of the opinion given under date of February 19, 1926, XV Op. Atty. Gen. 65.

You are advised that where a corporation has been appointed by the court in a regular manner as an administrator, executor, guardian or trustee in some legal proceeding it has the right to invest trust funds and acquire and hold paid up stock as such under the express provisions of sec. 215.22, but that word “trustee” as used in that connection means a trustee appointed in a regular legal proceeding, where the investment of the trust funds would be necessary or incident to the execution of the
trust. You will notice that the word is used with a group of specially appointive administrative officers. Under the familiar rule of construction that where several similar terms are used in succession they must be held to mean persons, things or capacities of a similar kind to the other named unless there is something to indicate a different intent—and in this case all of the others named are of a particular class appointed by a court to promote or carry out some legal proceeding and, there being nothing in the use of the word "trustee" in that section that indicates a legislative intent to include trustees other than those appointed in some legal proceedings in a similar way and for a similar purpose as those named, I think it must be held to refer only to trustees of that kind.

It may be said that the purpose in issuing paid-up stock was to give the association additional funds to aid the members in building homes and for that reason it would not matter whether the funds came from an individual or from a corporation either personally or in any of the capacities named. But that is not the question we are called upon to determine. The legislature has made the limitations, and we are simply to determine the intent of the legislature from the language used in the statute and we think that intent is quite clear in this case.

TLM

_Corporations—Trust Agreements—Trust company may issue trust agreement labeled "trust certificate."
Such agreement may be executed by one officer of corporation. Corporate seal need not be affixed to such agreement._

_Dwight T. Parker,
Commissioner of Banking._

With your letter of March 12 you submit copy of a trust agreement together with a letter addressed to your department requesting advice as to whether the trust agreement violates any law of the state of Wisconsin. You inquire whether the trust agreement, if issued, would create a legal liability against the trust company issuing the same. The proposed trust agreement reads as follows:
"TRUST CERTIFICATE OF THE...........................................

of.........................................................192. No........

"The............................................of......................,
does hereby certify and acknowledge that as trustee it has this
day received from...........................................of

the sum of...........................................Dollars ($.............)
to be held in trust as follows:

"To invest and re-invest the said principal sum in securities
that are legal investments for trust funds under the laws of the
State of Wisconsin, viz.,...........................................


and to collect the income from such investments. To pay to the
holder hereof out of the said income...........per cent per annum
on said principal sum, said payments to be made semi-annually
until the termination of this trust and at the office of the
trustee, the trustee to retain all of said income in excess thereof
for its services and expenses as trustee. Either the holder
hereof or the trustee may terminate this trust at any time after
one year from the date hereof upon six months' notice in writing
given by registered mail at the addresses shown herein; upon the
termination of this trust the securities and uninvested moneys,
if any, shall be delivered to the holder hereof, provided that
the trustee shall then have the option to purchase and have
assigned to it any or all such securities on payment of the cost
price plus accrued interest at the rate of...........per cent per
annum. This certificate is not transferable and is payable only
to the person above named as holder or to his or its executors,
administrators or successors.

The.............................................

By............................................

Secretary-Treasurer."

The letter above referred to refers specifically to the fact
that the trust agreement is designated as a "trust certificate;"
that the trust agreement will be signed by one officer only of the
corporation; that the corporate seal will not be affixed to the
agreement.

The fact that the trust agreement is designated as a "trust
certificate" has no legal effect. The trust company is bound by
the agreement to the same extent as if it were labeled "trust
agreement." The fact that only one officer of the corporation will sign the trust agreement is likewise immaterial. It is competent for the board of directors to designate a single officer to execute such agreement. The corporate seal need not be affixed. The use of the corporate seal is unnecessary except where the use of a seal would be required from an individual. Winterfield v. Cream City Brewing Co., 96 Wis. 239; Ford v. Hill, 92 Wis. 188.

The statute of uses and trusts has no application to trusts in personal property alone. Rust v. Evenson, 161 Wis. 627. It is clear that if an individual instead of a corporation should execute a trust agreement similar to that submitted, it would not be necessary that the instrument be sealed; consequently it is not necessary that the corporation should affix its seal.

It is the opinion of this department that the trust agreement, if issued, will create a legal liability in the corporation issuing the same. I find no statutory provision which requires a trust agreement to be in any particular form. The form submitted does not violate any of the provisions of the statutes.

SOA

Bridges and Highways—Cities and villages within county which maintain their own bridges are exempted from contributing to county aid granted to towns for construction or repair of bridges.

March 25, 1926.

HENRY J. BOHN,
District Attorney,
Baraboo, Wisconsin.

You state that for many years in your county certain cities and villages have not assisted in the paying of costs of construction of bridges on town roads; that these cities and villages have alone borne the cost of the construction and repairs of bridges within their corporate limits. You ask whether such cities and villages are exempted from paying a proportionate share of the amount of aid granted by the county board to towns for the construction and repair of town bridges.

The answer to your question, under the facts stated, is, I think, in the affirmative.

The cost of construction of bridges on town roads falls primarily upon the town in which they are located; but the town,
after voting to construct or repair a town bridge, and before such construction or repair has been done, on application to the county board in any county which has granted aid at any time in the past is entitled to aid from the county where the cost exceeds $200, under the provisions of sec. 87.01, Stats. The amount of such aid varies with the equalized assessed valuation of the town. See subsec. (2) of said section for the basis upon which the amount to be contributed by the county is computed. Cities and Villages in the county which are required to maintain their own bridges are expressly exempted from the levy of any tax necessary to provide the amount of the county aid. Subsec. (6) of said section.

An opinion will be found in XIV Op. Atty. Gen. 449 which may be of some assistance to you on questions related to the one above discussed.

March 25, 1926.

Robert P. Clark,
District Attorney,
Elroy, Wisconsin.

You submit the following statement of facts:

"In the year of 1924 a state bank in this county had a capital stock of $25,000 divided into 250 shares of $100 each and a surplus fund of $5,000. In that year the capital stock and surplus was assessed at $25,000 and the tax for state, county, city and school purposes amounted to $1,075. During the said assessment and tax year of 1924 and on the 1st of May, 1924, the said bank owned real estate in the State of Wisconsin which was
assessed and valued for taxation purposes at $37,805. On the 1st of May, 1924, the entire capital stock and surplus was invested in said real estate. The bank paid the tax on the real estate for 1924 and on February 27th, 1925, paid the tax on the capital stock, to wit: $1,075. The president of the bank stated to the city treasurer that it was an illegal tax and that he was paying it under protest, and the city treasurer endorsed upon the tax receipt 'Paid under protest.'

I quote your questions based on the foregoing statement, and answer them seriatim as follows:

"1. Was the tax on capital stock illegal under sec. 70.37 and, if illegal, should the tax be refunded under the facts stated?"

The answer is in the affirmative provided that in assessing the shares of stock, the value of the real estate was included in determining the total true cash value thereof. Sec. 70.37 provides:

"* * * If such bank owns any real estate which is separately assessed, the assessed valuation thereof, not exceeding the amount for which the same is included in determining the total true cash value of such bank shares, shall be deducted from the total value of such shares."

"2. Should the claim be filed first against the incorporated city in which the bank is located under section 74.73?"

I answer this question, yes.

"3. If such tax was illegal, should the claim be filed against the county?"

Since the tax was paid, it could not have been returned delinquent, and the claim for refund should not be filed with the county.

"4. If the county paid such refund, under what section of the statute may the county claim reimbursement from the state for the amount of state tax so refunded?"

As already indicated, the county is not liable to make the refund. The refund must be made by the city. In case of lawful refund by the city, subsec. (2), sec. 74.73 provides for credit to the city by the county treasurer of the full amount of state
and county tax involved in the settlement for taxes in the ensuing year, and for credit by the state treasurer to the county, of the amount of the state tax.

FEB

Taxation—Exemption—Whether real property of labor temple organization is exempt under provisions of sec. 70.11, Stats., is questioned of fact to be determined in first instance by taxing authorities of city in which property is located.

March 25, 1926.

RAYMOND E. EVRARD,
District Attorney,
Green Bay, Wisconsin.

You submit a copy of the articles of organization of the Green Bay Labor Temple, a nonstock corporation of Green Bay, which provide that no dividends or pecuniary profit shall be declared to the members thereof and states that the corporation has purchased a lot within the city of Green Bay, near the business district, on which there is an old house in poor condition, and on which lot the corporation proposes later on to build a labor temple; that the house now on the lot is being used as a meeting place for the various local unions, which pay a small amount per month toward the expense of keeping up the building and that, in addition, six rooms in the house are rented for other purposes at an annual rental of $192, and that in the summer of 1925 an automobile firm paid a small rental for the use of the grounds surrounding the building for a "used car sales lot;" that the income from all sources received from the use of the property is expended by the corporation on the upkeep of the building; and that such income is not sufficient for the purpose stated; that the corporation paid, under protest, the taxes for 1925 claiming that the property was exempt from taxation under the law; that the city is again this year intending to assess the property for taxation as before.

You state that you are of the opinion that the corporation rightly claims the property to be exempt from taxation and ask for an opinion as to whether that conclusion is correct.

I doubt that the question is one properly coming within your official duties at this time, since it appears from your statement that the taxes for last year were paid, and therefore could not
have been returned delinquent, and the county up to this time has no interest in the question raised.

The question is primarily one of fact, which in the first instance must be determined by the assessor, board of review and other taxing authorities of the city.

You state that your opinion is based upon your understanding that the purpose of the association is similar to that of all labor temple associations, and that the property should be exempted under the provisions of subsec. (4), sec. 70.11, as interpreted by the supreme court in the case of Catholic Women's Club v. City of Green Bay, 180 Wis. 102. The subsection to which you refer is the exemption of the property of religious, scientific, literary, educational, benevolent associations and fraternal societies, orders, and associations operating under the lodge system, and of colleges and universities and of parsonages. I think, however, that the question of whether or not this property is exempt from taxation should be referred to subsec. (31), sec. 70.11 which provides:

"Property owned and used exclusively by any labor organization or by any corporation or association formed under the laws of this state, whose members consist of workmen associated according to crafts, trades or occupations, or their authorized representatives or associations composed of members of different crafts, trades or occupations; provided, no pecuniary profit results to any individual member," is exempt from taxation.

The business and purpose of the corporation, as stated in its articles of association, is declared to be the purchasing or leasing of real estate and the erection, control and operation of a building for business purposes, and the uses of organized labor.

The question of fact to be determined is whether the property is at present used exclusively by the labor organization, or whether the leasing of the six rooms for residence purposes and of the lot for automobile storage and sales purposes renders the property not exclusively used for the purposes of the labor organization within the meaning of the statutes.

I think your question cannot be categorically answered by an opinion of the attorney general. Apparently no pecuniary profit results to any individual member of the labor organization and, on the bare statement of facts which you make, I am inclined to think that the renting of the property under the circumstances is incidental merely to the principal use, and that
the taxing authorities of the city would be justified in finding that the property is exempt from taxation under the provisions of said subsec. (31).

FEB

Appropriations and Expenditures—Wisconsin Veterans’ Home—Form of contract submitted for purchase of coal under sec. 34.02, Stats., approved.

Contract applies to Wisconsin veterans’ home.

March 27, 1926.

CHARLES A. HALBERT,

State Chief Engineer.

With your letter of March 22 you submit copy of contract for the purchase of coal for various state institutions. The form submitted provides for the signature on behalf of the state of Wisconsin of the board or department to which the legislative appropriation has been made for the purchase of coal, and for the approval of the contract by the state chief engineer and the governor.

This form of contract is sufficient to comply with the requirements of sec. 34.02, Stats., and it is not believed that any change is needed in this contract in this respect.

The same form of contract will apply to the Wisconsin veteran’s home for the reason that the heating plant of such institution is owned by the state and is therefore subject to the state coal purchase law, XI Op. Atty. Gen. 696.

SOA
School Districts—Detaching Territory—Electors in territory who petition school board for order detaching territory from high school district under sec. 40.595, Stats., are entitled to have territory detached providing such detachment will not reduce area of district to less than 36 square miles.

Distribution of liabilities is governed by sec. 66.03, Stats.

March 27, 1926.

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

The material facts presented in your letter of February 6 are as follows:

The union free high school district in your county consists of the town of Cleveland, the town of Eau Plaine, and the village of Stratford. The territory of the two towns and the village comprises two entire townships. On January 29 an application was filed with the clerk of the school board by electors and owners of property in the town of Eau Plaine requesting that the town of Eau Plaine be detached from the union free high school district. One hour later, on the same day, an application was filed with the clerk of the high school board by electors and owners of property in the town of Cleveland requesting that the town of Cleveland be detached from the union free high school district. Both applications were considered by the school board at the same meeting and both were refused.

The applicants in the town of Cleveland have appealed to the county superintendent. The applicants of the town of Eau Plaine have not yet appealed but will probably do so within the next few days.

If either of the towns is detached the union free high school district will continue to consist of more than 36 square miles. If both towns are detached the union free high school district will consist of less than 36 square miles. You inquire whether, in view of the fact that both applications were considered and refused at the same meeting of the union free high school, the county superintendent may consider the applications as joint, though they were appealed separately. You also inquire how the current indebtedness of the district is to be apportioned after the dissolution.
Ch. 251, Laws 1925, which is now sec. 40.595, Stats., provides a new method of altering the boundary of a union free high school district. Application may be made for the detaching of territory by electors and owners of property, which application shall be filed with the clerk of the high school board. Subsec. (4), sec. 40.595 provides that within ten days after the application has been filed with the clerk the board “shall meet and enter an order detaching the territory as requested.” In case the board refuses to grant the application an appeal may be taken to the county superintendent. Subsec. (5) of sec. 40.595 provides that the county superintendent “shall forthwith make and enter the order provided in subsection (4).”

The language in the statute is ambiguous and is therefore open to construction. Morgan v. Dornbrook, 206 N. W. 55 (Wis.). The statute provides for detaching territory from a union free high school district upon the request of electors and owners of property in the district, and imposes on the union free high school board the duty of entering an order detaching the territory. If the board refuses to act, an appeal may be taken to the county superintendent who must thereupon enter the order.

In Morgan v. Dornbrook, 206 N. W. 55 (Wis.), it was held that sec. 40.595 does not authorize the detachment of territory which will result in leaving the district with less than 36 square miles. Under the facts, if neither of the towns is detached the district will still consist of more than 36 square miles, but if both are detached the area of the district will be less than 36 square miles.

It will be noted that under subsec. (4), of sec. 40.595 the duty is imposed on the school board to enter an order detaching the territory as requested. The statute thus imposes on the school board the duty of performing a purely ministerial act. If the school board refuses to act the statutory duty may be compelled by an action of mandamus.

Since the school board may be compelled by mandamus to enter an order detaching the territory it is the opinion of this department that under the facts stated the territory in the town of Eau Plaine must be detached either by order of the school board or of the county superintendent. The applications of the two towns for detachment cannot be considered jointly.

The current indebtedness of the district must be apportioned in accordance with the provisions of sec. 66.03, Stats. In this
connection it should be noted that the territory detached is not entitled to any of the assets of the district. Subsec. (7), sec. 40.595.
SOA

Fish and Game—Ice Fishing—Pickerel—In all waters enumerated in sec. 29.28, subsec. (2), in which no close season for hook and line fishing has been established, it is lawful to spear pickerel through the ice during any part of year.

In all such waters, however, in which close season for hook and line fishing has been established, it is lawful to spear pickerel through the ice only during open season as fixed by secs. 29.19 and 29.191, Stats.

March 29, 1926.

Conservation Commission.

Attention Mr. Matt Patterson.

In your letter of March 2d you inquire whether it is lawful to spear pickerel after March 1st in the waters mentioned in subsec. (2), sec. 29.28, Stats.

Subsec. (2), sec. 29.28 provides:

"Spears may be used for spearing pickerel through the ice of the Mississippi river, Lake Winnebago, Lake Butte des Morts, Lake Winneconne, Lake Poygan, Lake Pepin, Lake St. Croix, and the lakes, bays, bayous and sloughs tributary thereto and connected therewith."

This provision sanctioning the use of spears through the ice in certain waters relates only to the method of taking, killing or capturing pickerel in those waters. No period or season during which such method of fishing is lawful is expressed herein. The only limitation imposed by this section is that spears may be used "through the ice." Hence, this section is open to construction. It must be read in conjunction with other sections dealing generally with close seasons for fish.

The two pertinent sections dealing with close seasons for fish are sec. 29.19 and sec. 29.191.

Sec. 29.19 provides in part:

"Except as expressly provided in this chapter and particularly in section 29.191, a close season is established for each variety of fish listed in the following table, extending during all
the time in each year except the period embraced within the dates, both inclusive, set opposite the name of each variety or each locality, respectively, in the column headed 'Open Season;' and except as expressly provided in this chapter, and particularly in section 29.191, no person shall take, capture or kill fish of any such variety with hook and line at any time other than the open season therefor; * * *.”

Subsec. (7), subd. (c) of sec. 29.19, provides that there shall be an open season for pickerel from June 1 to March 1 in certain waters, making a close season from March 1 to June 1.

Sec. 29.191 provides in substance:

“There shall be no close season for hook and line fishing, except for large and small-mouthed bass, sturgeon, and trout,” in certain described waters.

After a careful examination of ch. 29, and particularly secs. 29.19, 29.191, 29.27 and 29.28, I have reached the conclusion that it is the intent of the legislature to permit the use of spears “through the ice” during any part of the year in all waters enumerated in sec. 29.28 (2) in which no close season for hook and line fishing has been established.

However, in all waters enumerated in sec. 29.28, in which a close season for hook and line fishing has been established, such close season applies as well to fishing by means of spears as by hook and line. It is, therefore, my opinion that the use of spears in such waters through the ice is lawful only during the open season established by secs. 29.19 and 29.191.

CAE

Constitutional Law—Elections—Civil rights cannot be restored to convict of state prison without pardon from governor; he is only person under constitution who has power to restore civil rights to one convicted of felony.

March 31, 1926.

Board of Control.

You have directed me to sec. 2, art. III, Const., which reads in part as follows:

“* * * Nor shall any person convicted of treason or felony be qualified to vote at any election unless restored to civil rights.”
The civil rights under this provision can only be restored by a pardon, since sec. 6, art. V, Const., confers on the governor the sole power to grant pardons, it appears that he alone can restore a person convicted of felony to his civil rights. You say that it appears therefore that adult persons placed under probation to your board, having been convicted of a felony, do not have their civil rights restored to them under the law by their discharge from probation. You state that it is the opinion of your board that a restoration of civil rights should be granted to persons discharged from probation, and that it is respectfully requested that we outline to your board the steps that will be necessary in order that such restoration be made.

You direct our attention to an attached form of discharge issued to inmates of the Wisconsin state reformatory who have completed their sentence and are to be discharged from that institution. This discharge, you say, is so worded as to include under the provisions of the statute the restoration to civil rights, and you have attached your present form of discharge from probation and inquire whether your present form of discharge from probation can be so amended as to include within it the restoration of civil rights of the person being granted the discharge. This question must be answered in the negative. The discharge issued to inmates of the Wisconsin state reformatory, which restores civil rights, is authorized by subsec. (2), sec. 54.03, and reads thus:

“Upon the recommendation of the superintendent and the board of control, the governor may, without the procedure required by chapter 57 of these statutes, discharge absolutely, or upon such conditions and restrictions, and under such limitations as he may think proper, any inmate of the reformatory after he shall have served the minimum term of punishment prescribed by law for the offense for which he was sentenced. Such discharge shall have the force and effect of an absolute or conditional pardon, respectively.”

This is applicable, however, only to inmates of the state reformatory. There the discharge, by virtue of the statute, has the force and effect of an absolute or conditional pardon. It is expressly provided that the procedural steps required to be taken in the application of the pardon under ch. 57, Stats., need not be taken. We have no such provision applicable to inmates of the state prison, and there is no statutory authority found
anywhere which would authorize the board of control or the governor, by simply discharging the prisoner to effect a pardon so as to restore the convict to his civil rights.

JEM

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Peddlers—Motion Pictures—Person exhibiting motion pictures is not subject to provisions of sec. 129.14, Stats.

March 31, 1926.

Geo W. Meggers,

State Treasury Agent.

In your letter of March 22 you inquire whether a person who goes from place to place with a motion picture machine exhibiting motion pictures in a tent, at a public hall or other available place, and charging admission, is subject to the provisions of sec. 129.14, Stats.

Sec. 129.14 provides, in part as follows:

“(1) Every owner, manager or agent of a caravan, circus or menagerie, before he shall be allowed to exhibit the same in this state, shall procure a license as a public showman by making application in writing to the treasury agent, which application shall state in detail the manner in which he intends to travel and the nature and character of his exhibition, and shall pay into the treasury therefor the sum of one hundred dollars; and every owner or manager of a so-called side show, traveling vaudeville, Ferris wheel, merry-go-round, ocean wave, whip, sea-plane, caterpillar, butterfly or similar device, or so-called 'rides' operated for amusement, or transient shooting gallery, and, except at a regular theater or vaudeville house, every person exhibiting for money any trained animal, wild animal or any object of curiosity shall procure a state license as a public showman and pay therefor twenty dollars; provided, that if such person, owner, manager or agent shall state in the application that he applies for the license solely for the purpose of exhibiting at fairs, expositions, exhibits or carnivals held on the grounds and under the direction of a society, association or board receiving state aid, the license shall be granted upon the payment of the following fees: For a caravan, circus or menagerie, twenty-five dollars; for a side show, traveling vaudeville, the exhibit of any trained animal, wild animal, or any object of curiosity, ten dollars; for any Ferris wheel, merry-go-round, ocean wave, whip, seaplane, caterpillar, butterfly or similar device, or so-called 'rides' operated for amusement, or transient shooting gallery, the license shall be granted without charge. No such license shall be issued until the treasury agent shall have as-
Opinions of the Attorney General

certained from the industrial commission that the applicant has complied with the provisions of subsection (2) of section 102.28 of the statutes. This section shall not apply to a concessionaire or lessee of the state on state property where by reason of contract or otherwise the state would be obligated to furnish the license.

"* * * (3) Upon application of any owner, manager, or agent of any such caravan, circus, menagerie, side show, traveling vaudeville, animal, or object of curiosity exhibited for money, which shall have obtained a license under the provisions of subsection (1) hereof, the treasury agent after determining that the performance or exhibit is not immoral, indecent, disorderly, degrading, or otherwise objectionable, shall issue a permit to such owner, manager, or agent permitting such exhibit or performance at a stated fair, exposition or carnival of such society, association or board and at no other time or place.

"(4) Any person violating any requirements of this section for each such violation, failure or refusal, such employer, employee or other person, shall forfeit and pay into the state treasury a sum not less than twenty dollars nor more than fifty dollars."

Sec. 129.14 applies to a caravan, circus or menagerie, side show and traveling vaudeville.

The statute does not specifically include a person exhibiting motion pictures. Such person does not come within any of the provisions of sec. 129.14. It is the opinion of this department, therefore, that your question must be answered in the negative.

SOA
Counties—County Board—Public Officers—Register of Deeds—
County board may employ clerk in office of register of deeds and clerk, as one of his clerical duties, may assist in preparation of tract index, when register of deeds is paid salary by county board, fees of his office being turned over to county.

LEWIS W. POWELL,
District Attorney,
Kenosha, Wisconsin.

You inquire whether it is lawful for a register of deeds who is on a straight salary to hire an additional clerk for the purpose of preparing a tract index and whether it is lawful for the county board to pay such clerk any salary that they may deem adequate.

Your questions should be answered in the affirmative.

Section 59.57 provides:

"Except as otherwise provided by law every register of deeds shall receive the following fees, to wit:

"* * *

"(9) For making a new tract index upon the order of the county board, such sum as may be fixed by the county board, not exceeding two cents for each entry, to be paid from the county treasury."

The above section is applicable only when the register of deeds is not on a salary basis, but his income is derived solely from fees.

Docket entries must be made by the register of deeds, his deputy, or some of his employes. XII Op. Atty. Gen. 503. If he is on a straight salary basis the fees of register of deeds go to the county, in accordance with the provisions of sec. 59.15, subsecs. (5) to (8), inclusive. The county in paying the salary pays the register of deeds the maximum amount to which he is entitled for the performance of his duties. His salary includes the compensation for the preparation of a tract index.

Sec. 59.15, subsec. (3), provides:

"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, except that the salaries of the undersheriff and of the register in probate may be changed only at the annual meeting."
This section authorizes the appointment of clerical help to assist in the general office duties. Such help may be assigned to compiling a tract index under the direction of the register of deeds. It is essential, however, that the register may not employ any persons for the sole and specific purpose of preparing a tract index and obtain two cents an entry therefor. The statutory limitation of two cents for each entry applies to registers of deeds not on a salary, but deriving their income solely from fees.

MJD

Corporations—Taxation—Telephone Fees—Telephone company which does not operate its own central office but obtains switching service from other companies is not entitled to deduct amount paid to other companies for switching service in determining gross receipts on which license fees are paid to state.

April 1, 1926.

Railroad Commission.

You have inquired whether small rural telephone companies, who do not operate their own central offices but obtain switching service from other companies, have to pay the gross receipts license fee on the amount paid to other companies for switching service.

Sec. 76.38, subsec. (2), Stats., requires every person, copartnership, association, company or corporation operating a telephone exchange or toll line, or both, to pay an annual license fee to be computed upon the total gross receipts as required to be shown in the statement indicated in subsec. (1), sec. 76.38.

In The State v. Illinois Central Railroad Company, 246 Ill. 188, it was held that the term "gross receipts" used in the charter of the Illinois Central Railroad Company as the basis for computing the state per centum to be paid by the company was intended to mean the total receipts received by the charter lines of the company before anything is deducted for the expenses of management. In this action the state brought an accounting of the gross earnings of the railroad company over a definite period of years to ascertain the correct amount of taxes to be paid by the railroad company, the statutes requiring a tax paid upon the total gross receipts of the company on a percentage basis. The court in that case held, pp. 268–270:
“All counsel agree that the terms ‘gross proceeds’ and ‘gross income’ mean the same thing in this case as ‘gross receipts.’ But counsel for appellee insist that as these three phrases mean the same thing they should be fairly construed to mean the same as ‘gross earnings,’ which term, they argue, is ordinarily construed to mean ‘gross income,’ and that ‘gross income’ means ‘gross increase’ or ‘gross gain,’ while counsel for the State insist that the words ‘gross receipts,’ being the last phrase used in the proviso at the end of said section 22, indicate that that term was intended to include all the others, and manifestly means the total receipts of said charter lines and its branches, without any deductions for expenses for any purpose. All three of these phrases ‘gross income,’ ‘gross proceeds’ and ‘gross receipts,’ are of equivocal import. Their construction and meaning will depend much upon the context and the special matter to which they are applied. (23 Am. & Eng. Ency. of Law,—2d ed.—p. 159, and cases cited; 4 Words and Phrases, pp. 3174, 3501–3507, inclusive; 6 id., pp. 5639–5642.) In Commonwealth v. United States Express Co., 157 Pa. St. 579, the court held that a tax on gross receipts meant a tax upon the total receipts and not upon the net earnings or the gross earnings of the express company’s business, less the amount paid to other companies for transportation services. In German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410, this court held that it appeared to be the intention under a certain law to levy a tax on the ‘gross income’ of foreign fire insurance companies, and that this required such companies to pay a tax ‘on the gross receipts of their business.’ See, also, Goldsmith v. A. & S. R. R. Co., 62 Ga. 468; Railway Co. v. Shinn, 52 Ark. 93; People v. Roberts, 92 Pa. St. 407; Philadelphia and Reading Railroad Co. v. Commonwealth, 104 id. 80; People v. Morgan, 99 N. Y. Supp. 711; Remington v. Field, 16 R. I. 509.

“In Union Pacific Railroad Co. v. United States, 99 U. S. 402, the court had under consideration the question as to what were the net earnings for five per cent of which the company became liable to account, and held that they embraced ‘all the earnings and income derived by the company from the railroad proper and all the appendages and appurtenances thereof, including its ferry and bridge at Omaha, its cars, and all its property and apparatus legitimately connected with its railroad.’ The opinion also held that compensation accruing to the railroad company for services performed for the United States government should be taken into account in measuring the net earnings, notwithstanding the fact that the government did not pay such compensation directly to the railroad, but applied it, under the provisions of the charter, to the payment of subsidy bonds.”

Under the tax law imposing an annual tax on lighting and other companies of one-half of one per cent of their gross earn-
ings and defining the term "gross earnings" as all receipts from the employment of capital without any deduction, the definition having been added by subsequent amendment, the cost of raw materials used by a lighting company converted into gas and electric current is not to be deducted from the receipts of the company determining its gross earnings. *People ex rel. Westchester Lighting Co. v. Gaus*, 199 N. Y. 147. The court held, p. 150:

"* * * When the statute provides for taxing 'gross earnings from all sources' and adds that that means 'all receipts from the employment of capital without deduction,' however the language offends against the normal concept, we must regard the law as classifying with earnings, for the purpose of the tax, all receipts from the use of the capital. That is what the legislature has done. Its enactment measures the tax for the privilege of exercising the corporate franchise by a percentage upon all receipts of the company, which the use of its capital originated."

Money received from messengers not regularly in the company's service, but employed specially to call nonsubscribers to the telephone stations, and money collected from the company's patrons and subscribers as messenger charges actually paid to persons in whose buildings the company's booths are located, and as compensation for such location, are a part of the gross earnings within the statutes. *State v. Northwestern Telephone Exchange Company*, 120 N. W. 534. The court here held that these items constitute a part of the income of the company, and the fact that the money was disbursed to persons who rendered services to or supplied accommodations for the company does not change their character.

A pertinent discussion is set forth in *Commonwealth v. United States Express Company*, 27 Atl. 396. It appears that this was an action commenced to recover a certain tax and gross receipts of the defendant express company. The defendant claimed that it was liable only for the amount of its gross receipts, which accrued during the year included in the settlement, remaining after deducting from its total gross receipts the amount paid to the several railroad companies which carried parcels and articles entrusted to the express company. It further contended that the proposed taxation was erroneous for the reason that it constituted double taxation upon that portion of the said gross receipts paid out for transportation. Under the statute every
express company, incorporated or unincorporated, doing business in Pennsylvania, was required to pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of the company received from its express business done wholly within the state. The opinion in this case quotes the findings in the lower court, pp. 397–398:

"It is further claimed in the second specification that the taxation of all defendant's gross receipts, not deducting an amount equal to the sum paid by it for express transportation, will result in illegal double taxation. The subject of double taxation has recently been considered by each of the members of this court in opinions which will be found in a note to Com. v. Westinghouse Air Brake Co., 151 Pa. St. 281, 24 Atl. Rep. 1111, 1113, and it is not necessary to repeat what is there said. It is shown by the authorities there cited that the double taxation forbidden by the constitution requiring equality or uniformity of taxation is such as would require the same person or the same subject of taxation to contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once; and it was held in Com. v. Tioga R. Co., 145 Pa. St. 38, 22 Atl. Rep. 212, adopting the opinion of this court, by Judge McPherson, that where a railroad company had paid tax on all its gross receipts, including the amount paid by it to the defendant in that case for the use of its railroad, all the gross receipts of defendant, not deducting the amount received by it from the former company, were taxable, and that this was not double taxation, because both taxes were not levied upon the same subject, nor to be paid by the same person. The receipts of one company were paid to it for transportation; the receipts of the other were paid to it for tolls and track-age. In this case the sums paid by defendant to the several railroad companies, and which formed part of the gross receipts of these companies, were paid for the services rendered by them in transporting express matter for defendant; all defendant's gross receipts were received for the services rendered by it to its customers in receiving express matter, and delivering it to the persons to whom it was consigned. In Express Co. v. Robinson, 72 Pa. St. 274, the court says that express companies receive a larger compensation, because they contract for a personal delivery of goods intrusted to them. It could not be seriously contended that if defendant had transported the express matter for which it paid freight to the railroad companies by its own servants, and in its own vehicles, it could have deducted the cost of so doing from its taxable gross receipts, or that it could have done so if it had hired the vehicles for the transportation by the month or year. It did not receive any part of the sum paid to it by its customers as the agent of the railroad com-
opinions, but all of its gross receipts were for services rendered by it.'"

It is apparent from these opinions that gross receipts include gross revenue of the concern, irrespective of whether or not deductions have been made for payments to other companies or individuals for services rendered. It is, therefore, my conclusion that small rural telephone companies who do not operate their own central offices but obtain switching service from other companies have to pay the gross receipts license fee on the amount paid to other companies for switching service.

MJD

"Trade Regulations—Trading Stamps—Giving of coupon with loaf of bread which with other coupons will entitle holder to receive album containing pictures violates trading stamp law.

L. D. Potter,
District Attorney,
Racine, Wisconsin.

The material facts presented in your letter of March 25 are as follows:
The Schulze Baking Company, an Illinois corporation, bakes its bread in Chicago and then ships it to Racine for distribution to customers. The company has a manager in the city of Racine and also has several wagons which are used in the distribution of bread. A coupon is packed with each loaf of bread. On one side of the coupon is a picture of a bird; on the other side is a brief description of the bird. The coupon also contains the following:

"COLLECT 48 PICTURES AND RECEIVE A BEAUTIFUL BIRD ALBUM FREE"

"There is now being wrapped with each loaf of Schulze's Butter-Nut Bread, a Beautiful Bird Picture similar to this one. There are 48 pictures in the entire series. One will be wrapped each day for 48 days with every loaf of Butter-Nut Bread. Save the Bird Pictures until you have collected the entire series. Then bring them, or send them, to our bakery at 40 E. Garfield Blvd., or 1435 Webster Avenue, or 2858 W. Harrison St., and we will give you, or send to you, a beautiful album containing all of the 48 pictures with an interesting description of their
habits, etc. This Album carries no advertising and will make a valuable addition to any home library.”

You inquire whether this coupon violates the trading stamp law.

Subsec. (1), sec. 34.01, Stats., provides in part as follows:

“No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, * * *.”

The coupon used by the baking company is given in connection with the sale of goods, wares or merchandise, and a sufficient number will entitle the holders to procure goods, wares, merchandise privilege or thing of value. The coupon falls squarely within the provisions of the trading stamp law, and its use, therefore, is unlawful.

SOA

Municipal Corporations—Cities—Public Officers—City Supervisors—No opinion can be given on facts stated as to whether or not city must hold election for supervisors each year, but whether law is correctly construed or not, such supervisors when serving will be de facto officers and their acts will be valid.

April 5, 1926.

L. W. Bruemmer,
District Attorney,
Kewaunee, Wisconsin.

You state that in some of the cities of your county the mayor, city clerk, and all administrative officers are elected in one year, and the aldermen are elected in the alternate years, so that some of the city officers are elected every year.

You refer to subsec. (2), sec. 59.03, Stats., which, inter alia, relates to the composition of a county board in counties containing less than 250,000 population (which includes Kewaunee
county) and the election of the members thereof, and particularly to par. (d) thereof, which provides as follows:

"Notwithstanding any other provision of the statutes, a supervisor from a city, city ward, or a part of a city ward, or village or a part of a village, shall be elected by the electors thereof at the same time that city or village officers are elected."

You refer also to par. (b), subsec. (5), sec. 62.09, relating to the terms of city officers, which provides as follows:

"Except as otherwise specially provided the regular term of elective officers except supervisors shall be two years. The term of supervisor shall be one year unless otherwise provided pursuant to paragraph (d) of subsection (2) of section 59.03. The council may by ordinance provide a different term for such officers or any of them, and may provide that the term of one of the aldermen next elected in each ward shall be for one year only and that the terms of aldermen thereafter shall expire in alternate years."

Upon your statement I conclude that all city officers in the city in question are elected for the term of two years, and while you do not so state, I shall assume that the election of the two classes of officers, namely, (1) the mayor and other officers except aldermen, and (2) the aldermen, in alternate years, is pursuant to ordinances regularly adopted by the councils of the cities.

Prior to the enactment of ch. 421, Laws 1925, said sec. 59.03 (2) (d) read:

"A supervisor for a part of a city ward or a part of an incorporated village in the county shall be elected by the electors of such part of ward or village at the same time and in the same manner that city and village officers are elected."

And said sec. 62.09 (5) (b) read the same as it does now and as hereinbefore quoted. In an opinion to the district attorney of Brown county in March, 1924 (XIII Op. Atty. Gen. 120), I said, in reply to a request for an opinion as to the term of office of supervisors in the city of Green Bay, after quoting the two provisions as they then existed, in part, pp. 120–121:

"It is not apparent that sec. 59.03, subsec. (2), par. (d), has any bearing on the subject matter of sec. 62.09, subsec. (5), par. (d). I am of opinion that the reference in the latter section to the former may be disregarded as surplusage, so far as the city of Green Bay is concerned. Its presence is explainable, however,
for when sec. 28, ch. 242, Laws 1921, revising secs. 925–26 and 925–26a, Stats. 1919, and renumbering them as sec. 62.09 (5) (d) was passed by the legislature, sec. 59.03 (2) (d) included a relevant provision which was subsequently repealed by ch. 238, Laws 1921. When the last named act was passed, the legislature simply neglected to make allowance for it in ch. 242, and hence the present sec. 62.09 (5) (b) contains a reference to the part of sec. 59.03 (2) (d) which has ceased to exist.

"It is my opinion, therefore, that the supervisors elected from Green Bay hold for one-year terms unless the council of the city has by ordinance otherwise provided."

By said ch. 421, the legislature of 1925 amended sec. 59.03 (2) (d) to read as first above quoted, the intent probably being to reconcile the two provisions, but apparently without an understanding on the part of the framer of the amendment as to how the apparent conflict came to exist. The attempt would have been more successful had the amendment been of sec. 62.09 (5) (b) by striking out all reference to supervisors and to said par. (d), subsec. (2), sec. 59.03, and leaving said par. (d) as it read in the 1923 statutes unchanged.

The application of the law as it now stands to the situation you outline is difficult. Aldermen are officers of the city as much as the mayor, city clerk, and others in their class are (sec. 62.09 (1); and, as you say, in the cities in question there is an election of city officers, strictly speaking, every year. A strict construction of the words "city officers" in sec. 59.03 (2) (d) as applies to your question requires the conclusion that supervisors in these cities shall be elected every year, and, of course, that their term of office is one year. On the other hand, it may reasonably be argued that the language "shall be elected * * * at the same time that city officers * * * are elected" in a situation like that involved in your question should be construed as if it read "at the same time that the mayor and other executive and administrative officers are elected," particularly since it is very doubtful that it is competent for any city to provide that all the aldermen shall be elected in years alternating with the years of election of the mayor and other officers except aldermen, since the authority to the council to divide the aldermen into two classes whose term of office shall expire in alternate years, expressly provided for by the statute, is probably exclusive of any other scheme.

Probably it would be a safe enough policy to adopt the strict construction referred to until the councils of the cities in ques-
tion solve the puzzle by providing definitely by ordinance (as I think may be done under the powers conferred by said sec. 62.09 (5) (b), the last sentence of which reads: “The council may by ordinance provide a different term for such officers or any of them, and may provide that the term of one of the aldermen next elected in each ward shall be for one year only and that the terms of aldermen thereafter shall expire in alternate years.”) that supervisors shall be elected at the time the mayor is elected and shall hold office for the same term. However, I am not able to say that the other construction will be wrong. No attempt will therefore be made to give a categorical answer to your question. Whatever construction the cities in question may adopt as a practical solution of the present situation, the supervisors acting on the county board will at least be de facto officers, and their acts as such will be valid.

FEB

Corporations—Service of process on secretary of state, under sec. 262.09, subsec. (10), Stats., cannot be made unless sheriff's return is first submitted to secretary of state.

April 5, 1926.

FRED R. ZIMMERMAN,
Secretary of State.

The material facts presented in your letter of March 30 are as follows:

Attorneys are attempting to serve summons and complaint on you as secretary of state under the provisions of sec. 262.09, subsec. (10), Stats., but they refuse to submit sheriff’s return. It has been the policy to require a sheriff’s return and you inquire whether this practice is lawful.

Subsec. (10), sec. 262.09, provides that actions against corporations shall be commenced in the same manner as personal actions against natural persons. The summons and accompanying complaint shall be served, and such service held to be of the same effect as personal service on a natural person by delivering a copy thereof as follows:

“If against any other corporation organized under the laws of this state, to the president, or other such chief officer, vice president, secretary, cashier, treasurer, director, or managing agent. Provided, however, that whenever any such corporation
does not have any officer or agent within this state upon whom legal service of process can be made, of which the return of the sheriff shall be prima facie evidence, service of the summons and accompanying complaint may be made by depositing duplicate copies thereof in the office of the secretary of state, one of which copies shall be filed in the office of said secretary of state, and the other by him immediately mailed, postage prepaid, addressed to said company, at its office designated in its articles of incorporation on file in the office of the said secretary of state, and such service shall be deemed and treated as personal service on such corporation."

The statute provides two methods for obtaining service on a domestic corporation. If there be an officer or agent of the corporation within the state upon whom legal service of process can be made, the service must be on such officer or agent. If no such officer or agent is within the state, service may be made on the secretary of state. In case service is made on the secretary of state he is required to file a copy of summons and complaint in his office and to mail a copy addressed to the corporation at its office designated in the articles of incorporation. In order that the secretary of state may know that service cannot be made on an officer or agent of a corporation, the statute provided that the return of the sheriff should be prima facie evidence that no such officer or agent was within the state. The mere statement by a person seeking to serve process, that no such officer or agent is within the state is not sufficient to inform the secretary of state on this question. For that reason we concur with your opinion that before service can be made on the secretary of state the return of the sheriff must first be submitted.

SOA
Criminal Law—Depositions—Where attorneys have waived signature to deposition by written stipulation parties are bound by deposition although it, because it lacks signature, may be readily impeached by substantial contradicting testimony of other depositions properly signed.

After deposition has been used in trial and its use in new trial is sought to be prevented, motion should be made, based upon counter-affidavits, to suppress deposition or leave asked to file counter-depositions.

April 6, 1926.

John J. Boyle,
Special Assistant District Attorney,
Darlington, Wisconsin.

You have submitted depositions taken upon stipulations at Chicago, Illinois, which were used in a criminal prosecution in Darlington, and which are again to be used in the prosecution because a new trial was granted at the conclusion of the first trial.

It appears that the attorneys for the state and defendant stipulated that signatures shall be waived. At the conclusion of the first trial you were informed that the depositions were false, contained false testimony, and in fact were perjurious. No motion has been made to suppress the use of the depositions or suppress the depositions themselves. You now inquire what procedure you shall follow with this end in view.

It appears from review of the authorities that a deposition, whenever signature is waived by stipulation, is admissible unless secured through gross fraud. Ordinarily testimony of witnesses examined before a commissioner should be read over to them for correction and signatures. Evidence so taken which has not been so read and signed is not inadmissible, but will be received with great caution and where it conflicts with other evidence properly taken, the latter will prevail. Looker v. Looker, 46 Mich. 68, 8 N. W. 724. In this case a witness was examined before a circuit court commissioner and the signing of the testimony so taken was orally waived by the respective parties.

In Godfrey v. White, 43 Mich. 171, 5 N. W. 243, the admissibility of a deposition was questioned because several witnesses were stated by the commissioner to have waived the reading of
their depositions before signing them. The court in commenting upon this fact declared, p. 189:

"* * * The integrity of these gentlemen is not denied, and both commissioner and counsel seem to have supposed the practice correct. Except for the failure of any one to move to suppress, all this testimony must have been rejected. It is in no sense sworn testimony, any more than if they had signed affidavits in blank. It is merely the certificate of the commissioner that so far as he remembers, they swore as he has certified. Where it appears on the face of a deposition that the party signing it does not know its contents, it exhibits a degree of carelessness in regard to the solemn obligation of an oath which has been, with how much truth we do not know, attributed to custom-house oaths, but which we never saw before, and hope never to see again in the course of justice."

There was no stipulation here but the witnesses themselves waived the signatures.

In People v. Gleason, 63 Mich. 626, 30 N. W. 210, the respondent was convicted of robbery and it appeared upon the trial that the testimony taken in the police court and reduced to writing was not read to or by the witnesses before signing the same. No objection was made by the defendant in the police court, he having no counsel there, to the nonreading of these depositions. When he was arraigned in the higher court, no objection was made to the filing of the information and the defendant pleaded not guilty. Upon the trial after the testimony had been given by the witnesses to the effect that they did not read their testimony taken and reduced to writing upon the examination in the lower court, and that it was not read to them before signing, the counsel for the defendant moved to withdraw the plea of not guilty, and that the prisoner be discharged because of the non-reading of the depositions and failure to sign. The court discussed previous decisions in Michigan and stated, p. 629:

"We did not intend, however, to intimate that a failure to have such depositions read would vitiate an examination, when the express requisites of the statute had been substantially complied with.

"A deposition taken and filed, without being read by or to the witness, might be, if that fact was shown, altogether useless, as a means of contradicting or impeaching his testimony given on the trial, and of no value upon which to base a prosecution for perjury against him; but when the examination before a magistrate is, in other respects, legal, and in conformity to the express terms of the statute relating to such examinations, this
neglect or failure to have the testimony of any or all of the witnesses read to or by them before signing cannot affect the status of the defendant in the trial court to which he is bound over at such examination. There is no doubt of his right to require, at the examination, that the testimony shall be read before it is signed; but if he makes no objection, then he cannot be heard afterwards to complain of it."

A deposition has not been suppressed because of the insanity of the witness, but its veracity has been left to the court and the jury. *Redmond v. Quincy, etc., R. R. Co.*, 225 Mo. 721, 126 S. W. 159.

"The defect in the deposition would of necessity be fatal since there was a failure to comply with the absolute requirements of the statute but for the stipulation. This was sufficiently broad to cure this formal defect when the papers are examined in the light of the certificate of the notary, to the effect that the questions and answers were read and sworn to by the witnesses. The necessity for a signature is statutory and it was entirely within the province of counsel to waive any of the statutory prerequisites. We think this matter was within the contemplation of counsel when they signed their agreement and we must hold them bound by its terms. We are expressly inclined to this conclusion because this case has been twice tried, * * * Chipley v. Green, 7 Colo. App. 25, 27-28."

From the foregoing, it appears that where the parties have stipulated that signatures may be waived they are bound thereby.

I might suggest, however, these depositions may be met in one of two ways. In the first place, affidavits as to the real facts controverting the testimony of the witnesses testifying before the court commissioner should be attached to a notice of motion for suppression of the deposition on the grounds that the testimony is perjurious and false. Should this relief be denied by the court, leave should be sought so that depositions might be obtained to contradict the depositions in question.

The decisions above referred to clearly indicate that the lack of a signature shall be carefully considered where signed depositions absolutely disputing and denying the facts testified to by the witnesses who did not sign are introduced. The proper way to meet these depositions, it would seem to the writer, would be to take depositions on the other side of the case.

Sec. 326.15, Wis. Stats., in part provides:

"* * * No deposition which shall have once been used on the trial of an action shall be suppressed upon any retrial of the
same action for any cause unless objection for such cause was made thereon on the former trial or such cause is not disclosed in the deposition and accompanying papers and shall have been discovered since the former trial."

This would give grounds, together with the affidavits, for bringing the matter to the attention of the court. The question as to whether this deposition could be used in Illinois as a basis for a prosecution for perjury, is not discussed in this opinion.

It is my conclusion, therefore, that the parties, where the attorneys have waived the signature to a deposition by a written stipulation, are bound by the deposition although because it lacks a signature it may be readily impeached by substantial contradicting testimony of other depositions properly signed; that after the deposition is introduced in a trial of an action and is up for consideration in a new trial as a result of prejudicial error in the first trial, or some other valid reason, motion should be made to suppress based upon facts set forth in counter-affidavits, and if the court does not suppress the depositions, that leave be asked for permission to obtain and file a counter deposition.

MJD

Elections—Public Officers—Justice of Peace—Candidates for office of justice of peace shall be nominated by nomination papers signed and filed as required by law.

April 6, 1926.

A. F. Murphy,
District Attorney,
Marinette, Wisconsin.

You have inquired whether it is necessary that a candidate for the office of justice of the peace or school commissioner file nomination papers. You state that it would seem under sec. 5.02, subsec. (4), Wis. Stats. 1925, that this was no longer necessary.

Discussion of this question will be confined to the candidacy of aspirants for office of justice of the peace, because the school commissioner phase is a municipal matter, on which the attorney general cannot advise.

Sec. 5.02 provides:
"Methods of nominations. Hereafter, all candidates for elective offices shall be nominated:

"(1) By a primary held in accordance with this chapter, or

"(2) By nomination papers signed and filed as provided by this chapter.

"(3) Party candidates for the office of United States senator shall be nominated in the manner provided herein for the nomination of candidates for state offices.

"(4) Except as otherwise specially provided in this chapter there shall be no nomination by primary election of any candidate for the office of state superintendent, or county or district superintendent of schools, or board of education by whatever name designated, or constable or justice of the peace, or for any school district or judicial office."

Since candidates for elective offices shall be nominated by a primary or by nomination papers, and inasmuch as candidates for office of justice of the peace shall not be nominated by a primary election, I must conclude that they shall be nominated by nomination papers signed and provided for as indicated by sec. 5.26 and subsequent sections of ch. 5, Wis. Stats.

MJD

Elections—Prohibition party will be entitled to place on ticket at primaries of 1926 and 1928, since candidate on prohibition ticket at last general election received more than one percent of total votes cast for governor.

April 6, 1926.

FRED R. ZIMMERMAN,
Secretary of State.

The material facts presented in your letter of recent date are as follows:

The official returns of the last presidential election show that 840,321 votes were cast for president, the prohibition candidate receiving 2,918 votes. The official returns also show that 796,432 votes were cast for governor, and that the prohibition candidate received 11,516 votes. In Milwaukee county 148,936 votes were cast for governor, and the prohibition candidate received 462 votes. You inquire (1) whether the prohibition party will be entitled to a place on the state ticket in 1926 and the presidential ticket of 1928; (2) whether the prohibition candidate will have a right to a place on the ticket at the primaries in 1926 and 1928 in Milwaukee county; (3) whether if the pro-
hibition candidates will be eliminated, they will be eliminated at the time of the filing of nomination papers for the primary, under sec. 5.05, subsec. (6), par. (d), or after the primary, under sec. 5.17, Stats.

Sec. 5.05, subsec. (6), par. (d), provides:

"* * * Any political organization which at the last preceding general election was represented on the official ballot by either regular party candidates or by individual nominees only, may, upon complying with the provisions of this act, have a separate primary election ticket as a political party, if any of its candidates or individual nominees received one per cent of the total vote cast at the last preceding general election in the state, or subdivision thereof, in which the candidate seeks the nomination, * * * ."

Under the statute any political organization is entitled to a place on the official ballot if any of its candidates receive one per cent of the total vote cast at the last preceding general election, in the state or any subdivision of the state. Under your statement of facts the prohibition candidate for governor received more than one per cent of the total votes cast for governor. The prohibition candidates, therefore, are entitled to a place on the ballot. VII Op. Atty. Gen. 140, XIII Op. Atty. Gen. 604. Your first question therefore is answered in the affirmative.

The statute makes no distinction as to the number of votes cast in any particular county. Since the prohibition party will be entitled to a place on the state and presidential tickets it will also have a right to a place on the primary ticket in Milwaukee county. Your second question, therefore, is answered in the affirmative.

In view of the answers to your first and second questions it becomes unnecessary to answer your third question.

SOA
Public Health—Basic Science Law—Person giving x-ray treatments is required to be licensed by Wisconsin state board of medical examiners and must secure certificate of registration in basic sciences.

April 9, 1926.

DR. ROBERT E. FLYNN, Secretary,
Board of Medical Examiners,
La Crosse, Wisconsin.

You inquire if a man engaged wholly in giving x-ray treatments is required to be licensed by your board.

Sec. 147.14, subsec. (1), Stats., provides in part as follows:

"No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, without a license or certificate of registration from the state board of medical examiners, except as otherwise specifically provided by statute, * * * ."

I find nothing in the statutes which excepts one giving x-ray treatments from the requirement of having a license or certificate of registration from your board. One who is engaged in giving such treatments is surely "treating bodily or mental ailments or injuries of human beings." You are, therefore, advised that a person giving x-ray treatments must be licensed by your board.

Your attention is further directed to the provisions of sec. 147.01, subsec. (1), par. (a), Stats., being the section of definitions in the basic science law which provides as follows:

"To 'treat the sick' is to examine into the fact, condition, or cause of human health or disease, or to treat, operate, prescribe, or advise for the same, or to undertake, offer, advertise, announce, or hold out in any manner to do any of said acts, for compensation, direct or indirect, or in the expectation thereof."

Sec. 147.04 provides as follows:

"No examining board for any branch of treating the sick shall admit to its examinations or license or register any applicant unless such applicant first present a certificate of registration in the basic sciences. Any such board may by rule accept such certificate in lieu of examination in those subjects."

It would appear, therefore, that such practitioner comes within the definition set forth in the basic science law also, and
that he would be required to present a certificate of registration in the basic sciences.

CAE

Public Officers—Sheriff—Deputy Sheriff—County Dance Supervisor—Under art. VI, sec. 4, Wis. Const., sheriff is ineligible to hold office of county dance supervisor.

Offices of deputy sheriff and county dance supervisor are not incompatible.

April 13, 1926.

D. K. Allen,
District Attorney,
Oshkosh, Wisconsin.

In your recent letter you inquire whether a sheriff may legally act as dance hall supervisor and receive compensation from the county for both services.

You also inquire whether a deputy sheriff, who receives no salary for his services as such, may act as county dance supervisor and receive from the county compensation for such services.

Subsec. (9), sec 59.08, Stats., provides in part:

"* * * The county board shall select from persons recommended by the county board a sufficient number thereof whose duty it shall be to supervise public dances according to the assignments to be made by the county board. Such persons while engaged in supervising public dances or places of amusement shall have the powers of deputy sheriffs, and shall make reports in writing of each dance visited to the county clerk, and shall receive such compensation as the county board may determine and provide."

Art. VI, sec. 4, Const., provides:

"* * * Sheriffs shall hold no other office, * * * ."

This raises the question whether the position of county dance supervisor is an office.

In United States v. Hartwell, 6 Wall. (73 U. S.) 385, 393 (approved in Hall v. Wisconsin, 103 U. S. 5, 8), an office is defined as a

"public station, or employment, conferred by the appointment of a government. The term embraces the idea of tenure, duration, emolument and duties."
The position of county dance supervisor is created by the statutes. The duties of such position are in their nature public, in whose proper performance all citizens are interested. The duty is a continuing one defined by rules prescribed by law and not by contract. Compensation is provided for by statute. All of the characteristics of public office are present. 22 R. C. L. 372-376. It is, therefore, my opinion that the position of county dance supervisor is an office.

It follows that the constitutional inhibition applies and the sheriff is ineligible to hold the office of county dance supervisor.

A deputy sheriff may, however, hold the office of county dance supervisor since there is nothing inconsistent or incompatible, nor contrary to public policy, in one person's holding these two offices. Nor is there any constitutional or statutory prohibition which prevents a deputy sheriff from holding such office.

CAE

Courts—Criminal Law—Prisons—Probation — Under sec. 57.03, Stats., probationer who has been convicted of another offense may, upon termination of his present sentence, be brought before court for sentence upon his former conviction.

April 13, 1926.

BOARD OF CONTROL.

Attention Mr. A. W. Bayley.

In your recent letter you state that one C. H. was arrested in Manitowoc, and, in October 1918, was placed on probation to the state board of control for a period of five years. Later, C. H. violated the conditions of his probation and, on August 26, 1919, his probation was revoked, C. H. having become an absconder and having disappeared.

On May 8, 1922, C. H. was convicted of grand larceny in Marathon county. He was sentenced to three years' imprisonment in the state prison. Sentence was stayed and he was then placed on probation. C. H. violated his second probation and he was, on February 23, 1924, delivered to the Wisconsin state prison to serve this three-year sentence.

You inquire whether C. H. may, upon the termination of his three-year sentence, be arrested and returned to the prison to serve out his original sentence.
Sec. 57.01, Stats., authorizes the suspension of sentence in certain cases, and the placing of the defendant upon probation. Sec. 57.03 relating to recommitment on violation of probation provides in part:

"Whenever it appears to the board of control that any such probationer in its charge has violated the regulations or conditions of his probation, the said board may, upon full investigation and personal hearing, order him to be brought before the court for sentence upon his former conviction, which shall then be imposed without further stay, or if already sentenced to any penal institution, may order him to be imprisoned in said institution and the term of said sentence shall be deemed to have begun at the date of his first detention at such institution."

C. H. was placed upon probation to the state board of control in 1918. In August, 1919, C. H. violated his probation, which was then revoked by the state board of control.

The provisions of sec. 57.03 are clear and unambiguous. Such section clearly authorizes the state board of control to bring C. H. "before the court for sentence upon his former conviction." See also Application of Knox, 180 Wis. 622.

It is therefore the opinion of this department that C. H. may, upon the termination of his present sentence, be brought before the court for sentence upon his former conviction.

CAE

Prisons—Probation—Board of control must, under sec. 57.03, Stats., upon violation of probation, order such probationer brought before court for sentence or, if already sentenced, must order him imprisoned.

Inability to comply with court order relative to employment, restitution and payment of costs due to physical disability of probationer, constitutes violation of probation.

April 13, 1926.

Board of Control.
Attention Mr. A. W. Bayley.

In your recent letter you inquire whether the state board of control may return to the court for further consideration a probationer, who, because of some physical disability, is unable to comply with the provisions of the court order relative to employment, reimbursement, and payment of court costs.
Sec. 57.01, Stats., provides:

"Whenever any adult is convicted of a felony punishable by imprisonment for a term not exceeding ten years * * * said court may, except as otherwise provided for by law, by order suspend the judgment or stay the execution thereof and place the defendant on probation, stating therein the reasons for the order, which shall be made a part of the record, and may impose as a condition of making the order or of continuing the same in effect that the defendant shall make restitution or pay the costs of prosecution, or do both."

Sec. 57.03, subsec. (1), provides in part:

"Whenever it appears to the board of control that any such probationer in its charge has violated the regulations or conditions of his probation, the said board may, upon full investigation and personal hearing, order him to be brought before the court for sentence upon his former conviction, which shall then be imposed without further stay, or if already sentenced to any penal institution, may order him to be imprisoned in said institution, and the term of said sentence shall be deemed to have begun at the date of his first detention at such institution. A copy of the order of the board shall be sufficient authority for the officer executing it to take and convey such probationer to the court or to the prison, * * * ."

Under sec. 57.03, subsec. (1), whenever, in the judgment of the state board of control it appears that a probationer has violated the regulations or conditions of his probation, then it is the duty of the board of control to "order him brought before the court for sentence upon his former conviction, which shall then be imposed without further stay, or if already sentenced to any penal institution, may order him to be imprisoned in said institution * * * ."

It is the opinion of this department that an inability to comply with the provisions of the court order relative to employment, restitution, and the payment of costs due to the physical disability of the probationer constitutes a violation of the conditions of the probation.

CAE
Public Lands—Public Officers—Commissioners of public lands may issue patent to city of Marinette for tract of land described in ch. 348, Laws 1925.

April 13, 1926.

COMMISSIONERS OF PUBLIC LANDS.

Attention Mr. M. Lampert.

In your recent letter you state that under ch. 348, Laws 1925, approved June 19, 1925, the commissioners of public lands are authorized, empowered and directed to and shall execute and deliver to the city of Marinette a patent for certain reclaimed lands lying along the shores of Green Bay on the east frontage of the city of Marinette. Such land is to be used for public park purposes. The land is described as follows:

“All that tract of land formed by accretion and reliction lying and being south of the north line extended or produced easterly, of block (50) of the Menominee River Lumber Company’s First Addition to Menekaune, Wisconsin, section ‘A,’ and lying and being east of the west line, extended or produced southerly, of block forty-eight (48) of the Menominee River Lumber Company’s First Addition to Menekaune, Wisconsin, section ‘A;’ said tract of land lying and being adjacent to the southeast boundary of fractional section nine (9), township thirty (30) north, range twenty-four (24) east, in the county of Marinette.”

You inquire as to the legality of issuing a patent for such land.

The first question to be considered is whether the title to such land is in the state. If the state has no title to such land, any patent issued by it would be void. Polk’s Lessee v. Wendell, 5 Wheat. (18 N. S.) 293; United States v. Conway, 175 U. S. 60.

In ch. 348, Laws 1925, it is stated that this tract of land has been formed by accretion and reliction. It is an elementary rule of law, firmly established in Wisconsin, that land formed by accretion, that is, the gradual and imperceptible deposit of alluvial soil upon the margin of the water, and land formed by reliction, that is, the gradual and imperceptible recession of the water, belongs to the owner of the contiguous land to which the addition is made. Doemel v. Jantz, 180 Wis. 225; Roberts v. Rust, 104 Wis. 619; Boorman v. Sunnuchs, 42 Wis. 233.

Where, however, the title to the bed of a lake is in the state, the riparian owner cannot, by erecting an embankment or building up land above the water of such lake, acquire title to the new land thus artificially formed. Diedrich v. N. W. U. Ry.
Co., 42 Wis. 248; Menominee River Lumber Company v. Seidl, 149 Wis. 316.

In the instant case no question of riparian rights is involved as title to the tract of land under consideration was declared by the Wisconsin supreme court to be in the state. Menominee Lumber Company v. Seidl, 149 Wis. 316, 321, 322.

Having disposed of the question of ownership, we now turn to a consideration of the power of the state to convey this land to the city of Marinette for park purposes.

It is well settled that the legislature has authority to exercise any and all legislative powers not delegated to the federal government nor expressly or by necessary implication prohibited by the national or state constitution. Outagamie County v. Zuehlke, 165 Wis. 32.

The legislature has power to dispose of lands belonging to the state so far as not restricted by the constitution. State ex rel. Owen v. Donald, 160 Wis. 21.

The land in question constitutes part of the ordinary domain of the state. In respect to its use, enjoyment and alienation, the same principles apply which govern the management and control of like property of individual proprietors. Cooley on Constitutional Limitations (7th ed.), pp. 752–753.

It is therefore my opinion that the state has the power to grant the land in question to the city of Marinette for park purposes.

This opinion is, of course, based upon the assumption that the tract of land described in ch. 348, Laws 1925, is the same land which was involved in the case of Menominee River Lumber Company v. Seidl, supra, title to which is in the state. The question of the boundaries of said land is, of course, one of fact to be ascertained by a survey.

Assuming that the state has title to all of the land here in question, it is my opinion that the legislature may grant such land to the city of Marinette.

HLE
Fish and Game—Muskrat—Navigable Waters—Licensee of muskrat farm has, under sec. 29.575, Stats., exclusive control of trapping of muskrats within territory described in his license.

General public may, however, in open season, trap upon waters of drainage ditch and upon any navigable waters within such area.

Elmer S. Hall,
Conservation Commission.

In your letter of December 31 you state that the conservation commission granted a muskrat farming license pursuant to sec. 29.575, Stats., embracing an area in the so-called Horicon marsh and within which area is the old river bed of the Rock River which is, a large portion of the time, a dry run due to the fact that a drainage ditch has been run lengthwise through the marsh and dredged to a depth much deeper than the original river bed. From this drainage ditch lateral ditches have been dredged which are about a mile apart.

You inquire whether the licensee of such territory has, under his license, control of the trapping of muskrats in the drainage ditch, lateral ditches, and the old river bed at such times as they may contain water and muskrats, or whether the general public has a right to trap in these waters during the open season for trapping.

Subsec. (7), sec. 29.575, relating to the establishment, operation and maintenance of muskrat farms, provides in part:

"Such license * * * shall entitle the licensee therein named or his successors or his assigns, to the exclusive right for and during said term to breed and propagate muskrats thereon, and to the exclusive and sole ownership of any property in all muskrats caught or taken therefrom * * * *.*"

Sec. 29.575, subsec. (10), Stats., provides:

"Nothing in this section shall be construed to affect any public right of hunting, trapping, fishing, or navigation except as herein expressly provided."

Under sec. 29.575 (7), the licensee of the territory hereinbefore described has exclusive control and ownership of all muskrats within such area, except that the general public has a right, during open season, to hunt, trap and fish upon any navigable
waters within such territory. Sec. 29.575 (10), Stats.; Olson v. Merrill, 42 Wis. 203; Willow River Club v. Wade, 100 Wis. 86.

If the old bed of the Rock River—though at times a dry run,—has, during certain seasons of the year, periods of navigable capacity, then, during such periods, the general public has a right, in open season, to hunt, fish and trap upon its waters. Sec. 29.575 (10), Stats.; Olson v. Merrill, supra; Willow River Club v. Wade, supra.

It appears that the drainage ditch which has been cut length-wise through the marsh has been dredged to a depth much deeper than the old river bed of the Rock River and thus diverts the water from the old channel of such river. Hence, such drainage ditch becomes the new channel of the Rock River. The Rock River is a navigable stream. In re Horicon Drainage District, 136 Wis. 227. Hence all rights and incidents of navigation attach to the drainage ditch which must be considered as the new channel of such river. It is, therefore, the opinion of this department that the general public has a right to hunt, fish and trap, in open season, upon the waters of this drainage ditch.

The general public has, however, no right to hunt, trap or fish upon the waters of the lateral ditches. The sole purpose of such ditches is to drain the surrounding land, and, unlike canals or rivers, they are not intended for use as highways of commerce or pleasure. Since such lateral ditches are not navigable the general public has no right to trap upon such waters.

CAE

Appropriations and Expenditures—Legislature—Special Session—Live Stock—Bovine Tuberculosis—Where special session is called by governor to make emergency appropriation in addition to that already provided for bovine tuberculosis eradication, action is not permitted on any proposed amendments to statutes relating to maximum specific indemnities to be paid upon condemnation and slaughter of animals.

April 15, 1926.

Henry A. Huber,
Lieutenant Governor.

Referring to the proclamation by the governor, calling the present special session of the legislature, which in part reads as follows:
"To appropriate the sum of $450,000 as an emergency appropriation to the department of agriculture to be used exclusively for the payment of indemnities to the owners of diseased animals, heretofore or hereafter condemned by the order of the livestock sanitary board * * *

you inquire whether an amendment may be received to the bovine tuberculosis emergency appropriation bill, providing for the appropriation mentioned, where such amendment proposes to increase or decrease the maximum indemnity which the state is to pay for animals condemned and slaughtered.

Sec. 11, art. IV, Const., provides:

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

Your question must be answered in the negative.

The appropriation which it is proposed to increase as provided in the call of the governor is contained in sec. 20.60, Stats., and reads:

"There is appropriated from the general fund to the department of agriculture:

""(2) (a) On July 1, 1925, six hundred fifty thousand dollars and annually beginning July 1, 1926, for a term of five years, seven hundred fifty thousand dollars, for the purposes of carrying on the work of bovine tuberculosis eradication, and the payment of indemnities on animals condemned and slaughtered according to the provisions of chapter 94 of the statutes, under the area test plan, the accredited herd plan, and the local testing plan by established, practicing veterinarians, whose work is approved by the department of agriculture. * * *"

Ch. 94, Stats., contains a provision as follows:

"For each animal condemned and slaughtered the owner shall receive in addition to the net salvage upon the certificate of the department of agriculture and the state shall pay the owner in cases coming under the co-operative agreement between the state and the United States a sum equal to one-fourth of the difference between the net salvage and the appraised or agreed value of the animal, but additional payment shall not exceed forty-five dollars for a registered bovine and twenty dollars for an unregistered one. In other cases the owner shall receive in addition to the net salvage, and the state shall pay, half of the
difference between the net salvage and the appraised or agreed value, but not more than ninety dollars for a registered bovine and forty dollars for an unregistered bovine.” Sec. 94.16, subsec. (1).

Your inquiry squarely raises the question whether the call of the governor permits bringing before this special session of the legislature for action any proposed amendments to any of the provisions under ch. 94 relating to the payment of indemnities to owners of animals condemned.

It is apparent from the wording of the call that the subject matter is the total amount of appropriation to be made available for payment of indemnities. The governor has no power to limit the action of the legislature upon the specific subject included in the call. In other words, the legislature is in no sense bound by any indication he gives as to the amount to be appropriated. The legislature has no power to take any action on any subject not included in the call under the provision that “no business shall be transacted except as shall be necessary to accomplish the special purpose for which it was convened."

In the present instance the wording of the call indicates that the special purpose was not a revision of the provisions relating to the condemnation and slaughter of diseased animals and the payment of indemnities to be paid thereon and expenses connected therewith, but merely the one question of the aggregate appropriation to be available for these purposes.

The constitution has vested with the governor the sole determination of whether or not a special session shall be held at all, and with that the sole determination in case a special session is called of the special purposes of such special session. It follows, therefore, that under the wording of this call dealing solely with the total appropriation mentioned, the appropriation is the special purpose, and the action of the legislature is limited to the consideration of that special purpose.

This is in accord with the opinion of Attorney General Morgan given to the special session of 1922, XI Op. Atty. Gen. 249, in which it was held that any bill relating to the subject of the prevention of frauds under the income tax law or to correct or prevent errors or to impose penalties for violations or making appropriations for these purposes was included within the call for the special session of 1922, but that a bill dealing with the exemptions under the income tax law was not included.

HLE
School Districts—Taxation—Public Utilities—All school districts (common school, free high school, etc.) within territorial limits of which is located public utility are entitled to distribution of taxes paid by utility provided for by sec. 76.28, Stats. Subsec. (1a) applied to concrete example.

Limitation of amount distributed to given school district to not exceeding actual cost of operating and maintaining its school is to total cost, irrespective of how that cost may be apportioned between towns and villages from territory of which district was formed.

April 17, 1926.

Tax Commission.

You refer to the amendment of sec. 76.28, Stats., made by ch. 441, laws of 1925, and to subsec. (1a) of the same section created by ch. 423, laws of 1925, which reads as follows:

"In all counties having a population of fifty thousand or less, fifty per cent of the amount of taxes received by any town or village from the state treasurer on account of the assessment of any street railway, light, heat, power or conservation company shall be retained by the treasurer thereof for general town or village purposes, and the remaining fifty per cent shall be equitably apportioned by the town board or village trustees to the various school districts or parts of school districts in which the property of such company is located, in proportion to the amount which the property of such company within each such school district bears to the total valuation of the property of such company in the town or village or parts thereof; provided, that no such school district shall in any event receive more than the actual cost of operating and maintaining its school."

You first call attention to the fact that said sec. 76.28 provides for the distribution to school districts by towns in counties having a population of 250,000 or more, and by towns and villages in counties having a population of 50,000 or less, of taxes received from the state treasurer on account of public utility properties located in the towns, but makes no provision for the distribution to the school districts of any taxes so received by villages and cities in counties having a population of 250,000 or more, by cities in counties having a population of 50,000 or less, or by towns, cities or villages in counties having a population of more than 50,000 and less than 250,000, and ask whether, in view of the exclusion of school districts in some towns, cities, villages, and counties from the benefits of the distribution
scheme, while granting the benefits to others, the discrimination being based entirely on population of the counties, the statute is constitutional; and if the answer is in the affirmative you then propound certain questions based upon an example of a situation where the public utility is located within the territorial limits of one town which, with another town and a village within the latter, constitutes both a joint common school district and a union free high school district, the union free high school district including all the area of the joint common school district.

I think we must assume that the question of how taxes levied and collected shall be distributed is one entirely for the legislature to determine within its constitutional powers (State ex rel. Superior v. Donald, 163 Wis. 626) and if there be an arbitrary discrimination or improper classification here it is a judicial question, which only the courts may authoritatively determine; in other words, I shall assume that the statute in question is constitutional.

Your example and questions (which I shall endeavor to answer seriatim) as to the interpretation of subsec. (1a) as applied to such example are as follows:

[In a county of less than 50,000 population] Town A, Town B, immediately adjoining A on the south, and Village C, located in the Town of B, comprise a union free high school district. All such area except a few sections in the western portion of Town A and a few sections in the northwestern portion of Town B is included in a joint common school district.

In the Town of A there is utility property, all of which is within the boundaries of said free high school and joint common school districts. Town A received $10,000 from the state treasurer on account of such utility property.

The expenses of operating and maintaining the free high school are $5,500, which have been apportioned as follows:

<table>
<thead>
<tr>
<th>Location</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Town A</td>
<td>$2,500</td>
</tr>
<tr>
<td>Town B</td>
<td>2,200</td>
</tr>
<tr>
<td>Village C</td>
<td>800</td>
</tr>
</tbody>
</table>

Total .......................... $5,500
The expenses of operating and maintaining schools of the joint common school district are $4,000, which have been apportioned as follows:

<table>
<thead>
<tr>
<th>Town</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Town A</td>
<td>$2,000</td>
</tr>
<tr>
<td>Town B</td>
<td>1,500</td>
</tr>
<tr>
<td>Village C</td>
<td>500</td>
</tr>
</tbody>
</table>

Total: $4,000

Question 1. Sec. 76.28, subsec. (1a), provides that 50% of the utility taxes received from the state treasurer by a town or village shall be apportioned “to the various school districts or parts of school districts in which the property of such company is located.” [a] Do the words “various school districts or parts of school districts” refer to all kinds of school districts or to common school districts only? [b] In the example mentioned above are both the free high school district and the joint common school district entitled to a portion of the utility tax under this section; or is only the common school district entitled to such a distribution?

(a) I can discover no intention of the legislature to limit the application of the statute to any particular kind of school district, and I think that any and all school districts, whether they are ordinary single districts, joint districts, high school districts, free high school districts, or union high school districts, are entitled to the distribution provided for. It is necessary under the calls of the statute that the utility be located within the district or districts to entitle the latter to the apportionment of taxes paid by the utility.

(b) In the example given, I think that both the union free high school district and the joint common school district are entitled to share in the distribution.

Question 2. If more than one school district is entitled to a distribution of such utility taxes, [a] what basis of division is to be made as between the different kinds of school districts? [b] In the example, how much is to be received by the free high school district and how much by the joint common school district?

(a) The statute requires that the 50% shall be equitably apportioned to the various school districts or parts of school districts in which the property of the utility in the example is located in the territorial limits of both districts. I think that an
equitable apportionment of the 50% is one which is made upon the basis of the total cost of operation and maintenance of the school in each district.

(b) Since the taxes paid by the utility amount to $10,000, 50% thereof is $5,000. The total cost of operation and maintenance of the schools in both districts is $9,500. Since that is in excess of the amount to be distributed, the equitable proportion of the $5,000 to which the union free high school district is entitled is 55/95ths; and to which the joint common school district is entitled is 40/95ths, or 11/19ths and 8/19ths, respectively, of the $5,000; computing the amount accordingly, the union free high school district would receive $2,894.73 and the joint common school district, $2,105.27.

Question 3. The same section of the statutes provides also that “no such school district shall in any event receive more than the actual cost of operating and maintaining its school.” Are these words to be interpreted to mean that the school district is limited in the amount which it may receive of such utility taxes to the total expenses of the entire school district, or is it limited to that amount which has been apportioned for collection to the town in which the utility property is located? In the example, is the amount which either or both school districts are entitled to receive from the town of A limited to the total expense of operating and maintaining the school district, i.e., $5,500 in the case of the high school district and $4,000 in the case of the common school district; or is it limited by the amount apportionable to the town of A, i.e., $2,500 in the case of the high school district and $2,000 in the case of the common school district?

This question has in effect been answered by the reply to question No. 2. The statute does not say that “no such school district shall, in any event, receive more than that part of the actual cost of operating and maintaining its school which is apportioned to such town or village.” The limitation is simply that no school district shall receive more than the actual cost of operating and maintaining its school; and a further limitation cannot be read into the statute. The fact that the school district’s territory comprised, or is included in, another town or village distinct from the town or village in which the utility is located and which receives the taxes does not require the limiting of the distribution of the apportioned taxes to the propor-
tion of costs of operation and maintenance of the schools in each district contributed by the town or village in which the utility is located.

FEB

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Elections—Prohibition party is entitled to place on ballot at primary in September for state, congressional or legislative offices.

April 17, 1926.

FRED R. ZIMMERMANN,
Secretary of State.

In your letter of April 12, you refer to an opinion given you under date of April 6, 1926, relative to the right of the prohibition party to a place on the official ballot at the primary in September. You inquire whether candidates for congress from the 4th and 5th districts, and for the state senate from the 5th, 7th and 9th districts, and for the assembly districts all of which are located wholly within Milwaukee county, will have a right to a place on the prohibition party ticket.

As pointed out in the opinion above referred to, one of the prohibition candidates at the last general election, namely, the candidate for governor, received more than one per cent of the total votes cast for governor.

Sec. 5.05, subsec. (6), par. (d), Stats., provides that any political organization which at the last preceding general election was represented on the official ballot may have a separate primary election ticket as a political party "if any of its candidates or individual nominees received one per cent of the total vote cast at the last preceding general election in the state, or subdivision thereof, in which the candidate seeks the nomination."

At the last general election the prohibition party had candidates in all of the districts to which you refer. At that election the prohibition candidate for governor received more than one per cent of the total vote cast for governor. It is, therefore, the opinion of this department that the prohibition party is entitled to a place on the ballot at the primary in September in all of the districts to which you refer, for state candidates as well as congressional, senatorial and assembly offices.

SOA
Criminal Law—Indeterminate Sentences—Prisons—Twelve commitment papers considered: it is decided that in each case minimum number of years of imprisonment is stated in accordance with statutory requirements.

April 19, 1926.

Board of Control.

You have submitted copies of twelve commitments made to the Wisconsin state reformatory and you ask to be advised if, in each of these cases, the minimum sentence is stated in accordance with the statutory requirements.

I shall take up these commitments in their regular order.

1. C. A. was convicted of incest, for which sec. 351.21, Stats., prescribes a penalty of not more than ten years nor less than two years. He was sentenced for an indeterminate term of not less than two years nor more than three. This is in compliance with statute. (See sec. 54.03.)

2. A. N. was convicted of pandering, for which offense sec. 351.16 fixes a penalty of imprisonment for a period not less than two nor more than twenty years. The sentence of not less than two nor more than three years is in compliance with the statute.

3. S. S. was convicted of manslaughter in the second degree, for which sec. 340.17 prescribes a penalty of four to seven years. The sentence for an indeterminate term of not less than four or not more than seven years is in compliance with this statute.

4. T. E. was convicted of manslaughter in the first degree for which sec. 340.13 fixes a penalty of from five to ten years. The sentence for an indeterminate term of not less than five years nor more than ten years is valid.

5. F. M. was convicted of the crime of assault and robbery (armed) for which sec. 340.39 fixes a penalty of from three to thirty years imprisonment. The sentence to the state prison for a general and indeterminate term of not less than three years nor more than ten years is valid.

6. A. F. was convicted of assault and robbery while armed, for which sec. 340.39 prescribes a penalty of from three to thirty years. This sentence for a general indeterminate term of not less than three nor more than five years is also valid.

7. R. S. was convicted of the crime of incest, for which sec. 351.21 fixes a penalty of from two to ten years imprisonment. The sentence to a general indeterminate term of not less than two years nor more than five years is in compliance with law.
8. L. H. was convicted of embezzlement, for which sec. 343.17 prescribes a penalty, if the value of the property embezzled shall not exceed $25,000 nor be less than $10,000, of imprisonment in the state prison not more than twenty years nor less than five years. The commitment paper does not give the value of the property embezzled, but if the value comes within the amount here specified, then an indeterminate sentence of from five years to seven years is valid.

9. E. K. was convicted of an offense which is not named in the commitment paper. I can, therefore, not inform you whether a sentence of imprisonment in the Wisconsin state reformatory of three to ten years is valid. If the penalty prescribed by the statute requires an indeterminate sentence in which the minimum is three years and the maximum ten or any number above ten years, then the above sentence is valid.

10. A. W., J. Z. and J. R. were convicted of larceny from the person, for which sec. 340.39 prescribes a penalty of from three to thirty years. A sentence for an indeterminate term of not less than three years nor more than thirty years is therefore valid.

JEM

Public Officers—Mayor—County Board Chairman—Offices of mayor in city of fourth class and chairman of county board are compatible and may be held by same person.

John B. Chase,
District Attorney,
Oconto, Wisconsin.

You inquire if one man can hold the offices of mayor in a city of the fourth class, and also chairman of the county board of the county in which said city is located.

I have carefully examined the statutes with reference to the duties of mayor and chairman of the county board, and I am unable to discover any conflicting duties which would make the two offices incompatible.

In an opinion rendered May 1, 1920, IX Op. Atty. Gen. 230, which involved the question of the compatibility of the offices of mayor and county board member, the following statement is made, p. 23:
"There being nothing in the nature of the two officers 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."

I see no reason for applying a different rule in regard to the compatibility of offices of mayor and chairman of the county board. You are therefore advised that one man can hold the offices of mayor and chairman of the county board.

CAE

Elections—Public Officers—Town Chairman—Town Clerk— Although town chairman and town clerk who are candidates for re-election should not act as inspectors of election their re-election is valid in absence of fraud.

April 19, 1926.

J. V. LEDVINA,
District Attorney,
Park Falls, Wisconsin.

You state that at one of the recent town elections the town chairman and town clerk who were candidates for re-election acted as election officers. They were re-elected to office. You inquire: (1) Was the re-election of such chairman and clerk valid? (2) What effect would the election have on the election of other officers elected at such election?

In an opinion given to the district attorney of Kenosha county on March 14, 1924, XIII Op. Atty. Gen. 138, it was held:

"The supervisors who are candidates at the election cannot serve as inspectors thereof. I have so advised with regard to town officers generally (XII Op. Atty. Gen. 146), and I see no reason why that conclusion is not applicable to supervisors, despite the fact that sec. 6.32, subsec. (2), Stats., provides that supervisors shall be inspectors of election in towns. That provision must be taken to mean eligible supervisors, and by sec. 6.32, subsec. (1), a person who is a candidate at an election is not eligible to be inspector thereof."

I see no reason for departing from the rule laid down in the above quotation. This, however, does not dispose of your question.
Sec. 6.75, Stats., provides as follows:

"In every election for the choice of any officer, unless otherwise provided by law, each elector shall have one vote and no more; and the person appearing satisfactorily to have received the highest number of legal votes for any office shall be deemed to have been duly elected to that office, and the canvassers shall so determine and certify. The legality of such votes so appearing, failures to fully comply with the law respecting noticing or conducting the election or canvassing or returning the vote, shall be disregarded."

I think that under this statute the court would hold that the chairman and clerk were legally elected unless there were some showing of fraud. My conclusion is strengthened by a consideration of the early case of State ex rel. Bancroft v. Stumpf, 21 Wis. 579. In this case there were only two inspectors of election, although three inspectors and two clerks were required. I quote from the opinion of the court, p. 579-580:

"* * * Our statute undoubtedly contemplates that each election board shall be composed of three inspectors and two clerks (R. S., ch. 7, sec. 20 et seq.), and such reasonable and proper requirements of the law ought not to be disregarded, but if these statutory regulations are not complied with, and the board is composed of only two inspectors, what is the consequence? Does the irregularity vitiate and destroy the election at such poll? It appears to us not, and that these provisions of the statute in regard to the number of inspectors and the manner of organizing the board, are in the main directory in their character, and not imperative."

The courts, as a rule, are extremely reluctant to declare elections void. Assuming as above stated, that there was no fraud in the conduct of the election, your first question is answered in the affirmative. The above answer makes it unnecessary to rule upon your second question.

CAE
Public Officers—Village Constable—Village Marshal—Offices of village constable and village marshal may be held by same person.

A. L. Devos,
District Attorney,
Neillsville, Wisconsin.

You inquire if the office of village constable and the office of village marshal can be held by the same person.

It is not apparent how this question is put to you in your capacity as district attorney. The attorney general is the official advisor of district attorneys, but only as to matters pertaining to the duties of their office. Sec. 14.53, subsec. (3).

I have, however, examined the statutes with respect to village marshal and village constable, and I am unable to find anything which would indicate that the two officers are incompatible and could not be held by the same person. Sec. 61.28 which sets forth the duties of the village marshal provides:

"* * * He shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables, and be taken as included in all writs and papers addressed to constables."

This provision, it seems to me, is sufficient in itself to show that the two offices are compatible. Your question is therefore answered in the affirmative.

CAE

Bridges and Highways—Construction Limits—How facts which fix "construction limits" of state trunk highway system in places containing population of 2,500 or more shall be ascertained and whether and how such limits shall be marked is matter of administrative detail entirely within discretionary powers of state highway commission.

Highway Commission.

You refer to the opinion to you of October 13, 1925 (XIV Op. Atty. Gen. 447), in which it was held that the provision of subsec. (1), sec. 1313, Stats. 1917, 1919 and 1921, that:

"The state trunk highway system shall be laid out exclusive of every street and road in a place having a population of twenty-
five hundred or more by the last federal census, except that portion of any such street or road along which the houses average more than two hundred feet apart in any platted block or equivalent distance,"

remains in force, and that as cities become more thickly populated the "construction limits" automatically change, and that the highway commission is empowered to make the necessary determination of the facts existing at any given time and place which establishes such limits. You state that it has been decided by the commission to cause posts to be set at such construction limits in every city of two thousand five hundred or more population, and you inquire what the proper procedure in connection therewith is.

The only answer to your question that can properly be given is that the commission simply ascertains what the facts are as to population and average distance apart of houses in platted blocks or equivalent distances along any street or road connecting state trunk highways, and that it is purely a matter of administrative detail entirely within the discretion of the commission as to how the facts shall be ascertained and as to whether and how the construction limits as fixed by its determination of the facts shall be marked. The statutes do not attempt to lay down any rules of procedure, and we cannot do so. The matter lies within the broad field of administrative powers and duties conferred upon the commission and committed to its sound discretion by ch. 82.

FEB
Automobiles—Bridges and Highways—Law of Road—Limitation upon weights and dimensions of vehicles and loads imposed by subsec. (4), sec. 85.18, Stats., applies to motor vehicles and trailer separately.

Under provisions of sec. 85.18, subsec. (5), Stats., trains consisting of three or more vehicles cannot be operated on highways between 5:00 A.M. and 8:00 P.M.; between hours of 8:00 P.M. and 5:00 A.M. such trains, not exceeding 100 feet in total length, may be operated only under permit and while complying with regulations as to lights.

April 20, 1926.

HIGHWAY COMMISSION.

You direct attention to subsec. (4) and (5), sec. 85.18, Stats., relating to the maximum permissible dimensions of vehicles on the highways, and ask the following questions:

1. When a trailer is attached to a truck is the combination presumed to be one vehicle or two?

2. In such case does the limitation of subsec. (4) apply to the combination of the truck and trailer?

3. What is the maximum length of train that can be operated without requiring a special permit as provided by subsec. (5)?

It has heretofore been ruled by the attorney general that the limitations of said subsec. (4) upon the weight and dimensions of vehicles and loads apply to the truck, tractor, or other motor vehicle, and the trailer separately. XII Op. Atty. Gen. 236. That ruling is adhered to, and answers your first and second questions.

As to the third question, said subsec. (5) authorizes the issuing of permits by the commissioner of public works in cities of the first class and by the officer in charge of the maintenance of the highways or streets in other units of government "for the operation of trains consisting of tractors, trailers or wagons not exceeding one hundred feet total length between the hours of eight o'clock P.M. and five o'clock A.M. on such route or routes as may be designated in the permit," and provides:

"* * * Such trains shall carry, in addition to the lights prescribed by statute and the existing ordinances of the unit of government in which it is moved, a red light at the rear end, and a white light on each side of each trailer, so placed as to make the train visible from all sides."
The statute does not specifically define the term "train," but I think that the intention appears from the subsection just referred to and the other provisions of ch. 85, Stats., that there is included within that term any three or more connected vehicles, and that a motor vehicle to which is connected a single trailer or semitrailer is excluded.

I am also of the opinion that no "train" (consisting of three or more connected vehicles) can be operated on the highways, with or without a permit, between the hours of five A. M. and eight P. M., and under permit only when not exceeding one hundred feet in total length and while complying with the regulations as to lights. The reason for not permitting the operation of "trains" at all in the daylight hours, I assume, is because of the general congestion of traffic on the highways, and particularly city streets, during the daytime.

Ralph M. Immell,
Adjutant General.

You submit the following question for the opinion of the attorney general:

"Is a corporation organized under sec. 21.42, revised statutes, Wisconsin, 1925, considered a private corporation, eligible to borrow money from state life fund, state fire fund, and teachers' retirement fund?"

The statute quoted by you provides as follows:

"(1) Such company, when such organization is perfected, shall without any further proceeding constitute a corporate body to be known by the name by which such company is officially designated under the military laws and regulations of the state, and shall possess all the powers necessary and convenient to accomplish the objects and perform the duties prescribed by law.

"(2) The members of such military company in good standing and no others shall constitute the members of such corporation and shall elect three trustees who shall manage and administer..."
the business of such corporation. The trustees shall elect one of their number president, and one vice president and shall also elect a secretary.

"(3) Each such company may take by purchase, devise, gift, or otherwise and hold so long as such company is an existing company and a part of the national guard of Wisconsin any property real or personal. All such property shall be in the custody and control of the trustees hereinbefore provided for.

"(4) 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."

You will note that the state does not have any title to or proprietary interest in the property of the corporation except that when the company is disbanded its property shall become the property of the state. Until that time, however, the company is the owner of and has control of the property. A public corporation is defined as follows:

"Public including municipal corporations are called into being at the pleasure of the State, and while the State may, and in the case of municipal corporations usually does, it need not obtain the consent of the people of the locality to be affected. * * * * Public corporations within the meaning of this rule are such as are established for public purposes exclusively,—that is, for purposes connected with the administrations of civil or of local government,—and corporations are public only when in the language of Chief Justice Marshall, ‘the whole interests and franchises are the exclusive property and domain of the government itself’ such as quasi corporations (so called), counties and towns or cities upon which are conferred the powers of local administration.” 1 Dillon Municipal Corp. (5th ed.), sec. 92. See also 1 Thompson on Corp. (2d ed.), secs. 21 and 22; Dartmouth College v. Woodward, 4 Wheat. 17 U. S. 518.

You will note that the corporation created under sec. 21.42 does not have the above attributes which are required of a public corporation. You are, therefore, advised that a corporation such as you refer to is a private corporation at least in the sense that it is eligible to borrow money from the funds mentioned in your inquiry.

CAE
Courts—Public Officers—Justice of Peace—Municipal court of Fond du Lac county is given exclusive jurisdiction to try criminal cases that arise in city of Fond du Lac. Justices of peace in city of Fond du Lac still have jurisdiction to try criminal cases that arise in Fond du Lac county outside of city of Fond du Lac. Proceeding to secure search warrant or for issuing of peace warrant is not criminal action within contemplation of ch. 244, Laws 1921.

April 21, 1926.

James Murray,
District Attorney,
Fond du Lac, Wisconsin.
You have submitted the following question:

"1. Does the municipal court act created by chapter 244 of the laws of Wisconsin for the year 1921 abrogate the original jurisdiction of duly elected and qualified justices of the peace in the city of Fond du Lac with regard to criminal actions wherein the cause of action arises in Fond du Lac county, but outside of the city limits of said city of Fond du Lac?"

The material part of said ch. 244, Laws 1921, is as follows:

"Section 17. The municipal court shall have exclusive original jurisdiction to hear, try and determine all criminal actions and misdemeanors arising in the city of Fond du Lac, the punishment of which does not exceed six months' imprisonment in the county jail or a fine of one hundred dollars, or both said fine and imprisonment, and shall have concurrent jurisdiction with the justices of the peace and other magistrates throughout the county, except in the city of Fond du Lac * * *.

"Section 18. Said judge and circuit court commissioners shall have exclusive jurisdiction to institute and conduct examinations in all criminal and bastardy cases arising within the city of Fond du Lac, and said judge shall have the power and jurisdiction to cause to come before him the persons so charged with committing bastardy or criminal offense, within such district and commit them to jail or bind them over for trial at the next term of the circuit court, as the case may require, and shall have power and jurisdiction concurrent with the justices of the peace or other magistrates throughout the county * * *.

Under sec. 360.01

"Justices of the peace shall have the power and jurisdiction throughout their respective counties as follows:

"* * * To hear, try, and determine all charges for offenses arising within their respective counties and punishment whereof
does not exceed six months' imprisonment in the county jail or a fine of one hundred dollars, or both such fine and imprisonment, except as otherwise provided."

Ch. 244, Laws 1921, in sections 17 and 18, as above quoted, confers upon the municipal court of the city of Fond du Lac exclusive jurisdiction to hear, try and determine all criminal actions and misdemeanors arising in the city of Fond du Lac. This is, however, not the only criminal jurisdiction that such justices have. Under sec. 360.01 the justices of the peace of Fond du Lac county have jurisdiction to try criminal cases that arise in all parts of Fond du Lac county outside of the city of Fond du Lac. The right to try criminal actions that arise in parts of Fond du Lac county outside of the city of Fond du Lac have not been taken away by the provisions of said ch. 244.

Your question must, therefore, be answered in the negative.

You also inquire:

"2. Are 'search warrants' and 'peace warrants' considered as criminal actions within the meaning of the above entitled act?"

Sec 260.06 defines a criminal action as one prosecuted by the state as a party against a person charged with a public offense, for the punishment thereof. Under this definition neither proceeding for the issuing of a search warrant nor the proceeding for the issuing of a peace warrant is a criminal action.

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

JEM
Bridges and Highways—Bridge on portion of town line highway maintenance of which is, by agreement between two towns, charged to one town must be maintained by town charged with maintenance of highway.

County board may aid in reconstruction of such bridge only after electors of town have voted to rebuild bridge and have provided necessary funds therefor.

MAX VAN HECKE,
District Attorney,
Merrill, Wisconsin.

April 21, 1926.

The material facts presented in your letter of March 24 are as follows:

The respective town boards of towns S and C in your county entered into an agreement in 1885 concerning the construction, maintenance, and repair of a road located on the line between the two towns. This road was two miles long. One mile of the road under the agreement was to be constructed and maintained by town S, and the other mile by town C. Each portion of the road was intersected by a creek and two bridges were built. The bridge on the portion of the road the maintenance of which was assigned to town C, now needs to be rebuilt. The chairmen of the respective towns have petitioned the county board to assist in rebuilding this bridge. You state that in your opinion each town must bear its proportionate share in the expense of rebuilding the bridge, and you inquire whether under the agreement town S has a remedy against town C, and whether the fact that the chairman of town S joined in the petition to rebuild has any effect on the right to recover.

Subsec. (3), sec. 80.11, authorizes the respective supervisors of towns to determine the portion of a highway constructed on a town line which shall be maintained by each town “and each town shall have all the rights and be subject to the liabilities in relation to the part of such highway to be made or repaired by it as if it were wholly located in such town.”

Subsec. (8), sec. 80.11, provides:

“Unless otherwise provided by statute or agreement every highway bridge on a town, village or city boundary shall be maintained by the municipalities in which it is located, * * *.”

This department has held that the reconstruction of a bridge under the facts presented here devolves upon the town whose
duty it is to maintain that part of the highway in which the bridge is located. XIII Op. Atty. Gen. 162. The bridge which is to be rebuilt is located in the portion of the highway the duty of maintaining which devolves on town C. Consequently town C must rebuild the bridge.

You state that the chairman of the respective towns have petitioned the county board to rebuild the bridge in question. It is of course true that the county board may construct or improve or aid in constructing or improving any road or bridge in the county. Sec. 83.03 (6), Stats.; X Op. Atty. Gen. 1082; XII Op. Atty. Gen. 138; XIII Op. Atty. Gen. 162. In case the county board determines to build the bridge under this section the expenses thereof will be met wholly by the county and no part will be charged to either of the towns.

Under sec. 87.01 the county board is required to appropriate money to aid in the construction or improvement of bridges located in towns, subject to statutory conditions “when any town has voted to construct or repair any bridge on a highway maintainable by the town,” and has provided for such portion of the cost of such construction or repair as is required by this section, and after the town board has filed a petition with the county board setting forth the facts and the location of the bridge. The county board is not obliged to act until the statutory provisions have been complied with. The statutes provide that the petition must be signed by the members of the board or boards. The petition signed by the respective chairmen of two towns does not comply with the statute.

Sec. 87.01 does not authorize the county board to assess any portion of the cost of constructing a bridge to a town. The statutes provide that the town’s share of the cost must first be voted, and that after the other statutory provisions have been complied with the county board must aid in the construction of the bridge. The county board, however, has no power to act until all the statutory provisions have been met.

SOA
Public Officers—Justice of Peace—City Treasurer—Offices of justice of peace and city treasurer are incompatible.

WILLIAM M. GLEISS,
District Attorney,
Sparta, Wisconsin.

You inquire whether the offices of city treasurer and justice of the peace of a city of the fourth class are incompatible.

Sec. 62.09, subsec. (9), par. (a), Stats., provides.

"The treasurer shall collect all city, county and state taxes, receive all moneys belonging to the city or which by law are directed to be paid to him, and pay over the money * * * *"

Cities of the fourth class have a designated number of justices of the peace. If a justice of the peace were also a city treasurer, he would be disqualified from hearing actions involving the collection of city taxes or in which the city would be interested, and in which he, as city treasurer, would either indirectly or directly represent the city. Frequent incapacity through interest on his part would deprive the city of its required number of justices of the peace.

"* * * Physical impossibility is not the incompatibility of the common law, which existing, one office is ipso facto vacated by accepting another. Incompatibility between two offices, is an inconsistency in the functions of the two; as judge and clerk of the same court—officer who presents his personal account subject to audit, and officer whose duty it is to audit it. * * * * The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other." People v. Green, 58 N. Y. 295, 304–305.

Incompatibility must exist between two offices one of which has over the other the power of audit. Cotton v. Phillips, 56 N. H. 220.

The following offices have been held incompatible: (1) The offices of mayor and police justice—Howard v. Harrington, 96 Atl. 769, L. R. A. 1917A 211; (2) City secretary and recorder—State v. Brinkerhoff, 66 Texas, 45; (3) County treasurer and justice of the peace—Rex v. Patterson, 4 B. & Ad. 9; (4) Town clerk
Opinions of the Attorney General


Tax suits are brought before a justice of the peace and where a city has no police justice a justice of the peace has jurisdiction to hear, try, and determine prosecutions for violation of city ordinances. He would receive fines which he ordered paid, and would account for the proceeds to the city as city treasurer, which would seem to be an anomaly.

Because of this conflict of interest and inconsistencies I must conclude that these offices are incompatible.

MJD

Automobiles—Drunken Auto Drivers—One who has been convicted of driving auto along public highway while intoxicated contrary to sec. 343.182, Stats., and has been prohibited by court from driving any motor vehicle of any kind for one year under sec. 85.22, Stats., may be punished under secs. 256.03 to 256.06, inclusive, for criminal contempt for violating order.

April 23, 1926.

Howard D. Blanding,
District Attorney,
St. Croix Falls, Wisconsin.

You state that A was convicted in municipal court for Polk county of driving an auto along a public highway while intoxicated, contrary to sec. 343.182, and in addition to the penalty therein prescribed, the court made and entered an order prohibiting such person from driving any motor vehicle of any kind for a period of one year, pursuant to subsec. (4), sec. 85.22, Stats., which provides:

"Whenever any person is adjudged guilty of having driven an automobile, motor vehicle, motor truck, motor delivery wagon, automobile bus or other similar motor vehicle while intoxicated, the court in addition to imposing a fine or jail sentence, or both, may make and enter an order prohibiting such person from driving any motor vehicle of any kind for a period of not more than one year from the date of the making of the order."

You state that A has violated this order, and is again driving his auto, and inquire under what statute this man may be prosecuted.

You are referred to sec. 256.03 to sec. 256.06, inclusive, in which are enumerated the instances in which a contempt may
be committed, and provisions for punishment. Subsec. (3), sec. 256.03, provides that willful disobedience of any process or order lawfully issued or made by any court shall constitute criminal contempt. It seems clear to me that one who has been prohibited from driving by such an order and who violates it is in contempt of court, and can be punished accordingly under the foregoing sections.

MJD

_Mothers' Pensions—Legal Settlement_—Woman may acquire legal settlement in county although she is receiving mother's pension.

JOHN A. LONSDORF,
_District Attorney,_
Appleton, Wisconsin.

In your letter of February 25 you refer to a letter of this department of February 24, XV Op. Atty. Gen. 78, and you say that the question you desire answered is as follows:

"Can a woman with several children receiving mother's pension from one county by moving to another county and residing there more than one year _gain a new legal settlement in the latter county for purposes of poor aid_ as provided in sec. 49.02 (4) even though she was still receiving mother's pension in the former county?"

Sec. 49.02, subsec. (4), provides:

"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; but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein."

The answer to your question hinges upon the fact of whether a woman receiving mother's pension is a pauper within contemplation of the above quoted statute. If she is a pauper, then under the above statute it is impossible for her to acquire a legal settlement in the county while she is receiving a mother's pension, although the mother's pension is paid by the county from which she has moved.

So-called mother's pension is not relief given to the mother, but is an aid granted to the children. The statute calls it "aid for dependent children." Sec. 48.33, subsec. (5), Stats.
The aid given is called a pension, and I am of the opinion that a mother receiving a so-called mother's pension is not a pauper within contemplation of the above-quoted sec. 49.02, subsec. (4). I am therefore of the opinion that your question must be answered in the affirmative.

JEM

Indigent, Insane, etc.—In case arising under sec. 49.10, Stats., it is duty of board of control to determine value of maintenance and to collect same. Indigent insane person may be committed to state hospital for insane only upon judicial determination of such person's sanity and upon proper commitment.

April 24, 1926.

BOARD OF CONTROL.

Attention Mr. H. W. Williams.

In your recent letter you submit several questions:

1. "In the event that a patient is admitted to our state hospital as a public charge and it is then discovered that he has property liable for his support under section 49.10 which rate for his maintenance applies (1) the $4.80 under section 51.08 or (2) the value of such maintenance (49.10) which has been established by this board under section 51.10 at $7.50 per week?"

Sec. 49.10, Stats., provides in part:

"If any person at the time of receiving any relief, support or maintenance at public charge, under this chapter or as an inmate of any state or municipal institution, or at any time thereafter, is 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."

Sec. 49.10 authorizes the board of control to "sue for and collect the value" of the maintenance in all cases where the person receiving the maintenance has property chargeable. It is the duty of the board, in such cases, to determine the value of the maintenance and to collect such amount from the person or his estate.

If the $7.50 per week rate as established for voluntary patients under sec. 51.10 is the value of the maintenance furnished
the patient, then the board may adopt that rate and collect such
amount. It is clear, however, that in all cases arising under
sec. 49.10 the question of the value of the maintenance is one of
fact to be determined by the board of control. Hence, it is for
the board itself to determine the value of the maintenance and
to collect the same.

2. In your second question you inquire as to the procedure
to be adopted in a case where a patient makes application for
admission to a state hospital as a voluntary patient under sec.
51.10 and it is then discovered that he is indigent. The question
you ask is whether such person may be admitted to the state
hospital and the cost of his maintenance charged to the county
of his apparent residence, or whether such person must be ad-
mitted in the regular way in order that his legal residence may
be determined and the county chargeable for his maintenance be
established.

After a careful examination of the statutes, it is my opinion
that where a person makes application for admission to a state
hospital for insane under sec. 51.10, and it is then discovered
that he is indigent, such person must be committed in the regu-
lar way. Sec. 51.10 applies only to such voluntary patients as
are able to pay the cost of their maintenance. It does not apply
to indigent persons. The proper procedure, in all such cases, is
to have such person committed in the regular way, that is, have
a judicial determination of such person’s sanity, a determina-
tion of his legal residence, and an order of commitment issued
by the judge.

CAE

Fish and Game—Bait—Under sec. 29.37, subsec. (6), Stats.,
no frog or minnow, dead or alive, nor any part thereof, may be
used as bait.

Live angleworm used as bait, is “live bait” within meaning
of above named section. Dead angleworm may, however, be
used as bait.

April 24, 1926.

Conservation Commission.
Attention Mr. Matt Patterson

In your letter of April 14 you inquire whether under sec.
29.37, subsec. (6), Stats., a dead frog or dead minnow or any
Opinions of the Attorney General

part thereof may be used as bait. You also inquire whether a live angleworm, or a dead angleworm, may be used.

Sec. 29.37 (6) relating to the use of set lines provides in part:

“In the Mississippi river, Lake Pepin and Lake St. Croix, and Lake Winnebago not to exceed twenty lines with not to exceed one hundred hooks on each line may be used by each licensee, but no frog, minnow or live bait shall be used.”

It is the opinion of this department that sec. 29.37 (6) applies to dead frogs and dead minnows as well as to live frogs and minnows. Hence, no frog or minnow, dead or alive, nor any part thereof, may be used as bait.

A live angleworm used as bait is “live bait” within the meaning of the above section. Therefore, live angleworms may not be used on set lines in the above named waters. Dead angleworms are, however, not within the inhibition of the foregoing section and may be used.

CAE

Bankruptcy—Banks and Banking—In liquidating bank priority should be given claims for labor performed within six months prior to taking over bank.

If right to priority appears on face of claims, and investigation confirms that right, priority may be allowed even though not specifically claimed.

April 24, 1926.

W. H. Richards,
Deputy Commissioner of Banking.

You ask whether in liquidating a state bank the claims of persons who performed labor, at the request of the bank cashier, on farms in which the bank had an interest should be allowed as preferred claims. You also ask whether these claims should be treated as preferred even though no claim is made for a preference.

Sec. 224.05, Stats., provides:

“If any bank, banking institution or trust company, being indebted to the state of Wisconsin, or indebted to any county, city, town or other municipality therein, for deposits made or indebtedness incurred after the passage of this act, becomes insolvent or bankrupt, the state, county, city, town or other municipality shall not be a preferred creditor and shall have
no preference or priority of claim whatever over any other creditor or creditors thereof; but a just and fair distribution of the property of such bank, banking institution or trust company, and of the proceeds thereof, shall be made among the creditors thereof pro rata, according to the amount of their respective claims. Nothing herein contained shall in any manner affect the provisions of law as they now exist providing for the payment of unpaid taxes and assessments, laborer's claims, expenses of assignment and execution of the trust."

The provisions of law referred to are undoubtedly those contained in sec. 128.16, Stats.:

"* * * But before making any dividend the assignee shall pay all taxes assessed upon the property assigned, which remain unpaid, and the compensation due all laborers, servants and employees for labor or personal services performed for the assignor within the six months next preceding the making of the assignment, the claims for which shall be paid by him next after the payment of unpaid taxes and assessments, debts due the United States or this state, the expenses of the assignment and the execution of the trust."

Subsec. (1), sec. 220.08, Stats., does not expressly mention insolvency and bankruptcy as reasons for taking over and liquidating state banks. However, questions of priority or preference arise only when the bank is insolvent or bankrupt. While sec. 220.08, Stats., contains no provisions for allowing the preference or priority of claims, sec. 224.05, Stats., clearly implies their allowance in accordance with the provisions of sec. 128.16, Stats. It follows, therefore, that if the labor for which the claim is made was performed within six months prior to taking over the bank, it should be paid in full before the payment of dividends on general claims.

According to Collier on Bankruptcy, Vol. 2, p. 1484, 13th ed., under the federal bankruptcy law a priority should be specifically claimed; and if not claimed, it will be deemed waived. It is not obligatory on the banking department in liquidating banks to follow the strict practice of the federal bankruptcy law. If, therefore, the right to a priority appears on the face of a claim, and investigation confirms that right, the priority may be allowed even though not specifically claimed.

ML
Indians—Taxation—Indian reservation lands become taxable by state when patent conveying fee title to Indian has been recorded in general land office and then delivered to allottee so as to vest title in Indian.

April 26, 1926.

LEE H. CRANSTON,
Assistant District Attorney,
Green Bay, Wisconsin.

You submit two questions as to the right of the state or local subdivisions thereof to tax certain Indian reservation lands under the following conditions:

1. After the trust deed has been issued and before the trust period expires, and therefore before the patent has been issued.
2. After a deed has been issued and the trust period has expired, the patent not having been issued.

Your questions are somewhat confused because of the use of the words "trust deed" and "patent," which do not apply with exactness to the terms used in the federal statutes, which were sufficiently confused by congress in using the word "patent" to designate or describe two instruments quite different in their character and effect.

The question of the character of the Indian title has been the subject of much controversy, but the title to the soil in the United States finally became vested in the government and for years the government granted to the various tribes of Indians reservation rights to certain tracts of land which gave to the tribe the right to occupy and use the tract for a definite term of years, and the use was largely for fishing and hunting, that being the common occupation of the Indians at that early age.

After years of experimenting with that method of treating the Indians, congress determined to try an entirely new plan for the purpose of breaking up the tribal and community interests and to divide up the property so as to make individual ownership an incentive to industry. So congress declared it would make no more Indian reservation grants, but would divide up the reservation lands by issuing patents to the individual members on specified tracts somewhat on the principle of homestead pre-emption and other grants of government lands.

That practice seems to have been started in 1875 (18 Stats. at Large, 420, 3 Fed. Stats. Ann. 819), which provided that the
lands patented should not be alienable for a period of five years. In 1884 (23 Stats. at Large, 96, 3 Fed. Stats. 820) a trust period of twenty-five years was created, during which the government would hold the lands in trust for the Indians.

February 8, 1887, congress adopted ch. 119 (24 Stats. at Large, 388, 3 Fed. Stats. Ann. 821), entitled

"An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Sec. 1 of that act authorized the president to have any part of such reservation lands surveyed and to cause an allotment to each Indian located thereon not exceeding 80 acres of agricultural land to each.

Sec. 5 of that act provides that upon the approval of the allotments by the secretary of the interior, he shall cause patents to issue therefor in the name of the allottee, which patents shall be of legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, and that at the expiration of said period, the United States will convey the same by patent to such Indian or his heirs in fee, with the further right to the president to extend that period of trust.

Sec. 6 of that act provides that at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee as provided in sec. 5 of the act, then the allottee shall have the benefit of and be subject to the laws both criminal and civil of the state in which he may reside, and shall be a citizen of both the United States and the state.

Sec. 5 provides the method for issuing such final patents so as to vest the title. It provides:

"* * * The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto."

These provisions of the statutes must be construed with reference to the provisions in the constitution and the enabling acts.

Art. IV, sec. 3, subsec. (2), United States Const., provides:
"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *.”

The Wisconsin enabling act was adopted by congress and accepted by the state as a sort of compact agreement between the government and the state pledging each to certain general principles of good faith dealings.

Par. 5, sec. 7, of the enabling act of Wisconsin provides:

"* * * That said state shall never interfere with the primary disposal of the soil within the same by the United States, nor, with any regulations congress may find necessary for securing the title in such soil to bona fide purchasers thereof; and that no tax shall be imposed on lands the property of the United States; * * *.”

By that compact agreement congress pledged the state to two general principles, first, not to interfere with the primary or first disposal of the soil by the government and, second, not to tax lands the property of the United States.

The state accepted that provision in sec. 2, art. II, of the constitution wherein it provided:

"The propositions contained in the act of congress are hereby accepted, ratified and confirmed and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this state shall never interfere with the primary disposal of the soil within the same by the United States nor with any regulation congress may find necessary for securing the title to such soil to bona fide purchasers thereof; and no tax shall be imposed on land the property of the United States; * * *.”

That provision was carried into sec. 70.11, Stats., so the state has kept faith with the government and the provisions create a simple and comprehensive provision broad enough to cover every possible situation. It will be noted that the only restriction imposed upon the state’s right to tax lands was that it should not tax the lands the property of the United States. So I think the test in each case should be when the title passes from the United States to the Indians.

Some confusion in the decisions seems to have arisen from the unfortunate use of the word “patent” in describing the two instruments in sec. 5 of the allotment statutes above cited. The United States supreme court calls attention to that fact in the case of United States v. Rickert, 188 U. S. 432, and solves the
problem quite satisfactorily by holding that the first patent, so-called, was not really a patent within the usual meaning of that term, but a mere instrument to show that for a period of twenty-five years the United States would hold the land in trust for the allottee and then convey the lands to the allottee in fee. So that during that twenty-five years the lands would be property of the United States within the meaning of the enabling act, the constitution and the Wisconsin statutes.

Sec. 6 of that act provides that at the end of the trust period the land shall be conveyed to the Indians by patent in fee, and when that is done, the allottee shall have the benefit of and be subject to the laws, both criminal and civil, of the state.

It is stated in some of the decisions that while the Indian is still a ward of the nation, there is power in congress to even reimpose restrictions on the transfer of property by the Indians. Brader v. James, 246 U. S. 88; Goudy v. Meath, 203 U. S. 146. There seems to have grown out of this rule a custom by the secretary to restrict or claim the right to restrict the lands from taxation after the restriction period had elapsed, but the court in McCurdy v. United States, 246 U. S. 263, p. 269, says that the secretary

"is not given authority to exercise control of any property in which the funds released may thereafter be invested, or otherwise to create with the released funds a governmental instrumentality for the protection of the Osages,"

and the court, p. 270, calls attention to the fact that in sec. 7 of the act of April 18, 1912, it is expressly provided:

"That nothing herein shall be construed so as to exempt any such property from liability for taxes." 37 Stats. at Large 88.

So I think that whatever restrictions may be placed upon voluntary alienation of property by the Indians after the patent in fee, or the last patent so-called, has been issued and delivered, that would have no bearing upon the question of the right of the state to tax the lands, and the only way they could thereafter become exempt from taxation would be to have the title reconveyed to and vested in the United States so that it would become exempt under the provisions of the enabling act, the constitution and the Wisconsin statutes.

In the case of Goudy v. Meath, 203 U. S. 146, the court says that it was conceded in that case that the government might
in a deed convey a fee title and make a restriction against taxation for a period (which is not conceded under the Wisconsin compact), yet the court says there that the right to so restrict from taxation was not expressed in the law and could not be implied from a restriction against voluntary alienation. The court further says, p. 149:

"* * * The purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, * * *" 

But the court says it cannot be assumed that the officers of the state enforcing its laws cannot be trusted to do justice with the Indians. The court then referring to the act of February 8, 1887, which made the Indian a citizen, says, p. 149:

"Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens * * *." 

Your last question, which relates to the time when the title would pass in the process of issuing the patents, must, I think, be determined by the provisions of sec. 5 of that act which provides that:

"* * * The patents aforesaid shall be recorded in the general Land Office, and afterward delivered, free of charge, to the allottee entitled thereto."

Clearly by that provision, the recording comes before the delivery because that duty is imposed upon the government. That, of course, is in the land office and not in the register of deeds' office so that the delivery of the patent which would vest the taxable title in the Indian would be the actual delivery after recording in the land office, and after that delivery is made the title is vested and the land would be subject to taxation under the laws of this state and could only become exempt thereafter by having the title reconveyed to the government so that it would become exempt under the provisions of the Wisconsin statutes, as property of the United States.

The copy of the opinion of your circuit court which you enclose refers to statements in some of the decisions that the state cannot tax an instrumentality of the federal government. I do not think that rule has any application to the situation
here. Under the good faith pledge in the enabling act, I think the instrumentality ought to be a legal one and operated in a legal manner as both state and nation agreed upon and as already stated. The provisions of the two constitutions, the enabling act and the statutes, are broad enough to enable the federal government to carry out any plan or instrumentality it may wish to adopt in its policy of treating with the Indians and the Indian lands and, if it desires to have such lands exempt from taxation, it should continue the title in the government or have the same reconveyed to the government, which would make it then legally exempt from taxation by the state; but I do not think that congress has expressed an intent to relieve the Indian from taxation after the trust period has expired. The idea seems to be quite clearly expressed in the statutes that the duty to pay taxes and help maintain the government is a part of the right and duty of citizenship.

Under these general rules I think if you can ascertain the exact situation with reference to the issuing, recording and delivery of the last patent, so-called, which vests the title to the land in the Indians, you will be able to determine when the lands are taxable under the state laws.

TLM

Appropriations and Expenditures—Bridges and Highways—Arterials—Counties and cities are required to install stop signs, to be uniform throughout state as prescribed by state highway commission, along state trunk highways and connecting streets declared by order of commission to be arterials for through traffic, and to pay cost of such signs and installation from funds appropriated to them available for maintenance of such arteries; commission may furnish such uniform signs at cost to counties or other municipalities but may not draw directly against maintenance appropriations.

April 26, 1926.

HIGHWAY COMMISSION.

You direct attention to subsecs. (4) and (5), sec. 85.16, and subsecs. (3) and (4), sec. 20.49, Stats.

Subsec. (4), sec. 85.16, provides that the state highway commission may, when it shall deem it necessary for the public safety, declare any state trunk highway or any city street not a portion of the state trunk highway system but selected and
marked as a connection through such city between portions of such system, to be arteries for through traffic, and subsec. (5) provides that no order or ordinance declaring any road or street an artery for through traffic shall be effective until the sign or traffic device is installed, and that the cost of any sign or traffic device installed by reason of an order by the highway commission shall be paid from any funds available for the maintenance of the artery for through traffic.

Subsec. (3), sec. 20.49, provides an appropriation to the highway commission for marking and signing the state trunk highway system, and, you say

"Apparently the law contemplates that the marking and signing of the state trunk highway system shall hereafter be done by the state highway commission."

Subsec. (4) of the same section makes appropriations for the maintenance of the state trunk highway system and the "connecting streets," these amounts to be paid to the counties and cities when the maintenance work has been done. Apparently these funds may be used to pay for stop signs where said roads enter the arteries for through traffic.

The state highway commission has selected and designated certain state trunk highways as arteries for through traffic in accordance with sec. 85.16, and it is proposed to install the stop signs necessary to make the order effective during the coming season.

You inquire whether payments from the appropriation under the provisions of subsec. (4), sec. 20.49, may be drawn on directly or whether these must be paid into the county treasuries, and the county treasuries again reimburse the state highway commission for the cost of installing the stop signs.

After careful consideration of your question I am forced to the conclusion that the amounts of the apportionment of the appropriation provided by subsec. (4), sec. 20.49, must be paid into the treasuries of the counties, cities and villages intact, and that while it may be desirable, in the interest of efficiency and the required uniformity, that the highway commission should have the authority to install the stop signs and draw directly against the maintenance appropriation for the cost thereof, such authority has not been given. In other words, I am of the opinion that, under the provisions to which you refer,
when the state highway commission makes an order declaring a state trunk highway and/or connecting city streets arteries for through traffic, it becomes the duty of the county and/or the city to promptly mark, with such signs or traffic devices and method of installation uniform throughout the state as is prescribed by the commission, the places where the highway traffic crossing or entering such arterial is required to stop; the county and/or the city to pay for such signs and the installation thereof from any funds available for the maintenance of the artery for through traffic.

The highway commission is authorized, by said subsec. (5), sec. 85.16, when requested, to furnish such signs or traffic devices to the county or municipality, so required to install the same, at cost, which provision enforces the conclusion reached.

Elections—Civil Rights—Person convicted of felony but placed on probation before sentence was imposed nevertheless loses his civil rights. Same is true where one is convicted of felony and sentence has been imposed and stayed.

But where such sentence is to state reformatory pardon may be granted in manner prescribed by subsec. (2), sec. 54.03, Stats.

One convicted of felony and sentenced to state prison can be pardoned only after application has been made to governor for such pardon following procedural steps prescribed by statute.

"Felony" as here used is one that was considered felony at time constitution was adopted.

April 28, 1926.

Board of Control.

In your communication of April 7 you refer to the opinion rendered by this department on the 31st day of last March, XV Op. Atty. Gen. 134, relative to the restoration of civil rights of persons placed on probation to your board. You state that this opinion covers the question of persons committed to the Wisconsin state prison only, and you direct our attention to the following three classes of probationers, and you request that a further opinion be issued to your board in answer to the ques-
tions which follow. You state that there are three classes of persons placed on probation to this board, viz.:

"1. Probation granted adult persons by court withholding sentence and placing probationer under the charge of this board.

"2. Probationers convicted of a felony and sentenced to the Wisconsin state reformatory, but sentence imposed and stayed, and the persons placed on probation to this board.

"3. Probationers convicted of a felony and sentenced to the Wisconsin state prison, but sentence imposed and stayed, and the persons placed on probation to this board."

Your first question reads thus:

"In class one no conviction is made by the court, and it would appear therefore that persons so placed on probation, not having been convicted of a crime, have not thereby lost their civil rights and no restoration of civil rights is needed for persons of that group. Is this assumption correct?"

Your statement that in class one no conviction is made by the court is not a correct statement. It is, however, a fact that no sentence is imposed by the court. Under sec. 57.01 it is provided:

"Whenever any adult is convicted of a felony punishable by imprisonment for a term not exceeding ten years, convictions under section 351.30 excepted, and it appears to the satisfaction of the court that such person has never before been convicted of a felony, in this state or elsewhere, that the character of the defendant and the circumstances of the case indicate that he is not likely again to omit crime, and the public good does not require that he shall suffer the penalty provided by law, said court may, except as otherwise provided for by law, by order suspend the judgment or stay the execution thereof and place the defendant on probation, * * *.*"

You will note here that the adult is convicted. The same is true under the provisions of sec. 57.04 where he is convicted for a misdemeanor, or in sec. 57.05, where a minor is found guilty of a misdemeanor or convicted for the first time of a felony.

Sec. 2, art. III, Const., reads in part as follows:

"* * * Nor shall any person convicted of treason or felony be qualified to vote at any election unless restored to civil rights."

In the case covered by class one, a conviction for a felony will deprive the defendant of his civil rights, and these must be re-
stored to him by pardon of the governor. It is therefore not correct to say that no restoration of his civil rights is needed.

Your second question reads thus:

"Persons placed on probation in group two are sentenced to the Wisconsin state reformatory, but the sentence stayed. As far as the restoration of civil rights is concerned, could the discharge from probation of persons in class two be so worded as to include the provisions cited in your opinion of March 31, taken from subsec. (2), sec. 54.03, thereby gaining restoration of civil rights through the form of their discharge?"

Subsec. (2), sec. 54.03, provides:

"Upon the recommendation of the superintendent and the board of control, the governor may, without the procedure required by chapter 57 of these statutes, discharge absolutely, or upon such conditions and restrictions, and under such limitations as he may think proper, any inmate of the reformatory after he shall have served the minimum term of punishment prescribed by law for the offense for which he was sentenced. Such discharge shall have the force and effect of an absolute or conditional pardon, respectively."

If the discharge is signed by the governor and expressly grants to the probationer his civil rights, it will have that effect. This question is therefore answered in the affirmative.

Your third question reads thus:

"Class three, being convicted of a felony and sentenced to the Wisconsin state prison would, in accordance with your opinion, have to make application to the governor for restoration of civil rights."

This question must also be answered in the affirmative, as the only way in which the convict can be restored to his civil rights is by a pardon from the governor, and this must be secured by taking the procedural steps prescribed by the statute for securing a pardon.

We may also call your attention to the case of State ex rel. Isenring v. Polacheck, 101 Wis. 427, and to XIII Op. Atty. Gen. 141, which holds that the word "felony" in the provisions of the constitution must be limited to such offenses as are felonies at the time the constitution was adopted, so that all statutory felonies will not have the effect of depriving the one convicted of the same of his civil rights. The only exception to that is subsec. (5), sec. 6.01, which provides that a person who shall
have been convicted of bribery shall be excluded from the right of suffrage unless restored to his civil rights.

JEM

**Indigent, Insane, etc.—Old-age Pensions**—Payments may be made out of general fund to cover expenditures under old-age pension law in excess of amount appropriated by county board to carry out provisions of law.

April 28, 1926.

RAYMOND EVRARD,
District Attorney,
Green Bay, Wisconsin.

The material facts presented in your letter of April 7 are as follows:

Brown county has adopted and is now operating under the old-age pension law. The county board appropriated $5,000 to carry out the provisions of the old-age pension law. It was the intention of the county board that no expenditures in excess of the appropriation should be made unless a further sum were appropriated by the county board. You inquire whether expenditures in excess of the $5,000 appropriation may be made provided there is money on hand in the general fund with which to make such payments. You call attention to an opinion given by this department in V Op. Atty. Gen. 5, and you state that you believe the opinion governs the situation presented.

Sec. 49.20, Stats., authorizes a county through a two-thirds vote of the members elected to its county board to establish a system of old-age pensions.

Subsec. (1), sec. 49.37, Stats., provides as follows:

"The county board of each county which establishes an old-age pension system shall annually appropriate a sum of money sufficient to carry out the provisions of sections 49.20 to 49.39. Upon the orders of the judge of the county court, the county treasurer shall pay out the amounts ordered to be paid as pensions, under the provisions of said section."

In accordance with the statutory provisions last referred to it was the duty of the county board of your county, after having adopted the old-age pension law, to appropriate a sum of money sufficient to carry out the provisions of the statute governing such old-age pension law. The county board had no authority
to limit the appropriation to $5,000. A similar situation was presented and passed upon this department in V Op. Atty. Gen. 5, where it was held that while it was desirable it was not necessary for the county board to make an appropriation for payment of mothers' pensions under sec. 48.33.

It should be noted that the old-age pension does not call for any expenditure of county funds. It only requires that the county temporarily furnish the funds to carry out the purposes of the law, but the burden thereof is eventually borne by the state and local municipality. Subsecs. (2), (3), sec. 49.37.

It is, therefore, the opinion of this department that expenditures in excess of $5,000 appropriation may be made provided there is money on hand in the general fund with which to make such payments.

SOA

_Bonds—Public Offices—Constable_—Bond of constable shall be filed in office of clerk of town, city or village in which constable was elected.

**April 28, 1926.**

**John W. Kelley,**  
_District Attorney,_  
Rhinelander, Wisconsin.

You call attention to sec. 60.53, Stats., which provides:

"Every constable shall execute and file an official bond."

You inquire as to where this bond shall be filed.  
Your attention is directed to sec. 19.01, Stats., which provides in part as follows:

"4 WHERE FILED. Official oaths and bonds shall be filed,  
"(e) in the office of any town clerk: Of all officers elected or appointed in and for such term except the town clerk who shall file in the office of the town treasurer;
"(f) In the office of any city clerk: Of all officers elected or appointed in and for such city except the city clerk who shall file in the office of the city treasurer;
"(g) In the office of any village clerk: Of all officers elected or appointed in and for such village, except the village clerk who shall file in the office of the village treasurer."
From a reading of these provisions, therefore, it is clear that the bond of the constable should be filed in the office of the clerk of the town, city, or village in which such constable was elected.

CAE

Appropriations and Expenditures—Normal Schools—Removing of old steam engines and replacing them with five electric motors in connection with heating and ventilating system in old building of state normal school at Whitewater is not "completing and equipping the power and heating plant" and cannot be charged to appropriation made by sec. 20.38, subsec. (11), par. (f), Stats.

April 28, 1926.

WILLIAM KITLLE, Secretary,
Board of Regents of Normal Schools.

You call attention to sec. 20.38, subsec. (11), par. (f), Stats., which provides that there is appropriated to the board of normal regents:

"On July 1, 1919, fifteen thousand dollars, for the erection and equipment of a power and heating plant, and on July 1, 1921, twenty-five thousand seven hundred seventy-nine dollars for completing and equipping the power and heating plant and connecting the plant with the school building by conduits and necessary piping."

In carrying out the provisions of the above appropriation the authorities of the state normal school at Whitewater, Wisconsin, have submitted to the state engineer the following described project:

"Install wires to carry current to old normal school building; remove old steam engines and replace with five electric motors to run ventilating fans in connection with heating and ventilating system in old building."

You inquire whether the cost of this project can be legally charged to the appropriation above referred to.

I am of the opinion that your question should be answered in the negative. From a reading of the appropriation statute, it appears that the appropriation is made for "completing and equipping the power and heating plant and connecting the plant with the school buildings by conduits and necessary piping."
The installing of five electric motors to run ventilating fans with the heating and ventilating system in the old building is not "completing and equipping the power and heating plant," and, therefore, this project cannot be charged to the above appropriation.

CAE

Public Officers—District Attorney—Removals—District attorney is not required to prosecute charges against town officer for his removal under provisions of secs. 17.13 and 17.16, Stats.

G. E. OSTRANDER,
District Attorney,
Princeton, Wisconsin.

You inquire if it is the duty of the district attorney to prosecute charges against a town officer for his removal under the provisions of sec. 17.13 and sec. 17.16, Stats. You state that it is your opinion that it is not the duty of the district attorney to prosecute such removal proceedings. I concur in your opinion.

Sec. 17.16, subsec. (3), Stats., provides in part that removals shall be made only upon written, verified charges "preferred by a taxpayer and resident of the governmental unit of which the person against whom the charges are filed is an officer."

Nowhere in this section nor in any other that I have been able to discover is any duty imposed upon the district attorney. In the case of State ex rel. Shea v. Evenson, 159 Wis. 623, there is authority for the proposition that such removal proceedings are not criminal actions, and, therefore, no duty is imposed upon the district attorney by virtue of the provisions of sec. 59.47 or sec. 355.17, Stats.

CAE
Opinions of the Attorney General

Taxation—Income Taxes—Compromise of Illegal Taxes—
Sec. 75.60, Stats., is applicable to income taxes.

Only lack of jurisdiction of person or subject assessed under
income tax act constitutes such illegal tax as may properly be
compromised under sec. 75.60.

April 28, 1926.

C. J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

You inquire whether a tax assessment made by the assessor
of incomes against certain persons who failed to make a return,
though requested to do so, and which tax is claimed to be illegal,
may be compromised under sec. 75.60, Stats.

You state:

"We have several instances in which the assessor of incomes
of our county assessed an arbitrary amount against parties who
failed to make a return after having been asked to do so. In
each instance the parties would not have been subject to any tax
outside this assessment."

Sec. 75.60, Stats., provides:

"If it shall appear from any tax roll or tax proceeding that
any sum of money is due from any person or is charged against
any lands or other property, and such taxes have been returned
as delinquent to the county treasurer of the proper county,
and such person or the owner of the lands or property so
charged with such taxes shall claim such taxes to be illegal for
any cause the county treasurer, county clerk and district at-
torney of such county may, if they shall deem that there is reason-
able cause to believe such taxes illegal, compromise with such per-
son or owner and receive in lieu of the whole tax so appearing
due or charged as aforesaid such part thereof as the said county
treasurer, county clerk and district attorney, or a majority of
them, shall determine to be equitable and for the best interest
of such county."

The provisions of sec. 75.60 apply to the income taxes. Sec.

Such taxes may be compromised when they have been re-
turned unpaid on the ground that they are illegal and there is

was held that under sec. 75.60 (formerly sec. 1210g, Stats.
1919), no "reasonable cause to believe such taxes illegal" existed merely because the aggrieved taxpayer had been taxed somewhat higher than others.

This raises the question as to what is an illegal tax, and when the county treasurer, county clerk and district attorney have reasonable cause to believe a tax illegal.

It is the opinion of this department that the only case in which the county treasurer, county clerk, and district attorney would have reasonable grounds to believe a tax illegal is where the person or subject so assessed was without the jurisdiction of the assessor.

If jurisdiction of the person or subject assessed is had, the assessor of incomes may, under the statutes, according to his best judgment, make an arbitrary assessment of the income of such person or subject. Such assessment would be valid unless successfully attacked in the manner prescribed by law. See secs. 71.12, 71.13, 71.14, 71.15 and 71.155 relative to the steps in this procedure. If the taxpayer fails to avail himself of this remedy he is barred from relief in any other form. The legislature has adopted an orderly and comprehensive scheme for testing the validity of an assessment and the statutory procedure must be followed.

Where, however, no jurisdiction of the person or subject is had, such assessment is plainly illegal and may be compromised under sec. 75.60.

The law does not favor the compromise of taxes. Where the tax is plainly illegal, the taxpayer against whom such assessment is made ought not to pay any part of such illegal tax. Where, however, the tax is valid, such tax ought to be paid in full. Compromises should be discouraged. Hence, if a taxpayer feels aggrieved by any assessment he should test the validity of such tax in the manner set forth in the statutes or be barred from any other relief.

Under the facts presented in your letter, the taxes may not be compromised, as no reasonable grounds exist for believing such taxes illegal.

CAE
Appropriations and Expenditures—Geological and Natural History Survey—Method of payment of co-operative account for topographic survey in state approved.

April 29, 1926.

E. F. Bea, Acting Director,
Geological & Natural History Survey,
Madison, Wisconsin.

In your recent letter you inquire whether the state geological and natural history survey can legally expend money appropriated for topographic mapping in accordance with either plan number 1 or plan number 2 as set forth below.

Plan No. 1 provides that the state shall advance funds to the United States geological survey in lump sums prior to the performance of the work, on the receipt of signed vouchers.

Plan No. 2 provides that the state shall reimburse the United States geological survey by payment of a lump sum covering one-half or more of the cost of the work, after such work has been performed, and after the federal survey has paid all the accounts. This plan could be modified by submitting with the bill to the states certified copies of all vouchers paid by the federal government.

We cannot approve of plan No. 1, providing for the advancement of funds by the state to the federal government prior to the performance of the work. There is no statutory authority for any such method of handling the state funds used for co-operative purposes in connection with the topographic survey of the state.

There is, however, nothing objectionable in plan No. 2, provided it is modified so as to have the state reimburse the federal government for the state's share of the expenses incurred upon the receipt of a state voucher signed and sworn to by the proper federal official.

Your attention also is called to sec. 14.31, Stats., relative to claims against state; sec. 14.32, relative to items of expenditure not allowed; and secs. 20.42, subd. (a), and 36.24, subsec. (6), relative to expenditures for a topographic survey of the state.
Banks and Banking—Town Depositories—Public Officers—County Treasurer—Taxation—Failure of county treasurer to issue his warrant to sheriff and to otherwise perform duties imposed upon him by sec. 74.23, Stats., on failure of town treasurer to pay over amount of county taxes collected by him and deposited in bank which was not town depository and which failed, resulting in loss of funds so deposited, is breach of county treasurer's official bond, in action on which it need not be shown affirmatively that performance of that duty would have resulted in collection of amount due from town treasurer; insolvency of town treasurer and sureties on his official bond and that performance of duty imposed by statute upon county treasurer would have been vain is matter of defense.

April 29, 1926.

J. C. DAVIS,
District Attorney,
Hayward, Wisconsin.

The following statement of facts appears from your original and supplementary inquiry:

The treasurer of one of the towns of your county collected county taxes due from that town to the county for the year 1923 amounting, after deducting the amount of delinquent real and personal property taxes returned to the county treasurer, to $4,100.18, and deposited the money so collected, with other moneys, in the First National Bank of Hayward, which bank had not been designated as the town depository under the provisions of subsec. (25), sec. 60.29, Stats.; the bank was closed on March 8, 1924, while such money was so on deposit, and has since been in the control of the comptroller of the currency, and the money due from the town and town treasurer to the county treasurer for the county has not been paid; March 31, 1924, the county treasurer made demand upon the town treasurer for the payment of said amount; April 3, 1924, the town treasurer wrote the county treasurer to the effect that at the town meeting it was voted to call a special meeting and issue bonds to make up the loss of funds which the town had in the First National Bank, and that the county would be paid at the earliest possible time; April 4, 1924, the county treasurer wrote to the then district attorney, reciting the said demand, the contents of the town treasurer's reply, and requesting the said district attorney
“to take such steps as may be necessary, if any, to protect the county’s interests in this matter,” but that no other steps toward the collection of the amount due from the town and town treasurer were taken by the county treasurer; that the town treasurer had given bond as such with individual sureties in the sum of $16,100, the sureties being now thought to be insolvent and it being doubtful that anything can now be collected from the town treasurer personally.

You call attention to sec. 74.23, Stats., submit a copy of the county treasurer’s bond (which is in the statutory form in the sum of $50,000 with corporate surety) and, on the facts above stated, ask (1) whether there has been a breach of the county treasurer’s official bond, and (2) if so, whether in an action on the bond founded on such breach it will be necessary for the county to show not only that the county treasurer did not perform the duty imposed by said section, but further that such county treasurer could have caused the collection of all or a portion of the money due from the town treasurer if such duty had been performed.

The first question is answered in the affirmative.

The condition of the bond is that the county treasurer “will faithfully discharge the duties of said office according to law, and will pay to the parties entitled to receive the same, such damages, not exceeding in the aggregate fifty thousand and no one-hundredths ($50,000) dollars, as may be suffered by them in consequence of his failure to discharge such duties.”

Said sec. 74.23 provides:

“If any town, city or village, treasurer shall neglect or refuse to pay to the county treasurer the sums in his hands required by law to be paid to him, or if he shall neglect or refuse to account for moneys required by law to be collected and paid by him to the county treasurer, such county treasurer shall issue a warrant under his hand, directed to the sheriff of the county, commanding him to levy such sum, specifying the amount thereof, as shall remain unpaid or unaccounted for, with interest, and damages as specified in the preceding section, together with his fees for collecting the same, of the goods and chattels, lands and tenements of such town, city or village treasurer, and pay the same to the county treasurer, and return such warrant within sixty days from the date thereof and deliver the same to the sheriff, who shall immediately cause the same to be executed and make return thereof within the time therein specified, and pay to such county treasurer the amount
required by such warrant or so much thereof as he shall have collected thereon; and such sheriff shall be entitled to collect and receive the same fees as are allowed by law to sheriffs on execution. Nothing in this section shall prohibit prosecution of such treasurer's bond in case of a breach thereof."

Clearly, the failure of the county treasurer to issue his warrant directed to the sheriff as provided by the statute is prima facie a breach of the official bond, which the notice to the district attorney referred to does not excuse.

The second question is answered in the negative.

I think that proof of the execution of the county treasurer's bond, of the amount due from the town treasurer, of the failure of the town treasurer to pay that amount to the county treasurer and of the failure of the county treasurer thereupon to perform the duty imposed by law, makes out a prima facie case. If it be an excuse for not performing the duty imposed by the statute, that the town treasurer and the sureties on his bond were not financially responsible, and that any proceedings directed by sec. 74.23 or by action on the town treasurer's bond would have been in vain, that is a matter of defense, the burden of establishing which would be upon the county treasurer and his sureties.

FEB

Public Health—Dentistry—License to practice dentistry issued by Wisconsin state board of dental examiners authorizes practitioner to practice oral surgery when same is connected with condition of teeth.

April 29, 1926.

Dr. S. F. Donovan, Secretary-Treasurer,
Board of Dental Examiners,
Tomah, Wisconsin.

You inquire whether a license to practice dentistry issued by the Wisconsin state board of dental examiners authorizes the practitioner to practice oral surgery when the same is connected with the condition of the teeth.

Your attention is called to sec. 152.02, subsec. (1), Stats., which provides in part as follows:

"* * * A person shall be deemed to be engaged in the practice of dentistry who treats diseases or lesions of the human teeth or jaws or performs operations thereon, or inserts arti-
ficial teeth, fixtures, or appliances for the restoration, regulation or improvement of the dental organs, * * * ."

Your attention is further called to sec. 152.04, Stats., which provides as follows:

"Examination shall be in writing in anatomy, anesthesia, bacteriology, chemistry, histology, materia medica, metallurgy, pathology, physiology, prosthetic dentistry, pharmacology, physical diagnosis, oral surgery, orthodontia, oral hygiene, operative dentistry, therapeutics, toxicology and such other subjects relating to dentistry as the board deems necessary, and demonstrations in operative and mechanical dentistry."

In view of the above provisions of the statutes, it is clear that your question must be answered in the affirmative.

CAE
Counties—County Board—Public Officers—Clerk of Circuit Court—Resolution of county board considered and held to have changed compensation for office of clerk of circuit court from fee, or part salary and part fee, basis to all salary basis. Such compensation not having been thereafter changed by county board, it remains in effect.

Fees collected by clerk and deposited in bank pending determination of question of ownership belong to county.

May 3, 1926.

G. H. Dawson,
District Attorney,
Crandon, Wisconsin.

You submit a copy of a written opinion given by you to the county board to the effect that certain fees for the performance of official duties collected by a former clerk of the circuit court (now the county judge) for the years 1923 to 1925, both inclusive, belong to the county, under the terms of certain resolutions of the county board fixing the salary of such clerk, and not to the clerk, and ask whether such opinion is concurred in by the attorney general.

I have carefully examined and considered your opinion, together with a letter and certain memoranda submitted by such former clerk outlining his contention in opposition to such opinion.

I concur in your opinion.

I think it is unnecessary to refer to all the various resolutions of the county board which are set out in your opinion, two of which appear in an opinion of Attorney General Bancroft to the then district attorney under date of December 31, 1910, found in Op. Atty. Gen. for 1912, 876, the concluding paragraph of which reads, p. 879:

"* * * It may be well for your county board to pass a resolution at its next meeting under section 694, to provide a salary for the clerk, which they are authorized to do under said section, as amended by chapter 376 of the laws of 1907, at any time, and also to change said office to a salary basis."

It appears that no effective action of the county board in accordance with that suggestion was taken until the adjourned annual meeting of the board held on February 2, 1912, when a resolution was introduced by Supervisor Sherman, and action thereon taken, as follows:
Resolved by the County Board of Supervisors of Forest County that the salary of the clerk of the circuit court for the term beginning January 1, 1913, shall be, and the same is hereby fixed at nine hundred dollars ($900) per annum, said salary to be paid in equal monthly installments, and shall be in lieu of all fees, per diem and emoluments of whatever nature received by him.

Be It Further Resolved that the said officer shall conduct his office in such manner as prescribed by sec. 747a, ch. 411, laws of 1901. Upon failure to keep proper records or to file quarterly reports of fees and moneys collected by him with the county clerk as provided by the above section, the county treasurer shall not pay his salary until such law is complied with.

Previous to the adoption of said resolution, but after its introduction, a resolution presented at the preceding session of the board fixing the salary of the clerk of the circuit court was rescinded. The resolution so rescinded was introduced on November 15, 1911, and provided that the compensation of the clerk of the circuit court "shall be a salary hereby fixed at the sum of eight hundred dollars per annum in addition to the fees covering civil matters as prescribed by sec. 747 of the revised statutes, * * *" which was laid over until the next day and then amended by changing the salary from eight hundred dollars to six hundred dollars, but no action was taken on the resolution as so amended, or at least the minutes of the proceedings do not show that the resolution as amended was adopted, although the resolution of February 2, 1912, rescinding it treats it as having been adopted as amended.

Following the adoption of the resolution of February 2, 1912, and commencing with the term beginning the first Monday of January, 1913, the clerk drew his salary of nine hundred dollars per year in monthly installments and made the reports and paid over to the county treasurer the fees collected by him in accordance with said resolution, and continued so to do for each term thereafter up to the term beginning the first Monday of January, 1923, "when some question arose in his mind as to whether or not the fees in all civil actions belonged to him or to the county," whereupon he adopted the practice of depositing the fees collected by him in a local bank to be held subject to the determination of the question, and reported the amounts thereof and such disposition from time to time to the county board or its auditing committee, and has not attempted to appropriate the amount thereof to his own use.
I entertain no doubt that by the resolution of February 2, 1912, the county board legally changed the compensation of the office in question from a fee, or part salary and part fee, basis theretofore existing, to an all salary basis as authorized by laws then in force and now embodied in sec. 59.15, Stats. The intent of the county board so to do is evident, and the resolution should be so construed as to effectuate that intent. Burgess v. Dane County, 148 Wis. 427; Cotter v. School District, 164 Wis. 13; State ex rel. Smith v. Outagamie County, 175 Wis. 253.

No change having been made during the subsequent period involved, the salary so fixed continued to be the whole compensation for that office during the years in question. Sec. 59.15, subsec. (4); IV Op. Atty. Gen. 201. See also V Op. Atty. Gen. 106.

Corporations—Common Law Trusts—Secretary of state may accept and file annual report of common law trust after time for filing has expired.

Where common law trust has failed to file its annual report its status is defined in sec. 226.14, subsec. (9), Stats., making contracts on its behalf affecting personal liability or relating to property within this state wholly void on its behalf or on behalf of its assigns, continuing enforceability of such contracts against such trusts and making trustees of such trusts individually liable on such contracts.

May 3, 1926.

FRED R. ZIMMERMAN,
Secretary of State.

You state that a common law trust, organized and operating in Wisconsin, whose trust agreement has been filed in your office under sec. 226.14, Wis. Stats., has failed to file its annual reports as provided in sec. 226.14, subsec. (4), Wis. Stats., and inquire what status such common law trust now enjoys; whether or not you may accept such report after the expiration of the filing period therefor, and whether any affirmative action of your department is necessary.

Sec. 226.14, subsec. (1), provides in part:

"No common law trust organized in this state, and no such trust formed or organized under or by authority of the laws of any state
or foreign jurisdiction, for the purpose of doing business under a declaration of trust which shall have issued to five or more persons, or which shall sell or propose to sell beneficial interests, certificates or memberships therein, shall transact business, or acquire, hold or dispose of property in this state until the trustee named in said declaration of trust shall have caused to be filed in the office of the secretary of state the original declaration of trust, * * *

Filing of a verified copy with the register of deeds is also required

Sec. 226.14, subsec. (4), provides:

"Every such trust shall file in the office of the secretary of state a verified statement on or before the first day of March in each and every calendar year, showing the names and addresses of each of the trustees; the amount and nature of the assets and liabilities of such trust, and the income and disbursements of such trust; the amount actually paid for such assets in money, property and services; the nature of the business transacted during the preceding year; in what state such trust is operating; the amount and number of beneficial certificates sold in this state, or elsewhere; a statement as to the total amount of beneficial certificates outstanding; and a statement as to the amount of profits or losses for the preceding calendar year ending as of December thirty-first."

If the so-called annual report of such trust is filed after the time for filing has expired, it may be accepted for filing by your office without prejudice to the rights of the state.

Your inquiry as to its present status is sufficiently answered by sec. 226.14, subsec. (9), providing:

"Every contract made by or on behalf of such trust affecting the personal liability thereof, or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf, or on behalf of its assigns; but shall be enforceable against such trust, and the trustees named in said declaration of trust shall be individually liable therefor."

MJD
Corporations—Amendment of Articles—Corporation may not provide for amendment of its articles of organization by lesser vote than is required by statute.

Amendment of articles of organization of corporation, adopted in accordance with provisions of articles but with less than amount of affirmative votes required by statute is unauthorized and invalid.

Fred R. Zimmerman,
Secretary of State.

You state that the articles of incorporation of a nonstock corporation provides that such articles may be amended by vote of "at least two-thirds of all voting members of said corporation attending such meeting, provided that notice in writing shall have been mailed to each member thereof at least ten days before such meeting."

An amendment has been submitted to you for filing, in which it is recited that due notice was given and that seven members were present at the meeting, all of whom voted in favor of the resolution. Total membership is 345.

You wish to be informed whether or not the vote was sufficient under sec. 180.07, Stats.

Sec. 180.07, Stats., provides in part as follows:

"Any corporation organized under this chapter may at any meeting of its members by a vote of at least the owners of two-thirds of all the stock then outstanding, in case of stock corporations, at least one-half of the members of the corporation without stock, unless a greater vote shall be required in its articles, amend its articles of organization so as to modify or enlarge its business or purposes, change its name or location, increase or diminish its capital stock, change its officers or its directors or provide anything which might have been originally provided in such article; but no corporation without stock shall change substantially the original purposes of its organization. Such amendments shall be adopted only in accordance with the articles of organization, if a mode of amending the same shall have been therein prescribed. * * *

I am of the opinion that the provision in the articles determining the manner of amending the articles is contrary to the statute, as being an attempt to amend by a lesser vote than required by the statute and hence unauthorized. As a consequence, the amendment as submitted is not entitled to be filed. MJD
Bridges and Highways—Culverts—Counties—Where town has voted to construct bridge on town road and town board has petitioned county board for county aid under provisions of sec. 87.01, Stats., construction of 60-inch steel culvert in lieu of such bridge will not require county board to grant aid therefor, although it may, in its discretion, grant such aid under provisions of sec. 83.03, subsec. (6), Stats.

May 14, 1926.

J. C. Davis,
District Attorney,
Hayward, Wisconsin.

It appears from your statement of facts that one of the towns of your county has voted to construct a bridge on a highway maintainable by the town and that the town board has petitioned the county board for county aid in the construction of such bridge, pursuant to the provisions of sec. 87.01, Stats.; that it is now proposed to construct a 60-inch steel culvert with fills instead of the bridge, the conclusion having been reached by the engineer for the town “that such culvert will take care of the flow of water and be just as serviceable to the town and also be less expensive than a bridge.”

On the facts stated, you ask:

“Can the town claim aid for this construction work in case a culvert is used instead of a bridge and the same as if a bridge were actually built?”

I assume that you mean to ask whether the county board is compelled to grant aid under the provisions of sec. 87.01 for such construction.

The question, I think, must be answered in the negative.


It perhaps should be added that while the county board is not required to grant county aid for the building of the culvert instead of the bridge petitioned for, it may, in its discretion, do so in the exercise of the broad powers granted by subsec. (6), sec. 83.03, Stats., to “construct or improve or aid in construct-
ing or improving any road or bridge in the county.” The building of the culvert would unquestionably be the improving of a road in the county.

FEB

**Bonds**—County highway improvement bonds legally authorized to be issued may be advertised for sale and sold by duly authorized officers and committees prior to date of issue.

May 14, 1926.

G. E. OSTRANDER,
District Attorney,
Princeton, Wisconsin.

You inquire whether the chairman of the county board, the county clerk and the county highway committee, duly authorized by the county board to sell county highway improvement bonds which are to be dated July 1, 1926, may advertise and sell the same prior to the date of the bonds.

The answer is in the affirmative. I agree with you that there is no reason why bonds to be issued under legal authority may not be advertised for sale and sold prior to the date of issue, the purchaser to take and pay for them when they are issued.

FEB

**Bonds**—Wisconsin Statutes—Provision of subsec. (4), sec. 67.10, Stats. 1921 and 1923, that municipal bonds must be sold or hypothecated within three years of their authorization, is still in full force and effect although such subsection does not now appear in statutes.

May 15, 1926.

HENRY A. DETLING,
Attorney for Village of Kohler,
Sheboygan, Wisconsin.

In response to your inquiry relating to the sale of $10,000 remaining unsold of waterworks bonds of the village of Kohler authorized by popular vote in 1922, it is my opinion that subsec. (4), sec. 67.10, Stats. 1923, which provides that municipal bonds with certain exceptions not material here, must be sold or hypothecated within three years of the adoption of the initial
resolution, or of its approval when approval by popular vote is required, authorizing the issue, is still in full force and effect although that subsection does not appear in the statutes of 1925.

Said subsec. (4) was withdrawn from the biennial publication of the statutes by sec. 7, ch. 385, laws of 1925, but it was expressly provided by the act that such withdrawal was "without intent to affect any amendment or repeal thereof." Not infrequently during the past several sessions of the legislature, certain provisions appearing in the compilation of the statutes have been withdrawn from such compilation without amendment or repeal, the purpose being to reduce the bulk of the biennial publication of the statutes. These withdrawals have usually been of provisions which had a more or less limited application. I do not understand why this particular provision should have been withdrawn, as it would seem to be a provision which, if in force, should appear in the municipal bonding law, since it applies to practically all municipal bond issues and its absence from the compiled ch. 67 of the statutes while still in full force and effect may lead municipalities to serious error in the matter of the sale or hypothecation of their bonds.

This opinion will be published in order to give as wide notice as practicable that the limitation of time within which bonds must be sold contained in ch. 67 as it appears in the statutes of 1921 and 1923 is still effective.

FEB

Public Officers—District Attorney—Real Estate—Waste—Taxation—County holding tax certificates on property of corporation bid in by county at sale may maintain action to restrain commission of waste.

District attorney, when county board is not in session, may maintain action for waste on behalf of county without direction or authority of county board, subject to defense of plea in abatement.

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

You have inquired whether a district attorney has authority without direction of the county board to institute action against
a corporation to restrain junking of buildings and machinery when the county holds tax certificates on the real estate of the corporation. While not expressly ruling that a district attorney must have authority of the board of supervisors to prosecute civil actions, our supreme court has inferentially held this to be the rule, declaring that this is a matter in abatement, to be brought before the court by answer or by special motion or order for the district attorney to show by what authority he prosecutes the claim, and if it appears that he has none, to dismiss the action as to that cause. Board of Supervisors of Milwaukee County v. Hackett et al., 21 Wis. 613.

In III Op. Atty. Gen. 688 it was held that a district attorney needed express authority of the board of supervisors to prosecute a civil action. You will there find an able discussion and reference to leading authorities.

A county holding tax certificates on corporate property may bring an action of waste against a corporation to restrain destruction of buildings and machinery. Because the county is within the terms of sec. 279.08, which provides:

"The purchaser or his assigns holding any certificate of sale of real estate duly issued upon any sale for taxes, or upon execution, * * * may have an action to restrain the commission of waste during the period of redemption, * * * ."

I am of the opinion that a county holding tax certificates or property of a corporation, which tax certificates were bid in by the county at the sale, may begin an action against the corporation to restrain the commission of waste, and that a district attorney, when the county board is not in session, may maintain an action for waste on behalf of the county without direction or authority of the county board, if the board is not in session, subject to the defense of a plea in abatement.

MJD
Bridges and Highways—Diversion of Funds—Words and Phrases—"Next Construction Job in Said Subdivision"—Fund composed in part of state aid made available under provisions of sec. 83.03, subsec. (1), Stats. 1923, by county board for improvement of particular portion of state trunk highway system in particular subdivision of county, but not used for such purpose, may not be diverted to be used in construction of county trunk highway in such subdivision.

Under provisions of subsec. (6), sec. 83.04, Stats., on proper certification of facts by county highway committee with approval of state highway commission, it is duty of county treasurer to transfer such fund to credit of such subdivision, to be drawn against and used for construction or improvement of other portions of state trunk highway system in such subdivision.

May 15, 1926.

D. M. Perry,
District Attorney,
Black River Falls, Wisconsin.

You state that in 1923 the county board made available under the provisions of subsec. (1), sec. 83.03, Stats. 1923, about twenty-five hundred dollars, made up of state aid appropriated from the first fifty per cent of the state aid allotment to the county and of county and town contributions for the improvement of a particular portion of the state trunk highway system between Black River Falls and Merrillan in the town of Albion; that thereafter, and before any part of the fund so provided for was expended, the state trunk highway, for the improvement of a portion of which the fund was so provided, was made a federal aid project, and that therefore the said fund was not used and remains unexpended in the county treasury; that the town of Albion now desires to have such unexpended fund transferred to the credit of the town for use in the construction of a county trunk highway; and you ask whether such use of said fund is permissible under the law.

The answer, I think, is in the negative, and that the fund may properly be placed to the credit of the town to be used only to increase the funds available for the construction or improvement of the state trunk highway system in said town.

Although the fund was made available by the county board under the provisions of the state highway aid law (sec. 83.02
and subsecs. (1) to (5), inclusive, sec. 83.03) which has since been repealed, the repealing act (ch. 192, Laws 1925) makes no change in the provisions of the law for the disposition of any portion of such funds remaining unexpended, which provisions are the same now as when the fund was set up, and read as follows (subsec. (6), sec. 83.04):

"When final payment has been made upon any highway improvement, any funds remaining in the county treasurer's hands which were provided by the state or by any subdivision of the county for that particular improvement, shall be placed together with the county's balance available for that job to the credit of such subdivision of the county, and shall be used to increase the funds available for the next construction job in said subdivision, and any such balance in the bridge fund may be transferred to the road fund or vice versa by the town or village board with the approval of the state highway commission."

It is clear from your statement that the fund was provided for the improvement of a portion of a particular state trunk highway (No. 12) which, because of the federal aid construction project thereon, was not used for that particular improvement, and the official map of the state highway commission shows that there are at least two other state trunk highways (Nos. 27 and 54) traversing the town of Albion. I think that the words in the statute quoted, "next construction job in said subdivision," must be construed as meaning the next construction job of the same class as that for which the fund was made available, particularly since any fund composed in part of state aid could be used only for the improvement of the state trunk system.

Your further question is:

"Who has the power of transferring the funds?"

I think the law makes it the duty of the county treasurer to place the fund to the credit of the town of Albion on certification by the county highway committee, with the approval of the state highway commission, of the fact that it constitutes an unexpended balance remaining and not needed for the construction work for which it was made available, and that it may be drawn against in the usual way by the county highway committee and the state highway commission to meet the cost of any construction job on the state trunk highway system in said town.

FEB
Public Lands—Taxation—Where state acquires lands by forfeiting land contract for failure of purchaser to make payment, it takes title subject to valid liens and outstanding tax certificates and must redeem such certificates in order to protect its title.

May 17, 1926.

Commissioners of the Public Lands.

You say that in 1911 one Kramer purchased certain lands in sections 13 and 24, township 34, range 2 west, on contract for which Kramer was to pay in installments and to pay interest and taxes, which he did until 1921.

In 1925 the lands were advertised by the state and sold as forfeited state lands and bid in by the state. At that time there were delinquent tax certificates outstanding for the years 1921 to 1925 and are still outstanding, and the county treasurer has mailed a statement of such delinquent taxes to you. You ask whether or not the state is liable for such taxes under sec. 74.57.

You are advised that such lands were subject to taxes when the taxes were levied, therefore the tax certificates issued on the tax sale were liens against the property when the state acquired the title by forfeiture of the contracts and of course have continued as valid liens ever since. The fact that the officers did not have in mind such outstanding tax certificates at the time of the forfeiture of the contract could not affect the lien of the certificate holders and the state will have to redeem such tax certificates in order to protect its title.

TLM

Charitable and Penal Institutions—Home finding agency is not prohibited from placing child in home where foster parents are not citizens of United States.

May 19, 1926.

Board of Control.

You state that a child has been released by its parents to a private home finding agency with the consent of the parents for the society to place the child in a foster home for adoption; that recently the child was placed in a good foster home and on investigation it was found that the foster parents are not citizens of the United States, in fact, have not even taken out their first papers indicating intention of becoming citizens. You inquire
whether a home finding agency can consent to the adoption of a child, born in the United States, by citizens of another country, and whether the state board of control of Wisconsin can approve the placement of a child with such a family.

I find no provision in the statute prohibiting a home finding agency or anyone else from placing a child for adoption in a home where the foster parents are not citizens of the United States. Ch. 58, Stats., does not make any such limitations in the placing of children in homes for adoption. This seems to have been left to the home finding corporation and others that have the guardianship or control of the child.

JEM

Mothers' Pensions—It is within discretion of county court to determine whether mother's pension can be granted for support of six children, oldest of whom is eleven years of age and who are joint owners of fund of $2,500 in cash.

May 19, 1926.

L. W. Bruemmer,  
District Attorney,  
Kewaunee, Wisconsin.

You inquire whether in the exercise of his discretion the county judge may determine that six children, the oldest of whom is eleven years and who are jointly interested and the sole owners of a fund of $2,500 in cash and whose mother has little or nothing of her own, are dependent children and are entitled to mother's pension and make provisions therefor. This question should be answered in the affirmative. Very similar cases were discussed in an official opinion by this department in VII Op. Atty. Gen. 668. The reasons for giving an affirmative answer are there well stated. This question is peculiarly one within the discretion of the court. It is left to its good sense, upon investigation, to determine whether aid shall be expended and if it is to be expended, how much. The court will, of course, in granting aid, take into account the property of the infant.

See the opinion herein referred to for further discussion of this question.

JEM
Indigent, Insane, etc.—Wisconsin General Hospital—Application for admission to Wisconsin general hospital must be made to county judge of county in which person desiring admission resides at time application is made. One-half cost of caring for such patient must be borne by county in which person resides at time application is made.

May 19, 1926.

J. S. Earll,
District Attorney,
Prairie du Chien, Wisconsin.

In your letter of April 17 you present the following question:

(1) A person who resided in Waukesha county up to December, 1925, and who has since resided in Crawford county has made application to the county judge for admission to the Wisconsin general hospital. You inquire whether the application should be made to the county judge of Crawford county or whether it should be made to the county judge of Waukesha county. You further inquire if the county judge of Crawford county acts upon the application whether the portion of the cost for caring for such patient in the Wisconsin general hospital assessed to a county shall be paid by Waukesha or Crawford county.

Ch. 142, Stats., governs admission to the Wisconsin general hospital. Sec. 142.01 defines the term “public patient” as

“A resident of Wisconsin who is afflicted with a deformity or ailment which can probably be remedied or advantageously treated, if he or the person liable for his support is financially unable to provide proper treatment.”

Sec. 142.02 provides:

When the case of such person shall come to the notice of a sheriff, county supervisor, town clerk, health officer, health nurse, poor commissioner, policeman, physician, or surgeon, or any public official, he shall and any teacher, priest or minister may, file with the county judge an application for his treatment at such hospital.”

Sec. 142.03 provides that the application shall be in such form as the county judge may direct, and shall contain a full statement of the financial condition of the person, and a general statement as to his physical condition. The county judge shall thereupon make an investigation.
Sec. 142.04 provides that if the county judge is satisfied that the required facts exist and that the person should be treated at the Wisconsin general hospital he shall so find and enter an order granting the application.

Sec. 142.08 provides that one-half of the net cost of caring for such patient shall be paid by the state and "one-half by the county of his residence."

The statutes relating to the admission of patients has been referred to in detail for the purpose of showing that such admission does not in any way depend upon legal settlement in any particular county or municipality. If the patient is a resident of the state of Wisconsin, he is entitled, where the required facts exist, and the county judge so finds, to admission to the Wisconsin general hospital. The provisions of secs. 142.02 to 142.03 indicate a legislative intent that the application should be made before the county judge of the county in which the person resides at the time the application is made. This department therefore, is of the opinion that the application should be made to the county judge of Crawford county.

Under the statement of facts, the person to whom you refer is now a resident of Crawford county. Consequently, under sec. 142.08, half of the net cost of caring for such patient must be borne by Crawford county.

SOA

Courts—Court Commissioner—Police Courts—Criminal Law—
Sec. 62.24, Stats., does not take away from court commissioner or court of record right to issue criminal process and hold preliminary examinations in city having police court.

May 19, 1926.

Harold J. Marcoe,
District Attorney,
Darlington, Wisconsin.

You refer me to sec. 62.24, subsec. (2), pars. (a) and (b), which provide as follows:

"(2) (a) The police justice shall have within the city the jurisdiction of a justice of the peace and exclusive jurisdiction of offenses against ordinances of the city.

"(b) No justice of the peace shall have criminal jurisdiction of offenses committed in the city, nor power to issue warrant for,
examine, commit or hold to bail any person charged with an
offense therein."

You inquire whether under these provisions it is proper for
any other examining magistrate or court commissioner to issue
warrants and conduct preliminary examinations in a muni-
cipality or city where they have a police justice. This question
must be answered in the affirmative. There is nothing said in
these provisions as to the powers of court commissioners and
courts of record for issuing warrants or holding examinations
upon criminal charges.

Secs. 361.01 et seq. expressly grant to court commissioners and
courts of record the power to issue criminal process and to hold
examinations upon criminal charges. Criminal jurisdiction is
taken away from justices of the peace and given to the police
justice, but court commissioners and other courts of record that
may be located in the city still have the power to hear criminal
charges and issue warrants or other process in criminal cases.
JEM

Criminal Law—Second Offenses—Fish and Game—Public
Officers—Justice of Peace—Where repeater is charged with sec-
ond offense under sec. 359.14, Stats., justice of peace has no
jurisdiction to try case.

Judgment to pay fine and in default of payment of same to
sixty days in jail is prior sentence in contemplation of sec.
359.14.

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

In your communication of March 20 you state that you have a
defendant in custody who is charged with possession of hides out
of season in violation of the game law, and that he is a repeater.
You inquire whether the justice can give him more than six
months on account of a second offense, or whether the justice
should bind him over to the circuit court for trial.

Under sec. 360.01, subsec. (5), Stats., the jurisdiction of the
justice of the peace is limited to a maximum of six months' im-
prisonment in the county jail. Sec. 359.14, under which your
defendant could be sentenced as a repeater, provides for a pun-
ishment by imprisonment in the county jail of not more than one year or imprisonment in the state prison not more than three years nor less than one year. This is in excess of jurisdiction of the justice, and you are therefore advised that the justice should bind the defendant over to the circuit court for trial unless the conditions and circumstances of the case are such that you do not desire to punish him as for a second offense and do not charge it in the complaint. Then, of course, the justice will have jurisdiction to sentence him for possession of hides out of season, the penalty for which is, I understand, not exceeding the jurisdiction of the justice.

You also state that this party was sentenced last January to pay a fine and, in default of payment of the same, to sixty days in jail; that he failed to pay the fine for three weeks and then paid it. You inquire whether this would be a prior sentence to imprisonment in contemplation of sec. 359.14. This question must be answered in the affirmative on the authority of State v. Jacobs, 167 Wis. 299.

JEM

Public Officers—Coroner is not entitled to fees for making investigations over bodies of dead persons when no inquest has been ordered or held.

J. W. Bernard,
District Attorney,
Washburn, Wisconsin.

You inquire whether the coroner of a county is entitled to fees for conducting investigations over the bodies of dead persons when no inquest has been ordered by the district attorney and when no further inquest is held. It is a well established rule of law in this state that a public official's right to compensation is purely statutory, and that what the statute gives, he receives, but no more. The same is true as to expenses incurred by a public officer. See State v. Cleveland, 161 Wis. 457, 459.

Unless some statutory provision can be found which either expressly or by necessary implication grants fees for the services performed by the coroner, he is not entitled to compensation. I have been unable to find any provisions in the statute from which I could conclude that the coroner is entitled to com-
pensation for conducting investigations over the bodies of dead persons when no inquest has been duly ordered or held. The fees provided for in sec. 366.01 do not seem to be broad enough to authorize such fees.

JEM

**Appropriations and Expenditures—High Water Relief—Counties—** County board may not appropriate money for work of private association for relief of high water.

May 21, 1926.

HONORABLE JOHN J. BLAINE,

*Governor.*

You state that the Association for Relief of High Water is a voluntary association organized by citizens of this state primarily for the purpose of working out a solution of the problem of high water that inundates farms, etc., in the Fox and Wolf river valleys. It is an association depending entirely upon donations to carry on its work, and it is in no way interested in any promotion scheme or business undertaking. The work of the association is of material benefit to farmers and others of Fond du Lac and Winnebago counties.

It is proposed that the counties make an appropriation to aid in the work, especially the work of the association as affects each county. The question presented is whether the county boards have authority to make an appropriation to the association or for the work in which the association is engaged.


I have made a careful examination of the statutes relating to counties and county boards and I do not find therein any power, express or implied, which covers the instant situation. My conclusion therefore must be that the county boards have no authority to make the proposed appropriation.
This is not to say that the work which the above mentioned private association is doing is not of public concern. Neither is it to say that the legislature might not confer the necessary power in the premises. The conclusion is only that the legislature has not done so.

FCS

*Criminal Law—Embezzlement*—Where president of bank who is manager of its affairs converts to his own use funds of bank, he is guilty of embezzlement although he may have intended to ultimately replace funds.

May 27, 1926.

N. S. Boardman,
District Attorney,
Mineral Point, Wisconsin.

You state that “A” was president of a corporation in your city and the general manager in charge of its corporate affairs; that he was paid a salary something like $200 a month, and on the same ledger sheets on which his salary with the company was kept it appears that he over drew his salary some $8,000 while acting as such president and managing officer of the company; that on a ledger sheet appears his expenses with the company, that is, the money that he spent personally while transacting business for the company. You state that the fact that he over drew his salary was known to all of the officers and most of the directors, but that it was not known to one or two of the directors, who were the only responsible parties connected with the company and the only parties by whom the company secured credit from the banks and who will have to stand the loss on the loans made by the banks to this company. You also state that at the time of over drawing his salary the president made no effort to hide the fact; that the over drawn amounts are listed on the ledger sheets as of the date of withdrawal, and any person interested in the affairs of the company could have, by examination of the books at any time, ascertained the amount that the president was over drawn; that the company became insolvent and closed its doors and is in process of liquidation. You state there is nothing on the minute books of the directors’ meetings or stockholders’ meetings that would authorize the president to over draw his salary in this matter; that he is not financially
responsible and has no prospects of becoming such, and that at the time of the withdrawals the company was undoubtedly actually insolvent and becoming more so each day. You inquire whether the above facts constitute the offense of embezzlement.

You state that it was your conclusion that sec. 343.20, Stats., was made to cover such a breach of trust were it not for the recent decision of Sprague v. State (Wis.), 206 N.W. 69, in which case the trial court used language which seemed to have been taken as good law by the supreme court, and the case was decided as if such were the law, that is, that the defendant could not be convicted of embezzlement because the corporation never consented to defendant's having the funds in question in his custody.

Sec. 343.20 uses the following language:

"Any officer, agent, clerk, employe or servant of * any banking * company or other corporation, * or in the service or employment thereof, who, by virtue of such office or employment, shall have the possession or custody of, or who shall be entrusted with the safe-keeping, the disbursement, investment or payment of any money or fund, * shall embezzle or fraudulently convert to his own use * shall be punished, * * *"*

You will note that in order to constitute embezzlement the person must have possession or custody of the money which he converts to his own use. In the Sprague case the element in the offense was not shown. There checks were drawn on the bank which were paid by other officers who had charge of the bank, and other transactions were made with the bank by the defendant, who was not shown to have had custody of the money. In your statement of facts, however, "A" was president of the corporation and was general manager in charge of its corporate affairs. This would distinguish your case from the Sprague case.

The case of Glasheen v. State, 205 N. W. 820, decided by our supreme court on November 17, 1925, shows that "A" is guilty of embezzlement although he may have intended to replace the money later on, when he overdrew his account. It was there held that where defendant deliberately and intentionally converted funds of which he was custodian to his own use, the offense of embezzlement was complete when conversion took place; and that defendant thereafter expected to restore money to the public treasury from which he had wrongfully taken it was immaterial.
On page 822, the court said:

"The evident intent and purpose of the statute was to safeguard public funds which should be kept inviolate by those to whose care they are intrusted. No plea of economic necessity can justify conversion by a public officer of public funds to his own use. Those who assume the custodianship of public funds must be presumed to do so with a knowledge of their duties and liabilities as such. Ignorance or failure to appreciate the legal relationship involved may in some cases affect the moral but cannot affect the legal aspects of the conversion. In this case the defendant deliberately and intentionally converted the funds of which he was custodian to his own use. From that the law infers a wrongful and felonious intent. When the conversion took place the offense was complete, and the fact that he thereafter expected to restore the money to the public treasury from which he had wrongfully taken it does not acquit him in the eyes of the law. If the argument made in this case was to prevail and the secret intention of a public officer to restore funds unlawfully converted to his own use was held to be a defense, little protection to public funds from spoliation by dishonest and hard-pressed custodians would remain."

In that case the defendant was treasurer of a school district whose money he appropriated to his own use. The statute, however, applies and expressly enumerates officers of banks and other corporations as well as public officials, and the same reason will apply to an officer of a corporation who is manager of its affairs and has the custody of its property. I am of the opinion that the offense of embezzlement has been committed under the statement of facts submitted by you. The fact that the responsible directors did not know of the overdrawing of the president's salary strengthens the case against the president. JEM
Intoxicating Liquors—Nonintoxicating Liquors—Municipal Corporations—Ordinances—License for sale of nonintoxicating liquors may be issued by village or town board or common council pursuant to sec. 165.01, subsec. (29), subd. (a), Stats., under ordinance, resolution or motion.

Void ordinance may be good resolution.

Where bottle containing moonshine or alcohol is smashed against outside foundation of building being searched for nonintoxicating liquors it constitutes destruction under terms of sec. 165.01, subsec. (19), Stats.

Harold J. Marcoe, District Attorney, Darlington, Wisconsin.

You have inquired whether a license issued under a void ordinance may be good, considering the void ordinance as a valid resolution.

Sec. 165.01, subsec. (29), par. (a), Stats., provides:

"Each town board, village board and common council shall grant licenses to such persons as they deem proper for the sale of nonintoxicating liquors to be consumed on the premises where sold and to manufacturers of nonintoxicating liquors who are not required to obtain a permit from the state prohibition commissioner, and to wholesalers, retailers, and distributors of nonintoxicating liquors for which a license fee of not less than five dollars nor more than fifty dollars to be fixed by the board or council shall be paid, except that where nonintoxicating liquors are sold, not to be consumed on the premises, the license fee shall be five dollars. Such license shall be issued by the town, village or city clerk, shall designate the specific premises for which granted and shall expire the thirtieth day of June thereafter. The full license fee shall be charged for the whole or a fraction of the year. No such liquor shall be manufactured, sold at wholesale, or retail or sold for consumption on the premises, or kept for sale at wholesale or retail, or for consumption on the premises where sold without such license."

May 27, 1926.

The general rule is that where the enabling act commits a matter to the discretion of a governing body and is silent as to the mode—neither expressly nor by necessary or clear implication requiring the action to be in the form of an ordinance—the action or decision of the governing body may be evidenced by a
resolution and need not necessarily be by ordinance. II Dillon Municipal Corporations, p. 896.

In *Green Bay v. Brauns et al.*, 50 Wis. 204, the Green Bay charter declared that the common council should have power to "make, enact, ordain, establish * * * alter, modify, amend and repeal * * * ordinances, rules, resolutions and by-laws for the government and good order of the city," etc. The court in treating of these broad powers held that any mode of fixing a salary of the city treasurer is sufficient, provided that the action was made to appear in the record in some written or permanent form. The action of the common council by adopting a motion was held sufficient.

In *Porch v. St. Bridget's Congregation*, 81 Wis. 599, plaintiff sought an injunction restraining defendant from laying out and platting a cemetery. The statute prohibited the use of such grounds for such purpose within certain limits, without first obtaining the consent of the municipal authorities thereof. The statute required consent but was silent on the matter in which it was to be given. The consent herein was granted by motion. Answering the plaintiff's contentions, the court said, p. 602:

"* * * It is held in *Green Bay v. Brauns*, 50 Wis. 204, that, as to such a matter, 'any form or mode of procedure which the common council might resort to for expressing its decision or determination * * * would comply with the charter, providing such action were made to appear in the record of its proceedings in some written and permanent form.' This was said in relation to fixing the salary of the treasurer to be elected, a matter of more importance than simply giving 'consent.' The statute does not require such consent to be given by ordinance or formal resolution. A motion submitted and voted on and adopted or 'granted,' is the common form of procedure of deliberative bodies. The record would seem to be sufficient to show that the *St. Bridget's Congregation* had obtained the consent of the city to lay out and use said land for a cemetery."

In *State ex rel. Elliott v. Kelley*, 154 Wis. 482, 488, it is stated:

"What has been said sufficiently answers the contention that the action of the council is *ultra vires*, because had in the form of a resolution instead of an ordinance. The requirement as to action by ordinance has relation to the situations with which it deals. A common council, in the execution of its implied powers of legislation, is not restricted in all cases to action in any particular form. Any which will plainly express the legislative will and is reasonably appropriate to the case, is sufficient."
By the provision of the general-welfare portion of the charter (sec. 925-52, Stats.) the common council may act by "ordinance, resolution, by-law or regulation," and any such act is given the force of law, provided it "be not repugnant to the constitution of the United States or of this state or the laws thereof,"—all in harmony with the common-law rule that an ordinance—technically, an enactment in the form of a by-law—is not essential unless required, expressly or by necessary inference. There is no express requirement covering the precise situation the council, in the particular instance, dealt with, and there is no reason why it could not as well have acted as it did as in a more formal way.

"There is much confusion in the authorities in respect to whether municipal legislative action must be in the form of an ordinance, but the weight of authority is to the effect that where that is not expressly required, a more informal method is sufficient, or the latter is to be given the effect of an ordinance where the exigencies of the particular case do not reasonably require the formal action. 1 Beach, Pub. Corp., secs. 484, 485."

There having been no direction expressed by the legislature in sec. 165.01, subsec. (29), par. (a), Stats., on how the town or village board or town council were to fix fees and issue license for the sale of nonintoxicating liquors, these boards and the common councils may do it by ordinance, resolution or motion. The ordinance, though void, as such, if it contain all the elements of a valid resolution, would be a legal resolution and any licenses issued under such ordinance would be legal.

Your second proposition is as follows: While the sheriff and a deputy were searching an alleged soft drink parlor for intoxicating liquors, the proprietor, who had been in the building, put something in his pocket, and went out the door of the building. The deputy followed and came upon him while he, the proprietor, was in the act of destroying and smashing a bottle upon the masonry of the building, that is, the outside foundation. The deputy, after smelling of the contents, came to the conclusion that it was either moonshine or alcohol. You inquire whether this is a destruction of liquids in violation of sec. 165.01, subsec. (19).

In my opinion this is a violation of sec. 165.01 (19) and I refer you to Pitkunas v. State, 183 Wis. 90. In your situation the proprietor left the building while a search was being made. The sheriff and his deputy were lawfully upon the premises and came upon him while searching. This is clearly in violation of the statute above referred to.

MJD
Courts—Testimony given by girl, afterwards deceased, is not admissible in evidence in criminal prosecution after her death, when defendant had no opportunity of cross-examination.

RAYMOND EVRARD,
District Attorney,
Green Bay, Wisconsin.

You have submitted to this department testimony given by a girl on the 27th day of March, 1926, as a result of which a warrant for bastardy was caused to be issued by your office, pending the birth of the child. You say that this girl was less than seventeen years of age, and her testimony implicated at least two parties; that she has subsequently died from child birth. You inquire whether any prosecutions should be brought against these parties implicated, and whether her testimony would be admissible in evidence against them.

The testimony of the girl was not made in anticipation of death, and it not being a homicide case, the testimony would be inadmissible. Jones on Evidence, 1st ed., secs. 334–336. There having been no opportunity of cross-examination by any of the parties accused, the testimony is not admissible as the testimony of a deceased person, nor under sec. 325.31, Stats. Unless you have other testimony from other witnesses, it will be useless to begin a prosecution, as you have not sufficient evidence to make out a prima facie case.

JEM

Real Estate—Taxation—Unpaid taxes on real estate may be collected by distress and levy under sec. 74.10, subsec. (1), Stats., or by action for debt under secs. 74.12 and 70.17, with accompanying attachment upon personalty to insure collection of judgment.

GEORGE F. MERRILL,
District Attorney,
Ashland, Wisconsin.

You state that certain foreign corporations owning large tracts of land in Ashland county have failed to pay their taxes and are cutting timber and removing it from the county. The
land without the timber is worthless. You request advice on the
manner of collecting the taxes.

Under sec. 74.01, Stats.:

"* * * All taxes levied upon any lands and all costs,charges and interest thereon shall also be a lien on all logs,wood and timber cut upon such lands subsequent to the first day
of May in that year in which such taxes are levied; and it shall
be the duty of the town treasurer, or if such taxes be returned
uncollected, of the county treasurer, to pursue and levy upon
such logs, wood or timber wherever the same may be and collect
such tax by distress and sale of the same in the manner pro-
vided by law for the distress and sale of personal property for the
payment of taxes."

Sec. 74.10, subsec. (1), provides for the levy of unpaid taxes
by distress and sale of any goods and chattels belonging to such
persons, etc. The county treasurer can levy by distress and sale.

Sec. 70.17 provides:

"Real property shall be entered in the name of the owner,
if known to the assessor, otherwise to the occupant thereof if
ascertainable and otherwise without any name. * * * * The
tax thereon may be enforced in the same manner as other real
estate taxes or by action of debt as prescribed by section 74.12
for the collection of taxes on personal property."

Sec. 74.12 provides in part that in addition to the other reme-
dies provided in ch. 74, an action of debt shall lie in the name of
the town, city or village, and after the tax is returned as del-
iligent in the name of the county for any tax assessed against
any person upon personal property remaining unpaid after the
last day of January, etc. It furthermore provides that it is the
duty of the district attorney upon request to attend and prose-
cute any action or proceeding commenced under any of the
provisions of this chapter for the collection of a tax. These
provisions authorize an action of debt against the corporations
for the unpaid taxes. In connection with such an action, logs
could be attached.

If the county holds the tax certificates having purchased them
at the tax sale, it can bring an action of waste under secs. 279.08
and 279.09 to prevent further cutting of logs.

It is my opinion, therefore, that the collection of real estate
taxes such as you mention may be accomplished by levy and
distress of any personal property of the owner or occupant of the
lands, or by an action of debt, attaching the logs to insure pay-
ment of the judgment.

MJD
Public Officers—Toxicologist—Services of toxicologist in examining organs of dead bodies at request of district attorney and in making analysis are without charge, as he is on salary.

OTTO L. OLEN,
District Attorney,
Clintonville, Wisconsin.

You state that the body of a known man was found floating in the Wolf River and the doctors' investigation shows that his lungs were full of air and that he did not die from drowning; that you have ordered the heart, stomach, and other parts suggested by the doctors to be sent to the state chemist for analysis, and you ask whether this is the proper procedure and who pays for this analysis.

Mr. Klueter is the state chemist, and he would not be the proper person to send those organs to for examination, but the regents of the university, under sec. 36.226, have been required to establish and maintain a state toxicologist. Such state toxicologist is required, without charge, to make toxicological analyses of human and animal material when submitted to him by any district attorney in the state. If you have forwarded these to the state chemist, he will send them to the state toxicologist, and there will be no charge for his services. Of course, if you use him as a witness he will be entitled to his traveling expenses and witness fees. These witness fees must be paid as other witness fees.

JEM
Criminal Law—Elections—Election Inspector—Public Officers—Malesance—Words and Phrases—Wilful—Secs. 348.24, 348.28 and 348.29, Stats., are intended to punish only wilful violations of election laws. "Wilful" includes, in addition to mere purpose to do act, purpose to do wrong, and involves evil intent or legal malice.

Inspector of election who removes ballot from any polling place after it has been initialed by clerk is guilty of violation of sec. 348.234.

Inspectors of election in town containing only one election district are not guilty of violation of secs. 6.30 and 348.235 on account of failing to provide curtain and having booth with only one compartment. If town had been divided into two election districts and supervisors had designated polling places, supervisors would be guilty of violation of these sections.

June 2, 1926.

G. E. OSTRANDER,
District Attorney,
Princeton, Wisconsin.

You state that at an election held in X township the following irregularities occurred:

The polling booth had only one compartment. No curtain was provided. Two people were permitted to occupy this compartment at the same time, contrary to the provisions of sec. 6.38 Stats. One party, at least, was seen by a bystander to mark his ballot outside the polling booth. Inspector A took an official ballot outside the polling place and outside the building. Several others were seen to get out of line and walk outside the railing with official ballots. Inspectors A and B were candidates for side supervisors at the election. Inspector C was not on the ballot and publicly announced at the opening of the polls that he was not a candidate at such election. His name was, however, written in enough times to elect him to an office.

No requests were made for more adequate polling booths and no objections were made to the irregularities above mentioned. You inquire whether the three inspectors could be punished under the following sections of the statute:

"Any inspector of elections who shall wilfully violate any provision of law or be guilty of any fraud in respect to any election shall be punished." Sec. 348.24.
"Any officer * * * of any * * * town * * * who shall * * * do any other act in his official capacity, or in any public or official service not authorized or required by law, * * * shall be punished * * *.” Sec. 348.28.

"Any person mentioned in section 348.28 * * * who shall wilfully violate any provision of law authorizing or requiring anything to be done or prohibiting anything from being done by him in his official capacity or employment, * * * shall be punished * * *.” Sec. 348.29.

"No officer of any election held under the provisions of title II of these statutes shall * * * remove any ballot from any polling place before the polls are closed, * * *.” Sec. 348.234, subsec. (1).

You will note that secs. 348.24 and 348.29 above set forth provide a punishment only for wilful violation. I am of the opinion that sec. 348.28 should likewise be construed to provide a punishment for wilful violation only. The term "wilfully" has been defined by our supreme court in the case of Brown v. State, 137 Wis. 543, as follows, p. 549:

"* * * The word ‘wilfully’ has acquired a pretty well defined meaning in criminal statutes. While its lexiconic significance may in some association be no more than intentionally or even knowingly, yet, when used to describe acts which shall be punished criminally, it includes, in addition to mere purpose to do the act, a purpose to do wrong. It involves evil intent or legal malice, according to the great weight of authority. * * * It is used ‘to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty;’ * * *.”

It is, of course, for the jury to determine whether or not an act was "wilfully" done, applying the definition above set forth. A careful consideration of sec. 348.234, however, impels me to the opinion that Inspector A may be prosecuted under the provisions of this section. I am of the opinion, however, that the term "ballot" as used in such section must be construed to mean the ballot after it has been initialed by the clerk, as provided in sec. 6.36. Therefore, if Inspector A removed such ballot from the polling place before the polls were closed, and if the ballot was initialed, he could be prosecuted under this section.

I have not failed to consider sec. 6.30, which provides as follows:

"All officers upon whom is imposed by law the duty of designating polling places shall, under the penalties elsewhere pre-
scribed, provide and maintain in each polling place designated by them a sufficient number of places or compartments, at least twenty-four inches wide and deep, with shelves for writing, which shall be furnished with such supplies and conveniences as shall enable voters to conveniently prepare their ballots, and each compartment shall be furnished with a door, screen or curtain of cloth so hung as to completely conceal the voter and any one who may lawfully assist him from observation while marking and preparing his ballot, and said room shall have a guard rail so constructed that only persons within said rail can approach within five feet of the ballot boxes or such places or compartments. The number of such places, shelves or compartments shall not be less than one for every fifty electors who voted at the last preceding general election in the district. No person except the officers of election, other than voters engaged in receiving, preparing or depositing ballots, shall be permitted to be within said rail. The expense of providing and maintaining such places, shelves, compartments, doors, screens or curtains and guard rails shall be provided for in the same manner as other election expenses."

The penalty for the violation of this section is found in sec. 348.235, Stats., which provides in part:

"* * * Any officer required by law to provide election booths and compartments with doors, screens or curtains, who shall fail to provide and maintain the same; * * * * shall be punished by imprisonment in the county jail not more than thirty days nor less than ten days, or by fine not exceeding one hundred dollars nor less than twenty-five dollars, or by both such fine and imprisonment."

You will note that sec. 6.30, above quoted, imposes the duties upon "all officers upon whom is imposed by law the duty of designating polling places." The manner of designating polling places for towns is provided for in sec. 6.04, subsec. (3), Stats., as follows:

"In each town, at the place where the last town meeting was held, or at such other place as shall have been ordered by such meeting or by the supervisors, when they establish more than one election district as hereinafter provided; but the first election after the organization of a new town shall be at the place directed in the act, order or proceeding by which it was organized."

In the case of towns, therefore, it appears that the law itself designates the polling place, except where more than one election district has been provided. Where there is more than one
election district, I am of the opinion that the town meeting or the supervisors could designate the polling place, but not otherwise.

If, therefore, your town has only one election district, I do not think a successful prosecution could be maintained under the provisions of secs. 6.30 and 348.235. If, however, the supervisors had divided the town into more than one election district and had designated the polling places, the supervisors could be prosecuted under these sections.

CAE

Criminal Law—Intoxicating Liquors—It is unlawful for officer to arrest one who has committed misdemeanor in his presence after considerable time has intervened between offense and arrest.

When state has shown that defendant has in his possession distilled liquor, *prima facie* case has been made up, and it is matter of defense for defendant to show that he had permit or was authorized to have it in his possession.

June 4, 1926.

William M. Gleiss,
District Attorney,
Sparta, Wisconsin.

You have submitted the following statement as a basis for an official opinion:

"A deputy sheriff of Monroe county while in an alley of a city this county, saw B stealthily approach a car parked in this alley and take therefrom a package and in the same manner, after removing the package from the car, pass around a building with the package in question and, believing that B was committing a crime in removing this package from the car, judging from the manner in which he approached it and left, pursued B, and the latter, observing pursuit, dropped the package. The deputy sheriff took possession of the package, which, without opening, he discovered was a container filled with alcohol. He knew this, of course, by the odor. A search warrant was obtained, the car searched and nothing further found. B was apprehended later in the day and charged with transportation and possession of intoxicating liquor."

You inquire whether the state has a case against the defendant. You also state that there is no question of identity; that
the only point involved is the legality of the arrest and the knowledge obtained by the officer.

Under your statement of facts it must be held that the arrest was illegal. The officer did not arrest the man while he was committing a misdemeanor in his presence. In 2 Am. & Eng. Encyc. of Law (2d ed.) the rule of law applicable is stated thus, pp. 879–880:

"An arrest without a warrant, even if made by an officer, for a past misdemeanor is unlawful, unless the arrest is made within a reasonable time afterwards; or unless it is an assault liable to end in felony by the death of the injured person. Nor is an officer at any time justified in arresting a person on mere suspicion of misdemeanor."

In the case of Wahl v. Walton, 16 N. W. 397, it was held that the arrest must be made within a reasonable time after the misdemeanor has been committed in his presence, and, five hours having elapsed since the offense was committed, during which time the officer was attending to other matters, the authority to arrest had ceased. At common law it was unlawful to arrest one for committing a misdemeanor in the presence of the officer unless he was also disturbing the peace, but the statute has changed this, and now an officer may arrest anyone committing a misdemeanor in his presence. In the above case the court gave the reasons for the rule and used the following language (p. 398):

"* * * The power to arrest without warrant, while it may in some cases be useful to the public, is dangerous to the citizen, for it may be perverted to purposes of private malice or revenge, and it ought not, therefore, to be enlarged. When it is said that the arrest must be made at the time of or immediately after the offense, reference is had, not merely to time, but rather to sequence of events. The officer may not be able, at the exact time, to make the arrest; he may be opposed by friends of the offender; may find it necessary to procure assistance; considerable time may be employed in the pursuit. The officer must at once set about the arrest, and follow up the effort until the arrest is effected. In Regina v. Walker, 25 Eng. Law & Eq. 589, some two hours had elapsed between the offense and the arrest, and it was held that the authority to arrest was gone, because there was no continued pursuit; and the same was held in Meyer v. Clark, 41 N. Y. Superior Ct. 107, because the officer had departed and afterwards returned, the court saying, 'the shortness of the interval does not affect the question.'"
It would seem that in this case the officer had lost the right to arrest the defendant, although you do not state how long a time had elapsed between the offense and the arrest. It would seem, however, that the knowledge obtained by the officer was legally obtained. He did not search the defendant’s person, but simply examined the liquor that was abandoned by the defendant. I think the case is different from the case of Testolin v. State, 205 N. W. 825. In that case the defendant was placed under arrest immediately before the officer knew that there was moonshine in the bottle, and the court held that the arrest, seizure and subsequent examination of the bottles were all one transaction and that the arrest was illegal. Here, the arrest was not connected with the examination of the contents of the bottles, and no constitutional rights of the defendant were violated by the officer examining the bottles and ascertaining that they contained alcohol.

On the question whether the alcohol is privately distilled manufactured liquor, which you state you cannot prove, I refer you to the case of Hiller v. State, 208 N. W. 260, in which our court held that it is a matter of defense after you have shown that he had in his possession distilled liquor. You have made out a prima facie case when you prove that he had in his possession distilled liquor, which in the Hiller case was alcohol the same as in your case. I am of the opinion that you can prove possession and transportation of liquor in violation of the prohibition law. It may be necessary for you to dismiss the action and arrest the defendant on a warrant duly issued, as it seems that the first arrest was illegally made for the reasons heretofore stated.

JEM
Courts—Indigent, Insane, etc.—Notice of application for appointment of guardian of person in insane hospital must be served upon superintendent of such hospital, which is sufficient service in law.

Summons for beginning of foreclosure action or other action must be served on guardian of insane person and on patient personally.

June 9, 1926.

BOARD OF CONTROL.

You have submitted a letter of Dr. Sherman, superintendent of the northern hospital for the insane, and you ask to be advised concerning the question raised by him. Dr. Sherman says:

"During the past few months attorneys have been sending an unusually large number of legal processes to be served upon patients personally. These are notices of application for appointment of guardian, of foreclosure, of attachment, of divorce proceedings, etc. In many instances the service of such processes is detrimental to the welfare of the patient. I should, therefore, like an opinion as to just what processes it is necessary to serve upon insane persons."

Under sec. 319.16, Stats., which relates to petitions, etc. for an appointment of a guardian for insane persons, we find the following provisions:

"* * * Whenever any such insane person shall be confined in either of the state hospitals for the insane or any county asylum for the insane in this state such notice may be served upon the superintendent of such hospital or asylum, and such service shall be deemed sufficient in law; and if in the opinion of such superintendent it shall not be proper to remove such insane person, he shall certify that fact to the court, and it shall be deemed a sufficient cause for not producing such insane person on the hearing."

In the beginning of other actions, such as foreclosure, divorce, etc., it is necessary to serve a summons, and the statute provides the manner in which a summons may be served.

I quote from sec. 262.08 that part which is relevant here:

"(1) If [the action be] against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of excessive drinking or otherwise, and for whom a guardian has been appointed, to such guardian and to the defendant personally."

"(4) In all other cases to the defendant personally; or, if not found, by leaving a copy thereof at his usual place of abode in
presence of some one of the family of suitable age and discretion, who shall be informed of the contents thereof."

You are therefore advised that under the present statutes it is necessary to serve the process which begins an action on the insane person as provided in the above statutes. If it is believed best to change this statute so as to permit the service upon the superintendent of the hospital when the insane person is in the hospital, it will be necessary to present the matter to the legislature. It is very doubtful, however, whether the legislature would be willing to change the statutes on this subject. Insane persons, as you know, often have lucid intervals, and they should not be deprived of any of their rights or property without the personal service of a summons beginning an action being served on them. But this would be a matter for the law-making department of the government to pass upon.

JEM

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**Appropriations and Expenditures—Public Officers—Special State Treasury Agent—Employment in Two Capacities—Investigator of fraudulent advertising appointed by state treasury agent may act also as special treasury agent and receive commissions upon license monies collected by him if such agreement is made between him and state treasury agent.**

**GEO. W. MEGGERS,**

**State Treasury Agent.**

You state that you have several investigators of fraudulent advertising in your employ, who are also special treasury agents. These men receive a monthly salary as the investigators of fraudulent advertising under the appropriation therefor, made by 20.07, subsec. (3), Stats. They also receive as special treasury agents an amount equal to ten per cent of the license monies collected by them. This is pursuant to an agreement entered into with you when these men were employed. You inquire if such an arrangement is legal and if the men can be paid from the two funds.

I have carefully examined the statutes relative to the duties of special treasury agents and investigators of fraudulent advertising and find that there is no incompatibility between the
two employments; neither are the duties of one employment included in the duties of the other.

It would appear, therefore, that your inquiry is answered by the following quotation from Op. Atty. Gen. for 1910, 604, 606:

"An erroneous opinion seems to obtain in some quarters to the effect that one person cannot be employed in two capacities or positions by the state and be compensated for each. This is not true when the law or agreement under which the official is employed does not require him to devote all of his time exclusively to the performance of the duties of the position he holds and when the law does not require him to perform the duties of such other position.

"Because one is a state official or employed to perform specific duties or to perform such duties as are assigned to him by his superior officer, it does not follow that he cannot be employed in other capacities even by the state when the duties of the two positions do not conflict, where the law does not require him to perform the duties of the second employment and where the duties of the additional position or employment do not interfere with his successful performance of the duties of the first.

"But of course it will be borne in mind that no general rule may be laid down to govern all positions. There are many different positions and employments and various laws relating to them and as to each position or each class of officers or employes the law relating to the duties thereof must be considered and interpreted separately and independently of others."


I am of the opinion, therefore, that the arrangement made by you is legal, and that your appointees may receive both a monthly salary and commissions.

CAE

Normal Schools—Public Lands—Taxation—Property in city acquired by board of normal regents on July 5, 1921, was exempt from taxation for year 1921.

William Kittle, Secretary,
Board of Normal Regents.

The material facts submitted in your letter of May 22 are as follows: Robert E. Hackett and others conveyed certain property in the city of Milwaukee to the board of normal regents in

June 11, 1926.
trust for the state of Wisconsin, by warranty deed, dated July 5, 1921. Tax certificate for unpaid taxes for the years 1921 to 1925 inclusive, covering this property, have been sold to S. B. Know and Brothers of Milwaukee. You inquire whether the property should have been taxed during the years 1921–25, inclusive, and whether the state is legally liable for the payment of such taxes.

Sec. 70.11, subsec. (1), Stats., provides that property owned exclusively by the state shall be exempt from taxation. In Petition of Wausau Investment Company, 163 Wis. 283, the court held that lands deeded to the state prior to the first Monday in August in any year are exempt from taxation for that year. The decision is based on sec. 1064, Stats. 1913, renumbered sec. 70.50, which provides that the assessor shall, before the first Monday in August, deliver the assessment roll to the town, city or village clerk, that the assessment roll is open to correction up to the time that the roll is delivered to the town clerk, and that it is the duty of the board of review to omit property deeded to the state before the assessment roll is thus delivered.

The property here is property in Milwaukee, a city of the first class. Sec. 1064, Stats. 1913, renumbered sec. 70.50, does not apply to cities of the first class. Sec. 70.46, subsec. (2), Stats., provides that the board of review in cities of the first class shall meet on the first Monday of July, each year. Sec. 70.51, Stats., provides:

"The board of review in all cities of the first class * * * after they have examined, corrected and completed the assessment roll of said city and within the time prescribed by law, shall deliver the same to the tax commissioner who shall thereupon re-examine, perfect the same and make out therefrom, a complete tax roll in the manner and form provided by law."

In accordance with the statute, the board of review of Milwaukee meets on the first Monday in July of each year. The first Monday in July, in 1921, was July 4th, which was a legal holiday. The board, therefore, did not meet until July 5, 1921. However, construing the provision in sec. 70.51, subsec. (1), Stats., "within the time prescribed by law," it is apparent that the board of review could not possibly have finished their labors and turned over the assessment roll to the tax commissioner on July 5. The roll was subject to correction on this day, at least. The case, therefore, falls within the principle laid down

Consequently the property to which you refer was not subject to taxation in the year 1921 nor in any year subsequent thereto.

SOA

Counties—Dance Hall Ordinances—Public Officers—County Clerk—Unless ordinance confers discretionary power upon county clerk, he must issue license if requirements of ordinance have been complied with, upon application therefor.

June 11, 1926.

R. M. Orchard,
District Attorney,
Lancaster, Wisconsin.

You inquire whether a county clerk is compelled to issue a license for a public dance hall, or whether he has discretionary powers in regard to the granting of a license.

It appears from sec. 2 of the dance hall ordinance of Grant county that:

"It shall be unlawful to hold any public dance or public ball, or hold classes in dancing within the limits of the county of Grant, until the dance hall in which the same may be held shall first have been duly licensed for such purposes. The application for such license shall be granted by the county clerk as herein prescribed and the license shall be signed by the chairman of the county board, the county clerk * * *." 

Sec. 5 provides:

"No public dance or ball shall be held in any public dance hall unless the person, association or corporation intending to hold such dance or ball shall apply for and receive from the county clerk, with the approval of the chairman, a permit to hold the same. Application for such permit shall be made to the county clerk upon such forms as the dance hall inspection committee may prescribe. * * * Such permit may at any time be revoked by the county clerk or dance hall inspection committee in case it appears probable that the dance or ball for which permit has been issued will not be conducted in accordance with such rules and regulations. The license of any public dance hall may be revoked by the county clerk or dance hall inspection committee if a public dance or ball be therein held without the permit provided for in this section."
In granting or refusing a license, administrative duties may be conferred upon the acting officer. Thus an ordinance to regulate and license dance halls may require that all applications be referred to the chief of police, who shall investigate to determine whether prescribed regulations have been complied with and make report with recommendation as to whether license shall be issued. *Mehlos v. Milwaukee*, 156 Wis. 591, 146 N. W. 882.

The character and suitability of the applicant may be submitted to a named officer for determination on the theory that it is a matter of mere administration. Hence an ordinance to license junk shops which specified the amount of the license and other details in regard thereto and provided that application “shall be made to the mayor, who may grant or refuse such license as to him may seem best for the good order of the city” was held valid as a delegation to the mayor of legislative power. *Milwaukee v. Ruplinger*, 155 Wis. 391, 145 N. W. 42.

Such discretion, however, must be conferred upon the administrative officer. In its absence he has no alternative, but must grant the license.

In the ordinance, particularly the sections aforementioned, the county clerk is not given any discretionary powers and, in the absence of such power, cannot refuse to grant a license.

MJD

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*Corporations—Investment Associations*—Certain specified corporations held not to be investment companies under provisions of ch. 216, Stats.

*Railroad Commission.*

You ask whether certain companies are investment companies under the provisions of ch. 216, Stats. These companies, organized under the general corporation law, are in the business of purchasing, holding and selling securities, chiefly those listed upon the various stock exchanges. They are not stock brokers—that is, they do not sell stocks and bonds to the general public. They merely buy securities for investment and make their profit from dividends and appreciations in value. These companies ask permission for the sale of unsecured notes (called 10-year 6% notes in one case and 6% diversified invest-
ment certificates in the other). The proceeds of these notes are to be used in the conduct of the regular business of the companies of buying and selling stocks, bonds and other securities.

Sec. 216.04, Stats., provides for a distinct type of investment company doing a particular kind of business, organized in a specified manner, and having certain special powers and limitations. This section recognizes the existence of investment companies of other types, particularly in subsec. (13). Clearly, the companies in question are not investment companies in the restricted sense in which the term is used in sec. 216.04.

The question still remains whether they are investment companies within the meaning of secs. 216.01 to 216.03. These sections were enacted in 1899 by ch. 216 and apparently have never been construed by the banking department as applying to companies of the type now under consideration. The construction placed upon statutes by proper state officials is of great weight and is oftentimes decisive. State v. Johnson, 186 Wis. 59, 68-69.

It is my opinion, therefore, that the companies under consideration are not investment companies under the provisions of ch. 216.

ML

Appropriations and Expenditures—Secretary of State—Superintendent of Public Property—State treasurer should refuse to issue draft in part payment for permanent property, ordered by secretary of state, where purchase was not made by superintendent of public property. Purchases of permanent property must be made through superintendent of public property, and superintendent, at least in absence of abuse of discretion vested in secretary of state, must purchase such property as latter requisitions for his department.

June 11, 1926.

HONORABLE FRED R. ZIMMERMAN,
Secretary of State,
HONORABLE SOLOMON LEVITAN,
State Treasurer.

You have each submitted statements of facts involving the same transaction and have requested an official opinion thereon.
It is therefore deemed advisable and expedient to answer both of your requests in the same opinion.

It appears that the state treasurer has received a warrant from the secretary of state in favor of the Addressograph Company, amounting to $9,093.25, the same to be charged to the appropriation made to the secretary of state for the administration of the automobile registration law, 20.04, subsec. (2), Stats. This represents a payment of a contract of purchase amounting to approximately $48,000. The superintendent of public property has advised that the requisition for this equipment was not signed by him and that he did not purchase the same nor authorize the purchase. Under such a statement of facts, an opinion is desired as to whether or not the draft should be issued.

In considering this question it is well at the outset to bear in mind some of the definitions contained in ch. 33, Stats. They are as follows:

"The term ‘office’ includes both houses of the legislature and any department, board, commission or body connected with the state government." Sec. 33.01, subsec. (1).

"The term ‘officer’ includes each requisitioning officer of the legislature and the person or persons at the head of any such department, board, commission or body, by whatever title any such person or persons may be elsewhere designated." Sec. 33.01, subsec. (2).

"The words ‘permanent property’ include furniture and furnishings, typewriters, calculating, numbering and adding machines, apparatus, library and other books, and any and all property which in the opinion of the superintendent will have a life of more than one year." Sec. 33.01, subsec. (3).

It would appear, therefore, that the equipment which is proposed to be purchased would be for an "office," as the term is used in the sections of the statutes, which will be quoted. I also assume, for the purposes of this opinion, that the addressograph machine is "permanent property," as the same is defined in subsec. (3) above.

The powers of the superintendent of public property are set forth in sec. 33.03, Stats. It is provided in this section that the superintendent is empowered and it is his duty.

"(5) To purchase all necessary permanent personal property * * * required for state use * * * in or about the nec-
essential preparation for occupancy of all office rooms wherever located to which state officers have been lawfully assigned as occupants, or in or about the proper maintenance of such rooms and supplying them with suitable furniture and other necessary office supplies."

“(6) To furnish * * * every office room to which a state officer has lawfully been assigned as occupant, with necessary permanent property, furniture * * * for which he shall have received a requisition signed by such officer or by some other person designated by such officer for that purpose."

It will be seen by the above provisions that the legislative scheme contemplates that the superintendent is to act as the general purchasing agent for the state, and that the various departments are to make requisitions for such property as they may desire, but are not to contract for the purchase. The law is well settled that a state officer does not have, by virtue of his office, any inherent right to expend public funds, but that such right must be granted either expressly or by necessary inference. An officer is not entitled to extra compensation for performing added duties, nor even to reimburse for expenses unless the legislature has seen fit to grant it. Outagamie County v. Zuehlke, 165 Wis. 23; Milwaukee v. Binner, 158 Wis. 529.

It has also been held that no executive officer can incur a state debt except as authorized by law. In Re Incuring State Debts, 19 R. I. 610.

The legislature has provided how property shall be purchased.

“Method of purchases; institutional manufacturers. All materials, supplies, fixtures, apparatus or equipment required to be furnished by the superintendent which are manufactured at the state prison or at any of the other public institutions of the state shall be purchased by the said superintendent from said prison or institution. When such supplies, materials, fixtures, apparatus or equipment cannot be purchased at the state prison or any of the other public institutions of the state and the cost thereof exceeds one hundred dollars, the said superintendent shall, in such manner as he shall deem best to secure the attention of probable bidders, invite proposals to furnish the same and shall purchase from the lowest responsible bidder.” Sec. 33.04, Stats.

A well known authority has laid down the following rule with respect to the letting of contracts:

“The manner of letting contracts for public work is frequently prescribed by statute, and when so prescribed the officers
Opinions of the Attorney General

charged with the duty of letting such contracts must proceed according to the prescribed mode." 36 Cyc. 874.

It will be noted that our statute not only prescribes the method of letting contracts for purchase, but also prescribes who shall let the contracts. It would appear clear, therefore, that the warrant was not regularly issued. This conclusion is fortified by a consideration of sec. 20.10, Stats., which contains the appropriations to the superintendent of public property. The first three subsections provide for administration and operation and for material supplies, repairs and maintenance.

Subsec. (4) provides as follows:

"Annually, beginning July 1, 1923, four thousand dollars, for the purchase of permanent property for the executive residence, the capitol, the public grounds surrounding the capitol, executive residence and the light, heat and power plant, and all offices outside of the capitol provided by said superintendent; but no part of this appropriation shall be used for the purchase of any permanent property for which a separate appropriation is made; and whenever a state office or officer shall requisition permanent property and direct the same to be charged to the appropriation for such office or officer, the superintendent of public property shall purchase and furnish such property, and the same shall be charged as so directed. * * *"

There is no appropriation to the secretary of state for permanent property, which again shows the legislative scheme of concentrating the purchasing power in the hands of the superintendent of public property. Indeed in subsec. (5), sec. 20.10, there is a specific appropriation of three thousand dollars for the purchase of filing equipment for the office of the secretary of state, but the appropriation is made to the superintendent of public property.

In arriving at my conclusion I have not failed to take into consideration sec. 33.01, subsec. (4), Stats., which provides in part as follows:

The provisions of this chapter do not authorize the said superintendent to * * * limit the power of any state office or officer to hire employes or incur state liability for traveling or other incidental expense necessary for such office or officer to carry out the powers, duties and functions imposed by law upon such office or officer."

The above section does not contemplate the purchase directly by an officer of permanent property. If it were to be so
construed it would be at variance with and upset the whole legislative scheme for the purchase of permanent property. The legislature has used the term "incidental expense." It could not well be held that expense incurred in purchasing a machine of this size is incidental expense.

It is my opinion, therefore, that the warrant was not regularly issued and the treasurer should therefore not issue the draft.

From the statement of facts submitted by the secretary of state, it appears that about three months ago he sent a requisition to the superintendent of public property for addressograph equipment to be used in connection with the registration of motor vehicles. The superintendent of public property refused to approve the requisition. The secretary of state, after a lapse of some time, ordered the addressograph equipment, and the warrant before mentioned represents a part payment upon the same. An opinion is desired upon the following question:

Must the secretary of state use the equipment prescribed by the superintendent of public property or is it within his discretion to obtain such equipment as his experience and due regard for an efficient and economical administration leads him to believe is most suitable?

In considering this question, it is necessary again to bear in mind, the provisions of sec. 33.03, subsec. (6), Stats. The relevant portions of this section provide that it is the duty of the superintendent of public property:

"To furnish * * * every office room, to which a state office has lawfully been assigned as occupant, with necessary permanent property, furniture * * * for which he shall have received a requisition signed by such officer or by some other person designated by such officer for that purpose; and to furnish upon like requisitions to every officer or agent of the state, all supplies, of whatever kind, which he is entitled by law to receive. * * *"

This opinion has already called attention to the fact that the addressograph machine comes under the heading of permanent property. The purchase thereof, therefore, is governed by the first portion of subsec. (6), as above set forth, under which it becomes the duty of the state superintendent "to furnish * * * necessary permanent property." The question, therefore, is squarely presented as to whether or not the state officer—in this case the secretary of state—or the superintendent of
public property shall determine what permanent property is necessary.

I have carefully searched the decisions in this state but have been unable to find one in point, nor have I been able to find decisions in other states construing a similar statute. A consideration of the legislative scheme of providing for the expenditure of state funds and the responsibility therefor, is helpful. Under our scheme, such appropriations are made to the heads of the various state departments or to the departments of state, as the legislature deems necessary to enable such department or departments to perform its functions. A record is kept of the expenditures and succeeding legislatures examine these records so as to enable them to determine what the proper amount should be. The legislative scheme appears to center the primary responsibility for expenditures upon the state officer or the head of the department.

It will be noted that sec. 20.10, subsec. (4), Stats., provides:

"* * * Whenever a state office or officer shall requisition permanent property and direct the same to be charged to the appropriation for such office, or officer, the superintendent of public property shall purchase and furnish such property, and the same shall be charged as so directed. * * *"

It will be noted that this provision, at first blush, appears to be in conflict with the provisions of 33.03 (6), Stats., which requires the superintendent to furnish "necessary permanent property." I do not think, however, that there is any necessary inconsistency between the provisions of the two sections. I believe that the primary right, and the primary duty of determining what is necessary, devolves in the first instance upon the state officer or the head of a state department. His determination as to what is necessary is entitled to considerable weight. In the absence of an abuse of discretion by such state officer, the superintendent of public property is not authorized to refuse to purchase property which has been requisitioned.

The secretary of state is therefore advised that although purchases must be made through the superintendent of public property, the superintendent, at least in the absence of an abuse of the discretion vested in the secretary of state, must purchase the property which has been requisitioned.

CAE
Mortgages, Deeds, etc.—Where it is proposed to satisfy present first mortgage held by annuity board due in 1934 and to have new one executed, due in 35 years, and there is second mortgage on same property, both first and second mortgages should be satisfied of record. New mortgage should then be recorded followed by recording of new second mortgage.

June 14, 1926.

Retirement System.

In your letter of April 26 you state that the annuity board holds a first mortgage on certain property due in 1934. Bonds were subsequently issued by the holder of the property secured by a second mortgage on the same property. It is proposed to satisfy the present first mortgage or have a new one executed which will become due in thirty-five years. You inquire what procedure is necessary in order to protect the annuity board.

Where a first mortgagee grants to the mortgagor an extension of the time for payment of the mortgage debt, but without any actual or intended discharge of the mortgage or taking a new one, and without any fraudulent intent as regards the second mortgagee, the latter cannot claim to be preferred to the first mortgage merely on the ground of such extension. 27 Cyc. 1222; Fry v. Shehee, 55 Ga. 208; Kraft v. Holzmann, 206 Ill. 548; Whittacre v. Fuller, 5 Minn. 508; Farmers Bank and Mutual Ass. Soc., 4 Leigh. 69 (Va.); Sheridan First National Bank v. Citizens' State Bank, 11 Wyo. 32.

But where, as here, a new mortgage is to be executed, the rule does not seem to apply, on the theory that the security of the second mortgagee might be thereby impaired. Whittacre v. Fuller, 5 Minn. 508.

Our supreme court has not passed on the question. In order that the interests of the state may be fully protected, it is the opinion of this department that both the first and second mortgages should be satisfied of record, and new first and second mortgages executed and recorded.

SOA
Public Officers—De Facto Officer—School District Treasurer—De facto school officer may vote as member of school board until his successor has been appointed and qualified.

June 14, 1926.

Herman R. Salen,
District Attorney,
Waukesha, Wisconsin.

The material facts presented in your letter of May 17 are as follows:

The treasurer-elect of a school district failed to file his bond in accordance with the provisions of subsec. (1), sec. 40.19, Stats. The treasurer-elect has continued to act as treasurer. At a recent meeting of the school board the district clerk objected to the treasurer’s voting on the employment of a teacher on the ground that the treasurer-elect was not a member of the board on account of his failure to file an official bond. You inquire whether the treasurer-elect has a right to vote as a member of the school board.

The failure of the treasurer-elect to execute and file an official bond caused a vacancy in the office. XV Op. Atty. Gen. 80. The vacancy, however, has never been filled and the treasurer-elect is consequently a de facto officer. As such de facto officer the treasurer-elect has a right to vote on the question of the employment of a teacher and to act as a member of the school board until his successor has been appointed and qualified.

SOA

Banks and Banking—Foreign Trust Companies—Illinois bank with trust powers can transact trust business in this state only to extent authorized by sec. 223.12, Stats.

June 15, 1926.

W. H. Richards,
Deputy Commissioner of Banking.

You ask whether a state bank existing and doing business as an Illinois corporation, with powers to do a trust business, has the right to transact a trust business in this state.

The following is quoted from an opinion of this department in VIII Op. Atty. Gen. 750, 753–754:
"You are advised that this department is of the opinion that the only corporations which may do banking in Wisconsin are domestic banks and those chartered by the United States to reside in Wisconsin. All others are excluded by sec. 2024—78m, except so far as foreign corporations are permitted by sec. 17706 to loan money in Wisconsin and take security therefor and enforce collections.

"* * *

"As to trust companies, foreign trust companies are excluded from Wisconsin by still more explicit statutes."

Sec. 223.10, Stats., provides:

"No court of this state shall appoint or name any corporation as trustee, executor, administrator, guardian, assignee, receiver or in any other fiduciary capacity unless such corporation is organized and existing under the provisions of sections 223.01 to 223.09 of the statutes."

Secs. 223.01 to 223.09, Stats., relate to the organization of trust company banks in this state.

Sec. 223.12, Stats., provides if a foreign trust company is named by a resident of this state as executor or trustee under his last will and testament, such company may act, provided it appoints the banking commissioner its agent for process, files with him a copy of its charter and articles of incorporation, and complies with the provisions of sec. 223.02, Stats. It is clear, therefore, that an Illinois bank with trust powers can transact a trust business in this state only to the extent authorized by sec. 223.12, Stats.

ML

Words and Phrases—Workmen's Compensation—"Such notice" as used in sec. 102.12, Stats., barring claim for compensation unless "such notice" is given and payment of compensation made within two years from date of accident, includes actual notice, as well as written statutory notice.

June 16, 1926.

A. J. ALTMeyer, Secretary,

Industrial Commission.

You ask for an opinion as to the meaning of the following clause from sec. 102.12, Stats.:

"and provided, further, that if no such notice is given and no payment of compensation made, within two years from the
date of the accident, the right to compensation therefor shall be wholly barred."

In particular, you wish to know whether the expression "such notice" means written notice, or whether it is broad enough to include actual notice.

In *Ronning v. Industrial Comm.*, 185 Wis. 384, in speaking of the workmen’s compensation act, the court said on page 387:

"* * * The measure is a beneficent one, springing from humane motives, and is founded upon sound economic doctrine, and for this reason the rule is universally applied wherever a compensation law has been enacted and is in operation, that its provisions shall be liberally construed to accomplish the beneficent purpose for which it was passed. These fundamental ideas must always be prominently borne in mind when issues raised under the act are to be determined."

To construe the words "such notice" as referring only to the written statutory notice would result in depriving many working men of the benefits to which they are entitled under the compensation act. It is my opinion, therefore, that a liberal construction of the compensation act "to accomplish the beneficent purpose for which it was passed" requires that the words "such notice" be construed as including actual notice, as well as the statutory written notice.

ML

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*Municipal Corporations—Hospitals—Town has no authority to assist city in construction and maintenance of hospital.*

June 16, 1926.

**Board of Health.**

In your letter of May 21 you state that a city in the state plans to construct a hospital for the use of the city and also for the use of the surrounding towns. The major portion of the cost of construction and operation is to be borne by the city, and the remaining portion is to be borne by the various towns for whose use the hospital will be constructed. You inquire whether the city and the adjoining towns have the power to appropriate money for the construction of the hospital.

Sec. 67.04, subsec. (2), par. (h), Stats., provides that a city may borrow money for the construction of a hospital and the
purchase of a site. It is clear that the city may construct and maintain a hospital, but neither sec. 67.04 nor any other section in the statutes that we have been able to locate authorizes a town to construct and maintain a hospital. There is likewise no authority for a town to assist a city in the construction and operation of a hospital. In the absence of specific statutory authority it is the opinion of this department that the town cannot assist the city in constructing a hospital.

SOA

Insurance—University—Insurance money received from state insurance fund under provisions of ch. 210, Stats., for loss by fire of building on public land may be applied by board or officer having property in charge upon cost of any building erected on site; such application is authorized and directed and insurance money received is appropriated to purpose by provisions of subsec. (2), sec. 210.03, Stats.

June 16, 1926.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN.
Attention J. D. Phillips, Business Manager.

You state that the former residence of Dr. Birge, located at 744 Langdon Street, was destroyed by fire in January, 1922; that the property was owned by the university at the time of the fire and was insured in the state insurance fund for $8,700.10, which amount was paid to the university from said fund to cover such loss; that the site for the Memorial Union Building includes the lot on which such residence was located.

You ask whether the amount so received for insurance may be applied on the construction of the part of the Memorial Union Building which is located on said lot.

I think that the insurance money received may be so used under the provisions of sec. 210.03, Stats., subsec. (2), of which, so far as material, provides:

"When the amount of loss has been fixed and determined by the commissioner of insurance and certified to the secretary of state, the secretary of state shall issue a warrant in the amount fixed by the insurance commissioner as a transfer of the amount fixed as damages from the 'state insurance fund' and credited to the proper fund of the officer, board of control, board of trustees, or other agents in whose control said buildings or property..."
belongs, to be used by said officer, board, or agent for the rebuilding or restoring of the property damaged and to be disbursed by the state treasurer in such manner as other state funds for the use of said officer, board, or agent are paid out, * * *.”

I have emphasized the language of the statute which seems to me to clearly confer authority upon and to direct the board of regents to use such insurance money for the purpose stated. The Memorial Union Building of the university has been located and is in course of construction on the land formerly occupied by the building destroyed by fire, and other land owned by the university, and the use of the insurance received from the state insurance fund on account of the fire loss seems to come strictly within the authority of the statute. In other words, the legislature has appropriated all sums received as insurance from the state insurance fund for loss of or damage to university and other public buildings by fire to the specific purpose of rebuilding. The fact that the new building is not the same kind of a building as the one destroyed, does not, in my opinion, change the application of the statute. The legislature certainly did not intend to limit the board to the rebuilding of the same type or class of building as the one destroyed without regard to university needs; nor did it intend to limit the cost of the building erected in the place of the one destroyed to the amount of the insurance received. Application of the amount of insurance received on the cost of the building or part of building upon the land formerly occupied by the building destroyed for the loss of which the insurance was paid is, I think, in compliance with the statute.

FEB

Counties—Education—Blind—It is illegal for county to grant blind pension to person who has lost his residence in such county.

June 18, 1926.

Board of Control.

You state that it has come to the attention of your board that blind persons living in Milwaukee for a period of more than one year are receiving blind pensions from counties other than Milwaukee county, where they formerly have resided. You ask to be advised whether or not the granting of pensions to the
blind by counties to persons who have lost their residence in that county is a legal procedure.

Sec. 47.08, subsec. (1), Stats., contains the following:

"Any male person over the age of eighteen, and any female person over the age of eighteen years, who is declared to be blind or blind and deaf as hereinafter provided shall receive from the county of which he or she is a resident an annual pension * * * ."

Subsec. (2) of the same section provides in part:

"In order for any person to receive such pension he must: (a) Have been a resident of this state at the time he lost his sight, or have been a resident of this state for ten years or more, and of the county in which such application is made for at least one year immediately next preceding date of application before making application for such pension, * * * ."

Your question must be answered in the negative. Under the express provisions of the above statute, the recipient of a blind pension must be a resident of the county which grants the pension, and there is a further provision that such residence must have continued for one year before the application for the pension may be made. Mere living in a place, however, does not always alone determine legal residence.

JEM

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Banks and Banking—Courts—Executors—Where obligation has been contracted by executor without court order, suit should be commenced against executor rather than claim filed against estate.

W. H. Richards,

Deputy Commissioner of Banking.

You ask what action should be taken by your department in liquidating the Northern State Bank, Washburn, in regard to a note for $6,500 signed by the estate of M. A. Sprague by M. H. Sprague, executor, and also an overdraft of the estate for $2,584.86. The time for filing claims against the estate has expired; the Sprague estate was not indebted to the bank at the expiration of the time for filing claims; no authority was given by the county court to the executor to borrow money.
When an executor or administrator contracts a debt, even if it is for the benefit of the estate, the indebtedness is one due from the executor or administrator and not from the estate. *C. W. Beggs, Sons & Co. v. Estate of Behrend*, 156 Wis. 34, and cases there cited.

The proper procedure for your department, therefore, is to commence an action against the executor who contracted the debts.

ML

_Corporations—Securities Law_—Contract for purchase of pair of muskrats, containing provisions herein described, is "security" within meaning of sec. 189.02, subsec. (7), Stats.

June 23, 1926.

**RAILROAD COMMISSION.**

You have submitted a form of contract which a sole trader proposes to use in the sale of muskrats in this state, and you ask to be advised whether or not a permit from your department is necessary for the use of such contracts.

The facts appear to be as follows:

The sole trader operating under the name of X—Muskrat Breeders is a member of the National Muskrat Breeders' Association, Inc. The latter corporation operates muskrat farms. The sole trader does not operate a farm, but solicits orders for muskrats to be registered and farmed by the National Association.

The application for purchase indicates that the muskrats are sold for a certain sum and shall be farmed as before mentioned for two years. At the end of the two years the purchaser will receive "150 MUSKRATS, or the FURS (Pelts) or the value of the pelts in CASH based on prevailing market prices then, for EACH ONE PAIR FARMED."

Upon acceptance by the X—Muskrat Breeders of the application for purchase, a contract embodying all the details of their purchasing agreement and plans as outlined in their circulars is sent to the purchaser within thirty days of the date of purchase application. The literature and prospectus contains the information that the purchaser may send in the names of those interested in muskrats or he will be sent copies of their contract, which he
himself can distribute to the people, receiving $5.00 credit for each prospect he has furnished who has purchased some muskrats. The purchaser is guaranteed 150 pelts or their cash equivalent in two years, regardless of whether any pair of muskrats set aside for him dies during the two-year period following acceptance of the order.

There is nothing in the contract to indicate that any designated pair of muskrats is set aside for the purchaser. In fact, it appears, from the guarantee and from the literature, that the purchaser shall receive the stated number of furs or the cash equivalent no matter what happens to his animals. He would seem to be a tenant in common of the muskrats in possession of the National Association. Neither the breeder nor the National Association can be considered bailees for the purchaser, because they do not set aside any muskrats for him, but give him either the furs or the cash value thereof.

Sec. 189.02, subsec. (7), Stats., provides as follows:

"'Security' or 'Securities' include all bonds, stock, certificates of interest in a profit-sharing agreement, notes or other evidences of debt, or of interest in or lien upon any or all of the property or profits of a company; and all interest in the profits of a venture and the notes or other evidences of debts of an individual; and any other instrument commonly known as a security."

One who buys, trains, sells, and trades horses for another, the latter contributing the capital and the former performing as before mentioned is interested in a joint venture with the party furnishing the capital. Rice v. Peters, 113 N. Y. S. 40.

In State v. Agey, 88 S. E. 726, the defendant, as agent of a land company, sold lots on a time payment basis, the contract containing, among other provisions, the following, p. 728:

"5. The company guarantees to scientifically develop, cultivate, prune and take care of the said orchard plot or plots for five years, and upon completion of the payments above set forth, to make, execute and deliver to the purchaser hereof a general warranty deed for the number of plots mentioned above which shall have at that time 400 living trees thereon.

"6. The company guarantees the purchaser hereof 3 cents per pound for all fruit grown on said trees delivered at the preserving plant in good condition."

The court in its opinion stated, pp. 729–730:

"It will be apparent from the facts set out in the special verdict that the contract offered by the defendant for his com-
pany comes within at least three provisions of the statute. It is an 'investment company,' offering to the public an investment in land and fig orchards in Georgia. It is also offering the 'obligations of said corporation' to cultivate said land and giving its contract to make title on compliance with certain terms, and lastly it is offering for sale within the terms of Laws 1913, c. 156. such 'evidences of property.' Under all three of these provisions it is within the scope of the act.

"To prevent such impositions on its people is an essential duty of government. If there is fraud and imposition in a case of this kind the parties imposed on can rarely go to Georgia and hunt up the guilty party, even if to be found there, and undergo the expense incident thereto. Even if this could be done, there would rarely be any assets which could be applied to the demands of the plaintiff. This state has sought to protect its people, not by forbidding such transactions, but by the very reasonable requirement that when parties, whether incorporated or not, acting under the authority, actual or merely asserted, of another state, propose to do business in our borders, they must submit their statement of assets, and the nature of their business to the insurance commissioner of this state who will issue his license to do business here when he 'is satisfied that the company or corporation is safe and solvent and has complied with the laws of this state applicable to fidelity companies and governing their admission and supervision by the insurance department' and making it indictable to transact such business in this state until such license has been obtained. This is a reasonable requirement under the police power of this state.

"The obligation does not stipulate that the company will set out 200 trees or cuttings thereon, nor that the company shall make title if there should not be 200 trees living thereon at the end of said five years. But taking that it is intended to obligate the company to set out said fig cuttings (the usual mode) and to obligate further that there shall be 200 fig trees thereon at the end of five years, still there is no assurance that the company now has any assets nor is there any security to the buyer that at the end of five years and after payment of the said $600 (for about 1\(\frac{3}{4}\) acres of land) there will be any means to enforce specific performance or recover damages, if the company has or has not set out the 200 fig trees on the land, or there shall or shall not be 200 living trees on the lot at the end of five years or any guarantee that there will be any assets to which the purchaser can look for damages.

"It is true there is an agreement to prune and cultivate the said lot for five years, but there is no guarantee that this will be done, or as to the manner in which it shall be done, or of damages on failure to do so."
Prior to the amendment of 1925, which extended the definition of “security,” a merchandising contract whereby both parties had obligations to perform was discussed in Creasy Corporation v. Enz Bros. Co., 177 Wis. 49. This same contract came up in Lewis v. Creasey Corporation, 248 S. W. 1046. The Kentucky statute provided, in part, that one could not “sell or negotiate for the sale of any contract, stock, bonds, or other securities issued by him,” unless authorized by the state banking commissioner. The court stated, p. 1049:

“We therefore conclude as the cases referred to hold, that the primary purpose of Blue Sky Laws is to protect investors from investments in securities whereby a profit is promised and expected without any active efforts on the part of the investor and which scheme contemplates that the company or individual who receives the investment will employ it himself or itself in such a manner as to reap a profit to the holder of the sold security; and that it was not intended to apply to contracts containing mutual obligations, such as are daily entered into in commercial life, and from which a profit can only be reaped by the uses which the investor alone makes of them. * * *”


It is apparent from the foregoing, that a purchaser under the contract becomes the registered owner of a pair of muskrats; no particular pair, it seems, is set aside for him, because he is guaranteed 150 pelts or the cash equivalent, the guarantee being absolute and not dependent upon the propagation of muskrats. The guarantee is in the nature of an obligation and is an evidence of debt of the X—Breeders. It is also apparent that the purchaser has “an interest in the profits of a venture and the notes or other evidences of debts of an individual.”

You are therefore advised that the contract referred to comes within the provision of sec. 189.02 (7), cited above.

MJD

Public Health—Plumbing—Public Lands—It is not necessary for board of control in improving and remodeling buildings of industrial school for girls to comply with local plumbing code of city of Milwaukee.

June 25, 1926.

Board of Control.

You state that the industrial school for girls is an institution under the jurisdiction of your board and the property of which is
not the property of the state, but of the city of Milwaukee; that
the use of the buildings and equipments is under the jurisdiction
of the board so long as the purposes of the institution are main-
tained. In view of these facts you ask to be advised whether
plumbing remodeling done at this institution should be controlled
by the plumbing code of the city of Milwaukee or by the plumb-
ing code of the state of Wisconsin. The improvements and the
remodeling are being done under the direction of the state board
of control and are being paid for by appropriations made by the
legislature.

The answer to your question is determined by the decision of
our supreme court in the case of Milwaukee v. McGregor, 140Wis.
35. In that case our court held that in case of the construction
of a building by a state board for state purposes under state
authority the matter is wholly of state concern and not under
general state or municipal regulation. In that case the plumbing
inspector of the city of Milwaukee attempted to prevent the
building of an addition to the state normal because no permit
had been secured from the local authorities. In holding that the
state was not affected in the least by the local regulation, the
court said, pp. 37–38:

"* * * So general prohibitions, either express or implied,
apply to all private parties, but ‘are not rules for the conduct of
the state.’ Dollar Sav. Bank v. U. S., supra. That has been
applied in many ways. For examples: The state may sue as
freely as an individual, but cannot be sued except by its consent.
It may have the benefit of a general cost statute, but it is not
liable for costs without express written law to that effect. It
may plead the statutes of limitations the same as an individual,
or recover interest as use or damages, but is not subordinate in
adversary proceedings to the law on either subject, unless ex-
pressly named therein showing unmistakable legislative intent
to that effect."

You are therefore advised that the plumbing code of the city
of Milwaukee does not apply to this case.

JEM
Automobiles—Motor busses registered in another state but operating in Wisconsin must display Wisconsin number plates.

RAYMOND EVRARD,
District Attorney,
Green Bay, Wisconsin.

In your letter of June 10 you state that you recently arrested the driver of a bus operating between Green Bay and Iron River. The bus did not have a Wisconsin license. There are a few busses operating between these points, part of which have Michigan licenses and part having Wisconsin licenses. You state that in your opinion the busses must have a Wisconsin license, and you inquire whether your opinion is correct.

This department concurs in your opinion. Subsec. (2), sec. 85.15, Stats., provides:

“No motor truck, motor delivery wagon, taxi, motor bus, or other motor vehicle carrying goods or passengers for hire, registered in any other state, shall be operated on the public highways of Wisconsin, unless said motor vehicle shall have paid the full registration fee provided in section 85.04 of the statutes, and shall display Wisconsin number plates.”


SOA

Public Officers—Board of Industrial Education—Malfeasance—Sec. 348.28, Stats., does not prohibit member of board of industrial education from selling to school district board.

GEO P. HAMBRECHT, Director,
Board of Vocational Education.

In your letter of June 7 you inquire whether a member of a board of industrial education can sell anything to the board of education of a city when said board does not come under the city government, but represents a separate school district within the city. You call attention to XIV Op. Atty. Gen. 596. Sec. 348.28 prohibits a member of a board of industrial educa-
tion from making sales to the board of industrial education. This section does not apply to a case where a sale is made by a member of the board of industrial education to a school board of a school district. Such latter board is a separate and distinct body, of which body the member of the board of industrial education is not a member.

SOA

**Municipal Corporations**—Ordinance prohibiting dogs from running at large from June 1 to September 1 except under direct control of their masters and providing for fine for violation thereof is valid exercise of police power of enacting body and therefore constitutional.

June 29, 1926.

OTTO L. OLEN,
District Attorney,
Clintonville, Wisconsin.

You state that the following ordinance has been passed by the city of Clintonville:

"Section 1. No dog shall be allowed upon any street or alley in the city of Clintonville from the 1st day of June to the 1st day of September except under the direct control of his master. Any person who shall permit any dog owned by him or in his keeping to run at large during each restricted period of the year shall be fined not less than one dollar nor more than ten dollars."

You state also that some of the dog owners who pay a license under the state law complain that this ordinance is unconstitutional and unfair, because they claim that when they pay a license on their dog the dog should have the privilege of going unmolested upon public streets and alleys, as long as it does no damage to persons or property. You inquire whether this ordinance is a lawful exercise of the police power.

You are advised that this ordinance is a lawful exercise of the police power. *Wilcox v. Hemming*, 58 Wis. 144; III McQuillen, Municipal Corporations, secs. 943 and 944; II Dillon, Municipal Corporations, sec. 723.

The contention of the owner complaining against the ordinance is overruled by *Westgate v. Carr*, 43 Ill. 450.

It is my opinion, therefore, that the ordinance is constitutional.

MJD
Public Health—Public Officers—Board of health was organized and health officer appointed in city of Whitewater under provisions of sec. 141.01, Stats. This is in compliance with law, as Whitewater has made no change in manner of selection of these officials by ordinance duly adopted since it came under general charter law.

July 1, 1926.

Dr. C. A. Harper,
State Health Officer.

You state that you have been asked to pass upon the legality of the health organization of the city of Whitewater. You state that the city of Whitewater was incorporated under a special charter in 1885, ch. 227; that in the month of May, 1925, the city council adopted the following resolution:

"Resolved by the mayor and common council of the city of Whitewater that the following persons be, and hereby are appointed and organized as a board of health for the city of Whitewater for the ensuing year—"

that the individuals then appointed as members of the board of health met, organized, and elected a chairman, clerk and appointed a health officer for a period of two years, which appointments were confirmed by the common council; that in the month of May, 1926, another resolution was passed similar to the first, organizing another health board for the ensuing year; that this board did not appoint a health officer, because the former board had appointed a health officer for a period of two years. You state that the city of Whitewater automatically came under the general provision of ch. 62, Stats. You inquire whether the health board and health officer are legally appointed.

This question must be answered in the affirmative. The organization and appointment was made under sec. 141.01. The general charter law is contained in ch. 62, Stats. In sec. 62.01 there is this saving clause:

"(4) All offices, the terms of office and the manner of selection of officers shall continue until changed by ordinance adopted by a two-thirds' vote of all the members of the council to conform to chapter 62 of the statutes."

As no change has been made by ordinance in the offices of the health board and health officer, it is proper to proceed as heretofore, and the organization was effected under sec. 141.01 in the
same manner as was done when the city was under special charter. This is in compliance with the law.

JEM

_Agriculture—Constitutional Law_—Statute which when enacted was unconstitutional does not become valid when through subsequent legislation constitutional objection is removed. If statute is to be enforced it must be re-enacted.

_John D. Jones, Jr.,_

_Commissioner of Agriculture._

In your letter of April 28 you state:

"Your opinion is respectfully requested on the validity of subsection (13) of section 93.07 of the statutes and the regulations promulgated thereunder in the light of recent federal legislation and court action.

"On March 1, 1926, the supreme court of the United States held unconstitutional a statute of the state of Washington, which authorized the state department of agriculture to prohibit the introduction of materials which might carry insect infestations from outside localities.

"The decision was based on article I, section 8, of the federal constitution and on the ground that congress in the federal plant quarantine act of 1912 assumed complete jurisdiction over the interstate movement of materials which might carry insect pests.

"Upon publication of this decision there were introduced into congress several bills authorizing the states under certain conditions to enact quarantines for this purpose. One of these, senate joint resolution 78, was passed and was signed by the president on April 13, becoming public resolution No. 14, 69th congress.

"This department has issued the following regulations which affect the movement of plant materials from other states, and which have not been canceled or superseded:

"Quarantine No. 1 prohibits the importation of 'five-needled' pines into Wisconsin from the New England states, New York and Minnesota. Federal quarantine number 26 covers the same areas except that Minnesota is not included.

"Quarantine No. 4 (third revision) regulates the importation of corn and other materials from the European corn borer infested area. It prohibits the importation of corn on the ear from a larger area of New England than is covered by federal quarantine number 43 on the same subject.

July 1, 1926.
"Quarantine No. 6 (revised) is an embargo on the shipment of alfalfa and other hay and straw from the alfalfa weevil infested counties of seven Rocky Mountain states. There are no federal regulations concerning this insect.

"Quarantine No. 7 regulating the movement of nursery stock, forest and quarry products and Christmas trees and greenery from the gipsy moth infested areas of the New England states. The provisions are identical with those of federal quarantine number 45.

"Quarantine regulations, identical with those of the federal government, are issued because the federal department has no authority to confiscate or destroy infested or presumably infested materials but can only prosecute the shipper, thus offering inadequate protection to the state of destination.

"The object of exceeding the area covered by federal regulation in the case of state quarantine No. 1, is the failure of the federal horticultural board to take cognizance of the well recognized presence of the white pine blister rust in Minnesota.

"The object of exceeding the area covered by federal regulation in the case of state quarantine No. 4, is the belief of this department, that the federal quarantine does not include a border of sufficient width around the district in which the European corn borer has actually been observed, to offer complete protection to our corn interests.

"Your opinion is requested on the following questions:

"1. Will the second clause of subsection (13) of section 93.07 of the statutes need reenactment by the legislature (subsequent to the passage of senate joint resolution 78) before this department possesses authority to prohibit the importation of plant and other material from infested areas outside the state and to provide for its destruction if introduced?

"2. If not, will our present quarantine regulations need to be reissued to make them valid under the authority just granted by congress?

"3. Does senate joint resolution 78 authorize the state to exceed the area covered by a federal quarantine regulation on a particular pest under either of the conditions operative in our state quarantines No. 1 and No. 4, as described above?"

Sec. 1494-6, Stats. 1921, provides:

"The department shall have the power to prescribe, modify and enforce such reasonable rules, regulations and orders as may be needed to protect the resources and agricultural industries of the state from the introduction and dissemination of insect pests and plant and animal diseases."

By ch. 152, Laws 1923, sec. 1494-6, Stats. 1921, was renumbered sec. 93.07 (13) and revised and amended to read as follows:
"It shall be the duty of the commissioner of agriculture and he shall have the power:

"* * * to make, modify and enforce reasonable rules, regulations and orders needed to prevent the introduction and dissemination of insect pests and plant diseases in this state."

It is thus apparent from the history of sec. 93.07 (13) that the material portion for the purposes here was enacted in 1921.

By act of congress of August 20, 1912, 37 Stats. at Large, 315, ch. 308, as amended by the act of March 4, 1917, 39 Stats. at Large 1165, ch. 179, the secretary of agriculture was delegated the power to prescribe quarantine regulations with reference to plant diseases. On March 1, 1926, the United States supreme court in Oregon-Washington Railroad & Navigation Co. v. State of Washington, 46 S. Ct. Rep. 279, held that a statute of the state of Washington prescribing quarantine regulations for plant diseases was illegal and unwarranted for the reason that the federal government had acted. By joint resolution of congress (Public Resolution No. 14, 69th Congress, S. J. Res. 78, approved April 13, 1926), the plant and quarantine act of 1912 was amended to allow states to quarantine against the shipment therein or through of plants, plant products and other articles found to be diseased or infested when not covered by a quarantine established by the secretary of agriculture.

The sole question here is whether subsec. (13), sec. 93.07, was void when enacted, or whether its operation was suspended until the adoption of the joint resolution by congress.

Cooley lays down the following rule in his Constitutional Limitations, pp. 259-260:

"When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

In Seneca Mining Co. v. Secretary of State of Michigan, 9 L. R. A. 770, 771, the court said:

"* * * If the law-making power is prohibited from enacting a law, and in disregard of such prohibition it goes through
the forms of enacting a law, such enactment is of no more force or validity than a piece of blank paper, and is utterly void, and power subsequently conferred upon the Legislature by an amendment of the Constitution does not have a retroactive effect, and give validity to such void law.”

To the same effect see Duwar v. People, 40 Mich. 401; Mt. Pleasant v. Vansice, 43 Mich. 361.

In the case of In re Rahrer, 43 Fed. 556, 10 L. R. A. 444, the court held that a state law which violates the federal constitution is absolutely void and will not be revived when through act of congress the constitutional objection is removed. The case involved the validity of a Kansas statute enacted in 1889, which provides as follows:

“Any person or persons who shall manufacture, sell, or barter in spirituous, malt, vinous, fermented or other intoxicating liquors shall be guilty of a misdemeanor, * * *.”

In Leisy v. Hardin, 135 U. S. 100, this statute was held to be unconstitutional in so far as it attempted to prohibit the sale of intoxicating liquors imported into the state, and sold by the importer and his agent in the original package. In 1890 congress enacted the Wilson Bill, 26 Stats. at Large 313, which provided:

“That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”

The question presented in the case of In re Rahrer was whether the state statute had to be re-enacted before it could be enforced. The court on this point said, p. 446, L. R. A. report:

“How, then, can the Act of Congress in question have the effect and operation claimed for it by the attorneys for the State? For it must be kept in mind that a Legislative Act in conflict with the Constitution is not only illegal or voidable, but is absolutely void. It is as if never enacted, and no subsequent change of the Constitution removing the restriction could validate it or breathe into it the breath of life.”
The supreme court in *Oregon-Washington Railroad & Navigation Co. v. State of Washington*, decided March 1, 1926, in commenting on the Washington statute which was similar to ours said that since the federal law was in force, state action was illegal and unwarranted.

It is the opinion of this department, therefore, that sec. 93.07 (13) was void when enacted, and that it cannot be enforced until it has been re-enacted.

SOA

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*Peddlers*—Persons selling groceries on streets from trucks which travel from place to place are peddlers.

**Geo. W. Meggers,**

*State Treasury Agent.*

In your letter of June 18 you submit the following facts:

"The Kuebler Grocery Company, of Oshkosh, Wisconsin, has four retail stores in that city at 282 Main Street, 228 Algoma Street, 917 Iowa Street, and 1501 Oregon Street, respectively. In connection with these four stores, the company has two motor trucks with large store-like bodies constructed on them in which is carried a general line of groceries and meats. These trucks are driven through the streets in different sections of the city and at certain locations or at intervals are stopped, permitting people to come to the truck and purchase such articles as they may wish. The drivers of these trucks blow horns while driving on the streets to attract the attention of residents and to inform them of their presence. It is understood that these drivers do not at any time go from door to door to make a personal solicitation for the purpose of selling the goods which they carry in these trucks."

You ask whether the parties referred to are peddlers. They were held to be peddlers in an opinion rendered by this department in IX Op. Atty. Gen. 496, and your statement of facts discloses no change in the method of doing business which warrants any reversal of that opinion.

ML
Elections—Married woman may be nominated and elected to public office under name of her husband preceded by designation "Mrs."

VICTOR M. STOLTZ,
District Attorney,
Eau Claire, Wisconsin.

In response to your telephone inquiry of this afternoon, you are advised that it is the opinion of the attorney general that a married woman who is a candidate for public office may, if she so elects, use the name of her husband preceded by the designation "Mrs." in her nomination papers, and be nominated and elected under such name; that there is nothing in the law that requires her to use her Christian or given name or that her name should thus appear on nomination papers or official ballots at either primary or election, nor, on the other hand, is there anything in the law that prevents it. In other words, the choice of how her name shall appear is hers to make, but, having made it for the purpose of nomination papers, it should be followed in preparation of the ballot at the primary and election and, if elected, should be used as the official signature.

To put the proposition concretely:

Mary Smith, the wife of John Smith, may be nominated and elected either as Mrs. John Smith or as Mary Smith.


FEB
Public Officers—Register in Probate—Office of register in probate does not become vacant through death of county judge, hence salary of such register in probate cannot be increased until his term of office expires.

July 7, 1926.

LAWRENCE J. BRODY,
District Attorney,
La Crosse, Wisconsin.

The material facts presented in your letter of June 30 are as follows:

John F. Doherty was elected county judge to fill the vacancy caused by the death of John Brindley, this year. The register in probate under John Brindley has not been reappointed by John F. Doherty and will not accept an appointment under the present salary. An effort is being made to increase the salary of the register in probate. You state that it is your opinion that the office of the register in probate terminated immediately upon the death of John Brindley and that an increase in salary would not be an increase in salary during the term for which the register in probate was appointed, but for a new term to begin when he accepts the appointment.

In III Op. Atty Gen. 789, it was held by this department that the office of register in probate does not become vacant upon the death of the county judge and the opinion is, we believe correct. It follows, therefore, that the register in probate under John Brindley still holds office unless he has tendered his resignation. In any event, the salary cannot be increased if he continues to serve as register in probate.

SOA
Banks and Banking—When subagent collects check and becomes insolvent before remitting, depositor should file claim with banking commissioner against insolvent bank.

When subagent collects and remits by draft, on which payment is stopped because of insolvency of subagent, there is no remitting of proceeds of collection.

Municipality may claim traceable trust fund notwithstanding sec. 224.05, Stats.

July 7, 1926.

FARNHAM A. CLARK,
District Attorney,
Menomonie, Wisconsin.

In your letter of recent date you recite the following facts:

"On the 4th day of March, 1926, the town treasurer of the town of Grant, Mr. Tollifson, drew a check payable to Ole Nesseth, county treasurer of Dunn county, for taxes due to the county; the check was drawn on the Peoples State Bank of Colfax, Wis., for the sum of nine hundred fifty-five dollars and ninety-seven cents ($955.97).

"Mr. Nesseth endorsed the check as follows: Pay to the order of the First National Bank, Menomonie, Wisconsin, Ole Nesseth, Treasurer, Dunn County, Wisconsin, and deposited it in the said First National Bank with the county money. On March 8th the First National Bank of Menomonie, indorsed the check as follows: Pay to the order of any Bank, Banker or Trust Co., Prior endorsements Guaranteed, A. M. Simpson, Cashier; the check thus endorsed was sent to the Union National Bank, Eau Claire, Wisconsin, and was by them endorsed and sent to the Bank of Colfax, Colfax, Wisconsin. On the 10th day of March the Bank of Colfax presented the check to the Peoples State bank of Colfax for payment which was duly made to them by the Peoples State Bank. The Bank of Colfax then issued a draft on one of their correspondent banks, payable to the Union National Bank of Eau Claire, Wis., in payment of this check, but before the draft had been charged or paid by the bank on whom the draft was drawn, the Bank of Colfax failed, and payment on the draft was stopped. The Bank of Colfax was closed on the 11th day of March, 1926.

"The First National Bank, Menomonie, Wisconsin, then notified Ole Nesseth, county treasurer, Dunn county, that they would charge the item to the account of Dunn county."

You ask the following questions:

1. Who is the proper party to make the claim against the Bank of Colfax?
2. What is the proper form of proceedings to institute?
3. Is the claim entitled to preference?

When the check was deposited by the county treasurer, it may be assumed that it was accepted for conditional credit subject to final payment. In undertaking the collection of the check the First National Bank acted as agent of the depositor and was required to use reasonable care and skill in the selecting of its subagent. *Stacy v. The Dane County Bank*, 12 Wis. 629. Assuming that this care was used, the depositor must look to the defaulting subagent. It is elemental, of course, that the forwarding of a draft which is dishonored because of the insolvency of the remitting bank does not constitute a remitting of the proceeds of the collection. The county treasurer, therefore, should file a claim with the commissioner of banking in accordance with the provisions of sec. 220.08, Stats., against the Bank of Colfax.

Sec. 224.05, Stats., provides that state and municipalities therein should not be preferred creditors when banks become insolvent or bankrupt. However, this provision does not prevent the municipality from being entitled to reclaim its funds in case the subagent received the proceeds of the collection when it was irretrievably insolvent, and provided a traceable trust fund has resulted. See *Hyland v. Roe*, 111 Wis. 361, *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237; *Burnham v. Barth*, 89 Wis. 362.

**Counties—Borrowing by Counties**—County may borrow money for payment of its current expenses under sec. 67.12, subsec. (7), pars. (a) and (b), Stats. Such county may not borrow funds for payment of its current expenses under secs. 67.03 and 67.04.

July 7, 1926.

G. H. Dawson,
District Attorney,
Crandon, Wisconsin.

You state that Forest county is in need of funds for the payment of current expenses and request advice as to whether it may borrow money for the payment thereof. Subsec. (7), pars. (a) and (b), sec. 67.12, read as follows:
“(7) TEMPORARY BORROWING BY COUNTIES. At any legal meeting a county board by a yea and nay vote of at least two-thirds of its members-elect may borrow money and issue county orders therefor to pay current expenses at the times and in amounts and manner specified as follows:

“(a) In counties having two hundred thousand inhabitants or more, on or after the first day of July in any year, a sum not exceeding twenty per centum of the last tax levy for county purposes, such money to be repaid with interest at the agreed rate on or before the fifteenth day of February then next following.

“(b) In other counties, at any time after taxes have been levied in any year, a sum not exceeding ten per centum of the last tax levy for county purposes, and payable with interest as provided in paragraph (a).”

It is apparent that under the provisions of the foregoing subsection, Forest county—coming under the provisions of par. (b)—may borrow for these expenses after the taxes have been levied in any year, a sum not exceeding 10% of the last tax levy for county purposes, payable with interest at the agreed rate on or before the fifteenth day of February then next following, by complying with the requirements specified in subsec. 7, sec. 67.12.

You next ask whether the county may borrow under the provisions of sec. 67.03. This section, together with sec. 67.04, does not apply to borrowing for current expenses. It applies only to loans by a county for the purposes set forth in sec. 67.04.

You also inquire whether the county may borrow funds in addition to those described and stated in subsec. (7), pars. (a) and (b), sec. 67.12, giving as collateral tax certificates purchased by the county as set forth in sec. 74.44. Sec. 67.12, subsec. (7), pars. (a) and (b), is specific and exclusive, affording the only manner in which a county may borrow funds for payment of current expenses.

It is my conclusion that Forest county may borrow money for the payment of its current expenses and must do so under subsec. (7), par. (b), sec. 67.12.

MJD
Courts—Forfeiture—Peddlers—Truck sold on conditional sale, which provides that title shall remain in seller until purchase price is paid, cannot be held as against truck owner under peddlers’ law when used illegally—peddling without license—by purchaser of truck.

Geo. W. Meggers,
State Treasury Agent.

You have submitted a letter written by Walter G. Hurd, attorney for the Universal Car & Tractor Company of Dubuque, Iowa, relating to the return of a truck which was operated by one John Speranza, a peddler from Dubuque, and which was held by a special treasury agent of Platteville in default of payment of fine assessed in justice court. Mr. Speranza was found peddling without a license. His whereabouts are now unknown. It appears that the truck was sold to him on a conditional sales contract by the Universal Car & Tractor Company and the title was to remain in the seller until the purchase price was fully paid. One of the written stipulations was that the purchaser will see that the said property is used lawfully. The question confronting us is whether the seller’s lien has precedence over the state’s claim. It appears that the seller’s claim is greater than the present value of the truck.

Under sec. 129.09, peddling without a license subjects one to the forfeiture therein specified.

In sec. 129.12 it is provided:

"The treasury agent may appoint special treasury agents, who, as well as said treasury agent and his assistant, may, when there is reasonable ground to suppose that license fees or forfeitures which are imposed by this chapter and which are required to be paid into the state treasury, may become otherwise uncollectible, seize and detain any vehicle or any animals attached thereto, or any push or handcart, or any of the goods, wares or merchandise conveyed thereby, or any trunk, box or pack, or other means of carrying goods or any of the contents therein contained, carried by foot peddlers, until the summons or other process provided by law can be issued and served and the matter is disposed of in court. * * *

Sec. 288.08 provides:

"Where any property has been seized and detained pursuant to section 129.11, in case of the recovery of judgment for the forfeiture provided in section 129.07, and nonpayment thereof,
the court may issue its warrant directed to the sheriff or other proper officer of the county commanding him to cause such judgment, with the costs, to be forthwith collected by sale of the property so seized and that if sufficient property be not found whereof to collect the same to commit the defendant to the jail of the proper county, there to be imprisoned not exceeding six months or until otherwise discharged pursuant to law."

There is a technical error in the reference to the section of the statutes in the above provision. As originally enacted it referred to the present sec. 129.12, instead of sec. 129.11, and it also referred to the present provision of sec. 129.09 instead of sec. 129.07. This is not a serious error, however, as under the case of Flanders v. The Town of Merrimack, 48 Wis. 567, the courts will correct this error in construing the law and will hold that the reference is to sec. 129.12 and sec. 129.09.

You will note that under sec. 129.12 the vehicles or other property are held only for the purpose of aiding in collecting the state's money. It is not intended that the forfeiture of the vehicles and other property shall be a part of the penalty for violating the law. It is a cardinal rule in the construction of statutes that statutes imposing a forfeiture must be strictly construed and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation. U. S. v. One Cadillac-eight Automobile, 255 Fed. 173, quoted in One Hudson Super-6 Automobile, etc. v. State (Okla.), 187 Pac. 806, 813.

In an official opinion by this department, XIV Op. Atty. Gen. 118, it was held that it is doubtful whether under sec. 29.05, subsec. (7), it is the intent to forfeit interest of conditional vendor in automobile confiscated because used by conditional vendee in violation of game laws.

In the Hudson Super-Six Automobile case the authorities are reviewed and it was there held that the innocent party and mortgagee of the automobile, which was used in violating the prohibition law, was not to lose his automobile through the illegal act of the mortgagor.

The following authorities cited are, in my opinion, decisive of the question before us: United States v. One Automobile, 237 Fed. 891; Shawnee National Bank v. United States, 249 Fed. 583; United States v. Two Gallons of Whiskey, 213 Fed. 986; Whites v. State, 98 S. E. 171; Skinner v. Thomas, 171 N. C. 98. These
cases all held that statutes providing for forfeiture of the interest in a vehicle used for illegal purposes does not apply to the interest of an innocent mortgagee.

You are therefore advised that the truck in question should be returned to the Universal Car & Tractor Company of Dubuque, as their claim is prior to that of the state.

JEM

_Courts—Forfeitures—Peddlers_—Forfeiture collected in justice court for peddling without license should be turned over to town, village or city treasurer, as case may be.

Geo. W. Meggers,
State Treasury Agent.

In your letter of June 18 you call attention to sec. 129.09, Stats., which provides:

“Every person who shall engage in or follow the business of a hawker, peddler or transient merchant in this state, without having first obtained a license, or shall when licensed as a transient merchant neglect or refuse to pay the per diem fee required by law, or who in any manner shall fail to comply with the provisions of subsection (3) of section 129.04, shall, for each such violation, failure or refusal, forfeit and pay into the state treasury not less than twenty-five dollars nor more than fifty dollars.”

You say that such a forfeiture has been collected in a justice court, and you ask whether this money should be paid into the state treasury directly.

Ch. 288, Stats., concerns the collection of forfeitures. Sec. 288.14, Stats., provides in part:

“Every town, village and city treasurer shall demand of and recover from each justice of the peace of his town, village or city, respectively, all moneys received by such justice upon judgments rendered by him in actions under this chapter. * * *”

Sec. 288.15, Stats., provides:

“On or before the first Monday of February in each year every such town, village and city treasurer shall pay to the treasurer of his county all moneys so collected by him accruing to the state, taking a receipt therefor; and at the same time shall file with the county clerk of his county a statement, upon oath, con-
taining the names of the justices of the peace of his town, village and city, respectively, the amount of moneys so collected from each, the date of collection, the name of the defendant in each case, the cause of action and date of the summons and judgment.”

Sec. 288.17 Stats., provides:

“Every county treasurer shall, on the first day of the annual meeting of the county board of his county, submit to such board a statement in writing, verified by him, or all moneys received by him during the year next preceding from such town, village and city treasurers under this chapter, containing the names of such treasurers, the amount received from each and date of receipt. Upon receipt of such statement said county board shall deduct all expenses incurred by the county in recovering such forfeitures from the aggregate amount so received, and the county clerk shall immediately certify to the county treasurer the amount of clear proceeds of such forfeitures, so ascertained, who shall pay the same to the state treasurer as required by law.”

While it is true that sec. 129.09, Stats., provides for a payment into the state treasury, nevertheless when the forfeiture is collected under the provisions of ch. 288, Stats., the money must be transmitted to the treasury in accordance with the provisions of ch. 288, Stats. The justice, therefore, should not remit to the state treasury directly, but should pay the money over to the town, village or city, as the case may be.

ML

Trade Regulation—Trading Stamps—Coupons offered with sale of merchandise redeemable in merchandise and containing statement “void in any state or municipality where the redemption of trading stamps is prohibited” cannot be used in Wisconsin.

James Murray,
District Attorney,
Fond du Lac, Wisconsin.

You inquire whether the premiums offered by Dunham Manufacturing Company, as shown by an enclosed circular, violates sec. 134.01, Stats. You state that the complaint is made that this offer is not in violation of the law be-
cause it states that the offer is void in any state or municipality where the redemption of trading stamps is prohibited. I find no circular enclosed with your letter, and for that reason cannot give you a categorical answer.

I will say, however, that this department has held that coupons or trading stamps are not rendered permissible and legal because containing on their face the words "void where prohibited." X Op. Atty. Gen. 555. See also VII Op. Atty. Gen. 594. The reasons for the rule are given in the latter opinion and quoted again in the former. In a later opinion, also given in X Op. Atty. Gen. 821, it was held that when the coupons contain the distinct statement that the offer is not good in Wisconsin it does not come within the purview of the statute and is not violative of the trading stamp law. See also XI Op. Atty. Gen. 783 and XII Op. Atty. Gen. 151.

It would seem that these opinions will give you the necessary information, and a correct answer to your question.

JEM

Marriage—Alimony—Prisons—Prison Labor—One imprisoned in county jail for failure to pay fine and costs imposed after conviction of offense may be put out to work by sheriff under Huber law.

One ordered imprisoned for failure to pay alimony does not come under Huber law, as he was not convicted of offense within contemplation of said law.

July 7, 1926.

JAMES MURRAY,
District Attorney,
Fond du Lac, Wisconsin.

You inquire whether a prisoner who is committed to jail for failure to pay a fine and costs should be placed out to work by the sheriff.

Sec. 56.08, subsec. (1), Stats., provides in part as follows:

"In any county having no workhouse any person, and in all other counties any female person, convicted of any offense and sentenced to imprisonment in the county jail shall be committed to hard labor. Every such prisoner shall be required to do and perform any suitable labor provided for by the sheriff anywhere within said county; * * *."
In an official opinion by this department (XII Op. Atty. Gen. 308) it was held that the so-called Huber law applies to such a case. I see no reason for changing the conclusion reached in said opinion. You are therefore advised that such prisoner should be placed out to work.

You also inquire what the sheriff ought to do with a man who fails to pay alimony for his wife and children and is sentenced to jail; whether such man should also be put out to work.

You will note that the above quoted provision of sec. 56.08 requires that the person be convicted of an offense. That is not the case in a divorce proceeding, where alimony has been ordered to be paid. The defendant has not been convicted of any offense, and therefore does not come under said law. He is imprisoned by order of the court for contempt of court, and the sheriff should comply strictly with the order of the court.

JEM

Banks and Banking—Public Officers—Commissioner of Banking—Bank of Soldiers Grove being in process of liquidation by commissioner of banking, such commissioner should not permit books and accounts of bank to be inspected by accountant unless such accountant has authority from stockholder and is acting on behalf of stockholder of said bank; even then, such inspection should not be permitted if commissioner of banking is satisfied that inspection has for its purpose injury of banking institution.

Dwight T. Parker,
Commissioner of Banking.

In your communication of June 24 you state:

"The Bank of Soldiers Grove, Soldiers Grove, Wisconsin, is an insolvent bank and at the present time in the hands of the commissioner of banking as such, and in process of liquidation.

"It appears that the cashier of this bank during its solvency was treasurer of the village of Soldiers Grove and also school clerk and performed considerable of the duties of school treasurer and that the funds of the school district were in his hands.

"An audit of his accounts as such treasurer and clerk is being made by the Wisconsin state tax commission and in order to make a full and complete audit request is made of me for permission to examine the records and books of the said bank in connection with such audit."
"While I am disposed to comply with such request I am confronted with sec. 220.06 of the statutes, which provides, among other things, that the commissioner of banking, his deputy, every clerk and examiner, shall be bound by oath to keep secret all of the facts and information obtained in the course of examination of a bank with the exceptions therein referred to.

"I therefore desire your opinion as to whether I am permitted under the statutes to grant the tax commission authority to examine the books and records of the said bank in connection with its audit of the account of the said village treasurer and school clerk."

Said sec. 220.06 to which you refer provides:

"(1) No commissioner of banking, deputy or examiner shall examine a bank in which he is interested as a stockholder, officer, employe or otherwise. No commissioner of banking, deputy or examiner shall examine a bank located in the same village, city or county with any bank in which he is interested as stockholder, officer, employe, or otherwise. The commissioner of banking, his deputy, and every clerk in this department shall be bound by oath to keep secret all of the facts and information obtained in the course of such examinations, except so far as the public duty of such officer requires him to report upon or take special action regarding the affairs of any bank, and except when called as a witness in any criminal proceeding or trial in a court of justice; and except that such commissioner, deputy, or examiner may in his discretion and under such rules and regulations as prescribed by such commissioner compare notes as to names of borrowers, lines of credit, and other matters affecting a bank, with a national bank examiner, a clearing house examiner, or an examiner for an insurance company duly licensed in the state of Wisconsin to insure or guarantee depositors or deposits in banks or trust companies, and having such insurance in force.

"(2) If any commissioner of banking, deputy, examiner or clerk in such department shall disclose the name of any debtor of any bank, or anything relative to the private accounts or transaction of such bank, or shall disclose any fact obtained in the course of his examination of any bank, except as herein provided, he shall be subject, upon conviction thereof, to forfeiture of his office, and to the payment of a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment in the state prison not less than six months nor more than two years, or to both such fine and imprisonment."

I have received a letter from A. B. Curran, attorney at Prairie du Chien, Wisconsin, and also one from attorney J. Henry Bennett, of Viroqua, Wisconsin, on the legal phases involved
in your question, and both argue that this section does not apply to the audit of a bank in the process of liquidation by the banking commissioner when such audit is made by the tax commission on behalf of a school district and village whose treasurer is believed to be in default and who was a cashier of such bank. They argue that they are not seeking to have the bank commissioner disclose facts which he may have obtained by an examination of the bank, but are seeking to audit the books of a public official whose books and records are not only kept with, but largely confused with, and interwoven among the books of the bank. Our court has held that the prohibition of this section extends and applies during the liquidation of the bank by the commissioner of banking. Cousins v. Schroeder, 169 Wis. 438.

This statute has drastic provisions and you will note that it creates a felony and that the opinion of this department would not protect you if you should violate the law, although you acted in good faith on the advice of the attorney general. I have been unable to find a statute which authorizes the tax commission to examine and inspect the books of banking institutions when it is making a legal audit for school districts or municipalities. You will note that under the provisions of subsec. (2), said sec. 220.06, the commissioner of banking will be violating the said statute and be guilty of a felony if he "shall disclose the name of any debtor of any bank or anything relating to the private accounts or transactions of such accounts" as well as when he discloses "any fact obtained in the course of his examination of any bank."

I believe it is not at all certain that the court would construe this law so as to permit the commissioner of banking to allow the audit of the books of the bank by the tax commission as proposed herein. I therefore hesitate to advise you that you may legally permit the audit by the tax commission as proposed.

It seems to me, however, that the audit may be legally made if the request comes from a stockholder of said bank. I am informed that a great many of the stockholders are interested in having the audit made as proposed. Sec. 182.10 provides:

"The books of every corporation containing the stock subscriptions and accounts shall at all reasonable times be open to the inspection of the stockholders; and every creditor of a corporation shall be informed at any time of the amount of capital
stock of such corporation subscribed, the amount paid in, who the stockholders are, the number of shares of stock owned by each and the amount unpaid by each stockholder upon the shares owned by him, and if any shares of stock, which were not fully paid for, have been transferred within six months of the time of inquiry, the name of the person who transferred the same and the amount due thereon at the date of such transfer. And the officers of such corporation shall furnish any such creditor correct information thereof. And any officer refusing, when requested so to do, shall be liable for any damage caused thereby."

In State ex rel. Bergenthal v. Bergenthal, 72 Wis. 314, it was held that the above statute does not only cover the inspection of the stockholders' books and stock accounts, but also the general accounts of the corporation. In the case of State ex rel. Dempsey v. Werra A. F. Co., 173 Wis. 651, our court held that the statutory right of inspection here given is absolute and that courts will not inquire into the motives of the stockholders who demand the inspection; and in State ex rel. McClure v. Malleable Iron Range Co., 177 Wis. 582, the court held that this statute giving the right of inspection does not abridge the right as it existed at common law, but rather enlarges and extends it and the court reaffirmed the doctrine of the Dempsey case. Unless it can be shown and you are satisfied that the stockholders' right of inspection was conferred upon a stranger who seeks information for the purpose of injuring the company, it is your duty to permit such inspection. See the Dempsey case, supra. In this connection I will direct your attention to the opinion of this department, given to your predecessor in XI Op. Atty. Gen. 655, 658, in which it was held that a stockholder has a right to inspect the books and accounts in the bank even if the bank is in process of liquidation by the commissioner of banking. You will note that in those opinions it was held that you would be justified in refusing to allow the attorney for a stockholder to make such inspection until he procured from the court an order therefor. I believe that this was more cautious than it was necessary to be. In 14 C. J. 860 the rule is laid down:

"The stockholder is not confined to a personal inspection by himself, but may exercise the right through an agent, attorney, or expert accountant."

It cites cases from various jurisdictions, and the reason for
the rule is quoted from *Foster v. White*, 86 Ala. 467, 470, as follows:

"* * * The right may be regarded as personal in the sense, that only a stockholder possesses and can exercise it; but the inspection and examination may be made by another; otherwise, it would be unavailing in many instances. * * *. If a shareholder, who, from physical infirmity, or want of skill and knowledge, or other cause, is unable to make a satisfactory and intelligent examination, is debarred the privilege of procuring the aid and services of a competent accountant, the right itself would be worthless—a mockery."

In 7 R. C. L. 301, the reason for the rule is stated as follows:

"While the right of inspection is, in a sense personal to the stockholder, still he may employ a skilled agent, attorney or accountant to make an examination for him; otherwise the right would in many instances be unavailing. The possession of the right would be futile if the possessor, through lack of knowledge necessary to its exercise, were debarred of the privilege to procure in his behalf the services of one competent to exercise it. * * *

In view of the above authorities, and for the reasons assigned, you are advised that you may refuse inspection of the books and accounts of the Bank of Soldiers Grove unless it is made at the request of a stockholder who in good faith is trying to secure information as to the condition of the bank without intent to injure the bank, and such stockholder may delegate this inspection to an agent, attorney or accountant, in which case you may permit them also to make the audit.

JEM
Appropriations and Expenditures—Counties—County Board—Adoption by county board of report of committee resolving that appropriation be made, did not make appropriation. Condition attached to report was not satisfied at time report was made.

JULY 7, 1926.

E. A. R. L. J. PLANTZ,
Acting District Attorney,
Antigo, Wisconsin.

In your letter of May 6 you state that in 1922 the following resolution was submitted to the county board of Marathon county:

"WHEREAS, the federal and state government are willing to assist in this county wide clean up by each contributing one-third (1/3) of the expense contingent upon the fact that the county will contribute one third (1/3) of the expense.

"THEREFORE BE IT RESOLVED, that the county board of supervisors of Marathon county appropriate sixty-five hundred dollars ($6500.00) for this purpose.

J. N. Roy."

You further state that the above resolution was referred to the special committee on agriculture who reported as follows:

"Gentlemen:

"Whereas, the members of the Marathon county board referred the Marathon county tuberculosis campaign resolution to the members of the special agricultural committee, and whereas the special agricultural committee of Marathon county recognized the importance of this movement, and sanctions it for the benefit of human life.

"Therefore be it resolved, that the resolution be adopted providing fifty-one per cent (51%) of the farmers of Marathon county are in favor of said resolution.

Committee

| Carl Hilber |
| Fred Langbacker |
| F. J. Gaetzman |
| A. J. Peterson |

You also say that the report of the special committee on agriculture was adopted by a vote of 33 to 22. At the time the report was adopted by the county board 51% of the farmers were not in favor of the proposed appropriation. You state that the consent of 51% of the farmers to the proposed appropriation was secured this year. You inquire as to whether the appropriation is now available.
This department is of the opinion that no appropriation was ever made. It will be noted that while the report of the special committee on agriculture was adopted no vote was ever taken on the resolution making the appropriation.

The report of the special committee on agriculture shows that the county board did not intend to make an appropriation. The last paragraph of the report states that the resolution making the appropriation be adopted “providing 51% of the farmers of Marathon county are in favor of said resolution.” Assuming for the sake of argument that the county board in adopting the report of the special committee, made a conditional appropriation, it is apparent that the condition attached was not fulfilled. The condition was that 51% of the farmers “are” in favor of the resolution. In order to satisfy the condition, it was necessary that at the time of the adoption of the resolution 51% of the farmers were, in fact, in favor of the appropriation.

The required percentage was not, as a matter of fact, in favor of it, so that the condition was not fulfilled.

SOA

Counties—Indigent, Insane, etc.—Physicians and Surgeons—
County cannot be compelled to pay for medical or hospital care of poor people not ordered or contracted for by proper officials of county.

Doctor is not required to furnish aid in case of emergency when called by poor person.

Harold C. Smith,
District Attorney,
Fort Atkinson, Wisconsin.

In your letter of June 28 you inquire, first, whether Jefferson county can be compelled to pay for medical and hospital care of people who have never received aid from the county, but who are unable to pay for the medical treatment which they have received; second, whether a doctor must furnish aid in case of an emergency when called by a poor person even though the doctor calls the superintendent of the poor of the county and the superintendent refuses to pay for the doctor's services.

Municipalities such as counties or towns have no duty to render assistance to the poor, except as is provided by statute.
To incur liability there must be a contract, express or implied, between the county authority or other municipality, and the party furnishing the relief. *Mappes v. Iowa County*, 47 Wis. 31.

Courts are harmonious in their ruling that in order to raise such contractual obligation the aid or relief must have been furnished by the order or direction of the proper officials in the municipality. Unless your county has ordered the medical treatment through its officials it is not liable. XIII Op. Atty. Gen. 123; IV Op. Atty. Gen. 1015; II Op. Atty. Gen. 418; *Patrick v. Town of Baldwin*, 109 Wis. 342.

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

Your second question must also be answered in the negative. I find no authority, either under the statute or otherwise, which makes it the legal duty of a doctor to furnish medical aid to a poor person. There may be a moral or ethical obligation in certain emergency cases, but it has not yet been declared a legal duty or obligation.

JEM

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*Elections—Nomination Papers—Affidavit appended to nomination papers may be signed by elector not resident of same ward as signers of nomination of papers.*

July 7, 1926.

THEODORE A. WALLER,

District Attorney,

Ellsworth, Wisconsin.

The material facts presented in your letter of June 7 are as follows:

Nomination papers were circulated for a certain justice of the peace of a certain ward of a certain city in your county. All signers resided in that ward. The affidavit appended to the nomination papers was made by a qualified elector, but not an elector of the ward. You inquire whether under sec. 5.05, subsec. (5), par. (b), an affidavit can be made by a qualified elector not an elector of the ward.

Sec. 5.05, subsec. (5), provides as follows:

“(a) For all nominations, except state officers, representatives in congress and all judicial officers elected by the voters of one or more counties, all signers of each separate nomination paper shall reside in the same ward, town or village. For state
officers, congressmen and all judicial officers elected by the voters of one or more counties, all signers on each separate nomination paper, shall reside in the same county.

“(b) The affidavit of a qualified elector shall be appended to each such nomination paper, stating that he is personally acquainted with all persons who have signed the same, and that he knows them to be electors of that precinct, ward, town, village or county, as the nomination paper shall require; that he knows that they signed the same with full knowledge of the contents thereof and that their respective residences are stated therein and that each signer signed the same on the date stated opposite his name, and that he, the affiant, intends to support the candidate named therein. Such affidavit shall not be made by the candidate, but each candidate shall file with his nomination paper or papers, or within five days thereafter, a declaration that he will qualify as such officer if nominated and elected.”

The statute thus provides that all signers of a nomination paper shall reside in the same ward of the city. The statute however, does not require that the affidavit appended to each nomination paper shall be signed by a qualified elector residing in the same ward as the signer. The statute merely requires that the affidavit be that of a qualified elector.

The language of the statute is plain and unambiguous and consequently it is not open to construction. Your question, therefore, is answered in the affirmative.

SOA

_Corporations—Foreign Corporations_—Privilege tax upon foreign corporations is to be computed upon proportion of authorized capital stock rather than upon capital stock paid in.

_FRED R. ZIMMERMAN,_

_Secretary of State._

You inquire whether the privilege tax upon foreign corporations doing business in Wisconsin shall be computed upon the proportion of authorized capital stock or capital stock paid in, represented in the state of Wisconsin by its property located and business transacted therein during the preceding year, stating that a foreign corporation having paid the tax has intimated that the statute is unconstitutional.

I wish to advise that under sec. 226.02, subsec. (7), Stats., the so-called license fee or privilege tax shall be computed on the
basis of the authorized capital stock of the foreign corporation, rather than the paid-in capital stock. This view accords with IX Op. Atty. Gen. 166; XIII Op. Atty. Gen. 368 and 520. We have entered into no discussion of the constitutionality of the section referred to above. It is within the province of the court, not of your department or this department to question the constitutionality of the statute.

The secretary of state must adhere to the provisions of sec. 226.02 (7), and shall therefore compute the fee as aforesaid.

MJD

Indigent, Insane, etc.—Prisons—Person sentenced to state prison and thereafter transferred to central state hospital for insane by board of control upon finding him insane, who thereafter escapes from central state hospital for insane, may be required to serve time while he was out of central state hospital that time being added to his sentence.

July 8, 1926.

Board of Control.

You state that a man who, having been sentenced to the Wisconsin state prison, was transferred by the state board of control to the central state hospital for the insane because he was found to be insane; that thereafter he escaped from the central state hospital for the insane and was absent for approximately two years. You inquire whether, if this man be found sane and returned to the state prison, the period of approximately two years while he was out may be added to the balance of his sentence to be served at the Wisconsin state prison.

Under sec. 51.22, Stats., the state board of control is empowered, acting as a commission in lunacy as provided in sec. 51.11, to adjudge any prisoner in the state prison with the approval of the governor, insane and remove him to the central state hospital for the insane. I take it that while such person is in the central state hospital for the insane, upon being transferred thereto from the state prison under the above statute he is still in contemplation of law serving his sentence in the state prison. In other words, he is still an inmate of the state prison.

Sec. 359.07 contains the following concerning state prison sentences:
"* * * All sentences shall commence at twelve o’clock, noon, on the day of such sentence, but any time which may elapse after such sentence, while such convict is confined in the county jail or is at large on bail, or while his case is pending in the supreme court upon writ of error or otherwise, shall not be computed as any part of the term of such sentence; * * * and provided further that when any convict confined in said prison shall escape therefrom, the time during which he unlawfully remains absent from the prison after such escape shall not be computed as any part of the term for which such prisoner was sentenced to be confined in the prison."

While the man in question was adjudged insane and then escaped, I do not believe that he could be found guilty of the offense of escape, as an insane person is incapable of committing an offense unless it can be shown that at the time when he escaped he had recovered his senses and was acting during a lucid interval.

I believe, however, in view of this provision of the statute you are justified to add to the balance of the term to be served the time that he was out of the central state hospital for the insane. The question is not free from doubt, but a ruling to the contrary would, in my opinion, be rather dangerous and it might be the means of imposing on the officials.

The burden of proof, it seems to me, should be, in that case upon the defendant to show that he was insane during the time when he was absent from the prison. Your question is, therefore, answered in the affirmative.

JEM

Mortgages, Deeds, etc.—First mortgage should not be extended. Mortgage should be satisfied of record and new mortgage recorded.

July 8, 1926.

Retirement System.
Attention R. E. Loveland, Secretary.

In your letter of June 23 you state that a mortgage held by you has become due and that it is proposed to extend it for a definite period. You inquire whether the extension will be valid in case there is a second mortgage on the property.

Your inquiry presents the question as to whether the extension of a mortgage operates to impair the security of a second
mortgage. Under ordinary circumstances, the mere extension of a mortgage does not operate to impair the security of a second mortgage. It is, however, true that in every case where a mortgage is proposed to be extended and there is a second mortgage on the same property, the question is presented as to whether the security of the second mortgage is impaired.

In order to avoid any possible controversy on this subject, the mortgage should not be extended. The proper procedure is to have the mortgage satisfied of record and also have any subsequent mortgage satisfied of record. A new mortgage should then be recorded, followed by the recording of the subsequent mortgage. In this way, your board will have the assurance that no question involving the impairment of the rights of a second mortgage will ever arise.

SOA

Elections—Corrupt Practices Act—Use by or on behalf of candidate for public office of posters attached to automobiles bearing only words "Vote for [name of candidate] for [designation of office]" violates sec. 12.16, Stats.

July 8, 1926.

Theodore A. Waller,
District Attorney,
Ellsworth, Wisconsin.

You submit the question of whether a candidate for political office who uses a number of cloth posters by attaching to automobiles for the purpose of advertising his candidacy on which appears only the words "Vote for (name of candidate) for (designation of office)" violates the provisions of sec. 12.16 of the corrupt practices act because of the failure of such posters to bear the statements required by that section.

The question is answered in the affirmative.
Sec. 12.16, Stats., reads as follows:

"No person shall publish, issue or circulate or cause to be published, issued or circulated otherwise than in a newspaper, as provided in subsection (1), of section 12.14, any literature or any publication tending to influence voting at any election or primary, which fails to bear on the face thereof the name and address of the author, the name and address of the candidate in whose behalf the same is published, issued or circulated, and
the name and address of any other person causing the same to be published, issued or circulated."

The use of any poster, placard or other device on automobiles or other vehicles referring to a public office and the candidate therefor is, in my opinion, clearly within not only the spirit but also the letter of this statute, and is the issuing, publication and circulation of matter tending to influence voting, and must bear on the face thereof the information required by the statute above quoted.

FEB

Elections—Ballots—Deceased person whose nomination papers were filed before his death should not have his name printed on September primary ballot.

J. B. Chase,
District Attorney,
Oconto, Wisconsin.

You state that a certain party in your county has already filed his nomination papers for county clerk on the Republican ticket; that these papers are now on file in the office of the county clerk of your county; that this party was drowned on June 28, and you inquire whether his name, though deceased, should be placed on the ballot of the coming primary election.

Under sec. 5.10, Stats., it is provided that the name of all candidates for the respective offices for whom the nomination papers prescribed shall have been duly filed, shall be printed on the official ballot for the September primary. In the case of State ex rel. Bancroft v. Frear, 144 Wis. 79, it was decided that a dead man was not a person within the meaning of our election laws. I take it that a candidate must, in all cases, be a person within contemplation of our statute, and that a dead man can not be a candidate for an office.

In State ex rel. Adair v. Drexel, 105 N. W. 174 (Neb.), it was held that the word "candidate" of any political party and the nominee of a party must be a person who has been selected by a party as its candidate for public office.

I have found no authority directly in point on your question, but I believe that the Bancroft case is practically decisive of
the question. You are therefore advised that the deceased person's name should not be placed upon the primary election ballot.

JEM

Counties—Public Officers—County Clerk—Deputy County Clerk—County clerk has power to discharge person who has been holding office of deputy county clerk and bookkeeper.

County clerk has power to appoint another person to position of deputy county clerk and require that she perform services of bookkeeper at salary fixed by county board in payment for such services, subject, however, to power of county board to change such salary.

July 9, 1926.

PHILIP F. LA FOLLETTE,
District Attorney,
Madison, Wisconsin.

You state:

"At the January session 1923 of the county board, a resolution was adopted providing, 'That the county clerk be and he hereby is authorized to appoint the said S——F——as bookkeeper in connection with her other duties as deputy * * * at a salary of $1500 per year.'

"Miss S——F——was retained as deputy and bookkeeper by the new county clerk for 1925.

"At the January session, 1926, the county board by resolution increased the salary in the office of county clerk as follows: 'County bookkeeper from $1500 to $1600.'

"In other words, for three years the office of deputy clerk and county bookkeeper has been held by one and the same person at one salary covering payment of services for both deputy and bookkeeper. The county clerk now desires to discharge Miss S——F——as both bookkeeper and deputy."

An opinion is requested as to whether or not the county clerk has:

"1. Power to discharge Miss S——F——from both positions or either of them.

"2. Whether or not he has power to appoint another person to fill both positions at the salary of $1600 as vested by the county board."
The provisions relative to the appointment of deputies in the office of county clerk are contained in sec. 59.16, subsec. (1), Stats., which provides:

“Every county clerk shall appoint in writing one or more deputies and file such appointment in his office. Such deputy or deputies shall aid in the performance of the duties of such clerk under his direction, and in case of his absence or disability or of a vacancy in his office, unless another is appointed therefor as provided in subsection (3), shall perform all the duties of such clerk during such absence or until such vacancy is filled. The county board may in its discretion, at any meeting provide a salary for such deputy or deputies.”

You will note that by the above section the power of appointment is vested in the county clerk, although the right of fixing a salary is vested in the county board. Such being the case, it would appear clear that the county board does not have authority to designate the person or persons who shall be appointed by the county clerk. The following quotation from the case of Reichert v. Milwaukee County, 259 Wis. 25, 35, is instructive in regard to the problem under consideration:

“* * * The county acts through its officers as agents, but agents not of its own choice or creation. These officers are agents who represent the county in the transaction, but have their authority conferred and limited by act of the state through its legislature. Each has his appointed field of action, not created, limited, or expanded by act of the county or by usage or by contract obligations. Within the scope of the authority conferred by the legislature the county, through its board of supervisors, may by its acts arouse official action and official duties upon the part of other county officers, but the powers of the latter derived from the state legislature may not be taken away or narrowed by action of the county board nor enlarged except in cases in which the legislature has authorized such limitation or enlargement.”

It is also provided by sec. 59.18, subsec. (1), that the county clerk shall “execute and file an official bond” and by sec. 19.01 the form of bond is designated, which states that the clerk “will faithfully discharge the duties of his said office according to law.” The duties of the clerk are prescribed in detail in sec. 59.17, Stats. In the absence of anything in the statutes to the contrary, it would appear that the clerk, being charged with the performance of the specified duties, should have the power of appointing the deputies to assist him in their performance.
302 Opinions of the Attorney General

The statutes not only contain nothing to the contrary, but expressly provide:

“Every county clerk shall appoint * * * one or more deputies.”

In view of the statutes and the decision above set forth, it is clear that the county board does not have authority to designate whom the county clerk shall appoint. The original appointment, therefore, must be considered as having been made by the county clerk.

Proceeding now to the consideration of the right to discharge the deputy and bookkeeper, it appears that this is governed by sec. 17.10, Stats., which provides that appointive county officers may be removed as follows:

“(6) OTHERS. All other appointive county officers, by the officer, or body that appointed them, at pleasure” (with exceptions not material here).

In the case of State ex rel. Wagner v. Dahl, 140 Wis. 301, 303, the principle relative to removals was laid down as follows:

“It is a well-nigh universal rule that where no definite term of office is fixed by law the power to remove an incumbent is an incident to the power to appoint, in the absence of some constitutional or statutory provision to the contrary.”

Attention is here called to the fact that the term of the deputies appointed by the county clerk is not fixed by law.

I am of the opinion, therefore, that the county clerk has the power to discharge Miss S—F—from the position of deputy clerk and bookkeeper, and your first question is therefore answered in the affirmative.

In view of the above discussion it seems apparent that the county clerk has the power to appoint another deputy and require her to also perform the duties of bookkeeper. The only question that could arise would be with reference to the salary. The rule is well established, however, that resolutions of a county board are to be liberally construed, as appears by the following quotation from the case of Hark v. Gladwell, 49 Wis. 172, 177:

“* * * It will not do to apply to the orders and resolutions of such bodies [county boards] nice verbal criticism and strict parliamentary distinctions, because the business is trans-
coted generally by plain men, not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body.”

Applying the rule of construction above set forth, it would appear that in the original resolution of January, 1923, the county board intended to fix the salary for the office of deputy and bookkeeper at the amount of $1500 per year. The fact that the board purported to authorize the county clerk to appoint S—— F—— to such position when no authorization was necessary, would not vitiate the fixing of the salary. It also appears clear that the intention of the board, as appears by the resolution of January, 1926, was to increase the salary to $1600.

I am therefore of the opinion that the county clerk has the power to appoint another person to the position of deputy county clerk and require that she perform the duties of county bookkeeper at a salary of $1600, as fixed by the county board, although the county board, of course, has the power to change the salary. Sec. 59.15 (3), Stats.

CAE

Banks and Banking—Person who becomes owner of stock certificate by bequest or operation of law may be held for stockholder’s liability notwithstanding fact that stock has not been transferred on books of bank.

Holder of bank stock can be held for double liability notwithstanding fact that bank was closed less than six months after transfer of stock to present owner.

W. H. Richards,
Deputy Commissioner of Banking.

The questions raised in your letter of recent date are best stated by quoting in full:

I. “Stock in a bank is registered in the name of a deceased person whose estate has been probated, and the time for filing claims has expired. No transfer has been made on the books of the bank, although the certificate has changed hands. To whom should the special deputy of banking in charge of the bank look to pay the double liability on the stock called for by the commissioner?”

July 9, 1926.
Sec. 221.42, Stats., provides:

"The stockholders of every bank shall be individually liable, equally and ratably, not one for another, for the benefit of creditors of said bank to the amount of their stock at the par value thereof, in addition to the amount invested in said stock. Such liability shall continue for six months after any transfer of stock, as to the affairs of the bank at the time and prior to the date of the transfer. But persons holding stock as executors, administrators, guardians or trustees, and persons holding stock as collateral security, shall not be personally liable as stockholders, but the assets or funds in their hands constituting the trust shall be liable to the same extent as the testator, intestate, ward or person interested in such trust fund would be, if living, or competent to act, and the person pledging such stock shall be deemed the stockholder and liable under this section. Such liability shall accrue and become due and payable as to the stockholders of any bank forthwith, upon the commissioner of banking taking possession of the property and business of such bank under the provisions of the statutes, and may be enforced by him, in an action brought in his name, in the circuit court of the county in which such bank is located. In the event of the liquidation of such bank, the stockholders who shall have discharged such additional liability shall, after the payment of expenses and the claims of creditors, be entitled to reimbursement on account thereof out of any remaining property of such bank before the same is distributed among its stockholders."

Sec. 221.43, Stats., provides:

"The shares of stock of an incorporated bank shall be deemed personal property, and shall be transferred on the books of the bank in such manner as the by-laws thereof may direct, and no transfer of stock shall be valid while the bank is under notice to make good the impairment of its capital, as provided in section 220.07, nor until such impairment shall have been made good. All transfers of stock shall be certified to the commissioner of banking immediately."

The commissioner of banking has no interest in the apportionment of stockholders’ liability as between successive holders of the same stock. The only question presented is therefore: Against whom should the double liability be assessed in the first instance?

Normally the person liable for the double liability is the stockholder of record on the books of the bank. Parker v. Brumder, 187 Wis. 75. However, there are exceptions. For instance, in Cousins v. Flertzheim, 182 Wis. 275, it was held that
where a stockholder sold and transferred his stock to the president of the trust company and the stock was not transferred on the company's books, the transferrer was relieved of personal liability as a stockholder.

In Gianella v. Bigelow, 96 Wis. 185, 193, the court said:

"* * * The case of Cleveland v. Burnham, 64 Wis. 357, in which the opinion was expressed that a transfer 'on the books of the bank should be shown, upon which to found the liability,' was in respect to the liability of the purchaser of stock, who took the same by transfer inter vivos, and not where it passed by bequest or operation of law."

A person, then, who becomes the owner of stock by bequest or operation of law is subject to the double liability notwithstanding the fact that the stock has not been transferred to him on the books of the bank. It follows, therefore, that the special deputy of banking in charge of the bank should look to the holder of the certificate to pay the double liability.

II. "Shares of stock in a bank have been transferred to the rightful heirs of an estate, and before the six months provided by statute are up the bank closes, and the commissioner levies his double liability assessment; notice of such liability is sent to the registered holder of the stock. He refuses to pay on the ground that he is not liable until six months after the transfer in accordance with section 221.42. The estate is all closed, the property distributed and the administrator discharged. To whom must the special deputy commissioner look for payment, and can the holder of the stock be held?"

In Parker v. Brumder, 187 Wis. 75, 84-85, the court said:

"Sec. 221.42, providing for the double liability of stockholders, was enacted for the benefit of creditors, and it is provided in such section that such liability shall continue for six months after any transfer of stock as to the affairs of the bank at the time and prior to the date of the transfer. By enacting this section the legislature recognized that creditors of a bank, in transacting business with it, rely largely upon the financial standing and the personnel of the stockholders. In limiting the period of continued liability to six months it was assumed that creditors would periodically inform themselves of the personnel and financial responsibility of the stockholders. Constant and continued watchfulness may be desirable but is not practical. Therefore a limit of sufficient duration was fixed in order to give every creditor ample opportunity to determine whether he would continue as a creditor or patron of the bank. The stock book and the records of the banking commissioner are designed
to furnish available information to the public of the personnel of the stockholders. If all the stockholders succeeded in assigning their stock to irresponsible persons, and would be fortunate enough to have the six-months' period elapse before the bank was declared insolvent, and if it be held that a mere transfer to the transferee be effectual to all intents and purposes, the double liability provided for by the statute would lose its efficacy."

The provision relating to the liability of a stockholder for six months after the transfer of his stock does not limit the liability of the holder of the stock at the time the banking commissioner takes possession of the bank. The provision for the continuation of liability for six months after disposal of the stock is an additional protection to creditors of the bank and is not for the benefit of the stockholder at the time the double liability becomes payable.

It is unnecessary at this time to decide as to the rights between successive stockholders, nor to consider the remote contingency of collecting more than double liability. It is a sufficient answer of your question to state that the holder of the stock can be held for double liability notwithstanding the fact that the bank was closed less than six months after the transfer of the bank stock to the present owner.

ML

Public Lands—Fire Protection—State cannot recover by action against railroad company for owners of sawmill expense incurred by state fire warden in putting out forest fire caused by negligence of railroad company or sawmill company except where such expense is incurred to protect property of state.

Conservation Commission.

You call our attention to two forest fires, one of which was started by the negligent operation of a sawmill and the other by the negligent operation of the Soo Railway Company, each of which ran over a considerable piece of country and necessitated the calling upon of a large number of men by the district forest ranger in the suppression of the fires and as a result, bills of $2500 were incurred by the state. You ask if the state can recover this expense from the owners of the sawmill and the
railroad company in an action by the state, after a conviction establishing the responsibility for the fires, or before such conviction.

Your attention is called to the opinion in XIV Op. Atty. Gen. 436, which discusses somewhat the status, powers and duties of the commission in suppressing forest fires, but it was not necessary in that opinion to pass upon the question of the right of the state to recover from the persons causing the fire the expense of the state in suppressing the fire.

As I understand your present question, the state did not own any of the lands burnt over so that the expense was not occasioned by the state protecting its own lands. Secs. 26.09 and 26.21, Stats., give a right of action to recover damages, including costs, in protecting its own property.

Sec. 26.125, subsec. (5), gives a right of action to a town to recover the expense incurred in the suppression of a fire after the conviction of the person fixing the responsibility.

Sec. 26.13, subsec. (4), provides that the expense of preventing or extinguishing forest fires by a town or assistant town warden by those called in by either to assist shall be borne by the town.

Sec. 26.14 provides that every fire warden appointed by the state fire warden to act in case of emergency shall receive for his services $3.50 per day, one-half of which shall be paid by the county where such service is performed and one-half by the state, and the expense of persons employed by the state fire warden or deputy to assist in suppressing such fires shall be paid one-half by the county and one-half by the state. Subsec. (3) of that section provides that as soon as any account has been paid by the state, the commission shall send to the proper county treasurer a bill for the county's share of the expense, and if not paid as provided therein, it shall be included in the next state levy against the county.

Sec. 26.125 (5) gives a specific remedy in favor of a town to recover the expense of the town in suppressing such fires, as it provides that such expense shall be a lien on any property of such person within the state and that, of course, would include the right to foreclose such lien. I think that remedy would include the expense incurred by the state in participating in the suppression of the fire where the state was called in by the town board, because the town would then be primarily liable,
and it would seem as though that would be the safer procedure in all cases. But there being no similar provisions making the person causing the fire liable to the state for expense incurred by the state in suppressing a fire, I do not think there would be any cause of action in favor of the state except where the expense was incurred by the state in the protection of state property against damage by such fire.

You do not state whether these services were rendered and this expense incurred by the state in the protection of any state property, but I infer that state property was not involved or damaged by this fire and the services were voluntarily rendered to suppress a forest fire without being called in by the town authorities. If that is true, I find no provision in the law to recover such expense from the person causing the fire. I think the situation is not different than it would have been if I or any other person had voluntarily assisted in suppressing such a fire and I do not think I could recover for the value of such services so voluntarily rendered unless it would be from the person whose property I was protecting and then only upon the theory of an implied contract for services accepted by the person benefited, which would not apply to this situation as against the company causing the fire. If such a liability is desired, it should be created and established by law. That has not been done except in favor of a town under the conditions named in sec. 26.125 (5).

TLM

Corporations—Courts—Garnishment—Amount of judgment against corporation, transcript of which is filed with secretary of state under provisions of sec. 304.21, Stats., does not attach to money due under state contract to copartnership contractors using firm name similar to name of corporation.

July 10, 1926.

HIGHWAY COMMISSION.

Attention M. W. Torkelson, Engineer-Secretary.

K—B—C—Company, a copartnership, are the contractors engaged in the improvement of the portion of the state trunk highway system in Shawano county known as Federal Aid Project No. 345-B; the contract is signed “K—B—C—Co. by L. H. K—, co-partner”; a transcript of a
judgment in favor of one J—O—against K—B—C—Company, a corporation, rendered by the circuit court of Outagamie county, amounting to $144.56 damages and costs, has been filed in the office of the secretary of state, presumably under the provisions of sec. 304.21, Stats.; there is now due the contractors under said contract on account of work already performed, the sum of $5,385.18; you have reduced the amount of the payment to be made to the contractors by the amount of the judgment above referred to, pending advice from the attorney general as to what the effect of the transcript of judgment filed with the secretary of state is upon the question of your duty to pay the contractors under the contract, which question you submit on the foregoing statement of facts.

I think that the judgment is without any effect upon the amount the contractors are entitled to receive under their contract, for the reason that the judgment is not a judgment against these contractors but is on its face a judgment against the corporation, which, if it exists, is an entity separate and distinct from any copartnership existing between its stockholders. It follows that the partnership contractors are entitled to the payment of any amounts due or to become due under said contract without any deduction on account of such judgment.

FEB

Elections—Town Elections—Municipal Corporations—Town Board Meetings—Meeting of town board held in neighboring city, which is not within town nor adjoining town, is illegal.

Acts of town board at its illegal meeting filling vacancies created de facto officers, but not de jure officers.

Under sec. 10.54, Stats., special town election may be called for purpose of choosing town officers to fill vacancies.

July 10, 1926.

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

You have submitted the following statement of facts:

"1. Mr. F—had a contract with Waupaca county as a patrol man on the highway."
"2. While such patrolman he was voted in by the electors of the town of Matteson as chairman.

"3. Thereafter Mr. F—Mr. K—and Mr. H—and the town clerk of the town of Matteson held a meeting in the city of Clintonville as a town board.

"Mr. H—is a citizen of Canada but was elected by the electors as a member of the town board.

"4. At such town meeting in the city of Clintonville, not being a city that is joining the town of Matteson under section 60.29, they proceeded as follows:

"5. Mr. F—and Mr. K—both resigned from the town board and the clerk and the other member, the alien, voted Mr. K—in as chairman of the town board on the ground that there was a vacancy.

"6. Thereafter the town clerk, the alien, Mr. H—and Mr. K—the newly elected chairman of the town board, voted Mr. F—as a member of the town board, under the provisions of section 17.25 to fill a vacancy.

"7. Thereafter Mr. H—resigned and another citizen was appointed in his place.

"8. At all the times all the members of the town board elected by the people agreed and were willing to carry out this provision for the reason that the office of chairman and patrolman are incompatible and by having Mr. F—resign as chairman and appointed as side supervisor they felt that would be complying with the law."

You inquire:

"1. Has the town of Matteson now a lawfully constituted town board?

"2. If not, is there any provision in the statute that would allow them to hold a special election for the purpose of electing a new town board?"

Sec. 60.29, Stats., provides that the meetings of the town board shall be held in the town or in any village or city within or adjoining the town. The meeting of the town board, therefore, in the city of Clintonville, which is not within the town of Matteson, nor adjoining it, was not a legal meeting.

Mr. H—is a citizen of Canada, but was elected by the electors as a member of the town board and was therefore a de facto officer and not a de jure officer. See 8 Am. & Eng. Ency. of Law (2d ed.) 788. Mr. F—and Mr. K—having both resigned, the remaining member, Mr. H—and the village clerk should lawfully fill the vacancy under sec. 17.25, Stats.

Said section provides in part:
"Vacancies in town offices shall be filled as follows:

"(1) In the town board, by the remaining supervisors and the town clerk, except when the vacancy is caused by removal by the circuit judge as provided by law, which latter vacancy shall be filled by appointment by the said judge. * * *"

The appointment of Mr. F—— and Mr. K—— would have been lawful if the meeting had been held in a place authorized by law and then Mr. F—— and Mr. K—— would have been enabled to appoint a successor to Mr. H——. Under your statement of facts I believe none of the appointments were legally made, but that you have a town board of de facto officers instead of de jure officers.

It is a well established rule of law that a person who comes into office in a regular manner and exercises the duties thereof is an officer de facto, and a person in possession of an office under a claim of having been appointed thereto is a de facto officer though the officer by whom or the body by which he was appointed was without authority to make any appointment to such office. 8 Am. & Eng. Ency. of Law (2d ed.) 789; Laver v. McGlachlin, 28 Wis. 364; In re Woolcott, 163 Wis. 34.

It is well established that the acts of the de facto officer are valid as to the public and third persons and cannot be inquired into collaterally. Cole v. Black River Falls, 57 Wis. 110; Tolle v. Stone, 1 Pinn. 230.

Your first question is therefore answered to the effect that the town of Matteson has a town board which is composed of de facto, not de jure officers.

In answer to your second question I will refer you to sec. 10.54, Stats., which provides in part:

"Special town elections may be called for the purpose of choosing town officers to fill vacancies or to enable the electors to vote upon any question lawfully submitted to them for determination, in the same manner that special town meetings are called. * * *"

In view of the fact that you have no de jure officer on your town board, I believe under the above quoted provision of our statute a special election could be held to fill the vacancy in the offices of town supervisors.

JEM
County board has power to annul and set aside cancellation of tax certificates on ground that such cancellation was without authority of law, particularly on application and with consent of holder of certificates.

JONAS RADCLIFFE,
District Attorney,
Eagle River, Wisconsin.

You state that the county board, on the application of the holder, canceled certain tax certificates issued on the sale of certain lands for the nonpayment of taxes on the ground that the sales and the certificates issued thereon were invalid, and refunded the amounts paid for the certificates; that subsequently the county board by resolution reciting the cancellation of the certificates and the payment of the amounts to the holder thereof rescinded and annulled such cancellation with the consent and in fact on the application of the former holder of the certificates, and ordered the said certificates returned to said holder upon payment to the county treasurer of the amount refunded with six per cent interest, and that said cancellation was annulled and said certificates restored to the holder upon the payment of the amount of the refund with interest in accordance with said resolution. Your question is:

"Assuming that the cancellation in the first instance was wrong, has the county board the right to reinstate these certificates and give them any validity?"

The answer is in the affirmative.

Sec. 75.22, Stats., authorizes the county board to cancel certificates of the sale of land for the nonpayment of taxes and refund the amounts paid for such certificates only because of defects in the tax proceedings going to the groundwork of the tax. The county board has no authority to cancel tax certificates for defects which do not go to the groundwork of the tax (see IV Op. Atty. Gen. 1007 and V Op. Atty. Gen. 715), and since on your statement it had no authority to cancel the tax certificates referred to, it may correct the mistake by annulling the cancellation particularly on the application and with the consent of the holder of the certificates.

This opinion concerns only the power of the county board in the premises; it is not to be construed as in any way passing
or attempting to pass upon the rights of the individual owners either of the lands under the original title or of the certificates of tax sale. The rights of such parties cannot be made the subject of an official opinion.

FEB

_Elections—Corrupt Practices Act—Words and Phrases—“Political Purposes”—_Whether acts of prospective organization whose contemplated purpose is to get out vote at primary and general elections are “political purposes” within meaning of ch. 12, Stats., depends upon specific acts, and general or blanket advance opinion on question will not be given._

July 12, 1926.

**EUGENE WENGERT,**

_District Attorney,_

Milwaukee, Wisconsin.

I have had under consideration your letter submitting to the attorney general the following question:

"Would it be 'political purposes' within the meaning of the corrupt practice act if a nonpartisan organization was formed consisting of both men and women whose sole purpose was to urge voters, both at the primary and general election, to go to the polls without in anywise designating the candidate or candidates or party tickets that they were to vote at such primary or general election?"

You state that the subject matter of the question above quoted has come to the attention of your office and that your office has been asked for an opinion; that the purpose of the organization, as you are informed, would be solely to correct the laxity on the part of the voters indicated by the stated fact that for several years past scarcely more than fifty per cent of the voters have voted either at the primary or general elections.

I have arrived at the conclusion that an opinion should not be given on the question as presented.

Gen. 251; XIII Op. Atty. Gen. 568), I think it is inadvisable for the attorney general to attempt to render a blanket opinion as to whether a prospective organization is one whose activities will come within the definition of "political purposes" contained in and be subject to the provisions of ch. 12, Stats., should it come into existence and proceed to the carrying out of its contemplated purposes. It seems to me that it would be improper, and likely to prove most embarrassing in case a violation of the law should subsequently be charged, for either a district attorney or the attorney general to commit himself in advance by an opinion not based upon specific facts as to an actually existing organization and its acts on the subject of the application of the provisions of said ch. 12 thereto. The opportunity of using such an organization referred to in your question for political purposes even though its declared purposes could be held not to come within the statutory definition is so apparent that it illustrates the folly of giving an opinion except upon a question arising out of specific acts.

I may suggest, also, that an organization with the contemplated purposes and the suggested campaign referred to in your question should have no objection to complying with the provisions of the law as to filing accounts and authenticating published matters, etc., without raising the question of whether its purposes and methods come strictly within the definition of "political purposes" of subsec. (1), sec. 12.01, Stats.; with such purposes and such a campaign as appears to be contemplated, it would seem to have no reason for withholding the same publicity as to receipts, expenditures and activities that is required of candidates for political office and advocates of political measures at any election.


FEB
Bridges and Highways—Navigable Waters—Highway may be established in this state by twenty years' adverse user alone. Public is entitled to fish on lakes provided it can get to water without trespassing in private land. Riparian owners of lakes owning all adjoining lands around lakes cannot stop people from putting boats on lakes and fishing therein, provided they reach water by way of roads lawfully laid out.

July 14, 1926

John B. Chase,
District Attorney,
Oconto, Wisconsin.

In your letter of July 7 you submit the following:

“There are two lakes in this county known as 'Chicken Foot Lake' and 'Chicken Crop Lake' and there has been a road running past these lakes for about thirty-five years which said road has been used by the public for many years and from this road there is another road leading to the boat landing or edge of each lake. This road has also been used by the public for at least twenty-five years. These lakes have bass, perch and other fish in them and some time ago fish were planted in these lakes and said fish were furnished by the state. A resident of Illinois has now purchased all of the land around these lakes and he has ordered everybody to take their boats off the lakes and will not permit any fishing in said lakes by the public.”

and you inquire:

“In view of the fact that the roads above mentioned have been used by the public for so many years is it not a fact that these roads have become public highways by reason of long usage? Can the owners of the adjoining land now stop the people from putting boats on these lakes and fish therein provided that they reach the water by way of the roads above mentioned? In other words have the public a right to fish on these lakes providing they can get on to the water without passing over private lands?”

A highway may be established in this state by twenty years' adverse user alone. City of Chippewa Falls v. Hopkins, 109 Wis. 611.

If the public has used the said roads adversely for twenty years, then they have become public highways. The title to the soil under water in inland lakes is held by the state in trust for the benefit of the public for navigation purposes and its various incidents, such as hunting and fishing. Doemel v.
Jantz, 180 Wis. 225; Diana Shooting Club v. Husting, 156 Wis. 261.

The rights of the public in a small body of water, navigable in fact, are as much entitled to protection as in a more pretentious watercourse. Shepard Drainage District: Johnson v. Eimerman, 140 Wis. 327.

In the Diana Shooting Club case our court held that the policy of the organic law of Wisconsin, which carefully preserved to the people the full and free use of public waters, should not be limited or curtailed by narrow construction but should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Such navigable waters should inure to the benefit of the public and be free to all for commerce, travel, recreation and for hunting and fishing.

The owner of the adjoining lands around the small lake cannot stop the public from using said lake for navigable purposes. The public has a right to fish on the lakes, provided they can get to the water without trespassing on private lands. If for any reason the road leading to the lake should not be a public highway, I see no objection to the laying out of a highway by the proper authorities to said lake. There is ample authority given in the statute for condemnation proceedings to condemn land for highway purposes.

I believe the above answers all of your questions.

JEM

Criminal Law—Intoxicating Liquors—Search—Municipal Corporations—City Ordinances—Officer has right to search person who is under arrest for violating city ordinance.

JAMES MURRAY,
District Attorney,
Fond du Lac, Wisconsin.

You submit the following:

"A was arrested by police officer while discharging blank cartridges in revolver in violation to city ordinance, was taken to police station, searched and a bottle of moonshine found on his person. The question is; Did the officer have the right to search his person without a search warrant?"
"The right on the part of the government always recognized under English and American law to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime, has always been universally maintained." McFadden on Prohibition, page 212.

"* * * It is well settled that upon a valid arrest search of the person may be lawfully made * * *." Cornelius, Search and Seizure, p. 90.

On pages 151-155 the rule is stated as follows:

"Where a lawful arrest has been effected, the officer has the right to search the person and to seize, subject to certain limitations and restrictions, evidence tending to establish the crime for which the accused was arrested, or other crimes. Such a search of the person arrested is justifiable only as an incident to a lawful arrest. If the arrest be unlawful, the search is unlawful and is aggravated by the illegality of the arrest."

This is the law in this state, and the reason for the rule was well stated in Thornton v. State, 117 Wis. 338. On pages 346-347, the court said:

"* * * Not only in this country ever since the adoption of the constitution, but in England long before, it has been usual, upon the arrest of the prisoner, to subject him to a search. This is done as well for purpose of safety of custody and incarceration, to ascertain the presence of weapons or implements of escape, as for purposes of discovery. It had become so entirely well established as not an infringement of legitimate personal rights before our constitution was adopted, and has been so universally treated since, that it must be assumed not to have been within the class of unreasonable searches and seizures which the fourth amendment to the constitution of the United States prohibited, in language later adopted into our own constitution."

The fact that the arrest was made for the violation of a city ordinance does not, in my opinion, take it out of the rule. I assume that the arrest was a legal arrest, as arrests may be legally made in prosecuting city ordinances. It is just as necessary to make the search when the arrest is made under a city ordinance as it is when the arrest is made for the violation of a state law, for the purpose is to protect the officer, other prisoners, and property.

Your question is therefore answered in the affirmative.

JEM
Indians—Peddlers—Indian cannot peddle without obtaining peddler's license.

July 19, 1926.

GEO. W. MEGGERS,
State Treasury Agent.

In your letter of June 18 you say that an Indian, a resident of a reservation in the state of Wisconsin, wishes to peddle beads, rings and the like of his own manufacture, and you wish to know whether he is required to have a peddler's license.

Sec. 129.01, Stats., provides:

"No person shall engage in or follow the business or occupation of a hawker or peddler within this state without having first obtained a license for that purpose as provided in sections 129.01 to 129.24, inclusive."

Since an Indian is undoubtedly a person, he cannot peddle without a license.

ML

Public Officers—County State Road and Bridge Committee—County Board—Member of county state road and bridge committee holds office for one year and until his successor is elected or appointed.

It is not necessary that he be member of county board.

If he is a member of county board when appointed, fact that his term expires while he is member of committee does not make him ineligible to membership on committee.

July 21, 1926.

JOHN KELLEY,
District Attorney,
Rhinelander, Wisconsin.

You state that some of the members of the Oneida county state road and bridge committee were not re-elected at the April election held on April 6, 1926, and you wish to be advised whether these members not re-elected as members of the county board have ceased to be members of the county road and bridge committee.

Sec. 82.05, subsec. (1), Stats., provides in part:

"Each county board at the annual meeting shall by ballot elect, or instruct the chairman of said board to appoint, a com-
mittee of not less than three or more than five persons, of which said chairman may be one, to serve for one year and until their successors are elected or appointed. Such committee shall be known as the “County Highway Committee,” and shall be the only committee representing the county in the expenditure of county funds in constructing or maintaining, or aiding in constructing or maintaining any roads or bridges within the county. * * *"

It has been ruled by this department, IV Op. Atty. Gen. 1048, IX Op. Atty. Gen. 569, that it is not necessary for the members of this committee to be members of the county board; that the county highway committee may be chosen from the electors of the county. The members of this committee hold for a term of one year and until their successors are elected or appointed and have qualified. V Op. Atty. Gen. 339; VII Op. Atty. Gen. 350; XII Op. Atty. Gen. 40.

It is apparent from the statutes and the foregoing opinions that members of the committee shall hold office for one year and until their successors are elected or appointed; that it is not necessary that they be members of the county board, and that if they are members of the county board when appointed, the fact that their term of office expires while they are members of this committee does not make then ineligible to membership on the committee.

Your reference to a prior opinion of this department is not applicable to this situation. The committee is statutory; the terms of membership and qualification of members are also statutory. The sections and opinions above quoted are applicable.

MJD
Corporations—Telephone Companies—Taxation—Real estate of telephone company occupied in part by company officials as residence should be assessed locally in proportion in which same is used as such residence.

July 21, 1926.

D. M. Perry,
District Attorney,
Black River Falls, Wisconsin.

You submit the following statement of facts requesting an opinion thereon:

It appears that the 1925 tax roll of one of the villages of Jackson county shows that a certain telephone company owns real estate upon which there are improvements used by officers of the company for an office, with the exception that a portion of the building is used as a domicile for those who have charge of the office. A general tax of $44.54 was levied on said property; the tax remains unpaid. You wish to be advised whether this property is subject to a general tax.

Sec. 70.11, subsec. (20), Stats., provides:

"The property of all telephone companies and of persons, associations or corporations engaged in the business of transmitting messages by telephone or the renting, letting or keeping of telephones, wires, batteries or apparatus for that purpose except real estate not used in carrying on their business."

Sec. 70.12 provides:

"All real property not expressly exempt from taxation shall be entered upon the assessment roll in the assessment district where it lies."

Whether or not such improvements should be on the tax roll should be determined from the particular uses to which the building is devoted; it is always a question of facts. In XII Op. Atty. Gen. 63 it was held that real estate not used by the telephone company in carrying on its business is subject to taxation in the taxing district where it is situated the same as other real estate situated therein. Furthermore, in XIV Op. Atty. Gen. 6, this department ruled:

"Where real estate occupied by owner for residence, garage, oil station, and other purposes is also used by him in conduct of telephone business owned by him, and it is determined by taxing authorities that at least fifty per cent of such real estate
is used for purposes other than for telephone business, and fifty per cent of value is assessed to owner as other real estate is assessed, and remaining fifty per cent of such value is exempted under sec. 70.11 (20), Stats., as being used for telephone business (owner not appearing and offering evidence before board of review in opposition to such assessment), assessment and tax levied thereunder is valid.”

You are therefore advised that if this property is used as a residence for the officers of the company, it should be taxed locally as suggested by the aforementioned opinions and statutes.

MJD

Appropriations and Expenditures—Wisconsin Statutes—Words and Phrases—Term “loop tunnel conduits” in sec. 20.41, subsec. (1), subd. (n), Stats., is construed to mean “loop tunnel conduits,” etc.

July 21, 1926.

J. D. Phillips,
Business Manager of University of Wisconsin.

You state that sec. 20.41, Stats., reads in part as follows:

“On July 1, 1925, * * * eighty-two thousand one hundred fifty dollars for loop tunnel conduits, service connections, and equipment; * * *.”

and you call our attention to the omission of a comma between the words “tunnel” and “conduits.” You state that there is no known term such as “loop tunnel conduits” either in a general or technical sense; that the purpose of the fund is to provide for the construction of a tunnel and conduits, and request our interpretation on this provision of the statutes.

You are advised that under sec. 370.01, subsec. (1), Stats. which provides as follows:

“(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 section may be construed to read as follows: “loop tunnel, conduits, service connections,” etc.

MJD
Bridges and Highways—Land owner shut off from public highway should file necessary affidavits under sec. 80.13, Stats., to obtain public highway from his land to main highway.

Town board has discretion and is not liable in action of damages for refusing to lay out highway.

Highway laid out pursuant to sec. 80.13, Stats., is public highway, to be maintained by town.

Victor M. Stolts,

District Attorney,

Eau Claire, Wisconsin.

You have submitted an opinion which you have handed down to the town chairman of a town in your county, and have requested a verification of your answer to their questions. Your questions and answers follow:

"1. If a land owner is shut off from a public highway and is financially unable to buy a right of way can the town board proceed to lay out a highway and pay for the same?"

In your answer you state that sec. 80.13 provides the method by which this owner may obtain relief; further, that unless the proper affidavit is filed with the town board they cannot act in the matter and have no right to lay a private road, even though the applicant cannot pay for the same. This is correct.

"2. If the town board refuses to lay out a highway under such circumstances, would it be liable for an action of damages?"

"2. The town cannot be held liable in an action for damages if it fails to buy a private road for an applicant who is unable to pay his advantages as determined by the town board."

You are referred to State ex rel. Giblin v. Supervisors, 68 Wis. 158, and Baier v. Hosmer et al., 107 Wis. 380; also VI. Op. Atty-Gen. 509, wherein it was held that town board has discretion in the matter of laying out roads. In the cases cited the court laid down the rule that within ten days after the determination of the supervisors to lay out a highway under sec. 1275, now sec. 80.13, Stats., the applicant must pay the amount assessed as advantages, and thus secure the filing of the order. If he fails to do this, it will be deemed that the supervisors have decided against his application. The town, however, cannot be held liable in an action for damages if it fails to buy a private road for an applicant who is unable to pay his advantages as deter-
mined by the town board. The applicant, however, should be given an opportunity to pay the advantages and if he fails to do so, his application shall be deemed denied.

"3. In case the town board should lay out such private highway, is the cost of the bridges and culverts placed on said highway and their maintenance chargeable to the town?"


MJD

Elections—Nomination Papers—Limitation of ten per cent upon number of signers of nomination papers contained in sec. 5.05, subsec. (6), par. (c), Stats., does not apply to particular election precinct.

July 22, 1926.

J. V. Ledvina,
District Attorney,
Park Falls, Wisconsin.

As I understand your telephoned inquiry, it is: May a nomination paper for a party nomination for a county office signed in a particular election precinct be signed by more than ten per cent of the party vote in that precinct?

The answer, I think, is in the affirmative, because the limit of ten per cent contained in par. (c), subsec. (6), sec. 5.05, Stats., applies only to the number of signers on the nomination papers of a given candidate in the several precincts of the county and his nomination paper signed in a particular precinct may contain more signers than ten per cent of the party vote in that precinct if the aggregate number of signers contained in all of his nomination papers does not exceed ten per cent of the party vote in the county.

FEB
Counties—County Board—Parliamentary Rules—Records of county board proceedings do not show that parliamentary rules were violated in permitting member to change his vote cast by mistake before chairman had finally and conclusively announced result.

But even if rules were violated, no appeal having been taken from decision of chair, action is valid.

July 27, 1926.

W. E. Atwell,
District Attorney,
Stevens Point, Wisconsin.

You state that the county board for Portage county at their April, 1926, session appropriated $1,000 under a certain limitation for the use of the Stevens Point Fair Association. You attached to your letter a copy of the record of the proceeding of the county board, relative to this appropriation, and you inquire whether the motion for the appropriation was legally passed.

The record here pertinent reads thus:

"The original motion as amended was then voted on, resulting in a tie, there being 15 ayes and 15 nays. [The names of those voting aye and the names of those voting nay are then given.] Supervisor Edmond Frost then explained that he misunderstood what he was voting for and asked that he be allowed to change his vote from nay to aye.

"Supervisor Pomeroy rose to a point of order, objecting to the changing of a vote after the result had been announced and instructed the clerk to note his objection on the minutes.

"Supervisor Edmond Frost was granted permission by the chairman to change his vote from nay to aye, thus making the vote on the original motion as amended 16 ayes and 14 nays. [The names of those voting aye and of those voting nay are then given.]"

You do not state what rules of order have been adopted by your county board touching the point at issue. Robert’s Rules of Order in par. 38 reads:

"* * * A member has the right to change his vote (when not made by ballot) before the decision of the question has been finally and conclusively pronounced by the chair, but not afterwards."

While the record shows that the vote resulted in a tie, it does not show that the chairman had announced that the motion was
lost. Under a similar circumstance, the house of representa-
tives permitted a member to change his vote which was cast
by mistake in the affirmative when the member intended to
vote on the negative side of the question. See 5 Hinds’ Prec-
edents, sec. 6093.

But whether the ruling of the chairman was correct or er-
roneous is wholly immaterial. No appeal was taken from the
decision of the chair and his ruling, therefore, became the law
of the meeting and the meeting so accepted it and the records
so show. The ruling of the chair in the absence of fraud, if not
reversed by the meeting, becomes the act of the meeting it-

The fact that a deliberative body violates one of those rules
duly adopted does not invalidate a measure passed in com-
pliance with statute. 29 Cyc. 1692.

In McGraw v. Whitson, 28 N. W. 632, it appears that a city
council had adopted Robert’s Rules of Order. It was con-
tended that the rule had been violated and the ordinance was
therefore void, but the court said, p. 633:

"* * * But if we should concede that the rule in question
became applicable, the most that could be said is that the
council violated one of its own parliamentary rules. But if the
statute was complied with, as we hold it was, in the passage of
the ordinance, we think it was valid."

You are advised that I am of the opinion that the motion for
the appropriation was legally passed.

JEM

Criminal Law—Cruelty to Animals—Wilful, malicious, and
wanton killing of dog in violation of sec. 343.47, Stats., is felony.

J. A. LONSDORF,
District Attorney,
Appleton, Wisconsin.

You have submitted a form of a complaint of the violation
of sec. 343.47, subsec. (1), Stats., alleging the unlawful killing
of a dog in violation of said section. You inquire whether in
view of the provision of sec. 4445, Stats. 1898, this offense is a
felony or a misdemeanor.

July 27, 1926.
Sec. 343.47 reads, in part, thus:

"Any person who shall wilfully * * * kill, * * * any * * * dog, * * * shall, in all cases where such cruelty results in the death of such animal or is occasioned by the administering of poison, be punished by imprisonment in the county jail for a period not less than three months or by imprisonment in the state prison for a period of not to exceed two years, or by a fine not to exceed five hundred dollars, * * * ."

Sec. 353.31 provides:

"The term 'felony,' when used in any statute, shall be construed to mean an offense for which the offender, on conviction shall be liable by law to be punished by imprisonment in a state prison."

For the offense alleged, a maximum penalty is prescribed of two years' imprisonment in the state prison. In view of the definition of a felony, as given in sec. 353.31, I am constrained to hold that the offense is a felony. The fact that in sec. 4445, Stats. 1898, this offense was punished by imprisonment in the county jail only, does not, in any way, alter the case. Up to the time when the statute was amended, providing a penalty of imprisonment in the state prison, the offense was a misdemeanor but now it is a felony.

JEM

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Public Officers—Deputy county clerk, upon decease of county clerk, takes office of county clerk and holds it until county clerk is duly appointed or elected.

T. W. Andreesen,
District Attorney,
Medford, Wisconsin.

You have submitted an opinion which you have rendered to the county board of Taylor county, and request that we comment upon it. It appears that the county clerk of Taylor county died, and the county board wished to be advised as to the present status of that office and what should be done concerning a successor.

Your opinion states that the deputy county clerk, duly appointed and qualified, has assumed charge of the office, has filed the necessary bond, and under the provisions of sec. 59.16,
Stats., that the deputy is the duly authorized and duly acting county clerk. This is correct.

You also state in your opinion that he shall receive the salary of the former county clerk, is authorized to hire his deputy, and shall hold office until his successor is either duly appointed by the county board or duly elected. This is likewise correct.

MJD

Trade Regulation—Discrimination—Payment of bona fide profit or handling charge to party operating cream receiving station is not discrimination in price for dairy products under sec. 133.09, Stats.

July 28, 1926.

J. Q. Emery,
Dairy and Food Commissioner.

You request an opinion upon the following set of facts, submitted by a certain creamery company:

"We are contemplating buying the cream from a local receiving station.

"The man operating this station wants us to pay him three cents a pound, on fat, for handling the cream.

"Is this legitimate as long as his price and the price we pay for cash cream remains the same?

"This would mean that he would receive five cents above Chicago for the cream we received from him. It would not be exactly the same as the price we pay individual farmers delivering cream directly to us. However, we would pay the same to our patrons that sell for cash that he would pay as his are all cash patrons."

This matter involves an interpretation of sec. 133.09, Stats., which forbids discrimination in the price paid for dairy products. The statute provides, however, that it shall be a justification for a discrimination in price if the difference is merely commensurate with an actual difference in the quality or quantity of the commodity purchased or in transportation charges "or other expenses of marketing involved in said purchase."

According to the statement of facts submitted, there is no discrimination in the price paid to producers of cream. If the company buys some of its cream from others than producers, as from a party operating a receiving station, which it undoubtedly may lawfully do, it must necessarily pay the latter
a profit or handling charge. In my opinion the payment of such a profit or handling charge, if bona fide, to a middle man or distributor such as a party operating a receiving station, does not amount to discrimination under the statute, and moreover, would seem to be justified as one of the proper "expenses of marketing."

FCS

Automobiles—Municipal Corporations—City of Madison has jurisdiction to enact parking regulations concerning capitol side of square.

JOHN MECKS,
Superintendent of Public Property.

You have forwarded communications from the city attorney of Madison, and you request an opinion as to whether the city of Madison may regulate parking on the capitol side of the square.

The city of Madison paves this portion of the street, and it is under its control. It is not a part of the entrance to the Capitol, and can thus be distinguished from the driveway mentioned in XIV Op. Atty. Gen. 210, and it is within the jurisdiction of the common council of the city of Madison for the purposes of enacting parking legislation.

This opinion does not conflict with the provisions of sec. 343.46, wherein one is prohibited from allowing any animal in his charge to remain hitched or unhitched upon any street within eleven feet of the cement curb surrounding said park.

MJD

Legislature has sole power to apportion assembly districts.

Where wards are redistricted by common council and assembly districts have not been changed by legislature, election for assemblyman should be had in same manner as heretofore.

July 28, 1926.

LEWIS W. POWELL,
District Attorney,
Kenosha, Wisconsin.

You have requested an opinion on the following statement of facts.

Sec. 4.01, Stats., relating to the apportionment of assembly districts provides for two assembly districts in Kenosha county, placing the first, second, third, sixth, seventh, and ninth wards of the city of Kenosha in the first district, and the fourth, fifth, and eighth wards in the second district. Prior to the recent city election the city council redistricted the wards of the city of Kenosha acting under the authority conferred on city councils by subsec. (8), sec. 62.26, Stats. In this redistricting it created twelve wards and radically changed the boundary lines of the several wards. Territory not embraced in the original wards and ward boundaries was embraced in the new arrangement.

The assembly districts have not been changed by the legislature, and you inquire whether action of the city council of Kenosha alters the boundaries of the assembly districts as they were constituted prior to redistricting.

The power to change the assembly districts is vested solely in the legislature. It was received from sec. 3, art. IV, Wis. Const. No power whatever has been given the city of Kenosha to change the assembly districts and the action of the common council in redistricting and allocating the ward boundaries is valid, except that it does not change the assembly districts as determined by sec. 4.01, Stats. The boundaries as determined by sec. 4.01 are still effective.

This is true as to any territory which may be added to the city of Kenosha subsequent to the enactment of sec. 4.01.

You further request our opinion as to how the city of Kenosha can conduct a legal primary and general election for assemblyman this fall.
Because the old assembly districts are still in effect, the election for assemblyman should be conducted in the manner in which it was held prior to the redistricting of the wards by the common council in the city of Kenosha and will have to be done in this manner until the legislature changes the assembly districts and adopts the new ward boundaries as created by the common council.

MJD

University—Real Estate—It is within legal power of regents of university to acquire title to real estate, within area defined by sec. 36.065, Stats., by deed of gift from owners, and to lease same to donors for term of years for stated rental subject to termination during term by exercise of right of eminent domain.

July 29, 1926.

Board of Regents,
University of Wisconsin.

Attention Mr. J. D. Phillips, Business Manager.

Re: Deed of gift by the trustees of the trust for the members of the University Cooperative Company to the regents and proposed lease by the regents of the same property to the trustees.

I have examined the documents relative to the transaction above referred to submitted with your letter of July 12 requesting an opinion as to the legality thereof.

I have suggested certain changes in the forms of the deed and also of the lease, and have embodied such suggestions in a redraft of both documents, which I am enclosing herewith. I think that the redrawn instruments express the actual transactions better than did the original documents submitted, and eliminates possible questions which might have arisen on the face of the original draft of the instruments.

The proposition approved by the regents, as I understand it, is that the trustees of the trust for the members of the Cooperative Company having conveyed by deed of gift to the regents under the consideration embodied in said instrument certain real estate on the corner of Lake and State streets in the area described in sec. 36.065, Stats. (which section constitutes a legislative declaration of intention to acquire the area so
described for the future uses of the university), the regents, in consideration of the gift, among other things, have agreed to lease the same premises to the said trustees for a period of 30 years from July 1, 1926, upon the rental consideration expressed in the lease, namely, the payment by the lessees of the $75,000 mortgage existing against the premises, with interest, as and when it shall become due, of all special assessments levied against the property, of all premiums for adequate fire insurance on the building on the premises, of the cost of all repairs and reconstruction or remodeling of the building, and of all damages by reason of the want of repair or resulting from water, snow or ice in and about the premises, with a provision for the acceptance of a determinable sum computed on a stated basis as liquidated damages in case the lease shall be terminated by the regents by the exercise of the right of eminent domain at any time during the term. The University Co-operative Company is a co-operative corporation, whose members consist largely, if not entirely, of students and members of the faculty of the university, and conducts a mercantile business on the co-operative plan for the benefit of its members.

I find no reason to question the legality of the transaction. In my opinion, it is entirely within the powers of the board of regents, as defined by secs. 36.03 and 20.39, subsec. (8), Stats.

This opinion is confined to the single question presented, which does not go to any question of public policy or of tax exemption which may arise by reason of the transaction referred to. Of course, so far as any tax in the future may lawfully be assessed against the leasehold it must be assessed against and paid by the lessee; no tax could be assessed against or paid by the lessor, which is the state acting through the regents.

For your information, I may say that I have carefully considered the arguments of Mr. Frank Jenks, city attorney of the city of Madison, made in person at my invitation, in support of his contention that the transaction is an illegal one. I cannot, however, concur in any of the objections he has raised or that have been raised by others which have come to my attention.

FEB
Public Health—Barbers—Accepting tips for cutting hair without barber's license, although no charges are made, is in violation of sec. 158.01, Stats.

July 29, 1926.

R. H. Fischer,
District Attorney,
Shawano, Wisconsin.

You state that a party in your city, while in the military service during the recent war, performed work as a barber, though he has not been licensed nor has he the legal qualifications; that at present, occasionally neighbors or some of his friends will call at his house and ask him for a hair cut or a shave, or some women who do not care to go to a barber shop will do likewise, and he makes no charges therefor, although he does the work, but those who come will occasionally give him some small amount in the form of what may be termed a tip, but not full payment of the services performed.

You inquire whether this is contrary to the statute.

The definition of "barbering" as given in sec. 158.01 is as follows:

"Barbering is shaving, trimming the beard, cutting the hair, shampooing, scalp or face massage of a male for payment."

It must be done for payment; otherwise it is not in violation of the law. To receive payment in the form of tips for such services is in violation of the law, although no charges are otherwise made. The tip is the compensation for the services rendered.

In 30 Cyc. 1564 it is held that it is not necessary to show that a separate fee was charged for any specific service. It is sufficient if a fee was collected for a series of services in violation of the act. Citing State v. Littooy, 37 Wash. 693; State v. Brown, 37 Wash. 106.

JEM
Optometry—Postgraduate instructor engaged in instructing doctor in use of appliances in optometry does not violate sec. 153.01, Stats.

July 29, 1926.

HAROLD J. MARCOE,
District Attorney,
Darlington, Wisconsin.

You have inquired whether the instructor in the following situation is violating the provisions of ch. 153, Stats., in regard to the practice of optometry.

It appears that one of the local doctors has arranged with the LaGrange System of Refraction to give him a postgraduate course in instruction in optics, and to instruct him in a free eye clinic in his office. The procedure is this: That the postgraduate instructor is not a licensed physician but he merely assists and directs and instructs the physician in the latest approved methods of practical refraction. The doctor or surgeon is the only person who prescribes, and who examines the eye of the patient under the indirect control of the postgraduate instructor. The instructor possibly shows the doctor how to make out his prescription for glasses and also advises him and assists him in the actual work of examining the eyes and the technicality of all equipment. The instructor makes no charges for his services to the patient and in fact there is no charge for the services rendered unless the patient purchases glasses from the physician. The instructor is paid by the physician for the time spent in assisting and instructing and conducting the clinic.

Sec. 153.01 provides:

"The practice of optometry is the employment of any means, other than the use of drugs, for the measurement of the powers of vision and the adaption of lenses, prisms and mechanical therapy for the aid thereof. No person shall practice optometry without a certificate of registration properly filed. This shall not apply to physicians and surgeons nor to the sale of spectacles only at an established place of business without attempting to test the eyes."

It appears from your statement of facts that the postgraduate instructor is not engaged in the practice of optometry in merely instructing the physician in the use of the appliances. The moment, however, that he commences to practice prescribing, examining eyes and functioning in the manner of an

MJD

**Municipal Corporations—Town Board Meetings—Words and Phrases—"Adjoining"—**City of Clintonville, being located in town of Larabee and there being 110 rods between city limits and town of Matteson, town and city are not adjoining in contemplation of sec. 60.29, Stats.

July 29, 1926.

**Otto L. Olen,**  
**District Attorney,**  
Clintonville, Wisconsin.

On June 21, 1926, you asked for an opinion concerning the legality of a meeting of the town board of the town of Matteson, and the acts of the town board at said meeting. In your request you stated that the meeting was held at the city of Clintonville, which you stated was not a city adjoining the town of Matteson.

An official opinion was given to you, answering your questions on July 10, 1926. In view of the provisions of sec. 60.29, it was held that the meeting of the town board, having been held in a city which is not within nor adjoining the town, was not a legal meeting.

You now state that your question might have been misleading, and you inquire under your new statement of facts whether the city of Clintonville would be considered as a city adjoining the town of Matteson in contemplation of sec. 60.29. You state that the city of Clintonville is situated in the town of Larabee and is about 110 rods from the town of Matteson; that the town of Larabee extends around the city of Clintonville and joins the town of Matteson, but that the city does not join the town of Matteson, there being about 110 rods between the city and the town of Matteson; that the town board of the town of Matteson have been in the habit of meeting in the city of Clintonville.

Under your statement of facts and in view of the provisions of sec. 60.29, I am constrained to hold that the city of Clintonville is not adjoining the town of Matteson.
"Adjoining" is defined in Funk & Wagnall's College Standard Dictionary as "lying next, contiguous." The language being clear and unambiguous, there is no room for construction. See Rehill v. Borough of E. Newark, 73 N. J. L. 220; Bayliss v. Borough of N. Arlington, 80 N. J. L. 124. Your question is, therefore, answered in the negative.

JEM

Public Health—Dentistry—One who is merely teaching dental hygiene in university need not obtain license to practice dental hygiene. July 30, 1926.

DR. S. F. DONOVAN, Secretary,
Wisconsin State Board of Dental Examiners,
Tomah, Wisconsin.

You state that a Mrs. X who is directing and teaching young ladies dental hygiene at—University is not licensed to practice dental hygiene in Wisconsin and you inquire whether it is legal for Mrs. X to teach dental hygiene without a license to practice.

Sec. 152.07, subsec. (1), Stats., provides:

"No person shall engage in practice as a dental hygienist without a certificate from the state board of dental examiners. The certificate authorizes the holder to remove calcareous deposits, accretions and stain from the exposed surfaces of teeth, and to prescribe and apply ordinary washes of a soothing character, but not to operate on the teeth or other tissues of the oral cavity."

One who is teaching dental hygiene is not necessarily practicing within the meaning of the statute. A situation such as yours is always a question of fact, but upon the statement submitted by you, I must conclude that Mrs. X while instructing in a university, occupied solely in teaching dental hygiene and not engaged in the practice thereof, may do so without a license.

MJD
Public Health—Dentistry—Dentist failing to register annually while absent from state may be reinstated by payment of reinstatement and annual fees for years during absence.

July 30, 1926.

DR. S. F. DONOVAN, Secretary,
Wisconsin State Board of Dental Examiners,
Tomah, Wisconsin.

You state that a dentist holding a Wisconsin dental license issued some twenty-five years ago wishes to return to Wisconsin to practice after an absence of twenty-five years. During this time he did not keep up his annual registration dues and you inquire whether this man may be reinstated by paying the reinstatement fee and $1.00 for each year he did not register in Wisconsin.

It does not appear from your statement of facts that there was any revocation of his license. Sec. 152.06, subsec. (1), Stats., provides:

"The board may without further process, revoke the license of one who for sixty days after notice in writing, sent to his last known address, fails to annually register and pay the fee. His license may be reinstated, in the discretion of the board, by payment of ten dollars within one year from revocation."

In V Op. Atty. Gen. 711, it was established that a licensed dentist who has failed to register for a number of years may tender his registration fees and demand registration when his license has not been revoked.

It is my conclusion that this dentist may be reinstated by paying the reinstatement fee and fees for the years during which he failed to register.

MJD
Prisons—Parole—One sentenced for rape, under sec. 340.47, Stats., on two counts to five years' imprisonment in state prison for each count, to be served consecutively, must serve five years of ten-year term before he is eligible to consideration for parole.

August 9, 1926.

BOARD OF CONTROL.

In your letter of August 3 you say that an inmate of the state prison was sentenced to said prison by the county court of Vernon county, under sec. 340.47, Stats., for a term of ten years. You attach a copy of the certificate and conviction of sentence which shows that he was found guilty of two counts and was given five years on each count, to run consecutively. You inquire when this man will be eligible to consideration for parole.

Sec. 340.47, Stats., defines the crime of rape, and under sec. 359.07, the sentence for the crime of rape is to be for a certain term of time and not for a general or indeterminate sentence. Under sec. 57.06, Stats., it is necessary for this convict to serve at least one-half of the term for which he was sentenced before he is eligible to consideration for parole.

You are, therefore, advised that this man will be eligible to consideration for parole after he has served five years of his ten-year term.

JEM

Abandonment — Criminal Law — Indeterminate Sentences—Prisons—Parole—Sentence to one year in state prison for abandonment is general and indeterminate sentence in which minimum and maximum is one year. No parole can be granted until after expiration of one year.

August 9, 1926.

BOARD OF CONTROL.

In your letter of August 3 you state that W. R., inmate of the Wisconsin state prison, was sentenced on December 8, 1925 by the county court of Forest county for the crime of abandonment, receiving a sentence of one year.

Correspondence with the court by the prison officials has failed to obtain information from them as to whether this one-year sentence is to be considered the maximum, according to the terms of the indeterminate sentence law.
Question 1. Is this sentence under the indeterminate sentence law presumed to have a minimum and a maximum of one year?

Sec. 359.05, Stats., contains the following:

"* * * If through mistake or otherwise any person shall be sentenced for a definite period of time for any offense for which he may be sentenced under the provisions of this section, such sentence shall not be void, but the person shall be deemed to be sentenced nevertheless as defined and required by the terms of this section. * * *"

Sec. 359.07, Stats., provides:

"The sentence of any convict found guilty of treason, murder in the first degree as defined by law, rape, kidnaping, or of any crime the minimum penalty for which is fixed by statute at twenty years or more, to imprisonment in the state prison, shall be for a certain term of time. In all other cases the sentence shall be for a term not less than one year and shall be for a general indeterminate term not less than the minimum nor more than the maximum term of imprisonment prescribed by law for the offense. In imposing the maximum term, the court may fix a term less than the maximum prescribed by law for the offense * * *"

Under these provisions of the statutes, your first question must be answered "Yes." The one year is the minimum fixed by statute in an indeterminate sentence and the one year has been fixed by the court as the maximum, so one year is both the minimum and the maximum of the sentence.

Question 2. If so, when will this man be eligible to consideration for parole?

As this is a general and indeterminate sentence, he must serve the minimum before he is eligible for parole under sec. 57.06, Stats.

JEM

Minors—Neglected and Dependent Children—County from which neglected and dependent child is committed to private institution temporarily is liable for his support under sec. 48.07, Stats.

August 9, 1926.

J. B. Chase,
District Attorney,
Oconto, Wisconsin.

In your letter of July 21 you state that an institution at Green Bay, known as the St. Mary's Mothers' and Infants'
Home, which you understand is duly incorporated, takes and receives neglected and dependent children. You inquire whether the county from which a commitment is made of a neglected and dependent child is liable to the institution for the expense of its keep.

Your question is answered by the provisions of sec. 48.07, Stats. Subsecs. (1) and (3), here pertinent, are as follows:

“(1) When any such child shall be found to be dependent or neglected the court may make an order committing the child to the care, custody and guardianship of some suitable state or county institution as provided by law, or to the care, custody and guardianship of some incorporated association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent or neglected children; if it shall appear from the evidence in any such case that there has been an actual abandonment of the child by the parents or by the parent, if there be but one, or such gross neglect or moral unfitness on the part of such parents or parent as shall be deemed on abandonment of the child, the court shall expressly so find; if it be found that the child has been abandoned by the parents or by the parent, if there be but one, the court may order the commitment. The disposition of any child under the provisions of this section shall be deemed temporary unless otherwise specified in the order of commitment; or the court may make a temporary disposition of such case by placing such child in the care and custody of the probation officer or of some suitable person or institution for such period of time as the court shall see fit, not exceeding three months at one time, not exceeding, however a total period of one year, during which the parent or other person from whose custody such child is taken may be put upon probation and required to report to the court.”

“(3) During such period of probation the county shall be liable for the reasonable expense of the maintenance of such child, such expense to be at the rate of four dollars per week, but the court may, as a part of the conditions of probation, require any person who is before the court and who is legally liable for such support to pay in the first instance or to refund to the county all or any part of such cost of maintenance. The superintendent of the state public school shall charge to each of the several counties, in a book to be provided by him for that purpose, the said sum of four dollars per week for the care and maintenance of each such child in the state school for each of the said counties; and the cost of the original commitment of all persons to said school, which shall not exceed the sum of two dollars per day and necessary expenses, and no charge shall be made for more than one person escorting each child.”
Under this statute the county is liable during a temporary commitment, the maximum period of which is one year. I find no other provision in the statute for the county’s liability.

JEM

Bridges and Highways—County highway committee, with approval of Wisconsin highway commission, may re-locate, and may condemn land for, portion of county trunk highway forming part of county system of county trunk highways selected by county board and approved by highway commission, as provided in sec. 83.01, subsec. (6), Stats.

August 9, 1926.

ROBERT P. CLARK,
District Attorney,
Elroy, Wisconsin.

You inquire whether a county highway committee has authority to make relocations of county trunk highways and to institute condemnation proceedings, under the provisions of sec. 83.07, Stats.

Assuming that the system of county trunk highways has been selected by the county, and approved by the Wisconsin highway commission as provided in subsec. (6), of sec. 83.01, Stats., and that the Wisconsin highway commission has, by order, approved the relocation, I think that the question may be answered in the affirmative.

The history of the statutory provision and the fact that in the revision and renumbering thereof no change in the law was intended, was the basis of the opinion found in XII Op. Atty. Gen. 466, and the conclusion there reached applies to county trunk highways as well as state trunk highways.

FEB

Charitable and Penal Institutions—Indigent, Insane, etc.—Old-Age Pensions—Inmate of McCormick Memorial Home may continue to receive old-age pension.

August 9, 1926.

R. E. EVRARD,
District Attorney,
Green Bay, Wisconsin.

The material facts presented in your letter of August 2 are as follows: A certain person in your county has been granted an
old-age pension. A guardian has been appointed for this person. After the old-age pension had been granted, the guardian placed the person in the McCormick Memorial Home. The home does not admit old persons unless some provision is made for their care. In case a person has a legal settlement in a town, provision is made by the town for the care of the old person. The home does not insist that provisions be made for the entire support of the inmate, but provision must be made for a substantial part of such support. You inquire whether a person who has obtained an old-age pension may continue to receive the pension after being admitted to the McCormick Memorial Home.

Subsec. (1), sec. 49.23, Stats., provides that no old-age pension shall be granted or paid to a person while or during the time he is an inmate of and receives the necessities of life from any charitable institution maintained by the state or any of the political subdivisions of the state, or of a private charitable, benevolent or fraternal institution or home for the aged.

The statute provides that no old-age pension shall be paid while the person is an “inmate of and receives the necessities of life from” a charitable institution. The statute is designed to prevent the payment of a pension where an inmate of a charitable institution receives the necessities of life gratuitously from the institution. The statutory provision does not extend to a case where payment must be made before the inmate is admitted to the home.

The statute must be given a liberal interpretation in order to carry out the legislative intent. The intent of the legislature was to provide an old-age pension for persons who have no means of support, and no relatives to whom their support may be charged. It may very well happen that an old-age pension of a smaller amount may be sufficient where, as here, the person can be placed in a charitable home. So long as the necessities of life in the home are not furnished gratuitously, we can see no objection to an inmate’s receiving an old-age pension.

SOA
Bonds—Towns in counties not containing city of first or second class may not issue bond for highway improvements in under sec. 67.16, Stats., in excess of ten thousand dollars limited by sec. 67.04, subsec. (5), par. (d), Stats.

August 9, 1926.

HIGHWAY COMMISSION.

Attention M. W. Torkelson, Engineer-Secretary.

The value of the taxable property in a town of one of the counties of the state, according to the assessment thereof for taxation, is approximately two and one-half million dollars; the town desires to issue bonds for highway improvements under the provisions of sec. 67.16, Stats., in the amount of forty thousand dollars, and you inquire whether the limitation of ten thousand dollars on the amount of bonds which may be issued for highway purposes by a town located in a county which does not contain a city of the first or second class, contained in par. (d), subsec. (5), sec. 67.04, Stats., applies to such bond issue.

On the authority of an opinion to the chairman of the town of Bangor, under date of May 23, 1924 (XIII Op. Atty. Gen. 285), the question is answered in the affirmative. In the opinion referred to, you will find a full discussion of the ground on which it was rendered, after full consideration by the attorney general and his entire staff, and I refer you to that discussion. You will note that in that opinion, doubt was expressed that the legislature really intended that the limitation should apply to such bonds, but that nevertheless no conclusion could be reached other than that by making the authority to issue bonds subject to the provisions of ch. 67, the limitation existing in that chapter applies.

Since that opinion was given, a session of the legislature has intervened, and said sec. 67.16, with other preceding and following sections, were repealed and re-enacted, by ch. 385 of that session, but no change in the law was effected to remove the limitation so held to apply.

FEB
Peddlers—Transient Merchants—Resident and taxpayer who lives eight miles from city of Rhinelander and who sells feed and other mill stuff at retail out of car at Rhinelander is transient merchant at Rhinelander and is required to have transient merchant’s license.

August 9, 1926.

JOHN W. KELLEY,
District Attorney,
Rhinelander, Wisconsin.

In your communication of July 20 you state that a resident and taxpayer of the county of Onedia who is engaged in the general merchandise business about eight miles from the city of Rhinelander also buys feed and other mill stuff and retails it out of the car at Rhinelander. This feed and mill stuff is shipped in to this party and while the car is on the track at Rhinelander, sales and deliveries are made direct from the car to the customer.

You inquire whether this party may be classed as a peddler and be required to secure a peddler’s license.

Your statement of facts shows that the man is rather a transient merchant than a peddler. Sec. 129.05, Stats., provides:

“(1) A transient merchant within the meaning of sections 129.01 to 129.24, is defined as one who engages in the vending or sale of merchandise at any place in this state temporarily, and who does not intend to become and does not become a permanent merchant of such place. No person shall engage in or follow the business or occupation of a transient merchant, as hereinbefore defined, at any place in this state, without first obtaining a license authorizing him to do so.”

In an official opinion, under date of September 29, 1919, this department held that one who sells potatoes in a city which have shipped in in carload lots is a transient merchant whether or not he is a resident of the city in which he sells. VIII Op. Atty. Gen. 717.

In II Op. Atty. Gen. 616, it was held that persons who bring goods into the city of Sheboygan, sell the same from the freight cars, and persons who bring goods in by boat and sell them at the dock, are transient merchants.

Feed and mill stuff is certainly merchandise, and this is being temporarily sold in Rhinelander, which clearly brings the case within the contemplation of the above quoted statute.
You are advised that the party is a transient merchant, and it is necessary for him to procure a transient merchant’s license.

JEM

Courts—Forfeiture—Peddlers—Penalty provided for violation of ch. 129, Stats., is forfeiture action and not criminal action.

August 11, 1926.

C. E. SODERBERG,
District Attorney,
Rice Lake, Wisconsin.

In your letter of August 4 you inquire whether a criminal action can be brought under sec. 129.01, Stats. You state, that in your opinion, such action can be maintained and that sec. 353.27, Stats., prescribes a punishment.

Sec. 129.01, Stats., provides:

“No person shall engage in or follow the business or occupation of a hawker or peddler within this state without having first obtained a license for that purpose as provided in sections 129.01 to 129.24, inclusive.”

Sec. 129.04, Stats., provides for the licensing of hawkers and peddlers. Sec. 129.05 provides for the licensing of transient merchants.

Sec. 1575, Stats. 1921, provides:

“Any person failing to exhibit his license when requested by the proper officials shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than ten dollars nor more than twenty-five dollars, or by imprisonment in the county jail not less than fifteen days nor more than thirty days.”

Ch. 165, laws of 1923, amended sec. 1575, Stats. 1921, to read as follows:

“But one person shall be authorized to carry on business under the terms of any license provided for in sections 129.01 to 129.24, inclusive, and no person shall conduct business under the same license as copartners, agents or otherwise. And it shall be the duty of any person licensed as herein provided, upon the demand of the treasury agent or any of his deputies, or of any sheriff, constable or police officer to exhibit his license and make affidavit that he is the person named therein. Any person failing to exhibit his license when requested by the persons above designated, shall forfeit and pay into the state treasury
a sum not less than ten dollars not more than fifty dollars for each such offense.”

By ch. 291, Laws 1923, sec. 1575, Stats. 1921, was renumbered sec. 129.06.

Sec. 1578, Stats. 1921, provides:

“Every person who shall engage in or follow the business of a hawker, peddler or transient merchant in this state, without having first obtained a license, or shall when licensed as a transient merchant neglect or refuse to pay the per diem fee as provided by sections 1570 to 1584e, inclusive, or who in any manner shall fail to comply with the provisions of subsection (3), of section 1573, shall be guilty of a misdemeanor, and be punished by a fine not less than twenty-five dollars, nor more than one hundred dollars, or in default of the payment of such fine, by imprisonment in the county jail of the county in which he shall have been convicted, for a period not exceeding sixty days, for each offense.”

Ch. 165, Laws 1923, amended sec. 1578, Stats. 1921, to read as follows:

“Every person who shall engage in or follow the business of a hawker, peddler or transient merchant in this state, without having first obtained a license, or shall when licensed as a transient merchant neglect or refuse to pay the per diem fee required by law, or who in any manner shall fail to comply with the provisions of subsection (3) of section 129.04, shall, for each violation, failure or refusal, forfeit and pay into the state treasury not less than twenty-five dollars nor more than fifty dollars.”

By ch. 291, Laws 1923, sec. 1578, Stats. 1921, was renumbered sec. 129.09.

The history of ch. 129 thus clearly shows that the violation of this chapter at one time was a criminal offense. However, in 1923 the legislature changed the penalty to a forfeiture. If, therefore, ch. 129 is now ambiguous as to penalty, the ambiguity must be resolved in favor of a forfeiture action rather than a criminal action. The fact that a criminal action was once provided and that the legislature amended the chapter to provide for a forfeiture action shows conclusively a legislative intent to provide for one penalty only for a violation of ch. 129, and that by forfeiture.

SOA
Bridges and Highways—Assessment by county board of twenty per centum of county’s share of cost of emergency construction or reconstruction of bridges on state trunk highway system against municipalities where such bridges lie is lawful.

CHARLES VOIGT,
District Attorney,
Sheboygan, Wisconsin.

You inquire whether, under the provisions of sec. 84.09, Stats., considered with reference to those of subsec. (1), sec. 84.07, the county may assess twenty per centum of the county’s share of the cost of emergency reconstruction of bridges, found to be unsafe by the state highway commission, against the municipalities in which such bridges lie.

The question is answered in the affirmative. IX Op. Atty. Gen. 263. The fact that every county is required, by sec. 87.04, subsec. (1), to maintain the portions of the state trunk highway system within it does not, in my opinion, in any way prevent the operation or modify the provisions of subsec. (6), sec. 84.09, which expressly authorizes the county board to assess up to the maximum of forty per cent of the county’s share of the cost of emergency construction or reconstruction of bridges on the state trunk highway system against the municipalities in which they lie.

Constitutional Law—Constitutional Amendments—Elections—Suggestions for statement required by subsec. (1), sec. 6.10, in notice submitting proposed constitutional amendments to people at coming general election, and also for form of ballot to be used thereat.

FRED R. ZIMMERMAN,
Secretary of State.

In compliance with your request I suggest the following statement of the changes that will be made in the state constitution if the several proposed amendments contained in Joint Resolutions Nos. 16 and 52, agreed to by the legislature of 1925, are ratified by the people, as suitable for your use in making up the notice of the submission thereof required by sec. 6.10, subsec.
Opinions of the Attorney General

(1), Stats., and a similar statement with reference to the question to be submitted pursuant to Joint Resolution No. 47:

(Joint Resolution No. 16 to create sec. 12 of art. XIII, relating to the recall of elective public officers.)

This amendment, if approved, will add to the constitution a self-executing provision for the recall of elective public officers by the direct vote of the people of the state or of any county or of any congressional, judicial or legislative district, under the conditions and in the manner therein set forth. It will apply to officers elected by the people of the following classes only: state officers, county officers, congressional officers, judicial officers, and legislative officers, and will enable the people to recall any officer in the classes named, at any time after he has served one year of the term for which he was elected, and to elect another person in his place for the remainder of such term.

(Joint Resolution No. 52 for the amendment of sec. 5 of art. V, relating to the compensation of the governor.)

Under this amendment, if approved, instead of the governor's salary being fixed by the constitution, the legislature will have power by law to fix it at not less than five thousand dollars, which shall be in full for all traveling and other expenses incident to his duties.

(Joint Resolution No. 47, relating to the national prohibition act.)

This resolution simply provides for the submission to the voters at the coming general election of a question framed to ascertain the opinion of the electors of Wisconsin as to whether the Volstead act should be amended in the particulars stated in the question. No change will be effected in the constitution or the state laws by the vote upon the question submitted.

In connection with the foregoing suggested statement for the notice, and also at your request, I submit the following suggestions as to the form of the ballot submitting the several questions to the people:

Shall amendment to the constitution creating sec. 12 of art. XIII, providing for the recall of elective state, county, congressional judicial and legislative officers by direct vote of the electors, be adopted?

Yes □ No □

Shall amendment to sec. 5 of art. V of the constitution, providing that the annual compensation of the governor shall
be such sum, not less than five thousand dollars, as may be fixed by law, be adopted?

Yes ☐ No ☐

Shall the congress of the United States amend the "Volstead act" so as to authorize the manufacture and sale of beer, for beverage purposes, of an alcoholic percentage of 2.75% by weight under government supervision with the provision that no beverage so purchased shall be drunk on the premises where obtained?

Yes ☐ No ☐

FEB

Trade Regulation—Trading Stamps—Envelopes given by photographer in connection with sale of reprints are trading stamps within meaning of trading stamp law.

J. Q. Emery,
Dairy and Food Commissioner.

In your letter of June 29 you state that a photographer uses envelopes in the sale of pictures and negatives which he develops. On one side of the envelope the following printing appears:

WE FEATURE

—SNAPSHOT SERVICE
Photographic Supplies, Expert Kodak Finishing

PROMPT SERVICE
The best pictures your negatives will produce, may be secured through——SNAPSHOT SERVICE

<table>
<thead>
<tr>
<th>Date</th>
<th>192</th>
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<tbody>
<tr>
<td>NAME</td>
<td></td>
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<tr>
<td>ADDRESS</td>
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INSTRUCTIONS

Develop only

Develop and print .... of each negative

Reprint .... 1 .... of each negative

CHARGES

Printing ... Developing ... Total ...

Remarks


You state that in your opinion the envelopes thus used are trading stamps if the reprints are goods, wares or merchandise within the meaning of the trading stamp law. You inquire whether your opinion is correct.

Sec. 134.01, subsec. (1), Stats., provides, in part as follows:

"No person, firm, corporation, or association within this state shall * * * give * * * in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, * * * ."

It should be noted that the instructions on the envelope are "Reprint......1......" The transaction involves the sale of a reprint to a customer. It is true that the photographer performs a service in making a reprint, but the customer is not interested particularly in the manner in which the work is done. What the customer wants is the finished product, namely, the reprint.

It has been held by this department that a newspaper, although incidentally involving a service, is "goods, wares or merchandise," within the meaning of the statute. There is no distinction, under the statute, between a newspaper and a reprint. We therefore concur in your opinion that the reprint is "goods, wares or merchandise" under the trading stamp law.

There is a distinction between reprinting and developing a film. In the latter case, the title to the film remains in the cus-
Opinions of the Attorney General

tomer while it is in the hands of the photographer. The developing of the film involves a service only. If the envelope were used in connection with the developing of the film, it would not be a trading stamp for the reason that it would not be given in connection with the sale of goods, wares or merchandise. SOA

Public Officers—Sheriff—Where compensation of sheriff has been fixed before his election by county board at stated sum per annum plus compensation for keeping and maintaining prisoners in county jail, contract subsequently attempted to be entered into after his election by committee of county board appointed merely to draw up contract, and sheriff-elect, providing for additional compensation, is invalid.

When sheriff is placed on salary basis, his salary covers all fees, per diem, and expense authorized by statutes to which he would otherwise be entitled. Questions with reference to specific items answered.

Warren B. Foster,
District Attorney,
Hurley, Wisconsin.

You have submitted a contract, dated December 26, 1924, executed by the then sheriff-elect and the chairman of the county board of Iron county, which contract contains provisions as to the salary of the sheriff, payment or maintenance of prisoners, allowances for conveying persons to prisons, hospitals for the insane, and other state institutions, work outside of the county, and for the retention by the sheriff of fees for services in civil actions, exclusive of services to the state or county, and inquire whether this contract is legal.

It appears from your letter that in August, 1924, the county board at a special meeting thereof approved a recommendation of a committee on salaries that the sheriff receive an annual salary of three thousand three hundred ($3,300) dollars plus prisoners' maintenance; that on December 19, 1924, at an adjourned annual meeting of the county board, a committee was appointed pursuant to vote of the board to draw up a contract with the incoming sheriff, but that no report was made to the board by the committee and that nothing further was done by the county board.
The sheriff's salary having been fixed by the county board, the subsequent action of the committee and the chairman in entering into a contract providing for different or additional compensation, particularly since such contract was not approved by the board, is, in my opinion, invalid.

You further ask, as a guide for the future, whether a sheriff who is on a salary basis may receive additional compensation from the county for transporting prisoners and other persons to state institutions and for work done outside the county. This is answered in the negative. IV Op. Atty. Gen. 947; X Op. Atty. Gen. 592; XI Op. Atty. Gen. 126. Also whether he is entitled to fees received from service of process in civil actions. This is also answered in the negative. Gregory v. Milwaukee County, 186 Wis. 235; Op. Atty. Gen. for 1906, 212, 565; V Op. Atty. Gen. 876; VI Op. Atty. Gen. 126; X Op. Atty. Gen. 592; XI Op. Atty. Gen. 126. Opinions are based upon the express provision of subsec. (1), sec. 59.15, Stats., to the effect that when a sheriff is placed upon a salary basis by the county board and the salary fixed, it shall be in lieu of all fees, per diem and compensation for services rendered, except for keeping and maintaining prisoners in the county jail, and with another exception which applies only to the sheriff in counties containing more than 300,000 or more population, which is not material here.

Answering your further questions, for the same reasons expressed in the opinions cited, neither the sheriff who is on a salary basis, nor his under-sheriff or deputies, are entitled to per diem for attendance upon courts under sec. 59.28, subsec. (2); nor is it lawful for the county board to furnish the sheriff with gasoline for use in his automobile while used on official business.

You further ask whether under subsec. (5), sec. 59.15, Stats., it is lawful for the county board after the sheriff has been elected and is about to enter upon his duties, or after he has actually entered upon his duties, to change from a salary fixed to the same salary and in addition to that salary additional fees and additional compensation. The answer is in the negative. The subsection referred to grants no authority to the board to make such a change at such a time.

You are therefore advised, in conclusion, that the salary of $3,300, plus the cost of maintenance of prisoners in the county jail, constitutes the compensation of the sheriff in question, and
that the additional allowances attempted to have been made in the form of contract subsequently entered into between the sheriff and a committee of the board and signed by the chairman of the board are unlawful.

Elections—Nomination Papers—Candidates for nomination by political parties for county offices whose nomination papers are not signed by electors in at least one-sixth of election precincts of county are not entitled to have their names printed on official primary ballot as such candidates.

Such nomination papers are insufficient unless they contain at least three per cent of party vote in each of at least one-sixth of election precincts of county and in aggregate not less than three per cent nor more than ten per cent of total vote of party in county.

August 19, 1926.

William M. Gleiss,
District Attorney,
Sparta, Wisconsin.

Sec. 5.05, Stats., and par. (c), subsec. (6) thereof provide that nomination papers for candidates at the September primaries shall be signed.

"If for an office representing less than a congressional district in area, or a city or county office, by at least three per cent of the party vote in at least one-sixth of the election precincts of such district and in the aggregate not less than three per cent nor more than ten per cent of the total vote of his party in such district."

There are 38 election precincts in your county, in thirteen of which no votes were cast for candidates of a certain political party for presidential electors at the last presidential election in which such party had candidates for presidential electors; nomination papers of candidates of such party at the approaching primary for county offices have been filed, signed by electors of four precincts only, but containing the signature of more than three per cent of the party vote in the county; you have advised the county clerk that such candidates of such party are not entitled to have their names printed on the official ballot as candidates of such party for the county offices for which their nomination papers have filed because the provision of the law
above quoted has not been complied with, in that such nomination papers are not signed by at least three per cent of the party vote in at least one-sixth of the election precincts of the county; your opinion has been questioned by representatives of such party, and you submit a statement prepared by them of their contention that such candidates are entitled to places on the ballot because their nomination papers are signed by three per cent and more of the aggregate county vote in the county, in which the claim is made that the paragraph of the law above quoted does not require that such nomination paper shall be signed by at least three per cent of the party vote in each of at least one-sixth of the election precincts of the district (county) as it does in the case of nominations for state offices and for representatives in congress by the terms of pars. (a) and (b), subsec. (6); you submit the question of the correctness of your ruling to the attorney general for his opinion.

I concur in your opinion.

It is clear from both your statement and the statement of the party representatives referred to that the nomination papers in question are not signed by electors in at least one-sixth of the election precincts of the county, even if, in determining whether the law has been complied with, there be deducted (which is not permissible) the thirteen precincts in which no party vote was cast by the party. That fact is alone sufficient to sustain your ruling, and it is really unnecessary, under the facts stated, to consider whether if the nomination papers in question had been signed by electors in at least one-sixth of the election precincts of the county the failure to obtain the signature of three per cent or more of the voters of the party in each such precincts would nevertheless entitle the candidate to a place on the ballot, because they were signed by voters in four precincts only, which is less than one-sixth of the total number of precincts in the county.

Although it is not strictly involved in the question presented on the facts of the instant situation, it may not be out of place for me to add that in my opinion the phrase “each of” in pars. (a) and (b), subsec. (6) adds nothing to the requirement. “In at least each of six counties of the state” (par. a) and “in each of at least one-half of the counties of the congressional district” (par. b) mean exactly what would have been meant if the language was simply “in at least six counties of the state” and “in
at least one-half of the counties of a congressional district,” re-
spectively. So, if the language of par. (c) was “in each of at
least one-sixth of the election precincts,” instead of “in at least
one-sixth of the election precincts” as it is, the meaning would
be the same.

The contention of the representatives of the party in question
would strike the requirement that nomination papers must be
signed by at least three per cent of the party vote in at least one-
sixth of the election precincts entirely out of the statute. and any
candidate whose nomination papers are signed by electors in a
single precinct, or in a single precinct with one signer only,
in each of the other precincts making up one-sixth of the pre-
cincts, equal to three per cent or more of the aggregate party
vote in the county would be entitled to have his name placed on
the official ballot. Manifestly, this would do violence to the
plain provision of the law not contemplated by the rule of
liberal construction of subsec. (6), sec. 5.01, which is invoked by
the party representatives in support of their contention.

FEB

**Insurance**—Contract whereby seller agrees that articles sold
on instalment plan, obligation to pay being personal to buyer,
with provision that in case of buyer’s death remaining pay-
ments will be discharged and in case buyer is unable to follow
his usual vocation payments during such period will be dis-
charged, in contract of insurance within meaning of sec. 209.11,
Stats.

August 19, 1926.

**Olaf H. Johnson,**
Commissioner of Insurance.

The material facts presented in your letter of July 15 are as
follows: A corporation engaged in selling various articles on the
instalment plan proposes to adopt a contract providing that the
obligation to pay for articles purchased is personal to the buyer;
that in case of the buyer’s death unpaid payments will be dis-
charged; that in case the buyer by reason of sickness or disability
is unable to follow his usual vocation, the payments due during
such period shall be discharged; the sale price of the articles will
be the same whether purchased with the foregoing provisions
or otherwise. You inquire whether the proposed contract will
violate sec. 209.11, Stats., the corporation not being organized as an insurance company.

Sec. 209.11, Stats., provides as follows:

"No corporation, association, partnership or individual shall do any business of insurance of any kind, or make any guaranty, contract or pledge for the payment of annuities or endowments or money to the families or representatives of any policy or certificate holder, or the like, in this state or with any resident of this state except according to the conditions and restrictions of these statutes. And the term insurance corporation as used in this chapter may be taken to embrace every corporation, association, partnership or individual engaging in any such business."

The statute in clear and unambiguous language prohibits the doing of "any business of insurance" in this state, except according to the conditions and restrictions of the statutes relating to insurance. The statutes do not define the terms "insurance" and "any business of insurance." "Insurance" has been defined as:

"* * * A contract whereby one for a consideration agrees to indemnify another for liability, damage, or loss by certain perils to which the subject may be exposed * * *." Joyce, The Law of Insurance (2d ed.), sec. 2.

"A contract by which one of the parties, called the insurer, binds himself to the other, called the insured, to pay to him a sum of money or otherwise indemnify him." Rogers v. Shawnee Fire Ins. Co., 111 S. W. 592, 593, quoting from Bouvier.

"* * * A contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril." Shakman v. United States Credit System Co., 92 Wis. 366, 374.

"* * * An agreement by which the insurer, for a consideration, agrees to indemnify the insured against loss, damage or prejudice to certain property described in the agreement, for a specified period, by reason of specified perils." Barnes v. People, 168 Ill. 425, 429.

"* * * An agreement by which one party, for a consideration (which is usually paid in money either in one sum or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of some thing in which the other party has an interest." Com. v. Wetherbee, 105 Mass. 149, 160.

For further definitions, see Physicians' Defense Co. v. Cooper, 199 Fed. 576; People v. Rose, 174 Ill. 310, 314.
"A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury of something in which the other party has an interest." *Clafin v. United States Credit System Co.*, 165 Mass. 501, 502.

"The business of insurance" is the business of making contracts of indemnity. 32 C. J. 975; *Physicians' Defense Co. v. Cooper*, 199 Fed. 576; *Shakman v. United States Credit System Co.*, 92 Wis. 366.


A life insurance policy is not a contract of indemnity, but is a contract to pay money upon insured's death in consideration of certain payments being made during his life. *Reed v. Provident San. Life Assur. Soc.*, 190 N. Y. 111, 82 N. E. 734; *Wayland v. Western Life Indemnity Co.*, 166 Mo. A. 221.

Life insurance is a promise to pay a certain sum upon the death of the assured. *Ellison v. Straw*, 199 Wis. 502; *Tennes v. N. W. Mut. L. Ins. Co.*, 26 Minn. 271, 3 N. W. 346; *Talcott v. Field*, 34 Nebr. 611, 52 N. W. 400; *Shakman v. United States Credit System Co.*, 92 Wis. 366.

Under a life insurance policy "the amount payable has no necessary relation to damages actually suffered by the beneficiary. The insured buys and pays for the right to have from another a specified sum upon the happening of a specified event. Payment for the insurance is in the nature of an investment. The money value of the thing covered by the insurance does not enter into the transaction at all." *Gatzweiler v. Milwaukee E. R. & L. Co.*, 136 Wis. 34, 37.

In *Ellison v. Straw*, 119 Wis. 502, 508, the court said:

"** Life insurance is one thing, investment is another, but the ingenuity of the life insurance companies in formulating contracts which confuse the distinction has been active for generations. Pure life insurance has become rare, except with beneficial associations; but the gradations from that contract, with some slight provisions for accumulation of dividends, to contracts where the accumulation is the predominant, if not even the exclusive, purpose, are almost numberless."
"A policy of casualty insurance, ordinarily, has much the same features as one of life insurance, though, it is true, it more nearly than one of life insurance has the indemnity feature." Gatzweiler v. Milwaukee E. R. & L. Co., 136 Wis. 34, 37.

Definitions have been given at some length covering not only fire and marine insurance, but also life insurance. It is not necessary here to determine whether the proposed contract of the corporation constitutes a contract of any particular kind of insurance. As will hereafter be shown, it matters not what definition of insurance is adopted.

Whether a contract is one of insurance is determined from its contents and not merely from its terminology. Title Ins. Co. v. Los Angeles, 214 Pac. 667; Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396; State v. Beardsley, 88 Minn. 20, 92 N. W. 472.

It is not controlling that the contract does not, on its face, purport to be one of insurance. State v. Beardsley, 88 Minn. 20, 92 N. W. 472.

Neither can it be said that the definitions as laid down by text writers and the courts necessarily cover the entire field of insurance.

The court in State v. Citizens' Benefit Association, 6 Mo. Ap. 163, 169-170, said:

"* * * The law, however, is not fond of definitions, and these definitions are to be taken, perhaps, rather as statements by the learned men who make them, of the contract as they find it existing around them, than as strict definitions which contain every essential element without which the thing cannot exist, and which exclude everything not necessary to its being."

The definitions, then, are important only as they have been interpreted in the cases presented to the court.

It has been held that undertakings to defend malpractice suits against physicians constitute insurance contracts. Physicians' Defense Co. v. Cooper, 199 Fed. 576; Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396.

A contract by which a company in consideration of the payment of a certain sum agrees to indemnify against losses through uncollectible debts is held to be a contract of insurance. State v. Phelan, 66 Mo. A. 548; Robertson v. United States Credit System Co., 57 N. J. L. 12; Lexington Grocery Co. v. Philadelphia Casualty Co., 157 N. C. 116; American Credit Indemnity Co. v.

In several cases it has been held that a contract providing that the obligation thereon should be canceled in case of death or other extrinsic event was a contract of insurance. *United Security Life Ins. and Trust Co. v. Bond*, 16 App. D. C. 579; *State v. Beardsley*, 88 Minn. 20, 92 N. W. 472; *Missouri K. & T. Trust Co. v. Krumseig*, 77 Fed. 32; *Missouri K. & T. Trust Co. v. McLachlan*, 59 Minn. 468, 61 N. W. 560; *Attorney General ex rel. Monk v. C. E. Osgood Co.*, 144 N. E. 371 (Mass. 1924).

In *United Security Life Ins. and Trust Co. v. Bond*, 16 App. D. C. 579, there was a contract by which a company agreed to make a payment of a certain sum in consideration of the assured's undertaking to pay a specified sum each month for a term of years or during his life time, if he should die during that term, and the execution of his bond secured by a deed of trust on his real estate, providing for a surrender of bond and deed of trust on payment by him in full, or on proof of his death and stipulating for a sale of the premises on default. The court held that the contract was a contract of life insurance. The court said, pp. 587, 588, 589:

"* * * We are clearly of opinion that there was only one contract in existence between them at any time, and that simply a contract of insurance. As we have stated, the agreement between them nowhere provides for the repayment by Bond of the sum advanced to him, but only for the payment of certain monthly instalments during his life, with the limitation that they should not extend beyond twenty years if his life should extend beyond that period. This was simply a contract of insurance and nothing more; and this was the only contract that could be enforced under the bond or by a sale had under the deed of trust.* * *"

"* * * The surrender value of the agreement was the surrender value of a policy of insurance: * * *"

In *State v. Beardsley*, 88 Minn. 20, 92 N. W. 472, the contract under consideration provided in effect for a loan of $1,000 to build a house, and for monthly payments to be made by the borrower for the discharge of the debt, which was secured to the lender by the house. The following provisions were also made a
part of the contract, the disability referred to being that of the borrower:

"Should his disability be total, permanent, and determined by a satisfactory evidence, the unpaid balance of one thousand dollars provided for in this contract shall be paid to clear the home of the party of the second part, and his indebtedness to the parties of the first part shall be discharged, and the title to the property, if held by the parties of the first part, shall be conveyed as he may direct. In the event of his death before all advance payments to him shall have been returned to the first parties, the parties of the first part shall pay the balance, if any, of the one thousand dollars contracted for, and shall cancel his indebtedness to the first parties, and, if the title to the property purchased is in the first parties, they shall convey the same to his wife, if any; if there shall be no wife, then to his heirs. * * * If the second party is over fifty years of age at the signing of this contract, the provisions to give his wife or heirs a clear title in case of his death, unless accidental, do not apply. In case of his death, unless accidental, his wife or heirs must continue the payments according to the obligations of the second party." (Pp. 22–23.)

The court said:

"This is a valuable promise made to the contract holder for a consideration, namely, his monthly payments. If he becomes disabled, the company promises to do an act of value to him. If he dies, the promise is to do an act of value to his widow or to his heirs; that is, an act equivalent to, and actually involving, the payment of money, conditioned upon the cessation of human life. The real character of this promise, or of the act to be performed, cannot be concealed or changed by the use or absence of words in the contract itself; and it is wholly immaterial that on its face this contract does not expressly purport to be one of insurance, and that this word nowhere appears in it. Its nature is to be determined by an examination of its contents, and not by the term used. The performance of the contract may be enforced by the holder in case of disability, or by his widow or heirs in case of his decease. If it does not come within the definition of an insurance contract, as found in section 3 (that is, if it is not an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury of something in which the other party has an interest), it involves the payment of money or something else of value to the family or representatives of the holder, conditioned upon the continuance or cessation of human life, and is covered by the definition found in section 63. It is an agreement involving and providing, in effect, for the indirect payment of money by the relinquishment
of a debt; and there is no substantial distinction between such an agreement or obligation and the ordinary life insurance policy. The obligation in each case is conditioned upon the cessation of human life.” (Pp. 23-24.)

Referring to the Krumseig case hereinafter cited, the court said:

"* * * The contract there under consideration does not really differ from the one now before us, which we regard as a combination of a loan of money with security and a life insurance policy. It has the features and essentials of both, and the defendant, having solicited and acted as an agent in procuring it, without being licensed as an insurance agent, violated the law before referred to, and was properly convicted on the merits." (P. 26.)

In Missouri, K. & T. Trust Co. v. Krumseig, 77 Fed. 32, a contract issued after the applicant had passed a medical examination, by which a loan was made to him, and he gave a number of promissory notes, payable in monthly instalments, covering the sum loaned, interest, and costs, and secured by deed of trust or mortgage, and by which the lender undertook in case of the applicant’s death before all payments had been made, to release the unpaid portion of the debt, if previous instalments had been promptly paid, was held by Caldwell, J., to be a combination of a mortgage loan and policy of life insurance, so that it was incumbent on the company issuing it to comply with the laws governing insurance companies.

In Missouri K. & T. Trust Co. v. McLachlan, 59 Minn. 468, 61 N. W. 560, a contract similar to that in the Krumseig case was involved. The court said, p. 473:

“We have supposed that in the course of our professional and judicial experience we had met with about all the forms of contract which have been devised by the ingenuity of modern associations of this and similar kinds, but this one is entirely novel to us. It is certainly unique, and after a careful study of all its provisions it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws or the usury laws, or both, of this state; but we shall take plaintiff at its word, and assume, without deciding, that it is not a life insurance contract, and hence that the laws of this state prohibiting and declaring invalid such contracts made by a foreign insurance company which has not complied with our statutes are inapplicable.”
In *Att'y. Gen. ex rel. Monk v. C. E. Osgood Co.*, 144 N. E. 371, the contract was almost identical with that which is proposed by the corporation here. The Osgood Company was a corporation engaged in the business of selling household furniture and similar articles, largely on the instalment plan. The company delivered the property to its customer upon payment by him of a substantial sum and the execution of a lease whereby the customer had the right to the possession and use of the property, provided he made certain payments at definite times, title being retained by the corporation until all payments were made, when title to the property was to vest in the customer. The lease contained the following clause, p. 371:

"'In case of the death of the person signing this lease before the whole amount of the lease is paid, we will receipt the balance due us on this account in full, provided the person signing this agreement is the principal wage-earner of the family, and provided all the payments have been made according to the terms agreed to in this contract; but it is distinctly understood that this agreement does not apply on any account of five hundred dollars or more.'"

Under the agreed statement of facts the meaning and effect of this clause was as follows, p. 371:

"'It is agreed that should the purchaser die during the pendency of said contract of lease, having made all the installment payments called for by the terms of said lease in the amounts and within the time specified in said lease, up to the time of the death of said purchaser, that at the time of the death of said purchaser all further payments due on account of said lease and unpaid at the time of the death of the purchaser shall be remitted, and the title to the merchandise shall immediately pass to the estate of the deceased purchaser without further payments, and C. E. Osgood Company will give a receipted bill to the estate of said purchaser, acknowledging payment in full for all merchandise mentioned and contained in the subject matter of the particular lease in question, the only limitation being however that this concession shall only be allowed on unpaid accounts up to five hundred dollars ($500).'

The Massachusetts statute defined a contract of insurance as follows:

"An agreement by which one party for a consideration promises to pay money or its equivalent or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest."
The court in holding the contract to be a contract of insurance said, p. 372:

"It is manifest that the defendant does not receive so far as the face of its lease is concerned any particular sum of money for the part of the agreement which relates to the cancellation of the debt in case of the death of its customer. The consideration for the lease or contract appears to be single both for the personal property and the agreement as to cancellation of the debt in case of the customer's death. It is equally plain that the defendant is bound by the terms of its contract to cancel the balance of debt due it in case of the death of its customer, and to cause the title to personal property to vest in his estate. Its contract is not like an unsealed agreement to discharge an overdue debt on payment in cash of less than its full amount. The quoted clause of the lease is part of the defendant's initial contract with its customer, is supported by the consideration of that contract and is binding upon the defendant. The clause respecting cancellation of the balance of the debt necessarily implies transfer of title to the property by the defendant to the estate of its customer on the death of the latter.

"This constitutes insurance within the meaning of the statutory definition. The cancellation of the debt is the equivalent of the payment of money to the estate of the customer. The transfer of title to the personal property delivered on lease is a right valuable to the customer. The cancellation of the debt and the transfer of title to the personal property spring out of the agreement and are in performance of its terms. The customer pays to the defendant the consideration for the doing of these things in the money handed to it as deposit and as the partial payments made from time to time. The cancellation of the debt and the transfer of the title to the personal property occur upon the death of the customer. That loss of his life is plainly something in which the customer has an interest. Every element of the statutory definition of insurance is present."

The Osgood case is squarely in point here. It is true that the court based its decision on a statute defining insurance, but the statutory definition does not differ from the common law definition as the court stated. The statutory definition is the same as the definition in Com. v. Wetherbee, 105 Mass. 149, and Claftin v. United States Credit System Co., 165 Mass. 501, which have heretofore been cited.

The contract in the Osgood case is practically the same as the proposed contract. True, the proposed contract does not have the lease feature. The lease, however, is unimportant. The proposed contract contains the provision that in the case of death
or disability the payments will be discharged. This feature is sufficient to bring the contract within the prohibition of sec. 209.11, Stats.

SOA

Charitable and Penal Institutions—Home finding corporation which is reorganized into entirely new corporation requires new license under sec. 58.03, Stats.

August 26, 1926.

BOARD OF CONTROL.

You state that the Wisconsin Home Finding Society, in the city of Green Bay, is a corporation licensed as a home finding society and has a boarding home for children, and is also a maternity home; that it has been decided by the board of directors of said corporation to reorganize as an entirely new corporation and to take over the work of the present corporation, which will be dissolved as soon as this has been accomplished; that this new corporation has recently received a certificate of incorporation under the name of Orphan and Rescue Home. You state that the question has been submitted to you, and you inquire whether this new corporation will be required to take out a license, under the provisions of secs. 58.03 and 58.085, Stats., in view of the fact that the license previously issued to the old corporation are not transferable.

Your question must be answered in the affirmative. The new corporation under the name of Orphan and Rescue Home is a legal entity, in contemplation of law, entirely distinct and separate from the original corporation. The license granted to the old corporation is, therefore, not sufficient to satisfy the call of the statute which requires that corporations which find homes for children are to be licensed.

Sec. 58.03, subsec. (1), Stats., provides:

"No individual other than the parent or legal guardian of the child, and no corporation organized for the purpose specified in section 58.01 or section 58.02, or any other agency or institution until duly constituted legal guardian and duly licensed therefor as hereinafter provided, shall place any child in any family with or without contract or give him away for adoption."

JEM
Bridges and Highways—Public Officers—Highway commission has authority to lease real estate to be used in operation of paint shop for state highway signs.

August 27, 1926.

HIGHWAY COMMISSION.
You have submitted a proposed lease and request advice as to whether you have authority to execute this lease. It appears that your department needs a paint shop; that the quarters to be engaged are to be devoted to painting various signs used by your department in its work; and that the quarters are to be leased in the city of Madison. The lease proper appears to be an adoption of a standard form and contains references to purposes for which the premises are to be occupied. The exact purpose, however, has not been stated in the lease. I do not consider this a material objection, but you might insert, if you wish, that the building is to be occupied for the purposes set forth in your letter. The lease appears to be satisfactory as to form.

This department ruled in IX Op. Atty. Gen. 439 that your commission has implied authority to purchase or lease real estate to be used in furthering the state highway operations, and the opinion, in an adequate discussion, sets forth the reference together with the pertinent statutes leading to this conclusion.

MJD

Criminal Law—Elections—Intoxicating Liquors—One convicted in federal court of conspiracy to violate Volstead act has not lost his civil rights in this state.

August 31, 1926.

HONORABLE JOHN J. BLAINE,
Governor.

In your communication of August 24 you state that a petition has been made to you by F— E—, who represents that on the 20th day of April, 1922, upon a plea of guilty before the United States district court for the eastern district of Wisconsin, at Milwaukee, to an indictment charging him with conspiracy to violate the Volstead act, being section 37 of the criminal code in re national prohibition, the petitioner was fined in the sum of $10,000 and no imprisonment was imposed; that said petitioner has paid into court the said sum of $10,000; that petitioner now resides in Calumet county, state of Wisconsin, and is over
Opinions of the Attorney General

fifty years of age and prays that he be restored to his civil rights.

You ask to be advised concerning this matter.

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.”

The pardoning power is conferred upon the executive by sec. 6, art. V, Const., and in order to be restored to civil rights it is necessary that a pardon be secured of the governor. 205 Op. Atty, Gen. for 1902.

The governor has no power over United States prisoners sentenced to state, penal or reformatory institutions. XII Op. Atty. Gen. 220.

Power given by the constitution extends only to offenses in violation of state laws. 29 Cyc. 1562.

It does not include offenses against the laws of the United States. 24 Am. & Eng. Ency. of Law, 2d ed., 569.

But has the petitioner lost his civil rights in Wisconsin, is a question that confronts us here. Has he committed a felony within contemplation of sec. 2, art. III, Wis. Const.?

In State ex rel. Isenring v. Polacheck, 101 Wis. 427, our court referring to sec. 15, art. IV, Wis. Const., on page 431 said:

“...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.”

In an official opinion by this department, XIII Op. Atty. Gen. 141, it was held that the term “felony” as used in sec. 2, art. III, should be given the same meaning. It would then follow that the petitioner did not forfeit his civil rights unless he was convicted of a felony which was a felony at the time our constitution was adopted. A felony at common law was an offense which occasioned a total forfeiture of lands or goods or both and to which might be superadded capital or other punishment according to the degree of guilt. 16 C. J. 55; 2 Bouvier’s Law Dictionary 1202.
Conspiracy at common law was a misdemeanor. 5 R. C. L. 1062, cases cited under Note 10; 6 Am. & Eng. Ency. of Law, 2d ed., 363.

A conspiracy to commit crime of higher grade than the offense of conspiracy merges into the crime upon its execution. In this way a conspiracy to commit a felony would be a felony, but a violation of the Volstead act was not an offense at the time our constitution was adopted, so it can safely be said that the committing of a conspiracy to violate the Volstead act was not a felony at the time when our constitution was adopted.

It follows that F—E— has not been convicted of a felony in contemplation of sec. 2, art. III, Wis. Const., and he has not lost his civil rights. Whether said constitutional provision applies to conviction for felonies committed in other courts than those of the state is a question that need not now be determined. My conclusion is that F—E— has not lost his civil rights, and had he lost them, I know of no statute or constitutional provision which authorizes the governor to restore him to such civil rights when the offense committed was one against the federal statutes and the conviction in the federal courts.

JEM

Elections—Public Officers—County clerk must furnish election supplies to city of Fond du Lac.

James Murray,
District Attorney,
Fond du Lac, Wisconsin.

You have submitted tally sheets or so-called inspector’s statements for reporting the votes cast in the respective districts and precincts of the city of Fond du Lac and wish to be advised whether the county clerk is obliged to furnish such election supplies to the city of Fond du Lac. The city of Fond du Lac uses voting machines.

Under sec. 11.09, subsec. (6), the officer charged with the duty of providing ballots shall provide for each election precinct in which a voting machine is to be used return sheets, certificates, and other printed matter necessary for the proper conduct of the election and making up returns thereof, according to the type of voting machine to be used therein.

Sec. 6.28 provides:
"Each county clerk shall cause to be printed in the same manner and at the same time that official ballots are printed a sufficient number of poll lists and other supplies required by law for the conducting of elections, for each precinct in the county; also registry books where registration is required."

It appears from the foregoing that the county clerk is obliged to furnish election supplies to the city of Fond du Lac.

MJD
Insurance—Agreement whereby company agrees to indemnify owner of machinery against damage caused by breakdown of machinery is insurance contract, and company entering into such contract is insurance company within meaning of sec. 209.11, Stats.

O. H. Johnson,

Commissioner of Insurance.

You have requested an opinion as to whether a certain corporation, not organized as an insurance corporation, is engaged in the insurance business in this state. The company enters into contracts with owners of machinery. The contract contains the following provisions:

Section I—Service Agreement

The company agrees with the owners of machinery called in the contract "the serviced" to indemnify the serviced as respects loss caused by the breakdown, while the agreement is in force, of any electrical machine described in Statement 5, as follows:

"1. To indemnify the Service against loss (a) from damage to such machine.

"4. The company's liability hereunder is limited as specified in Statement 3."

Section II—This Agreement is Subject to the Following Conditions

"A. Definitions. As used in this agreement: (1) the word 'Machine' means any piece of electrical apparatus described in Statement 5, including all wiring beyond the machine terminals. It shall not include any mechanism or appliance driving or driven by the machine or connected to it by any coupling, belt, gear or other means, whether mounted with it on a common shaft or bed or otherwise, nor shall it include any shaft (with its bearings) which is common to the machine and to an engine or other prime mover with which it forms a direct connected unit or any wheels or gears on such shaft; (2) 'breakdown' means only the sudden, substantial and accidental breaking or burning out of the machine (or any part thereof) while the machine is in use or installed and connected ready for use, which immediately stops the functions of the machine and which necessitates repair or replacement before its functions can be restored; (3) 'accident' means a breakdown; 'one accident' as used in Statement 3 means the breakdown of any one machine, but shall include all resultant or concomitant breakdowns whether of one or more
than one such machine or other object described in Statement 5."

"C. Notices. Written notice of every accident and claim, and every summons or other process in suits on account thereof, shall be forwarded as soon as practicable to the Company or its authorized agent. The Service shall co-operate with the Company, except in a pecuniary way, in defense of claims and suits and in prosecuting appeals."

"D. Adjustment of Loss. (1) In case of an accident the Company shall have reasonable time and opportunity to examine thoroughly the machine and the premises connected therewith and the damaged property before any repairs are commenced. (2) In no case shall the claim be for more than the actual and immediate damage to property as serviced against, estimated according to the true cash value of the property at the time of the accident, proper deductions for previous depreciation having been made. (3) The Company may repair, restore or replace the serviced property damaged or destroyed or pay the loss in money, as the Company may elect. (4) In the event of a disagreement as to the extent of the direct damage to the serviced property and the amount of the serviced loss thereon (of the kind for which the company is liable under this agreement), the extent of such damage and the amount of such loss shall, if the serviced elect, be ascertained by two appraisers, one to be chosen by the serviced and one by the Company. The two appraisers so chosen, if they are not able to agree, may select a third, and the award in writing of any two of the appraisers shall determine the amount of such loss. The Company and the Serviced shall pay the appraisers respectively, selected by them, and shall bear equally the other expenses of the appraisal and of the third appraiser if one is selected."

"F. Cancellation. This Agreement may be cancelled at any time by either party by written notice to the other stating when thereafter cancellation shall be effective. Such notice by the Company mailed to the Serviced address herein given, not less than five days prior to the effective date of cancellation, shall be a sufficient notice. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata. If cancelled by the Serviced, the Company shall be entitled to the earned premium computed according to the short rate table printed hereon. The check of the Company or of its duly authorized agent delivered or mailed to the Serviced said address shall be a sufficient tender of any unearned premium."

"G. Subrogation. The company shall be subrogated to all rights of the Serviced against any person, firm, corporation or estate, as respects any payment or replacement made by the Company hereunder, and Serviced shall execute all papers required to secure to the Company such rights."
"I. Consideration. This agreement is issued in consideration of the payment of the premium and of the statements in the Schedule of Statements endorsed hereon and hereby made a part hereof, which statements the Serviced, by the acceptance of this agreement, warrants to be true."

Section III of the contract lists the machinery, and contains a provision that the company shall not be liable for more than $1,160. The contract also contains a short rate cancellation table showing percentage of premium to be taken as earned premium.

Sec. 209.11, Stats., provides:

"No corporation, partnership or individual shall do any business of insurance of any kind, or make any guaranty, contract or pledge for the payment of annuities or endowments or money to the families or representatives of any policy or certificate holder, or the like, in this state or with any resident of this state except according to the conditions and restrictions of these statutes. And the term insurance corporation as used in this chapter may be taken to embrace every corporation, association, partnership or individual engaging in any such business."

The statute does not define the term "insurance." The term has been defined as:

"* * * A contract whereby one for a consideration agrees to indemnify another for liability, damage or loss by certain perils to which the subject may be exposed." Joyce Ins., sec. 2.

"* * * A contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril." Shackman v. U. S. Credit System Company, 92 Wis. 366, 374.

"A contract of insurance is an agreement by which one person, for a consideration, promises to pay money or its equivalent or do some act of value to the insured, upon the destruction or injury of something in which he has an interest." Claflin v. U. S. Credit System Company, 165 Mass. 501.

While many other definitions of insurance and insurance contracts may be found, they differ in form only and not in substance. An insurance contract is a contract of indemnity and the business of insurance is the business of making contracts of indemnity. The agreement now before us is clearly a contract of indemnity. It is true that the contract is not, in express terms, called an insurance contract, but whether a contract is one of insurance is determined from its contents and not merely

It is not controlling that the contract does not on its face purport to be one of insurance. *State v. Beardsley*, 88 Minn. 20.

In accordance with the terms of the contract, the company agrees in express terms to indemnify the owner of machinery against loss from damage to the machinery covered by the agreement through breakdown or accident. The agreement apparently covers damage not only to the machine but to property and persons. Subdivision C of Section II of the agreement provides that written notice of every summons or other process in suits on account of a breakdown or accident shall be given to the company. This subdivision further provides that the owner shall co-operate with the company, except in a pecuniary way in defense of claims and suits and in prosecuting appeals.

That the contract is purely a contract of indemnity and not a contract for repairing machinery is established by one of the provisions in Subdivision D in Section II of the agreement, wherein the company has the option to "repair, restore or replace serviced property damaged or destroyed or pay the loss in money, as the company may elect."

Subdivision G of Section II of the contract provides that "the Company shall be subrogated to all rights of the Serviced against any person, firm, corporation or estate, as respects any payment or replacement made by the Company hereunder, and Serviced shall execute all papers required to secure to the Company such rights."

Here again is further proof that the contract is one of indemnity.

The company treats the agreement as an insurance agreement, as is shown by the short rate cancellation table. The owner of machinery pays a premium for the protection, as is shown by the provisions of Subdivision I of Section II of the contract. In case either party desires to terminate the contract, the unearned premium is determined by reference to the cancellation table.

It would be difficult to find a contract more nearly a contract of indemnity than the agreement submitted. The company, therefore, is engaged in the insurance business, in violation of sec. 209.11, Stats.

SOA
Peddlers—Butcher is peddler if his main business appears to consist of making concurrent sales and deliveries, going from place to place carrying with him goods to be offered for sale, and his delivery of prior orders is only occasional, and incidental to said main business.

September 1, 1926.

C. E. Soderberg,
District Attorney,
Rice Lake, Wisconsin.

In your letter of August 19 you state: One L runs a meat route on commission for a butcher in Rice Lake. L travels the route periodically, in a motor vehicle, carrying a supply of meats with him and calling chiefly on so-called regular "customers." However, in only a few instances is the delivery of a prior order involved. In the great majority of transactions there is present solicitation and concurrent sale and delivery of the meat.

You ask whether doing business in the above manner constitutes peddling on the part of L.

L's main business appears to consist of making concurrent sales and deliveries, going from place to place carrying with him the goods to be offered for sale, and his delivery of prior orders appears to be only occasional, and incidental to the said main business. If such are the facts, I am of the opinion that L is engaged in peddling.

Under the facts stated, L appears to be doing precisely that which constitutes peddling and constitutes him a peddler. It is the method of disposing of the goods which makes a person a peddler, and the fact that the sales are made only to regular customers does not render the business any the less peddling. I think that it is not necessary here to discuss what constitutes peddling. The subject is amply treated in XIV Op. Atty. Gen. 406. The case of Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235, involving peddling by a butcher, cited by you, is also in point. See also Chicago v. Bartee, 100 Ill. 57.
Banks and Banking—Foreign Trust Companies—Under laws of Illinois banking corporation may be trustee and as such may be named as trustee in will of resident of this state in cases and as required by sec. 223.12, Stats., but not otherwise; under subsec. (2) if such corporation is duly appointed as trustee under will in Illinois it may act as trustee of such trust property in Wisconsin same as natural person.

September 10, 1926.

Dwight T. Parker,
Commissioner of Banking.

You ask if a Chicago banking corporation can be a trustee and do a trust business in Wisconsin.

You are advised that sec. 223.12, Stats., authorizes trust companies of other states to be appointed and act as trustees in this state in the cases and in the manner specified in that section, which you will notice is confined to cases where such foreign trust company is appointed as executor or trustee by the will of a resident of this state and where the state creating the corporation has a similar reciprocal law.

Illinois seems to have such a law and also a law authorizing banks to be trustees for the purposes named.

In such a case the bank is required to comply with the provisions of that section, which requires it to file an appointment of the banking commissioner as its attorney to receive service of process and to file in your office a duly authenticated copy of its charter, articles of organization and amendments, if any, certified by the secretary of state and under his seal, giving the post office address of its principal office, and also to comply with the provisions of sec. 223.02 which require the depositing with the secretary of state cash or securities named, equal to 50 per cent of its capital stock but not exceeding $100,000.

Subsec. (2) of sec. 223.12 gives to such a nonresident corporation executor or trustee so appointed under such a foreign will, the same rights as to handling and selling real estate located in this state as a natural person would have if so appointed, which, under the provisions of sec. 287.16, would give to such a foreign trustee the right to file in the office of the county clerk an authenticated copy of its appointment and qualification in such foreign state, and it would then have all the powers with reference to the handling and sale of the property of the estate lo-
cated in this state as it would have if duly appointed here without giving any additional bond or security.

Under the provisions of sec. 223.10 courts are prohibited from appointing corporations as trustees, executors, administrators, etc., unless organized under the provisions of Wisconsin statutes, so except in the cases named in sec. 223.12 this nonresident banking corporation could not act as trustee in this state and then only in the manner there provided.

TLM

**Public Health—Vital Statistics—Public Officers—Health Officers**—Money paid to health officer for registration fees in excess of amount legally due him may be recovered by county in action against such health officer when overpayment was due to clerical error committed by state registrar in certifying amount due local registrar.

If state registrar, through clerical error, certified to county treasurer amount less than was actually due health officer, he may thereafter correct such error by certifying amount still due to such health officer.

September 13, 1926.

**Board of Health.**

In your communication of August 31 you state that in your certification of fees due the city health officers for reporting vital statistics, as provided for by ch. 69, Stats., an error has been made in the fees certified to Dr. G. F. Goggins and Dr. T. J. Oliver, both of whom served as city health officer for Green Bay during a part of the period covered by your last fee certification.

You state that through an error in compiling your monthly reports, you certified to the county treasurer for Dr. Goggins fees amounting to $357.20 whereas Dr. Goggins was entitled to only $222.40; that you certified to the treasurer in favor of Dr. Oliver fees amounting to $27.40 whereas he should have been paid $162.20; that Dr. Goggins therefore has been overpaid to the extent of $134.80 and there is still due Dr. Oliver the same amount, namely $134.80. You state that Dr. Goggins is not disposed to turn over to Dr. Oliver the amount due him, and you inquire what to advise in the way of an action to compel Dr. Goggins to either pay this amount to Dr. Oliver or to return it to the county treasurer.
You also ask to be advised as to whether you are authorized to certify to the county treasurer at this time the balance of the fees due Dr. Oliver.

The fees of the local registrar are provided for in sec. 69.53, Stats., subsec. (6). The state registrar is required to annually certify to the treasurers of the several counties the number of births, deaths, marriages and accidents registered, with the names of the local registrars and the amounts due each at the rates fixed in that subsection.

In subsec. (5) it is provided that the amounts payable to registrars shall be paid by the treasurer of the county in which the registration districts are located upon certification by the state registrar. Through a clerical error in computation, Dr. Goggins was overpaid by the county treasurer and Dr. Oliver was underpaid. The payment was, therefore, made under a mistake of facts.

It is a general rule:

"Where money has been paid under a mistake as to a material fact, to one not entitled thereto, and who cannot in good conscience receive and retain it, the law raises an implied promise on his part to refund it, and an action will lie to recover it back." 15 Am. & Eng. Encyc. of Law, 2d ed., 1103. Lowe v. Wells Fargo & Co., 78 Kan. 105.

The statute (sec. 69.53) expressly provides that the local registrars shall receive twenty-five cents for each registration. The above rule has some exceptions but they do not apply to this case. Here the amount due was definite, but owing to a mistake of fact money has been paid to the wrong person. The person overpaid has received money which rightly belongs to the county. The county has a clear right of action against Dr. Goggins for the sum of $134.80, the amount overpaid. An action may, therefore, be started against Dr. Goggins by the county for such sum.

As to your second question, will say that you are authorized to certify to the county treasurer at this time the balance of the fees due Dr. Oliver. The provision of the statute that you shall certify the amount due him has not been complied with by your office. This is a continuing mandate until it is performed, and you should do so now.

JEM
Indigent, Insane, etc.—Public Health—Communicable Diseases—State board of control may charge back to county cost of maintenance of persons committed to industrial home for women, Taycheedah, for treatment of venereal diseases, if they are indigent; rate of such charge shall be actual per capita cost of maintenance.

September 15, 1926.

BOARD OF CONTROL.

You have referred us to sec. 143.07, subsecs. (5) and (6), Stats., which provide for the commitment of any person who shall refuse treatment for venereal disease of which he is afflicted.

Subsec. (6) provides:

"During commitment, medical treatment shall be furnished without charge but not cost of maintenance unless the person is indigent, when such cost shall be paid by the county of his residence, or if he have none, out of the appropriation made by subsection (2) of section 20.43. Each county shall make such provision as may be required by the state board of health for the care and treatment hereby required."

You state that many commitments made in accordance with this section of the statutes are being made to the industrial home for women, Taycheedah, and that it would appear from the reading of this statute that your board has the right to charge back to the county the cost of the maintenance of such persons. You ask to be advised if this assumption is correct.

You have drawn the right conclusion. The statute is specific, and you have the right to charge back to the county the cost of the maintenance of such persons.

You also inquire what rate such charge should be. In the case of tubercular patients and insane persons committed to state institutions, the statute fixes the rate to be charged. There is, however, no rate fixed by statute in a case such as is under consideration here. I see no escape from the conclusion, therefore, that the rate of such charge must be the actual per capita cost of maintenance at such institution. You are so advised.

JEM
Real Estate—Trade Regulation—Method of selling lots set forth constitutes violation of sec. 136.01, subsecs. (5) and (25), Stats.

September 17, 1926.

Real Estate Brokers' Board.

You have submitted the following statement of facts, and request an opinion as to whether or not there has been a violation of the provisions of ch. 136, Wis. Stats.

It appears from your letter that L, W, and E of Chicago are selling lots in a nearby county. The contracts to the lots are transferred in Chicago. Legal title to the property is in one B, as trustee. The trustee's trust deed contains no mention of the aforementioned salesmen, nor do they appear anywhere in the chain of title to the property. The contracts given to purchasers all run from the trustee as vendor. The lots are sold in Chicago under a refund guaranty. Purchasers, visiting the property on Sunday, are shown these lots by salesmen mentioned above, and occasionally sales have been made after these inspections. Rumors indicate that, if arrested, the agents will contend that they are beneficiaries under the trust, and obtain a portion of the proceeds as such beneficiaries, and also that they advanced a portion of the purchase price of the land.

Sec. 136.01, subsec. (5), provides:

'* * * No person, firm or corporation shall engage in or follow the business or occupation of, or advertise or hold himself or itself out as or shall act temporarily or otherwise as a real estate broker or real estate salesman in this state, without first procuring a license therefor as provided in this section. * * *'*

Sec. 136.01, subsec. (25), provides:

'* * * Any person, firm, or corporation who shall engage in or follow the business or occupation of, or advertise or hold himself or itself out as or act temporarily or otherwise as a real estate broker or real estate salesman in this state without first having obtained a license therefor as required and provided by this section, or who otherwise violates any provisions of this section, shall be guilty of a misdemeanor. * * *'*

I am of the opinion that there is a violation of these sections in your statement, subject, however, to the defense of ownership by the salesmen, so-called. In the absence of such proof, a conviction of these salesmen for selling without a license should be sought.

MJD
Opinions of the Attorney General

Appropriations and Expenditures—Bridges and Highways—Appropriation for general highway purposes may be used for purchasing and repairing machinery where specific appropriation for this purpose has been exhausted. Orders should be drawn on general appropriation and not on specific appropriation.

September 21, 1926.

Howard D. Blanding,
District Attorney,
St. Croix Falls, Wisconsin.

The material facts presented in your letter of July 9 are as follows: At the November, 1925, session of your county board various items were appropriated for highway purposes, and among them $15,000 for the purchase of machinery and machinery repairs. This appropriation is now exhausted. The sum of $10,000 was appropriated for general highway purposes. This fund is called “the free fund” and was not allocated to any particular highway. The county highway committee claims the right to use the so-called free fund for the purchase of machinery and machinery repairs. There are a number of claims against the machinery fund and the county clerk is in doubt as to his power to issue orders on the machinery fund since the appropriation has been exhausted. You inquire whether the county clerk can issue an order on the machinery fund and whether, if such orders are issued, they may be paid out of the $10,000 appropriation.

The county board has made appropriations for specific purposes, among them an appropriation for purchasing and repairing machinery. In addition, it has made an appropriation of $10,000 for general highway purposes. This appropriation was not restricted in any way and was not made for highway purposes other than those provided for by specific appropriations. Clearly it was the intention of the county board to make provision for the proper execution of the county highway program. In order to accomplish this purpose, a general appropriation for highway purposes was made to supplement, where necessary, the specific appropriations. Consequently, the appropriation of $10,000 may be used for purchasing and repairing highway machinery.

Since the general appropriation of $10,000 may be used for purchasing and repairing machinery, the county clerk should
issue orders on this fund and not on the specific fund which has been exhausted.

SOA

School Districts—Words and Phrases—Contiguous—Territory in school district if otherwise contiguous remains so though highway is constructed.

September 21, 1926.

L. W. Bruemmer,
District Attorney,
Kewaunee, Wisconsin.

In your letter of September 8 you inquire whether territory in a school district is contiguous, within the meaning of sec. 40.01, Stats., where a highway intervenes between the territory and the remainder of the territory in the school district.

Subsec. (1), sec. 40.01, provides:

"* * * All territory comprising a school district must be contiguous."

The term "contiguous" does not seem to have been defined by our courts.

"Contiguous territory" is not territory near by, but territory touching, adjoining and connected as distinguished from territory separated by other territory. 1 Words and Phrases, Second Series, 958.

Modern civilization demands an intricate system of highways located in every progressive community. If a highway were to separate territory to such an extent that the territory on either side of the highway was not contiguous, it would be practically impossible to create a school district in compliance with the statutory mandate. It is clear that the legislature did not intend that property otherwise contiguous would not continue to remain so if a highway were constructed and maintained. If a contrary construction were placed on the statute, it would result in an absurdity. We, therefore, hold that the territory on either side of a highway is contiguous within the meaning of sec. 40.01, Stats.

This opinion is limited to the precise question presented, that is, whether a highway as such affects property which would be contiguous if no highway existed.

SOA
Appropriations and Expenditures—Education—State Aid to Consolidated and Graded Schools—Subsec. (1), sec. 20.26, Stats., applies to subsec. (1a) of same section to extent that under latter subsection state graded school must be maintained and remaining schools abandoned.

September 21, 1926.

JOHN CALLAHAN,
Superintendent of Public Instruction.

In your letter of August 23 you inquire whether the last two sentences in subsec. (1), sec. 20.26, Stats., apply to subsec. (1a), sec. 20.26.

Subsec. (1), sec. 20.26, appropriates $10,000 annually "for special state aid to partially defray the cost of erecting and equipping a school building in each consolidated rural school district formed by the uniting of the schools of two or more school districts as provided by law."

The last two sentences of subsec. (1) provide:

"The provisions of this subsection shall apply to each school district in which there are two or more school buildings located two or more miles apart when by a vote of the electors such buildings are abandoned for school purposes and such schools are united in one central grade school. When such central school building is erected and the schools of such district are united and maintained in such central school, such school district shall be deemed a consolidated district and each school abandoned and united in such central school shall be deemed equivalent of a school district participating in such consolidation."

Subsec. (1a), sec. 20.26, provides:

"The provisions of subsection (1) of this section shall apply also to rural school districts heretofore or hereafter created, consisting of sixteen or more square miles in area and wherein a state graded school of two or more departments was, subsequent to January 1, 1920, or is hereafter, constructed and equipped for said district. Such a rural school district, from and after the completion and equipment of said central school building, shall be deemed a consolidated rural school district, and shall be entitled to state aid as provided in subsection (1) of this section, *

Subsection (1) provides that special state aid shall be granted to (1) a consolidated rural school district, and (2) to a school district in which there are two or more school buildings located more than two miles apart where the schools are united in a
central school building and where the other school buildings are abandoned. Subsection (1a) provides that special state aid shall be granted to rural school districts of sixteen or more square miles in area.

Under the provisions of subsec. (1a), the provisions of subsec. (1) apply also to the former subsection. It is apparent, however, that provision has been made in subsec. (1a) for aid to rural districts even though the schools in such districts are less than two miles apart. Subsec. (1a) was enacted in 1923, subsequent to the enactment of subsec. (1). It is, therefore, reasonable to suppose that the legislature had in mind enlarging the class to which special aid should be given to include any rural school district having an area containing sixteen square miles or more.

The rural school districts embraced in the statutes are those which have a state graded school of two or more departments. Subsec. (1a) provides that such rural school districts, from and after the completion of said central school building, shall be deemed a consolidated school district. It will be noted that subsec. (1a) refers to a central school building, while subsec. (1) refers to a central state graded school. Subsec. (1a) certainly contemplates the abandonment of all other schools in favor of a central school. If subsec. (1a) is ambiguous in this respect, then the provisions of subsec. (1), which in express terms apply to subsec. (1a), clear up that ambiguity. If a school in a rural school district is to receive state aid under subsec. (1a), there must be an abandoning of all the schools except one. There need not be a vote of the electors to this effect as is provided in subsec. (1a), but with this exception the requirements of subsec. (1a) are the same as those of subsec. (1).

The legislature intended to grant state aid to a rural school district on the basis of the establishment of a state graded school and the centralization of the schools. Consequently, if a district establishes a state graded school and abandons the remaining schools, the provisions of the statute granting such special aid will be complied with.

SOA
Bonds—Elections—Special election required by sec. 67.05, subsec. (5), par. (b), Stats., may be called for and held on day of general election in November.

"Declaration of purpose" referred to in sec. 67.05, subsec. (5), par. (b), should be in form of initial resolution adopted in manner and form provided by sec. 67.05, subsecs. (1) and (3).

September 21, 1926.

E. G. Nash,
Manitowoc, Wisconsin.

As attorney for the city of Kiel you state that that city contemplates issuing bonds for the construction of a new city hall, and the submission of the proceedings and the bonds, if authorized, to the attorney general for approval and certification. Under these circumstances, I may reply to your questions, which are:

1. May the special election required by par. (b), subsec. (5), sec. 67.05, Stats., be called for and held on the day of the general election in November?

2. May the city "declare its purpose," as provided by said paragraph, by a simple resolution reciting the facts, or must its purpose be declared by the adoption of the initial resolution provided for by subsec. (1), sec. 67.05?

It is my opinion that the first question should be answered in the affirmative, and that the second question should be answered as follows:

An initial resolution, in manner and form as provided by subsecs. (1) and (3), sec. 67.05, must be adopted, and a special election called and held as provided in par. (b), subsec. (5), of said section.

The adoption of the initial resolution by the council will be a sufficient declaration of the purpose of the bond issue, and a vote of the people in favor of the issue will be a sufficient approval of such purpose by the electors. See par. (d) of said subsec. (5).

I am enclosing a copy of an opinion to the city attorney of Kewaunee, written some time ago, for what suggestions it may contain of value to you in this bond proceeding, and call your special attention to the requirements for the separate bond record, for the submission to the attorney general, and the form of the clerk's certificate to the copy of the record to be sub-
mitted. Some of the requirements as to contents of the initial resolution referred to in the opinion have been dispensed with by amendments to the law since the opinion was written. Otherwise, it stands as the ruling of the department.

The initial resolution should, of course, be offered and read at a regular meeting of the common council, published twice and adopted at a subsequent regular meeting within sixty days; the initial resolution may provide the direction to the city clerk to call a special election for the purpose of submitting the question to the electors at the general election in November, and no separate resolutions will be necessary for that purpose.

FEB
Criminal Law—Vagrancy—Indigent, Insane, etc.—Commitment to central state hospital for insane of one charged with vagrancy and having been found insane is in compliance with statute.

October 5, 1926.

Board of Control.

You have submitted a copy of the commitment of one H— from the municipal court of Milwaukee to the central state hospital for the insane. It appears that this man was charged with the offense of vagrancy, and in lieu of being sentenced to an institution for that offense, was committed to the central state hospital for the insane, he having been found to be insane. You inquire whether the statute authorizing commitment to the central state hospital for the insane applies to offenses such as vagrancy.

Sec. 357.13, provides:

"(1) If the court shall be informed, in any manner, that any person indicted or informed against for any offense probably is, at the time of his trial, or after his conviction and before commitment, insane, or feeble-minded and thereby incapacitated to act for himself, the court shall, in a summary manner, make inquisition thereof by a jury or otherwise as it deems most proper.

"(2) If it shall be determined by such inquisition that such accused person is insane or feeble-minded his trial, sentence, or commitment for such offense shall be postponed indefinitely, and the court shall thereupon order that he be confined in the central state hospital for the insane or in the home for feeble-minded."

You will note that this statute applies to "any person indicted or informed against for any offense." Vagrancy is a criminal offense and is described in sec. 348.351, and the penalty prescribed is "imprisonment at hard labor in the county jail not exceeding ninety days or by solitary confinement therein not less than three days nor more than ten days."

You are therefore advised that the statute covers commitment for an offense such as vagrancy, and that the commitment to the central state hospital for the insane is legal.

JEM
Criminal Law—Indeterminate Sentences—Prisons—Parole—
Persons having been sentenced to Wisconsin state prison, house of correction, state reformatory, or industrial home for women for definite sentence, and eligible for sentence instead under indeterminate sentence law but correction of sentence having been found impossible to obtain from court of commitment, are eligible to consideration for parole after they have served minimum sentence of general and indeterminate sentence under which, in contemplation of law, they are serving.

October 5, 1926.

BOARD OF CONTROL.

You have submitted the following question:

"Persons having been sentenced to the Wisconsin state prison, house of correction, Wisconsin state reformatory or industrial home for women for a definite sentence and who are eligible for sentence instead under the indeterminate sentence law but correction of the sentence having been found impossible to obtain from the court of commitment, when in such cases would the person be eligible to consideration for parole?"

Sec. 54.03, providing for an indeterminate sentence to the Wisconsin state reformatory and the Wisconsin industrial home for women and sec. 359.05, providing for a general and indeterminate sentence for certain commitments to the state prison, both contain the provision:

"If through mistake or otherwise any person shall be sentenced for a definite period of time for any offense for which he may be sentenced under the provisions of this section, such sentence shall not be void, but the person shall be deemed to be sentenced nevertheless as defined and required by the terms of this section."

Both sections also contain the provision:

"Such sentence shall have the force and effect of a sentence for the maximum term subject to the power of actual release from confinement by parole by the board of control or actual discharge by the governor upon recommendation of the board of control * * *.”

It is also provided in sec. 54.03, subsec. (1):

"In imposing the maximum term, the court may fix a term less than the maximum prescribed by law for the offense."

Under sec. 57.06 the board of control, in proper cases, may "parole any prisoner convicted of a felony and imprisoned in
the state prison or in the house of correction of Milwaukee county who, * * * if he is a first offender and is sentenced for a general or indeterminate term, shall have served the minimum for which he was sentenced not deducting any allowance for time for good behavior."

Under the above provisions, although the persons were sentenced for a definite period of time, the sentence must be deemed, nevertheless, as a general and indeterminate sentence, the minimum being that prescribed by law and the maximum being the definite term given by the court. This must necessarily follow, as the court is not permitted to change the minimum, but may change the maximum.

Under these various provisions it is apparent that the persons referred to by you in your question are eligible to consideration for parole when they have served the minimum for which they were sentenced, not deducting any allowance for time for good behavior.

JEM

Intoxicating Liquors—Druggist who sells intoxicating liquors on forged prescription is guilty of violating prohibition law, although he was ignorant of forgery.

October 6, 1926.

Louis C. Gunderson,
Prohibition Commissioner.

You have submitted the question of whether a pharmacist is guilty of violating the prohibition act if he sells intoxicating liquors for medicinal purposes on what purports to be a physician's prescription but which, in fact, is a forgery and fraudulently made to deceive the pharmacist who is actually deceived thereby.

The words "knowingly," or "wilfully" or other words of equivalent import are omitted from the prohibition statute, and the offense consists of the sale without a physician's prescription, in the case of the pharmacist.

"* * * Penal statutes prohibiting not merely the doing of a described act, but the wilful, intentional, or malicious doing of such act, if they do not require the prosecution in the first instance to prove something more than the doing of the prohibited act, at least permit the accused to exculpate himself by showing that although he did the act he did not do it wilfully, intention-
ally, or maliciously. * * * On the other hand, * * * where a statute commands that an act be done or omitted which in the absence of such statute might be done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation.” Welch v. State, 145 Wis. 86, 88–89.

In other words, intent is not a necessary element in the crime here under consideration. The statute imposes a duty upon the pharmacist and when he enters into that business the law casts upon him the duty to inform himself as to whether the conditions prescribed in the statute are present. He can sell only upon a prescription and that, of course, must be a legal prescription, one that was actually made by some physician who is authorized to make it.

Want of knowledge or ignorance cannot be a defense. 33 C. J. 596.

So, it was held in an early case by our courts in State v. Hartfiel, 24 Wis. 60, that the sale of intoxicating liquor to a minor is an offense, though the vendor does not know that the purchaser was a minor. The court said that the legislature intended to inflict the penalty, irrespective of the knowledge or motives of the person who has violated its provisions. The court further said, p. 62:

"* * * Indeed, if this were not so, it is plain that the statute might be violated times without number, with no possibility of convicting offenders, and so it would become a dead letter on the statute book, and the evil aimed at by the legislature remain almost wholly untouched."

I have been unable to find any decision directly in point involving the sale of intoxicating liquors by pharmacists on a forged prescription, but the principle announced in the Hartfiel case, and since adhered to by our court in Welch v. State, 145 Wis. 86, if applied here, will make the pharmacist liable under the facts stated by you. Any other construction would make it possible to violate this law with impunity and it would be well-nigh impossible to enforce its provisions.

JEM
Bonds—Bridges and Highways—Highway Improvement Bonds

—While in given year interest as well as principal of county highway improvement bonds issued under provisions of sec. 67.13, Stats., may, under authority of subsec. (3) of said section, be paid from state or federal and state aid fund allotted to and received by county, and only difference, if any, between such funds available and amount to become due on such bonds need be raised by tax levy, yet total amount of allotments which may be so set aside for retirement of such bonds is limited by share of state or of state and federal government of cost of highway improvements for which bonds were issued, which is represented by principal of bonds; ultimately, therefore, interest on such bonds must be met, under present laws, by tax levy, except that any surplus of maintenance funds allotted to county, under express provisions of subsec. (2), sec. 84.07, may, with approval and upon authorization of state highway commission, be used for payment of such bonds, which, if sufficient in amount, may make tax levy wholly unnecessary.

October 6, 1926.

GAD JONES,
District Attorney,
Wautoma, Wisconsin.

Sec. 67.13, Stats., provides for the issuing of bonds by counties for the improvement of any portions of the system of prospective state highways or of the state trunk highway system, and subsec. (3) of that section reads as follows:

"The proceeds of county bonds heretofore or hereafter issued under the provisions of this section shall be used only for road and bridge construction performed under the provisions of chapters 83 and 84, of the statutes, and the county shall be entitled to receive state aid or federal and state aid for the improvements performed with the proceeds of such bond issue in the proportions respectively specified in said sections. The county board may set aside from any funds received from the federal government or from the state, or both, for use in state aid or federal and state aid highway construction in said county, the amount required to pay the state or state and federal portions of the cost of any construction performed with the proceeds of said bond issue, until the amounts so set aside equal the share of cost provided to be paid by the state or by the federal government and the state. Any amounts so received and set aside in any year may be used by the county board to reduce the county levy necessary to be made in accordance with the bonding resolution in order to retire
any portion of the bond issue which may be retired thereafter, such reduction to equal the amount so received from the state or from the state and federal government, and such action by any county board shall in no way invalidate the bond issue."

You state that the county board of your county is about to consider the issue of bonds under the provisions of said section, and that it has been suggested that the state and federal construction funds hereafter allotted to the county may be used for the payment of principal and interest on the bonds if the county shall authorize their issue. You inquire whether the interest on such bonds, if issued, may be paid from the federal and state funds received by the county, and you state that it is your opinion "that the amounts that may be set aside from these sources are expressly limited by the above statute to the cost of construction, and that interest is not and cannot be included."

It is true that the total amount that may be set aside from the funds received from the federal government or from the state, or both, for use in the reduction of the tax levies required for the retirement of such bonds is limited to the amount or amounts equal to the share of the state or of the state and federal governments, respectively, of the cost of construction performed with the proceeds of such bonds, and therefore ultimately only the principal, without interest, of such bonds will be paid out of the allotment to the county of state and federal funds; nevertheless, by the express provisions of said subsec. (3), such funds received by the county may be used in any year to reduce the amount of the tax levy of that year necessary to retire any bonds about to become due. In other words, in any year, the amount necessary to be raised to retire such bonds, including unpaid interest thereon, may be set aside from the allotment of state and federal aid funds received, and only the balance, if any, of the amount needed for the payment of principal and interest after deducting the amount of state and federal aid funds received by the county and set aside for the retirement of the bonds need be raised by tax levy, but in the end, the interest on the bonds, under present provisions of the law, must be raised by tax levy, because the amount in the aggregate of the allotment of state and federal aid funds to the county which may be set aside for the retirement of bonds is limited by the amount of the shares of the state and of the state and federal governments, as the case may be, of the cost of construction with the proceeds of the bonds, which is represented by the prin-
pricipal of the bonds; except that any surplus of maintenance funds allotted to the county, under the express provisions of subsec. (2), sec. 84.07, may, with the approval and upon the authorization of the state highway commission, be used for the payment of such bonds, which if sufficient in amount, may make a tax levy wholly unnecessary.

FEB

Taxation—Inheritance Taxes—Until supreme court otherwise decides, state treasurer should not pay interest on amount of taxes erroneously paid into state treasury on refunding such taxes under provisions of sec. 72.08, Stats.

Solomon Levitan,

State Treasurer.

Application in due time and form has been filed with the state treasurer, under the provisions of sec. 72.08, subsec. (2), Stats., for a refund of that portion of the inheritance taxes paid into the state treasury in the matter of the estate of Ferdinand Schlesinger, deceased, which was held to be invalid by the supreme court of the United States on the ground that the particular provision of our inheritance tax law under which the tax was assessed is unconstitutional (...U. S...., 46 Sup. Ct. Adv. Sheets 260, 70 L. ed. Adv. Sheets 301), in which application claim is made that the refund of the invalid taxes should be made with interest from the date of payment, which payment was made under protest on July 1, 1922, in advance of the determination of the tax by the county court, under the permissive statute, sec. 72.08 (3), the order of the county court originally determining the tax not being made until September 11, 1923.

You inquire whether you should pay interest on the amount of the tax paid into the state treasury which is subject to the refund, and if so, from what date.

It is my opinion that since the statute providing for the refund of inheritance taxes erroneously paid does not, by its terms, authorize the addition to, and payment of interest on, the amount subject to refund, you should not pay interest on the amount of the tax refunded.

Subsecs. (2) and (3) of sec. 72.08 of the inheritance tax law in effect at the date of the payment of the illegal tax in question, and as now in effect, reads as follows:
“(2) ERRONEOUSLY PAID. When any amount of said tax shall have been paid erroneously into the state treasury, it shall be lawful for the state treasurer upon receiving a transcript from the county court record showing the facts to refund the amount of such erroneous or illegal payment to the executor, administrator, trustee, person, or persons who have paid any such tax in error, from the treasury; or the said state treasurer may order, direct and allow the treasurer of any county to refund the amount of any illegal or erroneous payment of such tax out of the funds in his hands or custody to the credit of such taxes, and credit him with the same in his quarterly account rendered to the state treasurer under this chapter. Provided, however, that all applications for such refunding of erroneous taxes shall be made within one year from the payment thereof, or within one year after the reversal or modification of the order fixing such tax.

“(3) ADVANCE PAYMENT AND REFUND OF EXCESS. Any person from whom any such tax is or may be due may make an estimate of and pay the same to the county treasurer, who shall receipt therefor, at any time before the same is determined by the court, and shall thereupon be entitled to any discount and be relieved from any interest or penalty upon the amount so paid in the same manner as if the tax were then determined. Any excess so paid shall be refunded to the person so paying or entitled thereto by such treasurer out of any inheritance tax money in his possession, or by the state treasurer when the county treasurer is without such money, upon filing with such treasurer a copy of the order fixing such tax, and attached thereto a certificate of the judge stating the amount of refund due.” (The italics are mine.)

You will note that by the terms of the statute, your authority to refund from the state treasury, or to direct the county treasurer to refund out of inheritance tax moneys in his hands, is only the amount of the erroneous or illegal payment. You are an administrative officer having the custody of public funds, which may be paid out by you only when and in the manner and in the amounts authorized by law. In view of the large amount of interest involved in the instant application and the large amount of interest, in the aggregate, that may be involved in other similar applications, and of the fact (conceded by the applicant in the brief filed with the application contending that interest should be allowed, which I have carefully considered) that the question of whether the statute requires or authorizes the payment of interest has never been before the supreme court, I think that, before you will be safe in paying interest on the amount of the illegal tax paid into the state treasury, you must
have the judgment of the supreme court, in a proper action or proceeding, holding that the payment of interest by you is authorized by law.

It is true that the supreme court in an early case, in an action against a county to recover the amount paid for tax certificates issued on illegal tax sales, brought under a statute expressly providing for the recovery of interest on the amount paid, said, p. 613:

"Of the plaintiff's right to have the money back, there is no question. The statute expressly provides that in all such cases the county treasurer shall refund the money, with interest, to the purchaser or his assigns;"

and, continuing *obiter dicta*:

"We think the same result would follow without any statute, by an application of the general principle, that money paid for a consideration which fails may be recovered back." Norton v. Rock Co., 13 Wis. 611, 613.

And in another similar case, under the same statute, in disposing of a motion for a rehearing on the ground that the facts did not bring the case within the terms of the statute expressly authorizing the refund of the amount paid at a void tax sale with interest, the court said:

"We deem it necessary to make only a remark on overruling the motion for a rehearing. The sale being void, the plaintiff was entitled to recover the money paid, and interest, at common law, even if he did not come fully within the provisions of ch. 22, Laws of 1859." Barden v. Columbia Co., 33 Wis. 445, 451.

It is also true that a provision of the New York inheritance tax law for the refund of taxes erroneously paid somewhat similar to our sec. 72.08 (2) was held to require the payment of interest although it contained no express provision for such payment. Matter of O'Berry, 179 N. Y. 285. This was in 1904, but since 1911 at least, the New York law has been:

"* * * The representatives of the estate, legatees, devisees, or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund, * * * ." Sec. 225 of the New York law.

Thus it appears that Wisconsin cases relied upon by the applicant to sustain the claim for the payment of interest were decided under specific statutes expressly providing for interest
and therefore cannot be regarded as indubitably sustaining the contention; nor are the early New York cases construing the refund provisions of her inheritance tax law prior to 1911 controlling. So I think the least that can be said is that it is not certain what the supreme court of this state would hold should the question of the right to interest as a part of the refund under the provisions of sec. 72.08 be presented to it. In this situation I cannot assume to take the responsibility of construing the statute as contended for by the applicant and advising you to act upon such a construction.

To sum up the matter: You are advised that until the supreme court otherwise decides, the state treasurer should not pay interest on the amount of taxes erroneously paid into the state treasury on refunding such taxes under the provisions of sec. 72.08

To sum up the matter: You are advised that until the supreme court otherwise decides, the state treasurer should not pay interest on the amount of taxes erroneously paid into the state treasury on refunding such taxes under the provisions of sec. 72.08.

FEB

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_Taxation—Income Taxes—Assessment of back income under secs. 71.10 and 71.11, Stats., made in 1927, may go back to year 1920._

TAX COMMISSION.

Subsecs. (1), secs. 71.10 and 71.11, Stats., providing for the assessment of back income of corporations and individuals, respectively, provides as follows:

"Whenever it shall appear probable that a corporation [or individual] has been over or under assessed, or that no assessment has been made when one should have been made in any of the years following January 1, 1916, the tax commission may require such corporation to furnish such information with reference to its capital, surplus and business transacted as it may deem necessary to enable it to ascertain the amount of taxable income such corporation received during the year or years in question. Upon such information and such other information as it may be able to discover the commission shall determine the true amount of taxable income received during the year or years under investigation. Any part of the income so ascertained and not previously assessed, shall be assessed and entered upon the next assessment rolls. If it shall be found that the prior assessment was in excess of the actual taxable income received in any of such previous years, the tax commission shall credit such corporation with such excess and apply the same as a payment upon any tax or taxes assessed in the current year or the next succeeding
assessment; provided, however, that after January 1, 1927, assessments and corrections in assessments may be made only for the six years immediately preceding the current assessment. * * * "

You state that during the year 1927 the tax commission and the several assessors of incomes will assess the 1926 income, and you call attention to the italicized proviso "that after January 1, 1927, assessments and corrections in assessments may be made only for the six years immediately preceding the current assessment," and you inquire whether discovered unassessed income for the year 1920 may be assessed in the assessment made in 1927.

I think the question should be answered in the affirmative. In my opinion the words "previously" and "prior" italicized in the quotation above from the statute must be given effect in ascertaining the meaning of the words "current assessment" in the proviso referred to, and that the "current assessment" in 1927 will be the assessment of income received in 1926 and the assessment of additional income and the correction of assessments of income for the six years immediately preceding 1926, namely, the years 1925, 1924, 1923, 1922, 1921, and 1920.

FEB

Railroads—Taxation—Income Taxes—Income derived from royalties, rentals or sales of real estate of railway companies, assessed locally under sec. 76.02, subsec. (7), Stats., not used for railroad purposes, is subject to taxation.

October 11, 1926.

Tax Commission.

You state that certain railway companies operating in this state own real estate assessed locally, from which income is received in the form of royalties from mining, rentals, or from sales. The real estate is not used for railroad purposes.

The railway companies claim that such income is exempt from income taxation under sec. 71.05, subsec. (3), Stats., and the land grant roads claim exemption from income taxation because the grants were given to induce the original construction and subsequent operation of the roads and have been used for that purpose and hence are exempt.

You inquire whether such income is subject to taxation or whether it is exempt under sec. 71.05 (3), Stats.

Railway companies operating in Wisconsin are taxed on the ad valorem basis. All franchises, rights of way, road beds,
tracks, stations, terminals, rolling stock, poles, wires, cables, devices, appliances, instruments, equipment and all other real and personal property of the company referred to, used or employed in the operation of its railroad, street railway or other property, as the case may be, and in the conduct of its business, and all title and interest in such property as owner, lessee or otherwise, shall be considered property of a railway company subject to taxation under the ad valorem system. Sec. 76.02, subsec. (7), Stats.

The property you mention is taxed locally under sec. 76.02 (7), which is as follows:

"* * *. All real estate not necessarily used in operating any railroad or street railway are excepted from railroad and street railway property, and shall be subject to taxation in the manner such property is taxed when owned by individuals."

Sec. 76.23 provides:

"The taxes imposed by this chapter upon the property of the companies defined in section 76.02 shall be in lieu of all other taxes on such property necessarily used in the operation of the business of such companies in this state, except that the same shall be subject to special assessment for local improvements in cities and villages. * * *."

This section relieves and exempts such railway companies paying ad valorem taxes, from further taxation on such property necessarily used in the operation of the business of such companies in this state.

Sec. 71.05 provides:

"(1) There shall be exempt from taxation under this chapter income as follows, to wit:

"* * *

(3) Incomes derived from property and privileges by persons now required by law to pay taxes or license fees directly into the treasury of the state in lieu of taxes, and such persons shall continue to pay taxes and license fees as heretofore. * * *.

Railway companies are not required to pay taxes on property not used in railroad operation directly into the state treasury, because under sec. 76.02 (7) such real estate is assessed locally and not included in any ad valorem computations. The exemptions set forth above were not made applicable by direction or intent to the real estate assessed locally. Income from royalties, rentals or sales of such locally assessed property is not within
the purview nor within the terms of the exemptions set forth above, and hence shall be taxed under the provisions of pertinent statutes.

You are therefore advised that income derived from royalties, rentals or sales of real estate of railway companies, assessed locally under sec. 76.02 (7) since not used for railroad purposes, is subject to taxation.

MJD

Public Health—Sunday Work—Public Officers—Industrial Commission—Commission has power and it is its duty to enforce provisions of sec. 351.50, Stats.

INDUSTRIAL COMMISSION.

In your letter of September 21 you inquire whether it is the duty of the industrial commission to enforce the provisions of sec. 351.50, Stats.

The specific powers of the industrial commission are enumerated in sec. 101.10, Stats. Subsec. (2) of this section provides that it shall be the duty of the industrial commission, and it shall have the power to administer and enforce "all other laws protecting the life, health, safety and welfare of employes in their employment and places of employment."

Subsec. (2), sec. 101.24, provides that upon the request of the industrial commission the attorney general and the proper district attorney shall aid and prosecute under the supervision of the commission "all other laws of this state relating to the protection of life, health, safety and welfare" of employes.

The duty is thus imposed on and the power granted to the industrial commission to enforce the laws which relate to the protection of life, health, safety and welfare of employes.

Subsec. (1), sec. 351.50 provides that every employer of labor who owns or operates any factory or mercantile establishment, shall allow every person employed in such factory or establishment, except those employes specified in subsec. (2), "at least twenty-four consecutive hours of rest in every seven consecutive days." Manifestly, the latter section was enacted for the purpose of protecting the life, health, and welfare of the employes. It was designed to protect the life of the employes by allowing such employes a sufficient rest, so that they would be less liable to sustain an industrial accident. It was likewise designed to
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protect the health of the employes, in that one day's rest in seven is conducive to better health. The statute, therefore, is clearly one relating to the protection of life, health, safety and welfare of the employe within the meaning of secs. 101.10 and 101.24, Stats. Hence the commission has the power and it is also the duty of the commission to enforce the provisions of sec. 351.50, Stats.

SOA

Mortgages, Deeds, etc.—Trade Regulation—Deductions in excess of 10% of loan proceeds on mortgages violate sec. 115.06, Stats.

October 13, 1926.

REAL ESTATE BROKERS’ BOARD.

You request advice as to whether the following situation violates sec. 115.06, Wis. Stats.

One M., a licensed broker, is an agent for the Blank Security Company, a foreign corporation, loaning money on second mortgages. The nominal rate of interest on the loans is 6%. The loans are made by a so-called trustee, although the mortgage is executed to the security company. Before the loan is handed over to the debtor, a commission is deducted which is paid to the security corporation. On two-year loans, 15%, three-year, 19%, and four-year, 25% is paid, making the rate of interest 13 1/2% per annum on a two-year loan, 12 1/3% per annum on a three-year loan, and 12 1/4% on a four-year loan. The interest is really more than this, because the security corporation receives the value of this amount of commission for the period for which the loan runs. For his services M. is paid 3% by the security company.

Sec. 115.06 is as follows:

“All bonds, bills, notes, assurances, conveyances and all other contracts or securities whatever, whereby there is reserved or secured a rate of interest exceeding ten dollars on one hundred dollars for one year, shall be valid and effectual to secure the repayment of the principal sum loaned; but no interest shall be recovered on such securities or on any money or other thing loaned by such contract except upon bottomry and respondentia bonds and contracts; and no corporation shall interpose the defense of usury.”

It is a question of fact in instances such as this whether the statute is violated, but from the statement submitted by you
I am of the opinion that the discount retained by the security corporation is in excess of the 10% allowed by the terms of the statute and therefore violates the provisions of sec. 115.06.
MJD

Appropriations and Expenditures—Department of Engineering
—Where annual requirements for fuel for heating or heating and power purposes of specific state institution are in excess of fifty tons, individual heating or heating and power equipment in separate buildings of institution, within range of practical supply from central plant, not supplied with heat or heat and power from its central plant, where they exist, are properly considered part of heating or heating and power plant of institution owned or operated by state, although not themselves using in excess of fifty tons; and such fuel should be purchased and cost thereof charged as provided by subsec. (14), sec. 34.02, Stats., and several appropriations made to such institution in ch. 20, Stats., referring thereto.

October 19, 1926.

CHARLES A. HALBERT,
State Chief Engineer.

Subsec. (14), sec. 34.02, Stats. (created by ch. 302, Laws of 1921), provides:

"(a) The state chief engineer is exclusively authorized to and he shall:
First, select, purchase and test all coal and other solid fuel necessary to properly and efficiently operate each state owned or operated heating or heating and power plant wherein the annual requirement is in excess of fifty tons of such fuel.
Second, direct the quantity and time of shipments, and supervise the methods of receiving, handling, storing and use of such fuel at or in such plants.
Third, make such rules and regulations as he may deem necessary, not inconsistent with this subsection, to promote efficiency and economy in the purchasing, testing, handling, storing and use of such fuel.
Fourth, annually, on or before November first, furnish the state board of public affairs an estimate of the number of tons of such fuel necessary for each such state owned or operated plant for the ensuing fiscal year and the estimated delivered cost thereof.
(b) All contracts for the purchase of such fuel shall be on a competitive basis according to specifications prepared and publicly advertised by the state chief engineer, and no such contract
shall be binding upon the state unless signed by the state chief engineer and approved by the governor. No payment for any such fuel delivered to any such plant, or for freight, switching or hauling charges thereon, shall be made unless the written claim therefor is first approved by the state chief engineer. When such claim is so approved it shall be audited and paid as are other claims against the state and shall be charged against the proper appropriation to the officer, department, board or commission charged with the control of the plant to or for which such coal was delivered."

The several provisions of ch. 20, Stats., making appropriations to various state institutions for fuel are in terms substantially alike, as follows:

"Annually, beginning July 1 * * *" "an amount" or "a sum" "sufficient to cover * * * the cost of coal and other solid fuel purchased pursuant to section 34.02 of the statutes, including freight charges and local hauling charges thereon." (See, for example, sec. 20.38 (9) (ab) for the Stevens Point normal school; sec. 20.41 (1) (ab) for the university; sec. 20.34 (3a) for the Stout institute; sec. 20.17 (10) (a) for the home for the feeble-minded.)

The interpretation placed upon these provisions by the state chief engineer from the beginning has been that where a state institution which requires in excess of fifty tons of fuel annually consists of several buildings on the grounds of the institution so located that they could be supplied by a single central plant without disproportionate cost, some of which, however, are supplied with heat or with heat and power from the central heating and power plant of the institution and some from an individual heating or heating and power equipment within the individual building, such equipment in the latter is considered as a part of the heating or heating and power plant of the institution whether such equipment in the individual buildings requires more or less than fifty tons of fuel annually, and all the fuel required by the institution for such buildings is purchased under the provisions of said sec. 34.02 (14) and charged against the appropriation above referred to.

The officers, departments, boards, and commissions in charge of such institutions, in reliance upon such interpretation by your department, have not included in their budgets anything for fuel for such individual equipment, and no specific appropriations have been made therefor.
The question has been raised as to whether the fuel required by such individual equipment where the annual requirement thereof is less than fifty tons is properly purchased under the provisions of said subsection and the cost thereof properly charged against the appropriate appropriation referring thereto, or whether such fuel should be purchased by the institutions without reference to said subsection and charged against the appropriation to the institution for operation.

You have asked for an opinion as to whether the interpretation of said statutory provisions by your department is the correct one.

I think the question should be answered in the affirmative.

In my opinion there can be no doubt that such construction carries out the intent of the legislature in the enactment of said subsec. (14) and of the various appropriation statutes referring thereto. I think that the plain intent of the legislature, as manifested by the provisions themselves, is, clearly, that the fuel requirements for heating or heating and power purposes of every specific state institution (excluding, of course, the fuel requirements which do not exceed fifty tons of such buildings thereof so situated—in some instances many miles away—that they could not, in any practical way, be supplied with heat or power from a central plant at the main location of the institution), if in excess of fifty tons annually, shall be met as provided therein, and that the several subplants in the individual building of such an institution, where they exist, are a part of the main heating or heating and power plant owned or operated by the state at such institutions, in the same way that individual boilers furnishing heat or power to different parts of the same building or of different buildings housed in a central plant are a part of such plant.

If, however, it could be said that the statutory provisions referred to are ambiguous, then I think the construction placed upon them by the state chief engineer and relied upon by the officers and boards in charge of the state institutions should prevail until the legislature has cured the ambiguity or the courts have placed some other construction upon the statutes involved.

It must be understood, of course, that fuel purchased under the provisions of said sec. 34.02 (14), as interpreted above, must be purchased only in accordance therewith, i. e., by the
state chief engineer, and selected, contracted for on a competitive basis, tested, handled, delivered, stored and used under his direction, as provided therein.

And it should be noted, further, that (as before indicated) separate state owned or operated plants the annual fuel requirements of which do not exceed fifty tons, in detached buildings which, although a part of or belonging to a specific institution, are situated at such a distance from the main location thereof that it is not practicable to supply fuel therefor from such main location, cannot be considered as a part of the heating and power plant of the latter. Fuel for such remotely detached buildings frequently must be delivered at intervals during the heating season and must necessarily generally be purchased locally, and the state engineering department cannot in such cases render any real service or effect any economy either by testing or by buying fuel under competitive bid contracts and the plants in such buildings are plainly excluded from both the letter and intent of the statutes referred to herein.

FEB

Bridges and Highways—Provisions of sec. 84.09, Stats., relating to emergency repair and construction of bridges on state trunk highway system do not apply to bridges on county trunk highway system.

October 19, 1926.

CHARLES VOIGT,
District Attorney,
Sheboygan, Wisconsin.

You state that Sheboygan county now has a considerable county trunk system of highways. You refer to my opinion to you of August 11, 1926 (XV Op. Atty. Gen. 346), relating to the assessment by the county of 20% of the county's share of the cost of emergency reconstruction of bridges on the state highway system against the municipalities in which such bridges lie, and you now ask whether the county may assess part of the cost of emergency repairs and construction of bridges on the county trunk highway system against such municipalities. You state that although sec. 84.09 refers to "trunk highway system" you are of the opinion that that section does not apply to the county trunk highway system.
I agree with your opinion. "Trunk highway system" as used in sec. 84.09 is defined in sec. 84.02. County trunk highways are outside this system by the express provisions of subsec. (6), sec. 83.01, authorizing their establishment by counties. By the same subsection it is provided that the system of county trunk highways selected by a county board becomes, by virtue of such selection, a portion of the county system of prospective state highways. Sec. 83.06 provides (subsec. (1) ) that all city and village streets and highways improved with state or county aid under the provisions of ch. 83 shall be maintained by the cities and villages in which they lie, and that all other state highways shall be maintained at the expense of the county in which situated, and that the county board shall make adequate provisions therefor. Subsec. (5), sec. 83.01, Stats., provides that all portions of the systems of prospective state highways including the bridges thereon improved pursuant to the provisions of ch. 83 shall become state highways when the improvement shall have been accepted by the state highway commission and the improved portion declared by the commission to be state highways. It follows that emergency repair and construction of bridges on county trunk highways which have become state highways but are not a part of the state trunk highway system must be performed by the cities and villages in which they lie, and by the county if they lie outside of a city or village. Bridges on the county trunk system of highways which have not become state highways must be repaired and maintained by the municipality (town, village, or city) in which they lie, subject to the provisions for county aid provided for in ch. 87, stats.
Fish and Game—Wisconsin Statutes—Ch. 450, Laws 1925, changing open season for deer, modified by implication sec. 29.45, Stats., to extent that period within which deer may be transported in years in which there is open season is changed from November 13 to 11:00 o'clock p. m. of November 22 (which corresponded to former open season) to period from December 2 to 11:00 o'clock p. m. of December 13 to correspond with present open season.

October 22, 1926.

Elmer S. Hall,
Conservation Commissioner.

By the statutes of 1923 the annual open season for deer was fixed as November 13 to November 22 (sec. 29.18) and licensed hunters were permitted to transport one deer between the 14th day of November and 11:00 o'clock p. m. of the 25th day of November—in other words, between the second day of the open season and 11:00 o'clock p. m. of the third day following its close (sec. 29.45).

The legislature of 1925 limited the open season for deer to the alternate even numbered years and changed the open season to the ten days commencing December 1 in those years by repealing sec. 29.18 and creating a new section 29.18, but did not amend, repeal or refer to sec. 29.45 relating to the transportation of deer either by the act making the change referred to or any other act. (Ch. 450, Laws 1925.)

You submit the question of whether, under the present state of the statutes above referred to, it will be lawful to transport deer during a period corresponding to the present open season.

After a careful consideration, and a review of the judicial authorities (which we do not deem necessary to discuss at length), the question is answered in the affirmative, the conclusion being reached that by the repeal of sec. 29.18, Stats. 1923, and the creation of the new sec. 29.18 changing the open season for deer as stated, sec. 29.45 was by implication correspondingly modified, and that one deer may be transported by licensed hunters, under the limitations and restrictions of the latter section, between the 2d day of December and 11:00 o'clock p. m. of the 13th day of December in the years in which there is an open season.

The two statutes are in pari materia, and are a part of a code of statutes relating to one subject, namely, the protection of
fish and game, which is governed by the same spirit in all its parts and is intended to be consistent and harmonious, and they must be read and construed together as if they were parts of the same statute, and to carry out the plain intent and purpose. The failure of the legislature of 1925 to change the dates in sec. 29.45 to correspond with the changed dates of the open season for deer was clearly a mere oversight.

While the modification, amendment or repeal of an earlier act by a later one by implication is not favored in the law, courts do not hesitate to declare such an effect when it is necessary to carry out the clear intent or to harmonize the acts of the legislature. And we feel quite certain that were the question presented to it, the Wisconsin court would hold that sec. 29.45 was modified by the enactment of present sec. 29.18 to the extent involved in the answer to your question.

Appropriations and Expenditures—Public Officers—Health Officers—Under sec. 141.02, Stats., city health officer is entitled, in addition to his annual salary, to his actual and necessary expenses incurred in performance of his duties.

Boards of Health.

You refer me to sec. 141.02, Stats., so far as it relates to the compensation of the local health officer. In subsec. (1) it is provided:

"* * * He shall receive an annual salary to be fixed by the council or the board of health, if so provided by ordinance, and shall receive his actual and necessary expenses."

You state that in the particular case under consideration the salary of the health officer was fixed by the common council, and the health officer presented a bill to the council for something over $300, expenses which he had legitimately incurred in the performance of his official duties such as car, mileage, clerical help, and other incidentals; that the council has refused to pay the health officer the amount which he claimed, and the question arises if, under this section, the health officer can legally collect from the city for any and all actual and necessary expenses which he incurred in the performance of his duties.
This statute, in addition to the annual salary, expressly provides that he shall receive his actual and necessary expenses. It can therefore not be argued that his salary is to cover his actual and necessary expenses. The conclusion is inevitable—that he has a right to his actual and necessary expenses, and, of course, if the city will not pay the same, he has a right of action for the same.

JEM

Trade Regulation—Trading Stamps—Cards given to members of University Co-op do not violate trading stamp law. Card given to member showing amount of dividends or rebate that member is entitled to for purchases of previous year for which he may have credit in purchase of merchandise does not violate trading stamp law.

October 30, 1926.

HARRY KLUETER,
Dairy and Food Commissioner.

You state in your communication of September 29 that you have investigated a practice used by the University Co-op in the sale of their merchandise, and you desire an official opinion as to whether this practice is in violation of the trading stamp law, sec. 134.01.

Your statement of facts is as follows:

"We find that certain slips or tickets are used, which slips and tickets we are submitting with this letter designated as 'A' 'B' 'C' 'D' and 'E'. The membership card designated as 'A' is given to anyone applying for same upon the payment of $2.50. Kindly note that this membership card bears the purchaser's number, in this case being 30496. At the time the purchaser receives the membership card 'A' a fountain pen coupon designated as 'B' is also given to him. This fountain pen coupon can then be exchanged in the store for any $2.50 fountain pen. If the customer desires, however, he may purchase a five dollar pen and apply the coupon as part payment upon it paying cash for the balance. The customer has now been admitted to membership as stated on the card 'A'. In making subsequent purchases the customer informs the clerk of his membership number which number is placed upon the cash register slip, which we have designated as 'C'. If the customer desires he may retain the top part of this cash register slip and the store retains the lower part. The store uses a form substantially the same as shown on the card we have designated as 'D'. This card is filled out by the store with the customer's name, address and
file number and in addition the membership number. The amount of the purchase is placed upon this card, which you will note is simply a form used by the store to keep a record of all of the purchases of their member customers. At the end of the calendar year the purchases are totaled and in March of the following year the board of managers of the store meet and declare a certain dividend or rebate which is in the form of percentage, that is if a customer's purchases amount to two hundred dollars ($200) and the rebate or dividend is 15% the customer has a credit of thirty dollars ($30) in dividends or rebates. In handling this rebate a slip designated as 'E' is used by the store. This slip is sent or given to the customer and contains the membership number and amount of credit which in the illustration just used was thirty dollars ($30). The customer then takes this rebate slip and presents it to any clerk in the store in payment for any article purchased up to the amount of the credit. It is not mandatory to purchase the full amount of the credit at one time."

I have also been informed by Mr. Aberg, the president of the company, that membership can only be acquired by students and faculty members, and that there is no provision in any of its articles for the withdrawal of members; that at present there are over thirty thousand members, and that the memberships, slips, or tickets are not assignable.

That part of sec. 134.01 which is material to the question here is as follows:

“(1) No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, except that any manufacturer, packer or dealer may issue any slip, ticket, or check with the sale of any goods, wares or merchandise, which slip, ticket or check shall bear upon its face a stated cash value and shall be redeemable only in cash for the amount stated thereon, upon presentation in amounts aggregating twenty-five cents or over of redemption value, and only by the person, firm or corporation issuing the same; provided, that the publication by or distribution through newspapers, or other publications, of coupons in advertisements other than their own, shall not be considered a violation of this section.”
This law makes it unlawful to give, in connection with the sale of merchandise, any coupons which shall entitle the purchaser to receive in exchange for them any goods, wares, merchandise, or thing of value. The only exception is in the case of coupons redeemable only in cash in amounts aggregating 25¢ or over of redemption value.

The membership card "A" and the fountain pen coupon "B" are given prior to the sale of any merchandise and not in connection with it. It is apparent that neither of these is violative of the trading stamp law.

Card "C" cannot be considered a trading stamp coupon as the possession of it is not necessary to give the purchaser the credit. It is the record kept by the store on card "D" which indicates the amount of purchases made and from which the rebate will be later determined.

The use of card "D" does not violate the trading stamp law, for it is never delivered to the purchaser.

Neither do I believe that the card or slip designated "E" as used by the store is violative of the trading stamp law. This card is given not in connection with the sale of any merchandise but is a slip made out at the end of the year which states the amount of dividend or rebate that the member is entitled to for all the purchases during the year, and this dividend or rebate is determined on a certain percentage on all the purchases. It certainly cannot be argued that a company has no right to give to its members at the end of a year a card showing the amount of dividends that the member is entitled to and to pay these dividends in merchandise. This is what this company is doing. This practice has been carried on by this company for over twenty years in substantially the same way and there is no attempt at evasion of the law. It is true that the card or slip "E" which gives the amount of rebate that the purchaser is entitled to and the number of the membership has also a note on it which reads thus:

"Rebate slips lost or destroyed will not be replaced."

This, however, in my opinion, is not fatal. It simply facilitates the payment of dividends. It insures care on the part of the students in retaining the slips and thus avoids the necessity of reissuing the same. This slip is not assignable and cannot be
said to be a trading stamp given in connection with the sale of merchandise as contemplated by the trading stamp law. JEM
Courts — Garnishment — Quasi-garnishment — Sec. 304.21, Stats., is not limited to judgments in justice court, but applies to judgments in any court. November 1, 1926.

W. R. Kirk,
District Attorney,
Hudson, Wisconsin.

You have referred me to sec. 3716a, now renumbered 304.-21, Wis. Stats., and you inquire whether this section applies to all judgments from any court.

This section pertains to quasigarnishment of public employes. The language is broad enough to cover all judgments, but it is a fact, as you say, that it appears in the chapter covering proceedings or actions in justice court and it was numbered by the legislature as sec. 3716a when the law was originally enacted in ch. 360, laws of 1915.

I am of the opinion that the section should be interpreted as applying to all judgments. It has so been practically construed ever since its enactment and I believe it was the intention to cover all judgments—those of a court of record, as well as those of a justice of the peace.

JEM

Counties—County Chairman—Chairman of county board is required to countersign all orders. November 1, 1926.

Theodore A. Waller,
District Attorney,
Ellsworth, Wisconsin.

You have inquired whether it is the duty of the chairman of the county board to countersign all county orders, and you refer to a possible conflict between secs. 59.05, subsec. (1), 59.20, and 59.81, subsec. (1), Stats.

I am of the opinion that there is no conflict between these sections and that the chairman of the county board is required to countersign all orders. There is nothing in the sections mentioned that relieves the chairman of the county board of the positive duty imposed by sec. 59.05 to “countersign all orders.”

HLE
Criminal Law—Second Offenses—Desertion or absence without leave is not crime within provisions of ch. 57 and ch. 359, Stats. Sentence therefor does not make one subsequently convicted in state or federal court second offender.

November 3, 1926.

BOARD OF CONTROL.

You state that one A was sentenced to serve a term of one to ten years in the state prison at Waupun, the sentence being handed down on October 24, 1925. In May, 1917, he was tried by court martial on a charge of being absent without leave and sentenced to 10 months at Ft. Leavenworth, Kansas, military prison. You inquire whether this man is to be considered a second offender.

Sec. 57.01 makes a first offender one who has never before been convicted of a felony in this state or elsewhere. See sec. 359.12, 359.13, 359.14, 359.15 apply to and refer by implication to prior convictions and expressly state such to be sentences to punishment by imprisonment in any state prison or state reformatory by any court in this state or any other state or of the United States.

The offense with which this man was charged while in military service, to wit, desertion or absence without leave, arises purely out of the contract of enlistment; it is classed exclusively as a military crime triable and punishable in time of peace as well as in time of war by court martial only and not by civil tribunals. Kurtz v. Moffitt, 115 U. S. 487; Dillingham v. Booker, 168 Fed. 696, 18 L. R. A. (N. S.) 956. Such an offense is not considered a crime within the terms of our statutes in determining whether one is a first or second offender and, in this instance, your statement of facts indicates that this man is a first offender. MJD
Automobiles—Nonresident auto owner is required to take out Wisconsin auto license when he becomes resident of Wisconsin. Wisconsin resident purchasing auto registered in another state must take out Wisconsin auto license. Camp operating bus equipped with Michigan license, tuition of camp guests including transportation charges, is required to have Wisconsin auto license.

November 3, 1926.

John W. Kelley,
District Attorney,
Rhinelander, Wisconsin.

You have submitted three questions as follows:

1. "The manager of the city of Rhinelander drives an automobile with license plates of the state of Ohio attached; he formerly resided in Ohio but now lives here. Is it necessary for him to obtain an automobile license in Wisconsin for 1926?"

The answer is in the affirmative. The exemption accruing under sec. 85.15, subsec. (1), Stats., has been construed to apply only to the operation of autos registered in another state by their nonresident owners in this state until they become residents of this state. V Op. Atty. Gen. 635.

2. "A resident of the city of Rhinelander has purchased an automobile to which are attached license plates for the state of Indiana, this party has lived here for a number of years and in the past has always procured Wisconsin plates. Is it necessary for him to obtain a Wisconsin license for 1926?"

The answer is likewise in the affirmative, and you are referred to XIII Op. Atty. Gen. 524, wherein it was held that a resident of this state who acquires a motor vehicle registered under laws of another state must register the same under Wisconsin law before it can lawfully be operated on Wisconsin highways.

3. "A girls' camp near Rhinelander operates a bus for the carrying of the girls at the camp to Rhinelander and other places. I understand that no charge is made for riding in the bus and that the tuition charge covers the transportation in the bus. The manager of the camp lives in Detroit, Mich., and the camp is run only during the summer months. The bus has a Michigan license. Is it necessary for a Wisconsin license to be had for 1926?"
The bus owner is required to have a Wisconsin license. Your statement indicates that those who are quests of the girls' camp pay for the bus service in their tuition, and this constitutes the owner of the bus an operator for hire within the provisions of sec. 85.04 and is covered by the opinion in XV Op. Atty. Gen. 269, and other opinions there cited.

MJD

Courts—Minors—Child Protection—When judge of court of record has been appointed to hear juvenile matters, such appointment gives him exclusive jurisdiction under sec. 48.01, subsec. (1), Stats.

James Murray,
District Attorney,
Fond du Lac, Wisconsin.

You advise that there are three courts of record in Fond du Lac—a circuit court, a county court, and a municipal court. The judge of the municipal court has been designated to hear juvenile matters and you inquire whether that gives him exclusive jurisdiction or whether juvenile matters may be heard by any of the judges during the period in which he is designated.

Sec. 48.01, subsec. (1), Stats., provides:

“All courts of record in this state shall have original jurisdiction of all cases of neglected, dependent, or delinquent children, as defined in this subsection, concurrent with that of the circuit courts of this state. The judges of the several courts of record in each county of this state shall, at intervals not exceeding one year, designate one or more of their number, whose duty it shall be to hear at such places and times as he or they may set apart for such purpose, all such cases; and in case of the absence, sickness or other disability of such judge, he shall designate a judge of any court of record whose duty it shall be to act temporarily in his place.”

It is apparent from the foregoing section that in case of the absence, sickness or other disability of such judge he shall designate a judge of any court of record whose duty it shall be to act temporarily in his place. This eliminates the other judges from assuming jurisdiction in juvenile matters until they have been designated.

MJD
Minors—Public Officers—Deputy Register of Deeds—Minor may be appointed deputy register of deeds under sec. 59.50, Stats., and may perform functions under sec. 59.51, Stats.

LEWIS W. POWELL,
District Attorney,
Kenosha, Wisconsin.

You inquire whether a person who is not yet twenty-one years of age can be legally appointed deputy register of deeds and perform all the duties prescribed by sec. 59.51, Stats.

Sec. 59.50 provides in substance for the appointment of a deputy register of deeds, filing and recording of the written appointment, and further:

"Such deputy or deputies shall aid the register in the performance of his duties under his direction, and in case of vacancy or the register's absence or inability to perform the duties of his office such deputy or deputies shall perform the duties of register until such vacancy is filled or during the continuance of such absence or inability."

Sec. 59.51 enumerates the duties of the register of deeds, the majority of which are ministerial.

In the absence of a constitutional provision or a statute describing the qualifications of a deputy county clerk, a minor is eligible to appointment to such deputyship and he is competent to perform all ministerial duties for his principal, and also to administer oaths and like affidavits and perform all such like official acts as may be legally performed by his principal in person. Harkreader v. State, 35 Tex. Crim. 243, 33 S. W. 117, 60 A. S. R. 40. So held as to a deputy sheriff. Jamesville & W. R. Co. v. Fisher, 109 N. C. 1, 13 S. E. 698, 13 L. R. A. 721, and note.

I find no prohibitory provision in the constitution or statutes, and in the absence of such prohibition you are advised that a minor may be appointed deputy register of deeds and act under secs. 59.50 and 59.51, Stats.

MJD
Criminal Law—Second Offenses—One serving term in United States disciplinary barracks for desertion and being drunk and disorderly and subsequently convicted of felony in Wisconsin is not second offender under ch. 57, Stats., because of his military sentence.

November 4, 1926.

BOARD OF CONTROL.

One H. was sentenced to the Wisconsin state prison to serve a term of one to ten years for burglary during night time. In February, 1924, he was sentenced to serve two years for being drunk and disorderly—desertion, at the United States disciplinary barracks, Alcatraz, California. You inquire whether this man is to be considered a second offender.

Generally, an offense against military law may or may not be a criminal offense, depending upon whether the act constitutes a violation of military law and also a violation of the local criminal code.

This charge does not seem to be a felony under our statutes. The charge of desertion is likewise not a felony and is not a crime within the terms of our statutes.

You are therefore advised that this man is not a second offender within the terms of ch. 57, Stats.

MJD

Automobiles—Discrimination—Granting of “fleet” rate, consisting of lower rate per car where number of automobiles or trucks are insured for one owner than where only one car is insured, is violation of anti-discrimination law, secs. 201.52 to 201.55, Stats.

November 4, 1926.

OLAF H. JOHNSON,
Commissioner of Insurance.

You have submitted for an opinion the following question:

“It is now the practice of some of the liability insurance companies to issue automobile liability policies at what is termed a ‘fleet’ rate to owners operating a large number of automobiles or trucks. Under this practice a lower rate or a lesser premium is charged per car than is charged to an insured who owns only one car. Is this practice a violation of secs. 201.52–201.55 or other provisions of the insurance laws?”
The material part of the sections referred to reads:

"No company or other insurer licensed in this state to write liability insurance shall unfairly discriminate in its writings between risks or classes of risks, nor shall it use any schedule or other system of rating or classifying the application of which results in discrimination. * * *." Sec. 201.52.

Sec. 201.53 requires the filing of the rates and classification of risks for each kind of liability insurance, and the filing of changes or additions.

Sec. 201.54 reads:

"Any schedule or other system of rating and classifying risks used in this state shall be filed with the commissioner of insurance and no such schedule or plan shall be used until it is so filed. The commissioner of insurance may upon his own motion or upon the complaint of any interested person investigate the results produced by the application of such schedule or plan and, if upon such investigation he shall find that it produces unfair or discriminatory results, he shall by order require the company filing it to modify the schedule or plan as directed in such order."

Sec. 201.55 reads:

"No such company shall in the writing of any risk in this state use a rate or classification other than that filed with the commissioner of insurance and properly applicable to the risk."

Sec. 201.56 provides for a review of any rate by the commissioner of insurance and that:

"* * * If he shall find that the rate is discriminatory, he shall order the discrimination removed and a nondiscriminatory rate substituted. * * *"

Similar discriminations are prohibited in regard to fire insurance by secs. 203.39-203.42.

As to workmen's compensation insurance see sec. 205.20, prohibiting discrimination rates in much the same manner.

The statutes relating to discrimination in rates or premiums for insurance originally only applied to life insurance, and this was then extended to fire insurance and later to liability and workmen's compensation.

An examination of the different statutes prohibiting discrimination in insurance rates or premiums clearly indicates an intention on the part of the legislature to give no recognition to the quantities or the amount of the insurance in the making
of the rate or the premium. It follows therefore that, if any difference is to be made in the rate or premium where several automobiles are insured for the same owner from the rate given where only one automobile is insured for one owner the distinction must be made on the basis of some fact other than the number of cars so insured for the same owner.

I am therefore of the opinion that the practice you describe is in violation of the anti-discrimination statutes, and cannot be permitted in this state.

Corporations—Public Utilities—Merger of public utilities under sec. 196.535 ipso facto dissolves such public utilities as are absorbed or merged.

November 5, 1926.

FRED R. ZIMMERMAN,
Secretary of State.

You have inquired as to the corporate status of a public utility which has been merged with another concern under sec. 196.535, Wis. Stats., and particularly whether the merger automatically dissolves the merged corporation.

Sec. 196.535, Wis. Stats., provides in substance as follows:

Subsec. (1) With the consent and approval of the commission but not otherwise. (a) Any two or more public utilities or any two or more public utilities owning or operating street railway or interurban lines may merge with each other; (b) such public utility owning all the stock of the public utility to be merged may file in the office of the secretary of state a certificate of such ownership in its name, signed by its president or vice president and secretary or treasurer, bearing its corporate seal, and setting forth a copy of the resolution of its board of directors merging such other corporation and assuming all of its obligations, a change of name, if any, and the date of the adoption of such resolution. The possessor corporation shall be deemed to have assumed all liabilities and obligations of the merged corporation and shall be liable in the same manner as if it had itself incurred such liabilities and obligations. All of the estate, property rights, privileges, and franchises of the merged corporation shall vest in and be held and enjoyed by such possessor corporation as fully and entirely and without change or diminution as the same were before held and enjoyed.
by such other corporation, and be managed and controlled by such possessor corporation, be subject to all liabilities and obligations of such other corporation, and the rights of all creditors thereof.

Subsec. (3) Application shall be made for the approval and consent of the commission, and shall contain a concise statement of the proposed action, the reasons therefor, and such other information as the commission shall desire. The commission shall, thereupon, investigate, hold hearings if necessary, shall consider the reasonable value of the property, plant, equipment or securities involved, and if it shall find that the proposed action is consistent with the public interest it shall give its consent and approval in writing.

Subsec. (4) Any transaction required to be submitted to the commission for approval shall be void, unless the commission shall give its consent and approval thereto in writing.

Subsecs. (2) and (5) are omitted from this consideration.

Whether the old corporations are merged into the new or are continued in existence under a new name depends on the terms of the statute, and the contract under which the merger was brought about and upon the pre-existing relations of the constituent corporations to which the statute and the contract relate. Proprietors of Locks & Canals v. Boston & M. R. R., 139 N. E. 839.

A merger of corporations takes place when one of the constituent corporations remains in existence, absorbing or merging in itself all other companies, and succeeds to the franchises and acquires the property and assets of the constituent corporations. Collinsville Natl. Bank v. Esau, 176 Pac. 514; Vicksburg & Y. C. Tel. Co. v. Citizens Tel. Co., 79 Miss. 341, 354, 30 So. 725; Lee v. Atlantic Coast Line R. Co., 150 Fed. 775; 7 Fletcher on Corporations, secs. 4661 and 4662; Alabama T. & N. Ry. Co. v. Tolman, 76 So. 381.

As a general rule, the merging corporation continues its existence and the merged or original corporation is dissolved. Thompson uses the term "consolidation" synonymously with the term "merger" and in Vol. 1 of his work on corporations, sec. 396, he states:

"It has been seen that consolidations frequently take the form of one company purchasing the capital stock of another. In such cases and in others that may be imagined, the terms of
the union may be such that one corporation without any change of name merely absorbs or annexes the other. In such a case the absorbing corporation continues unaffected and the other is dissolved."


The statute may continue the existence of a constituent company of a merged corporation and keep it nominally alive for a particular and specified purpose but the constituent corporation is limited in the exercise of its corporate functions solely to the purpose authorized by statute. Thus where a statute provides:

"Rights of creditors and all liens upon the property of any of the said former corporations shall be preserved unimpaired and the former corporations may be deemed to continue in existence in order to preserve the same; and all debts, liabilities, and duties of each of the said former corporations shall henceforth attach to the consolidated corporation and may be enforced against it to the same extent as if said debts, duties and liabilities had been incurred or contracted by it."

It was held that the constituent corporation although merged under statutes similar to ours, existed for the purpose of being sued, to preserve the rights and liens of all creditors. Alabama T. & N. Railway Co. v. Tolman, 76 So. 381, 384.

Where the statute expressly declared that no suit, etc., in which the merged corporation is a party shall be abated or discontinued by reason of any such merger, the merged corporation continued to exist for the purpose of being sued.

"* * * But the Morton Company [merged corporation] did not surrender its corporate existence. It was not dissolved. It remained a corporation, but for the single purpose with the sole power of being sued or proceeded against upon and defending against causes of action alleged to exist against it at the time of the merger."

This statement of the law was handed down in a discussion of a merger of banking corporations. The statute expressly provided that the corporation into which they were merged shall be held liable to pay and discharge all such debts and lia-


bilities and to perform all such trusts of the merged corporation in the same manner as if such corporation into which the other shall become merged had itself incurred the obligation or liability. *In re Bergdorf's Will*, 99 N. E. 714, 717.

Where a statute authorizing a merger of corporations contained no provision making the possessor corporation liable for the debts of the corporation merged and expressly provided that the merger of corporations shall be "without prejudice to any liabilities of such other corporation or the rights of any creditors thereof," the court held:

"* * * This reservation of the rights of creditors permits them to proceed against the debtor corporation, notwithstanding such corporation is merged into another. The rights of creditors include the right to sue the debtor corporation and to take the property which was of the debtor corporation by execution issued upon a judgment obtained against such debtor. Such right rests upon the express terms of the statute, and does not depend, as has been suggested, upon the existence and a finding of a fraudulent transfer." *Irvine v. N. Y. Edison Co.*, 101 N. E. 358, 360.

We now come to a comparison of the statutes pertaining to dissolution of public utility corporations and to merged corporations.

Under sec. 196.535 it is necessary that the merger of public utilities be approved by the railroad commission. Under sec. 181.03 it is necessary for the railroad commission to consent to the dissolution of a public utility.

A merger may only occur under sec. 196.535, when the possessor corporation owns all the stock of the constituent or merged corporation. Dissolution can only be determined under 181.03 at a meeting called especially for that purpose at which a vote of two-thirds of the stock or one-half of the members must be in favor of dissolution.

A certificate of ownership, properly signed by two corporate officers, sealed, and containing a resolution of the board of directors to merge the corporation is filed with the secretary of state under sec. 196.535. Under 181.03, Stats., duplicate copies of resolution of dissolution, properly attested by two officers of the corporation, with the corporate seal, must be filed with the secretary of state and register of deeds.

Under sec. 181.02, the dissolved corporations remain corporate bodies for three years thereafter, for the purpose of
prosecuting and defending actions, and of enabling them to settle and close up their business, dispose of and convey their property and divide their capital stock and for no other purpose. During this time the directors are the legal administrators of the corporation. (See State ex rel. Pabst v. Circuit Court, 184, Wis. 301, 199 N. W. 213.)

Under sec. 196.535 the board of directors agree, in the resolution accompanying the certificate of ownership, to assume all of its obligations and the possessor corporation shall thereupon be deemed to have assumed all liabilities and obligations of the merged corporation and shall be liable in the same manner as if it had itself incurred such liabilities and obligations. Thereupon all of the estate, property rights, privileges and franchises of such other corporation shall vest in and be held and enjoyed by such possessor corporation as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation and be managed and controlled by such possessor corporation, but subject to all liabilities and obligations of such other corporation and the rights of all creditors thereof.

If the corporation owned real estate a certificate of the president or secretary, sealed, stating names of stockholders at the time of dissolution shall be filed with the register of deeds and the persons named therein become tenants in common of the realty. The public utility owning all the stock would get the real estate upon dissolution. Sec. 181.04.

Ordinarily, after dissolution, the directors are the legal administrators of the corporation and its existence for the purpose of winding up its affairs continues for three years. Under sec. 196.535, the possessor corporation assumes all liabilities and can be held, just as can a board of directors. Though the property, etc., vests in the possessor corporation subject to the rights of creditors, this fact alone, in the absence of an additional provision in our statutes continuing the corporation other than under the general dissolution statutes, does not, as was held in the Irvine case, supra, continue the corporate existence of the merged corporation. It is evident from a comparison of the aforementioned statutes, that sec. 196.535 by implication dissolves merged corporations upon filing of the required certificate of ownership, etc., with the secretary of state.
In view of the foregoing, it is unnecessary to comment upon the necessity of filing the dissolution papers required by ch. 181, Wis. Stats.

MJD

Criminal Law — Extradition — Application for extradition which contains information duly filed by district attorney and warrant issued thereon for arrest of party requisitioned for is sufficient under federal statute, sec. 5278, Rev. Stats., which requires copy of indictment found or affidavit made before magistrate.

November 8, 1926.

HONORABLE JOHN J. BLAINE,

Governor.

The application for the rendition of Glen Ingle, of Virginia, by the governor of said commonwealth has been again considered by this department. It appears now by the letter of the governor that, in Virginia, criminal warrants are issued on oral statements, and that it is not the practice to have complaints in writing before the warrant is issued. A complaint, however, charging the said Glen Ingle with a criminal offense committed in Washington county, Virginia, in July, 1926, has been formally made by the commonwealth attorney of said Washington county, and a warrant has been issued by a magistrate for the arrest of said Glen Ingle in said Washington county, Virginia. The governor has certified that the papers are authentic.

The federal statute sec. 5278 (R. S. U. S.) makes it the duty of the executive of a state to honor the application for extradition when a copy of an indictment found or an affidavit made before a magistrate is produced charging the person demanded with having committed a crime, and when these papers are certified by the governor to be authentic. In the case of In re Hooper, 52 Wis. 699, it was held that where the application is accompanied with an information this is a valid substitute for a copy of an indictment or an affidavit made before a magistrate. The court said, p. 702:

"* * * Now it is said that a copy of an information, certified by the governor of Kansas to be authentic, fails to comply with the law of congress on this subject; fails to show that the petitioner is charged with the commission of a crime in that state. I think, however, the evidence of the charge by
'information' is a sufficient compliance with the law of congress. The intent of that law obviously is, that the charge must be made in the regular course of judicial proceedings, in the form of an information, filed by the proper law officer, an indictment, or other accusation known to the law of the state in which the offense is committed."

Other courts have made a similar ruling. See cases cited in 25 C. J 262.

In view of these authorities I am able to hold that the application for the extradition of Glen Ingle is in compliance with law and I approve the same.

JEM

Public Health—Public Officers—Pharmacy board should present facts and data showing violations of pharmacy law to district attorney of county where violations occurred.

Henry G. Ruenzel, Secretary,
Board of Pharmacy,
Milwaukee, Wisconsin.

You ask to be given information to enable you to prosecute successfully the violators of the law affecting pharmacy. You state that you would like to get a method how to proceed.

The official prosecutor in the state of Wisconsin is the district attorney in the county where the offense was committed. If you have facts and data showing that the pharmacy law has been violated you should present the matter to the district attorney and furnish him with all the proof and facts in your possession. It is his duty to prosecute if in his discretion enough facts are presented which will make a conviction reasonably certain. These are all the instructions that you need in a general way.

JEM
Minors—Child Protection—Maternity Homes—Under provisions of sec. 48.07, Stats., juvenile court is authorized to make temporary placements of young children in unlicensed homes.

Sec. 58.04, Stats., construed.

November 9, 1926.

Board of Health.

You state that it appears that the juvenile court of Milwaukee has seen fit through the operation of its probation department to place young children in homes for varying periods of time which are not licensed as child boarding homes. At the request of the city health department of Milwaukee you inquire if the said juvenile court is authorized under sec. 48.07 to make temporary placements in unlicensed child boarding homes.

The licensing of boarding homes for children is provided for under sec. 58.035, and the licensing of homes for the boarding and sheltering of infant children, or so-called baby farms, is provided for in sec. 58.04. The material part of sec. 48.07 reads thus:

"When any such child shall be found to be dependent or neglected the court may make an order committing the child to the care, custody and guardianship of some suitable state or county institution as provided by law, or to the care, custody and guardianship of some incorporated association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent or neglected children; * * * The disposition of any child under the provisions of this section shall be deemed temporary unless otherwise specified in the order of commitment; or the court may make a temporary disposition of such case by placing such child in the care and custody of the probation officer or of some suitable person or institution for such period of time as the court shall see fit, not exceeding three months at one time, not exceeding, however, a total period of one year, during which the parent or other person from whose custody such child is taken may be put upon probation and required to report to the court."

Under the broad powers here given to the court it clearly appears that such juvenile court is authorized under this section to make temporary placements in unlicensed homes.

You also inquire whether the words "Every individual, firm, association or corporation owning, keeping, conducting or managing any institution or home for the boarding or sheltering of infant children" in sec. 58.04 applies only to homes and in-
stitutions which are operated for the sole purpose of boarding such children, or whether the licensing requirement applies to all homes who take children and board them either with or without remuneration. You state you have always interpreted this provision to require that all such homes must be licensed, and that it has been the effort of your department and also the effort of the city health department at Milwaukee to discourage the opening of child boarding homes solely for the income derived from such activities; and that you have taken this position for the reason that you believe it is far better to secure homes for the boarding of babies and young children where at least one of the principal purposes is the desire of the family to have children in their homes because of their love for children, rather than for the remuneration which would be obtained from them.

In answer to this question I will say that this provision of the statute does not require every home to be licensed in which the court has placed temporarily a child or baby, but where one of the outstanding features of the home is to take in children, and the home is maintained for that purpose, it would be necessary for such home to procure a license. The court as hereinbefore stated is authorized to place a child temporarily in any home that in its discretion it finds to be a suitable place for such child. It often happens that close relatives or friends of the child are willing to temporarily take a child into their home, and it is the purpose of this law if considered in connection with sec. 48.07 to permit the court to give an order placing the child with such relative or friend of the child. In fact, often a very desirable home may be found temporarily for a homeless child among actual strangers to such child. The law has placed the responsibility for this matter in the hands of the court and the probation officer, and it cannot be held that the court has not the power to temporarily place a child in a home that is not licensed.

JEM
Appropriations and Expenditures—Bridges and Highways—

County board may provide by resolution that where towns of county levy minimum tax for town highway purposes and request county to construct and maintain town roads with funds so raised and allotments of state funds provided for by sec. 20.49, subsec. (8), Stats., such work shall be done by county under supervision of county highway committee; but county board cannot compel such town action.

November 9, 1926.

Victor M. Stolts,
District Attorney,
Eau Claire, Wisconsin.

You refer me to subsec. (8), sec. 20.49, Stats., relating to the allotment to towns, villages and cities of surplus motor vehicle registration fees and motor vehicle fuel taxes for the improvement within their limits of public roads and streets which are not portions of the state or county trunk highway systems, and the specific provision thereof that:

"* * * The amounts allotted to the towns and villages shall be expended by town and village officers, subject to the supervision and approval of the county highway committee, but the town and village boards may authorize the work to be done by the county,"

and state that some of the town chairmen of your county seek to have adopted by the county board at its coming session a resolution providing for the construction and maintenance of all town highways by the county under the supervision of the county highway committee, and providing that each town in the county shall levy a tax of not less than two mills for town highway purposes and that the funds so raised, together with the said allotment to each town, shall be used by the county highway committee in the construction and maintenance of the town roads.

You further state that it is urged that the county, with its road machinery, can do the work of building and maintaining the town roads at less expense than the towns can do it, but that you doubt that the county board has authority to adopt such a resolution, or to do the work contemplated by the proposed resolution, and you submit the question of the legality of the proposed action by the county board to the attorney general for an opinion.
To the extent that your opinion holds that the county board has no authority to require any town in the county to levy a minimum tax for the construction and maintenance of town roads, I concur therein. The construction and maintenance of town highways and bridges and the amount of taxes to be raised for that purpose are matters wholly within the jurisdiction of the towns themselves, subject only to the limitations of the statutes. Ch. 81, Stats. The county board clearly cannot compel action with reference thereto.

I think, however, that a resolution of the county board providing that where any town, by action of the town meeting, levies a specified minimum tax within its powers for town highway purposes and requests and authorizes the county to expend funds so raised together with the allotment of state funds referred to and do the work of constructing and maintaining the town highways, the county highway committee shall do such work, using the county road machinery and charging against the cost of such work a reasonable sum for the use of such machinery and perhaps for expense of supervision, would be free from legal objection. There is express authority for the doing of such work by the county with the allotment funds on request of the town board (see the provision of the statutes first above quoted) and I have no doubt that the town may make the county its agent for the doing of such work with the funds provided by its tax levy for the purpose. The county is expressly authorized by sec. 83.03, subsec. (6), Stats., to construct or improve or aid in constructing or improving any road or bridge in the county, and may commit the execution of such work to the county highway committee under the provisions of sec. 82.06.

The advantages to the towns, the county and the general public of such an arrangement between the towns and the county in the securing of a more economical and efficient construction and maintenance of highways in the county are apparent, and I see no legal impediment to carrying out such a plan voluntarily entered into by the towns and the county.

FEB
Appropriations and Expenditures—Public Officers—Board of control is not authorized to purchase machinery, equipment and material for manufacture of rugs in workshop for blind.

November 10, 1926.

BOARD OF CONTROL.

You state that the Wisconsin workshop for the blind is operated under sec. 47.05, Stats., and the funds therefor are appropriated under sec. 20.17, subsec. (7). You wish to be advised whether or not it is proper for said workshop to engage in the making of rugs in addition to the present willow ware and basketry being manufactured, to purchase raw materials and equipment for the manufacture of rugs, and to pay from the proceeds the wages and other costs incidental to their manufacture.

Under sec. 47.05 your board is authorized to furnish blind artisans availing themselves of the privilege of the institute a limited amount of materials and tools required in their employments. Sec. 20.17 provides that appropriations from the general fund to the state board of control shall be:

On July 1, 1925, ten thousand dollars, together with any materials then in stock, pursuant to the provisions of this subsection, to be invested in materials, payment of artisans, and for expenses incident to manufacture and sale of basketry and willow ware; and whenever any such materials, or the articles manufactured therefrom, are sold, the proceeds thereof shall be paid into the general fund within one week of receipt, and credited back to this appropriation.” Subsec. (7), par. (c).

Sec. 20.17, subsec. (7), specifically enumerates the purposes for which the appropriation shall be devoted, and sec. 20.17 (7) (c) directs the investment of such appropriation in materials, payment of artisans and for expenses incident to manufacture and sale of basketry and willow ware.

When the legislature has set aside a fund and named the purposes for which it shall be used, it may be expended only for the objects set forth. In this connection you are referred to X Op. Atty. Gen. 790, XI Op. Atty. Gen. 819 and XIII Op. Atty. Gen. 579.

Nothing being said by the statute on rugs, their employment and manufacture, you are advised that your board is not at liberty to make the purchases aforementioned.

MJD
School Districts—School district composed of territory detached and organized under provisions of sec. 40.85, Stats., is not legal school district.

November 11, 1926.

JOHN CALLAHAN,
Superintendent of Public Instruction.

The material facts presented in your letter of October 11 are as follows:

In July, 1926, Joint School District No. 3 of the city of Lancaster and towns of North and South Lancaster comprised the entire city of Lancaster and parts of the towns of North and South Lancaster. Under the provisions of ch. 431, Laws 1925, sec. 40.85, Stats., certain territory was in August, 1926, detached from Joint School District No. 3, and the territory thus detached was organized as Joint School District No. 13. You inquire whether Joint School District No. 13 is a legally organized school district.

Your question is answered in the negative.

In State ex rel. Brown v. Haney, 209 N. W. 591, the supreme court held that ch. 431, Laws 1925, was unconstitutional. The organization of Joint School District No. 13 was, therefore, invalid unless the organization was effected under some other statutory provision.

Subsec. (1), sec. 40.03, provides as follows:

"A district shall be deemed organized when any two of the officers elected at its first legal meeting file with the clerk and cause to be recorded in the minutes of such meeting their written acceptance of the offices to which they have been respectively elected or where such officers fail to state refusal to hold the office in writing. A district shall also be deemed legally formed when it has been duly organized and has exercised the rights and privileges of a district for a period of four or more months, and no appeal or other action attacking the legality of the formation of such district, either directly or collaterally, shall be taken after such period has expired."

This section provides that a school district shall be deemed organized when any two of the officers elected at the first legal meeting shall file their written acceptances of their respective offices, or where such officers fail to state their refusal to hold the office in writing within ten days after the date of their election. The statute further provides that a district shall also be deemed legally formed when it has been duly organized and
has exercised the function of a school district for a period of four months.

Joint District No. 13 held a meeting and elected officers after the territory comprising this district had been detached from Joint District No. 3, in accordance with the provisions of sec. 40.85. Since the latter section was declared unconstitutional the effect of the statute was as if it had never been. Hence, the meeting at which the officers were elected was not a legal meeting within the meaning of subsec. (1), sec. 40.03.

Again, Joint District No. 13 is composed entirely of the territory detached from Joint District No. 3. There was no statutory authority for the detachment of this territory for the purpose of forming a new joint district. For this reason Joint District No. 13 has never been duly organized and has never exercised the function of a school district within the meaning of these terms as used in subsec. (1), sec. 40.03.

Subsec. (1), sec. 40.03 is the only section under which it might be contended that the organization of Joint District No. 13 could have been perfected. In view of the fact, as above shown, that the provisions of subsec. (1), sec. 40.03, did not apply to the organization of Joint District No. 13, and in view of the fact that sec. 40.85 has been declared unconstitutional, it is the opinion of this department that Joint District No. 13 is not a legally organized school district.

SOA

Appropriations and Expenditures—Public Officers—Deputy Fire Marshal—Expenses incurred by deputy fire marshal in defending action of malicious prosecution growing out of attempt to perform his official duties cannot be paid out of appropriation to state fire marshal under sec. 20.55, Stats., nor out of appropriation to attorney general under sec. 20.08. Such officer must present his claim to legislature.

November 11, 1926.

Commissioner of Insurance.

The material facts presented in your inquiry of recent date are as follows:

One of the deputy fire marshals swore out a criminal complaint charging a certain party with the crime of arson. Subsequently, the accused in the arson case brought a civil action
against the deputy fire marshal for malicious prosecution. The jury returned a verdict in favor of the deputy fire marshal. The deputy fire marshal incurred expenses in defending the charge brought against him which amounted to $409.83, which amount included attorney's fees. You inquire whether the deputy fire marshal may be reimbursed presently for the expenses he has incurred, or whether he must present his claim to the legislature.

Sec. 200.18, Stats., provides that the commissioner of insurance shall be ex officio state fire marshal. This section further provides that the state fire marshal may appoint such deputy fire marshals as may be necessary for the carrying out of the duties of the office of state fire marshal. Sec. 20.55, subsec. (4), par. (b), appropriates to the commissioner of insurance for the execution of his functions as ex officio state fire marshal:

"Such salary or compensation of assistants, deputies, clerks, stenographers and other employes under the commissioner of insurance as ex officio state fire marshal, as shall be fixed by said commissioner with the approval of the governor."

The statutes do not grant to the commissioner of insurance the power to expend money for the payment of expenses incurred by a deputy fire marshal in defending a civil suit of malicious prosecution instituted against him.

Subsec. 3, sec. 172-7, Stats. 1915, appropriated to the attorney general as follows:

"There is annually appropriated, beginning July 1, 1913, such sums as may be necessary, payable from any moneys in the general fund not otherwise appropriated, as a legal expense appropriation to cover the cost of special counsel and other litigation expenses incurred in the defense or prosecution of action and proceedings involving the state, or any officer thereof in his official capacity, and which cost or expense is not charged to some other appropriation."

Subsec. 3, sec. 172-7, Stats. 1915, now appears in the statutes as subsec. (2), sec. 20.08, which appropriates to the attorney general:

"Annually, beginning July 1, 1917, such sums as may be necessary to cover the compensation and expense of special counsel appointed as provided in section 14.13; and for the payment of expenses incurred by the attorney general, his deputy or assistants, in the prosecution or defense of any action or proceeding in which the state may be a party or may have an inter-
OPINIONS OF THE ATTORNEY GENERAL

est, for any abstract of title, clerk of court's fees, sheriff's fees, or any other expense actually necessary to the prosecution or defense of such cases; unless such cost or expenses are charged to some other appropriation."

The attorney who represented the deputy fire marshal was not appointed special counsel by the governor nor by the attorney general. Consequently the expenses incurred in the defense cannot be charged to the appropriation provided for in subsec. (2), sec. 20.08.

The only provision in the statutes relating to the defense of actions instituted against state officers is found in sec. 20.08.

The charge of malicious prosecution grew out of an attempt on the part of the deputy fire marshal to perform the duties imposed by law. There appears, however, to be no specific authority granted to pay this claim at this time, and I would, therefore, suggest that your deputy present his claim to the next legislature.

SOA

Courts—Criminal Law—Search Warrants—Justice of peace and police justices of Manitowoc county have no jurisdiction to issue search warrants in cases involving misdemeanors, but they have right to issue search warrants involving felonies.

November 11, 1926.

LOUIS C. GUNDERSON,
Prohibition Commissioner.

You have referred me to ch. 17, laws of 1895, which creates the municipal court of Manitowoc county, and contains the following provision, after describing the jurisdiction conferred upon said municipal court, to wit:

"* * * And no justice of the peace, police justice or court commissioner within said county shall exercise any jurisdiction in criminal cases, except that in cases of felony, justices of the peace may issue warrants returnable before the judge of said municipal court, and when so doing, they shall cause the complaint in such action to be forthwith filed in said criminal court."

In view of this provision you submitted the following questions:
1. Can justices of the peace in Manitowoc county issue search warrants for the search of premises within their county?

2. Can police justices issue search warrants to search premises within their cities?

Sec. 363.01, Stats., provides:

"When complaint shall be made on oath to any magistrate authorized to issue warrants in criminal cases that [stating the grounds], the magistrate, if he be satisfied that there is cause for such belief, shall issue his warrant to search for such property."

In sec. 363.03, the magistrate is authorized to order the property searched brought "before the magistrate who issued the warrant or before some other magistrate or court having cognizance of the case."

The provision first quoted creating the municipal court of Manitowoc county is a special provision and would be controlling here. Search warrants are issued in criminal cases; and in so far as the jurisdiction in criminal cases was taken from the justices of the peace in Manitowoc county, their right to issue search warrants has also been taken away. In other words they cannot issue search warrants in cases involving an offense which is merely a misdemeanor. I think this is fairly clear from the above quoted provisions of the statute.

I am also of the belief that in view of the fact that the justice of the peace and police justices still have the right to issue warrants in cases involving a felony, in felony cases they may also issue search warrants. I believe this answers both of your questions.

JEM

Criminal Law—Requisitions—Prisoner in Wisconsin state reformatory who has been placed out on parole, who escapes and leaves state, is guilty of crime of escape within contemplation of sec. 346.40, subsec. (1), Stats.

HONORABLE JOHN J. BLAINE,
Governor.

I have examined the application for requisition papers for the rendition of Allen Smith, who is charged with the crime of escape from the Wisconsin state reformatory and has escaped to the state of Pennsylvania. It appears that Allen Smith was
out on parole at the time of his escape, but as the Wisconsin statute expressly provides that he is still in custody while out on parole there can be no question but that this is an escape under our statute as alleged in the complaint filed against Allen Smith. In the case of Saylor v. Commonwealth and Smith v. Commonwealth, 93 S. W. (Ky.) 48, it was held that where prisoners in custody of a jailer fled from him while being worked on a highway, as the jailer was authorized to do, such flight constituted an escape to the same extent as though the prisoner had escaped from jail.

The statutes of Kentucky were somewhat similar to those of Wisconsin. The court said:

"The appellants, though not in jail, were in the custody of the jailer and when they escaped from the guard by running away from him they escaped from jail."

The jailer is authorized by the statute to work the prisoners on the highway and while there they are as fully in custody as when actually in jail. To escape from the custody of the jailer is to escape from jail within the meaning of the statute.

In the case of State v. Wright, 81 Vt. 281, 69 Atl. 761, it was held that in a prosecution for an escape it was no defense that defendant left the jail under orders to work at a certain place, and that being without a guard he left such place, and in the case of Jenks v. State, 39 S. W. (Ark.) 361, it was held that a convict who is serving his term of imprisonment and is required to remain within certain bounds and obey prison rules is guilty of escape in fleeing from the state, though he had been made a trusty and was not confined within the prison walls or kept under guard.

Our court has not passed upon the question here discussed, but under the above authorities and our statute I believe that a man who escapes from custody after being put out on parole is guilty of the crime of escape.

I therefore approve said requisition.

JEM
Contracts—Education—Where contract is entered into between school board and teacher, commencing Sept. 8 in certain year and terminating nine months later, and where teacher at time contract was entered into held certificate authorizing him to teach, fact that certificate expired March 1 following year does not preclude recovery under contract on part of teacher for contract period commencing Sept. 8 and terminating March 1 following year.

Herman R. Salen,
District Attorney,
Waukesha, Wisconsin.

In your letters of November 3 and November 12 you state that the school board of a school district on April 13, 1925, entered into contract with one C. K. to teach school for a period of nine months, said term commencing on September 8, 1925. On March 1, 1925 the said C. K. was granted a special license to teach for one year. The work of the said C. K. was not approved by the state supervisor nor by the county superintendent of schools; and for this reason the license to teach was not extended. The school board now refuses to comply with the contract for the reason that the teacher did not have the necessary qualifications to teach the full term, and for the further reason that the license of the said C. K. expired on March 1, 1926. You inquire whether the contract is valid for any purpose and whether the school teacher is entitled to recover damages by reason of the refusal of the school board to accept his services from September 8, 1925 to March 1, 1926.

Subsec. (1), sec. 40.28, Stats., provides:

"The board shall contract with qualified teachers, specify in the contract the wages per week, month or year to be paid and when completed file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk. No contract with any person not holding a diploma or certificate authorizing him to teach shall be valid; and all such contracts shall terminate if the authority to teach expire by limitation and be not renewed or be revoked."

At the time the contract was entered into with the said C. K. he was a "qualified teacher" within the meaning of subsec. (1), sec. 40.28. The contract, therefore, in its inception was legal. However, on March 1, 1926, the certificate to teach expired and was not renewed. Consequently on March 1, 1926, the teacher
ceased to be a qualified teacher within the meaning of the statute, and in compliance with subsec. (1), sec. 40.28, the contract terminated on March 1, 1926.

It follows that the teacher is entitled to recover under the contract from September 8, 1925, to March 1, 1926.

SOA

Banks and Banking—State bank chartered in certain town, village or city in this state cannot move its bank to another town, village or city in this state.

Charter of state bank cannot be amended so that location of bank can be changed from one municipality to another.

November 18, 1926.

W. H. Richards,

Deputy Commissioner of Banking.

In your letter of November 4 you ask the following questions:

"Can a state bank chartered in a certain town, village or city, in this state move its bank to another town, city or village in this state?"

"Can the charter of a state bank be amended so that the location of the bank can be changed from one place to another?"

The application to the banking commissioner for the purpose of organizing a bank required that the location of the proposed corporation be set forth (sec. 221.01, subsec. (2)); sec. 221.01, subsec. (5), requires the commissioner of banking to ascertain among other things, "the outlook for the growth and development of the city, town, or village in which such bank is to be located, and the surrounding territory from which patronage would be drawn."

Sec. 221.01, subsec. (6), Stats., provides:

"Should the result of the investigation satisfy the commissioner of banking that the facts and conditions justify him in authorizing the organization of the bank and that the public will be benefited thereby, he shall indorse on each of the duplicate original applications the word 'approved' over his official signature, but if the commissioner of banking is not so satisfied or believes the public interests will be endangered, he shall indorse the word 'disapproved' thereon. One of the duplicate originals shall be filed in his office and the other returned by mail to the applicants."
The articles of incorporation must contain, among other things, "the particular village, town or city, and the county where such bank is to be located" (sec. 221.03, subsec. (2), par. (c)). Since the application, the investigation, the approval of the banking commissioner, and the articles of incorporation all concern a particular municipality, it would be absurd to permit a bank chartered in one town to move to another town.

This department held in VI Op. Atty. Gen. 600, that a bank may move its main banking house or branch to another location in the same municipality; and inferentially, at least, that opinion negatives the idea of a change of location to any other municipality.

Sec. 221.12, Stats., which provides for the amendment of the articles of association of a bank, contains no express provision permitting the amendment of a charter so as to allow the change of location of the bank from one place to another. The right to make such a radical change by amendment cannot be inferred. Such a change would constitute the starting of a bank in a new community; and therefore the regular procedure for the organization of a bank must be followed.

ML

Criminal Law—Indeterminate Sentences—Conviction for offense of assault with intent to murder or rob as defined in sec. 340.40, Stats., requires indeterminate sentence minimum of which must be not more nor less than one year. If parties are repeaters trial court may, under sec. 359.12, impose indeterminate sentence minimum of which must be minimum of crime previously committed by defendant.

HONORABLE JOHN J. BLAINE,
Governor.

You state in your letter of November 17 that you have a pardon application before you where three men were sentenced under sec. 340.40 on the charge of assault with a dangerous weapon, with intent to rob, each being sentenced for an indeterminate term of not less then seven years nor more than twenty years.

You inquire whether this sentence is irregular under the law in that it fixes the minimum at seven years. The penalty for
assault with intent to murder or rob, under said sec. 340.40, is imprisonment in the state prison not more than thirty years nor less than one year. Under sec. 359.05 the trial court is required to sentence the convict for a general indeterminate term, the minimum of which sentence must not be more than the minimum punishment fixed by statute. But if it is ascertained by the court in compliance with sec. 359.12 that the convicts are repeaters, then a heavier sentence may be imposed. Said sec. 359.12 reads as follows:

"When any person is convicted of any offense punishable only by imprisonment in the state prison and it is alleged in the indictment or information therefor and proved or admitted on the trial or ascertained by the court after conviction that he had been before sentenced to punishment by imprisonment in any state prison, or state reformatory, by any court of this state, or any other state or of the United States, and that such sentence remains of record unreversed, whether pardoned therefor or not, he may be punished by imprisonment in the state prison not less than the shortest time fixed for such offense and not more than twenty-five years."

Penalty for assault with intent to murder or rob is imprisonment in the state prison only so that the provisions of sec. 359.12 are applicable thereto. It follows that if the trial court ascertained at the trial that the defendants were previously convicted and sentenced to imprisonment in the state prison, as provided in sec. 359.12, the trial court may impose the punishment for the offense for which the convicts have been previously convicted and sentenced. For instance, if it is shown at the trial court that the defendants were previously convicted and sentenced for murder in the third degree, for which the punishment is imprisonment in the state prison not more than fourteen years nor less than seven years, the trial court would be empowered to sentence the defendants to an indeterminate term of not less than seven years nor more than twenty years. As to whether the sentence is irregular will therefore depend upon the fact whether the trial judge has proof before him as required by sec. 359.12 that the defendants were repeaters, and that they were previously convicted and sentenced for an offense for which a penalty was prescribed which had a minimum of imprisonment in the state prison of seven years.

JEM
Banks and Banking—Trust Company Banks—Bank given fiduciary powers under sec. 221.04, subsec. (6), Stats., has same trust powers as are conferred by sec. 223.03, subsec. (7), on trust companies.

W. H. Richards,  
Deputy Commissioner of Banking.

You call attention to subsec. (6), sec. 221.04, Stats., and you ask whether this section confers upon state banks the trust powers given to trust companies by subsec. (7), sec. 223.03.

Subsec. (6), sec. 221.04, Stats., provides in part:

“When thereto authorized by the commissioner of banking, and if and after it shall have in good faith complied with all requirements of law and fulfilled all the conditions precedent to the exercise of such powers imposed by law upon trust company banks, except section 223.02, any bank may act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, and in any other fiduciary capacity in which trust company banks are permitted to act and when so appointed, is authorized and shall be required to execute bond with a corporation authorized to transact surety business as surety in such amount and in other respects as shall be directed or approved by the court exercising jurisdiction of such trust.”

It should be noticed that this section after specifying certain particular cases in which the bank may act when given trust powers, expressly provides that it may act “in any other fiduciary capacity in which trust company banks are permitted to act.” The only restriction on the power is that when the bank is appointed in a fiduciary capacity it must require a surety bond in the amount and nature directed or approved by the court exercising jurisdiction of such trust. The words “when so appointed” do not limit the power of the trust company to cases where there is an appointment by a court, but merely require that a bond be given in certain cases where trust companies are not required to give bonds. See subsec. (8), sec. 223.03, Stats.

It should be remarked that various provisions of subsec. (6), sec. 221.04 (not quoted), indicate an intention to give the banks the same power as trust companies. For instance, the application is for permission to exercise “such fiduciary powers;” the commissioner of banking is required to take into consideration
the amount of capital and surplus of the bank and whether the capital and surplus are sufficient to serve the needs of the community; and there is the express proviso "that no special authorization shall be issued to any such bank having a capital less than the capital from time to time required by law of a national bank exercising fiduciary power in the same place."

ML

Public Officers—County Highway Commissioner—Town Chairman—Offices of county highway commissioner and town chairman are compatible in counties operating under commission form of county government as provided in sec. 59.95, Stats.

C. J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

The material facts presented in your letter of November 8 are as follows:

Burnett county is operating under sec. 59.95, Stats., which provides for a commission form of county government. Under this system the chairmen of the various towns are not members of the county board. A chairman of one of the towns in your county is a candidate for county highway commissioner at the November meeting of the commissioners. You inquire whether the town chairman may be elected county highway commissioner. You call attention to XIV Op. Atty. Gen. 135 and XII Op. Atty. Gen. 108.

The question of compatibility of two offices depends largely upon the statutes. Offices are ordinarily compatible unless there is a specific statute prohibiting the holding of the two offices by one person, or unless there is a valid reason based on public policy which would prevent the two offices from being so held. Subsec. (2), sec. 66.11, Stats., provides:

"No member of a town, village, or county board, or city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such board or council."

Under the commission form of county government as provided in sec. 59.95 the county board is superseded by a board
composed of commissioners elected by the voters in the various commissioner districts. So far as the town chairman is concerned the office of county highway commissioner is not one created by, or the selection to which is vested in a board of which the town chairman is a member. Consequently the town chairman is not inhibited from holding the office of county highway commissioner under the provisions of subsec. (2), sec. 66.11.

There is no statute and no reason based on public policy which would prohibit the town chairman from holding the office of county highway commissioner. In the absence of such restrictions it follows that the two offices are compatible. SOA

Criminal Law—Complaints—Physicians and Surgeons—Public Officers—Board of medical examiners may employ special investigator to secure evidence on various men illegally practicing medicine and osteopathy.

Board of medical examiners has no power to clothe special investigator with police powers.

Special investigator appointed by board of medical examiners has not privilege of wearing star indicating possession of police powers.

ROBERT E. FLYNN, Secretary,
Board of Medical Examiners,
La Crosse, Wisconsin.

In your letter of November 11 you ask three questions which will be quoted and answered successively:

1. "Our state board of medical examiners is planning on employing a special investigator to secure evidence on various men who are practicing medicine and osteopathy illegally in our state. I should like to know if there is any legal objection to our doing so."

Subsec. (4), sec. 147.13, Stats., provides:

"The board shall employ a licensed attorney as counsel and other necessary assistants, and fix their compensation. The counsel shall attend the meetings of the board, advise the members, and assist the board generally."

Subsec. (6), sec. 147.13, Stats., provides:
“The board shall investigate complaints of violation of this chapter, notify prosecuting officers, institute prosecutions, and if it so direct, and the court and district attorney consent, its counsel shall assist the district attorney.”

In an opinion rendered by this department in XIII Op. Atty. Gen. 514, it was said in regard to subsec. (6):

“I believe that under the provisions of this section it was contemplated that your board should have more power than that merely of investigating complaints and then requesting some person to actually sign the same.”

Subsec. (4) gives you the power to employ necessary assistants. Since the investigation of violations of ch. 147, which concerns treating the sick, is one of your duties, it follows that you may employ a special investigator for that work.

2. “Has our board the power to clothe such special investigator with police powers, so that he may file a complaint with the district attorney in such cases as we find are practicing illegally?”

The statutes do not grant to your board the power to confer police powers upon a special investigator and therefore you do not possess such power. It is not necessary, however, for the special investigator to have police powers in order to file complaints with the district attorney. In XIII Op. Atty. Gen. 514, it was said:

“* * * The law appears to contemplate that criminal complaints should be signed by an individual. It would appear, however, perfectly proper for your board, after having made an investigation of any case, to direct either the secretary or one of its members who is familiar with the matter to sign the complaint, * * *”

There is not reason why the complaint may not be signed by the special investigator as well as by the secretary or a member of the board.

3. “Would such a man be privileged to wear a star indicating that he had police powers?”

Since your board cannot confer police powers upon a special investigator, naturally he would not possess the privilege of wearing a star to indicate the possession of police powers.
ML
**Criminal Law—Definite Sentences—Prisons—Parole—Definite sentence for offense for which statute does not provide minimum penalty must be considered as definite sentence; board of control will then have right to parole after prisoner has served one-half of sentence.**

*November 24, 1926.*

**BOARD OF CONTROL.**

You have submitted the following:

"When a definite sentence of one year is given a first offender, guilty of felony, the penalty for which provides no minimum but only a maximum, may the offender come up for hearing for parole at the expiration of one-half the sentence pronounced by the court, or must he be held until the expiration of sentence set by the court?"

"The following is a hypothetical case illustrating the question. John Doe is sentenced for one year for abandonment. The penalty for abandonment (351.30) is imprisonment in the state prison, county jail or workhouse not exceeding two years. There is no minimum set by statute. He is a first offender. The crime is a felony. Shall it be construed by this board that he was sentenced indeterminately as a first offender and that the minimum which he shall serve must be one year, or shall it be construed by this board that he was sentenced determinately, that the maximum is one year, as set by court, and could he apply for hearing for parole at the expiration of six months' time? This is a hypothetical case illustrative of a number of similar cases which have come before this board."

The statute does not seem to make provision for a case such as you present. A sentence of general, indeterminate term is to be given in all cases except those specified in sec. 359.05, Stats., namely, treason, murder in the first degree as defined by law, rape, kidnapping, or crimes for which a minimum penalty is fixed by statute at twenty years or more. The form for an indeterminate sentence is given as follows:

"You are hereby sentenced to the state prison at Waupun at hard labor for a general indeterminate term of not less than (the minimum for the offense) years, and not more than (the maximum fixed by the court) years, and shall have the force and effect of a sentence of the maximum term, * * *.*"

The statute provides further:

"* * * If through mistake or otherwise any person shall be sentenced for a definite period of time for any offense for which he may be sentenced under the provisions of this sec-
tion, such sentence shall not be void, but the person shall be deemed to be sentenced nevertheless as defined and required by the terms of this section. * * *”

The legislature seems to have overlooked the fact that there are penalties provided in the statute without specifying a minimum, but only giving the maximum of the penalty. It is therefore impossible to sentence them to an indeterminate sentence in those cases. I suppose because of this fact the trial courts have given a definite sentence in all cases where the penalty provided for the offense, for which the accused was convicted, had no minimum.

Such sentence being definite, and it being impossible to consider it an indeterminate sentence, I believe the board will have the power to parole the prisoner if he has served at least one-half of the term for which he was sentenced as provided for in sec. 57.06. In other words, it must be considered as a definite sentence. I see no other practical solution of the problem presented by your inquiry.

JEM

Criminal Law—Indeterminate Sentences—Indeterminate sentence law enacted by ch. 359, Laws 1925, is not retroactive so as to change sentences already imposed by court prior to its enactment.

November 24, 1926.

You state that on January 19, 1925, a man was sentenced to three years in the state prison at Waupun, convicted of the crime of forgery; that the courts stayed the sentence and placed the man on probation; that on December 23, 1925, the probation of this man was canceled and he was ordered incarcerated in keeping with the judgment of the court. You therefore refer to ch. 359, Laws 1925, which went into effect upon passage and publication. It was published June 26, 1925. This chapter provides, among other things, that if through mistake or otherwise any person should be sentenced for a definite period of time for any offense for which he may be sentenced under the provisions of sec. 359.05, such sentence shall not be void, but the person shall be deemed to be sentenced nevertheless, as defined and required by the terms of the section.
You state that this man was convicted for forgery which falls into the class of crimes to which the indeterminate sentence act applies in the case of first offenders, and you ask whether this man is entitled to be paroled after he has served half of his term, or whether he may be paroled after he has served the minimum of an indeterminate sentence for the crime of forgery. In other words, is a prisoner sentenced prior to enactment of the indeterminate sentence act, but who was not received at the prison until after the indeterminate sentence law became effective, entitled to consideration for parole upon the expiration of the minimum sentence provided in the law for his offense, or must he serve one-half of the definite term to which he was sentenced before he becomes eligible to consideration for parole?

The provisions of ch. 359 do not purport to change sentences already imposed by the court. It is not retroactive as to past sentences. It applies only to sentences that are to be imposed after the enactment of said law. This is a general principal applicable to statute law, and there is no reason why it should not be applicable in this case. You are, therefore, advised that the prisoner will be entitled to parole only after he has served one-half of the three years for which he was sentenced.

JEM
School Districts—Dissolution of School Districts—Assets of union free high school district which has been dissolved pursuant to sec. 40.605, Stats., belong to town, city or village in which they are located at time dissolution takes effect.

John Callahan,
Superintendent of Public Instruction.

The material facts presented in your letter of November 11 are as follows:

On August 25, 1925, the electors at a special meeting voted to dissolve the Union Free High School District of the Town of M. The Union Free High School District of M has no bonded indebtedness and no school building. The Union Free High School District has, however, assets in the form of money. On September 10, 1925, a portion of the Town of M was incorporated as a village. You refer to sec. 40.605, Stats., and inquire whether the assets of the Union Free High School District on dissolution become the property of the town of M or the village of M.

Sec. 40.605 provides:

"Any union free high school district which has no bonded indebtedness and no school building may, in addition to any other method provided by law, be dissolved" in the manner provided in this section.

Subsec. (6), sec. 40.605, provides that if a majority of the votes cast at the special election shall be for dissolution, "such district shall be dissolved as of July first, following such election."

Subsec. (7), sec. 40.605, provides:

"In case of dissolution there shall be no division of assets but all property of the district so dissolved shall become the property of the town, city or village in which the same is located."

The Union Free High School District of the town, now village of M, has no bonded indebtedness and no school building. The district, therefore, may be dissolved in accordance with the provisions of sec. 40.605.

The assets of the district must be disposed of in accordance with the provisions of subsec. (7), sec. 40.605. At the time the election provided for in sec. 40.605 was held the assets of the district were located in the town of M. Subsec. (6), sec. 40.605, however, specifically provides that dissolution after the vote
at the special election shall not take effect until the following July first. On July 1, 1926, the assets of the district were located in the village of M. Such assets, therefore, become the property of the village of M, as provided in subsec. (7), sec. 40.605, Stats.

SOA

Bridges and Highways—Damages—Repeal of subsec. 5, sec. 1317, Stats. 1921, did not relieve county from liability for defects in trunk highways.

December 3, 1926.

WARREN B. FOSTER,
District Attorney,
Hurley, Wisconsin.

Restating your question, as I understand it, it is: Assuming that a portion of a state trunk highway in the county is not properly or adequately maintained and is defective in fact, is the county liable in damages to a traveler who, being free from contributory negligence, suffers an injury proximately caused by such defect?

The answer is in the affirmative.

You refer to Sipple v. Fond du Lac County, 184 Wis. 607, in which a recovery was sustained under the conditions stated in your question but which you assume was based entirely upon the express provisions of subsec. 5, of sec. 1317, Stats. 1921, which, as you say, was repealed by sec. 165a, ch. 108, Laws 1923, and you state that as far as you have been able to discover, no similar provision has been enacted by the legislature.

Ch. 108, Laws 1923, was the enactment of a revision bill. The revisor's note to said sec. 165a of that chapter (to which recourse should be had for the purpose of determining the legislative intent, see Pfingsten v. Pfingsten, 164 Wis. 308; State ex rel. Globe Steel Tubes Co. v. Lyons, 183 Wis. 107) is as follows:

"This subsection [5, of 1317, Stats. of 1921] is repealed because its provisions are fully covered by sections 1339, 1340 and 1340a" (now 81.15, 81.16 and 81.17, respectively).

While the repealed subsection was referred to and quoted in the opinion of the court in the Fond du Lac county case, the liability was sustained on the broad ground that the statute made it the duty of the county to keep the trunk highways in repair, which latter statute, also referred to and quoted in the
opinion, remains in full force and effect as sec. 84.07. Sec. 81.15 expressly 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. * * *"
FEB

Legislature—Privilege from arrest of members of legislature as provided for in art. IV, sec. 15, Wis. Const., does not apply to assemblyman who was arrested for violating state law against speeding with his automobile.

December 3, 1926.

PETER M. HUIRAS,
District Attorney,
Port Washington, Wisconsin.

You say that a short time ago an assemblyman who is a Milwaukee attorney was stopped for speeding in your city when he was going at about thirty-five miles an hour and passed cars; that this assemblyman claims he is exempt from arrest under art. IV, sec. 15, Wis. Const. In other words, he claims because he is an assemblyman he can speed all he wants to, and his office grants him immunity from arrest. You inquire whether his contention is correct.

Art. IV, sec. 15, reads thus:

"Members of the legislature shall in all cases, except treason, felony and breach of the peace, be privileged from arrest; nor shall they be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session."

The semicolon following the word "arrest" in the second line was not placed there by the convention that drafted the constitution. The Journal and Debates of the Constitutional Convention contains the provision as we have it today, but in place of the semicolon we have a comma after the word "arrest." See Journal and Debates of the Constitutional Convention 1847–1848, pages 118 and 606. The rejected constitution which was drafted by a convention two years prior to the one that drafted our present constitution had the provision in practically the same wording. It read thus:
"Senators and representatives shall in all cases except treason, felony, and breach of the peace, be privileged from arrest, nor shall they be subject to any civil process during the session of the legislature, nor for fifteen days before the commencement and after the termination of each session." Journal and Debates of the Constitutional Convention 1847–1848, page 634, being art. V, sec. 11, of the rejected constitution.

I am of the opinion that the underlined part of sec. 15, art. IV, of our constitution above quoted modifies all that goes before it. I am persuaded that this is the correct construction to be placed upon it, because the privilege from arrest is nowhere found to be so broad as to exempt a legislator from arrest during his whole term of office when there is no session pending, and it is not within a reasonable time before or after said session. As so interpreted, the assemblyman is not exempt at the present time because it is more than fifteen days before the commencement and after the termination of a session of the legislature.

The discussion in *Doty v. Strong*, 1 Pin. 84, and in *Anderson v. Rowntree*, 1 Pin. 115, concerning the privilege from arrest of legislators prior to the enactment of our constitution is instructive and shows that a reasonable and liberal construction should be placed upon the law providing for the privilege; but it seems to be well settled that a constitutional privilege of senators and representatives from arrest in all cases "except treason, felony and breach of the peace" during their attendance at the session, and in going to and returning from the same, confers merely a privilege from arrest in civil cases as those terms comprehend all criminal offenses. 5 C. J. 388; *Williamson v. United States*, 207 U. S. 425, 2 R. C. L. 481, par. 40.

The *Williamson v. United States* case is a well-reasoned case, and it shows clearly that the words "treason, felony and breach of the peace" as used in the constitution, should be construed in the same sense that those words were commonly used and understood in England as applied to the parliamentary privilege, and as excluding from the privilege all arrests and prosecutions for criminal offenses, and confining the privilege alone to arrests in civil cases. This decision to my knowledge has never been questioned nor modified.

The same words "treason, felony and breach of the peace" as used in our constitution undoubtedly should be given the same interpretation. I am aware of the decision of our court in the case of *State ex rel. Eisenring v. Polacheck*, 101 Wis. 427, in
which our court held that the word "felony" as used in our constitution in sec. 15, of art. IV, must be limited to such offenses as were felonies at the time the constitution was adopted. But it was not necessary for the court to pass upon that question, as the court held that the legislator in that case had waived the right which the court said was a personal privilege merely, and could be waived, and also that the writ of habeas corpus issued in that case was not the proper remedy.

For the above reasons which I have collected during the short time that I have had to pass upon this question, I am constrained to hold that the assemblyman in question is not privileged from arrest for unlawful speeding; that he is subject to arrest at this time for violation of any criminal law of which he may be guilty. I have assumed in this opinion, although you do not state it in your request, that he is arrested for violating the state law instead of a city ordinance. If he was arrested for violating a city ordinance then the prosecution would be a civil case, and he would still be subject to arrest under the interpretation here given by reason of the fact that it is more than fifteen days before the beginning of a session and more than fifteen days after the close of the session.

JEM

Architects—Person or firm not registered as architect in Wisconsin may not employ titles "architectural engineer," "architectural designer" or "bachelor of architecture" in business of making plans and specifications and supervising construction of buildings.

December 4, 1926.

Board of Examiners of Architects.

You wish to know whether a person or firm not registered as an architect in Wisconsin may lawfully employ the title of architectural engineer, architectural designer or bachelor of architecture in business of making plans and specifications and supervising the construction of the same in Wisconsin.

Sec. 101.31, subsec. (1), Stats., provides:

"No person doing business in this state shall use the term 'architect' as a part of his business name or title or in any way represent himself to be an architect, without a certificate of registration, as provided in this section."
An architect is a person skilled in the art of building; one who understands architecture or makes it his occupation to form plans and designs of buildings and to superintend the artificers employed. *Wilson and Edwards v. City Council of Greenville*, 65 S. C. 426, 43 S. E. 966, 967.

An architect is one who makes it his occupation to form or devise plans and designs and to draw up specifications for buildings and structures and to superintend their construction. *People v. Lower*, 96 N. E. 346, 347.

In *Hickey and Velguth v. Sutton* (Wis.), 210 N. W. 704, recovery was denied the plaintiffs who held themselves out as architects contrary to the terms of the statute. They had prepared and furnished plans to the defendant and the words "architects and builders" appeared on the plans of the plaintiffs. The court said:

"The statute 'does not in express terms make the mere rendering of architectural services by one not holding a license certificate unlawful, nor does it in express terms make a contract for such services by one not holding a license certificate unenforceable; but the language of the act manifestly expresses the legislative intent that it shall be unlawful for one not holding a license certificate to assume the professional title of architect and as such enter into a contract to render architectural services.'"

Statutes prohibiting in any manner holding out as an attorney at law or solicitor in chancery or representing oneself, either verbally or in writing, directly or indirectly, as authorized to practice law are violated by calling oneself a collection attorney while not licensed to practice law. *People v. Schreiber*, 95 N. E. 189.

Calling himself "attorney, solicitor of American and foreign patents" violated the statute similar to the one aforementioned. *People v. Erbaugh*, 94 Pac. 349.

So held where a statute provided that one may not advertise, represent or hold himself out in any manner as an attorney, attorney at law, or counselor at law, when he calls himself a lawyer without a license to practice law. *People v. Taylor*, 138 Pac. 762.

A letter contained, among other things, "LL. B." The entire letterhead was condemned. *Commonwealth v. Grant*, 87 N. E. 895.
The statute was enacted for the protection of the public and the prevention of improper persons' assuming title of architect and contracting for services as such. Sherwood v. Wise, 132 Wash. 295, 232 Pac. 309; Hickey & Velguth v. Sutton, 210 N. W. 704.

The titles enumerated by you were evidently designed to convey the impression that one using them was an architect, if not in law, at least in fact. It is a representation that the holder thereof is authorized to call himself an architect. It is clearly an attempt to defeat the statute. It is within the condemnation of the statute and in my opinion the use of such titles is a mere artifice and hence prohibited by law.

MJD

Workmen's Compensation.—Provisions for increased and decreased compensation apply to injuries occurring outside state.

INDUSTRIAL COMMISSION.

Attention of A. J. Altmeyer

You ask whether pars. (h), (i), (j), and (k) of subsec. (5), sec. 102.09, Stats., are applicable when the injury occurs to an employe outside of the state of Wisconsin, the contract of employment having been made in this state, it being assumed that the injured has a valid claim for compensation under the Wisconsin act.

The paragraphs in question are as follows:

"(h) Where injury is caused by the failure of the employer to comply with any statute of the state or any lawful order of the industrial commission, compensation and death benefits as provided in sections 102.03 to 102.34, inclusive, shall be increased fifteen per cent.

"(i) Where injury is caused by the wilful failure of the employe to use safety devices where provided by the employer, or,

"(j) Where injury results from the employe's wilful failure to obey any reasonable rule adopted by the employer for the safety of the employe, or

"(k) Where injury results from the intoxication of the employe, the compensation, and death benefit provided herein shall be reduced fifteen per cent."

In Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 115, the court said:
"The liability of the employer under the act [compensation law] being statutory, the act enters into and becomes a part of every contract, not as a covenant thereof, but to the extent that the law of the land is a part of every contract. * * *

"By the law of this state, when an employer enters into a contract with an employe, both being within its terms, in the event of injury to the employe the employer becomes liable therefor in the manner and to the extent prescribed by the workmen's compensation act, and he has no other or different liability."

In Booth Fisheries Co. v. Industrial Comm., 185 Wis. 127, 134, the court said:

"The law presents an entire scheme for compensating industrial accidents, and he who accepts the law accepts it in its entirety."

If the compensation act applies, then the scale of compensation therein provided applies, regardless of whether the injury occurs within or outside the territorial limits of this state. By accepting the compensation act the employer agrees, in effect, that he will pay increased compensation if any accident occurs because of his failure to comply with the laws of this state and the lawful orders of the industrial commission; and his agreement covers accidents occurring both within and without the state. Similarly the employe by accepting the compensation act agrees that his compensation shall be decreased in certain cases; and his agreement likewise covers accidents occurring both within and outside this state.

ML

Education—School Attendance—Truancy officer has power to pick up child on street and take him to proper school.

Truancy officer has no authority to compel parents and children to give information in regard to school records and ages of children.

No offense is committed when child refuses to follow truancy officer to school.

December 9, 1926.

JOHN A. LONSDORF,
District Attorney,
Appleton, Wisconsin.

The following is quoted from your letter of recent date:

"An opinion has been requested regarding the powers of the truancy and school attendance officers."
"1—Has he police powers which enable him to pick up on the street or in the home, unless in case of serious illness, a child of school age and take him to the school building, in which he is by law supposed to be present?

"2—He needs information regarding the school records and ages of children. Has he the authority to compel parents and children to give him this information?

"3—What offense is committed if question No. 1 is answered in the affirmative when a person refuses to follow the officer to the school?"

Sec. 40.74, subsec. (4), par. (c), Stats., provides in part:

"* * * All truant officers or other officers having the power of truant officers shall have the power to apprehend without warrant, any child or children found violating the provisions of sections 40.73 and 40.74, and cause such child or children to be placed in some public, parochial or private school. It shall be the duty of all school officers, superintendents, teachers or other persons to render such assistance and furnish such information as they may have at their command, to aid truant officers in the performance of their duties.”

Sec. 40.73, Stats., concerns compulsory school attendance and sec. 40.74 concerns truancy officers. The provisions above quoted clearly give a truant officer the power to pick up a child of school age and take him to the school building in which he is supposed to be present.

The section above quoted, however, does not give the truant officer power to compel parents and children to give him information in regard to the school records and ages of the children. The rule of ejusdem generis requires that “other persons” in the last sentence above quoted be construed as referring to persons in the school system.

Subsec. (2), sec. 40.74, which concerns the powers of truancy officers, gives them the power to ascertain whether minors are employed in factories, etc., contrary to law. Neither that section nor any other gives truancy officers the right to compel parents or children to give information in regard to the school records and ages of the children, and therefore it must be held that truancy officers do not possess that power.

Truancy officers are not given police powers (although various police officers may be truancy officers) and therefore refusing to follow a truancy officer does not constitute the offense of resisting an officer.

Sec. 40.73, subsec. (1), Stats., relating to compulsory school attendance, provides in part:
Any person who shall be proceeded against under the provisions of this subsection may prove in defense that he is unable to compel the child under his control to attend school or to work, and he shall be thereupon discharged from liability, and such child shall be proceeded against as incorrigible, or otherwise, according to law, and in case of commitment, if the parents or person having control of such child desire it, such child shall be committed to a school or association controlled by persons of the same religious faith as such child, which is willing and able to receive and maintain it without compensation from the public treasury."

In re Alley, 174 Wis. 85, it was held that this provision contemplates that parents be first proceeded against. Truancy officers, by par. (b), subsec. (1), sec. 40.74, must serve a notice upon the parent or other person in paternal relation to the child and then proceed against the person having charge of the child. It seems clear that the child is not the subject of punishment until the parents refuse or are unable to act. It does not seem that any offense is committed when a person refuses to follow a truancy officer to school. It should be stated, though, that truancy officers may use all necessary force to take the child to the proper school.

Public Officers—Malfeasance—School board member does not violate law in working for brother who is contractor making repairs on district school.

HAROLD J. MARCOE,
District Attorney,
Darlington, Wisconsin.

In your letter of recent date you say that a member of the school board is working for his brother "who is a contractor putting repairs upon the district school." You ask whether the school board member is violating the law.

Sec. 348.28, Stats., provides in part:

"Any officer, agent or clerk of any school district who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, in any purchase or sale of any personal or real property or thing in action, or in any contract, proposal or bid in relation to the same, or in relation to any public service shall be punished by imprisonment."
It was held in *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, and *State v. Cleveland*, 161 Wis. 457, that the section above quoted does not cover contracts for personal service. In XII Op. Atty. Gen. 141, it was held that a contract between the chairman of the town and the county highway commission was invalid so far as it related to the furnishing of material, but was valid and not in violation of law so far as relating to personal services.

Since the school board member could have contracted directly with the school board for performing personal service, it necessarily follows that he does not violate the law in performing personal service for his brother who took the contract for repairing the schoolhouse.

ML

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**Building and Loan Associations**—In determining limitation on borrowing power of building and loan association under subsec. (2), sec. 215.07, Stats., borrowed money cannot be considered as assets.

December 9, 1926.

Dwight T. Parker,
Commissioner of Banking.

Attention of C. P. Diggles,
Building and Loan Supervisor

You call attention to subsec. (2), sec. 215.07, Stats., and you ask whether this section has reference to the assets before borrowing or to the assets after borrowing.

Sec. 215.07, Stats., provides in part:

"Such local associations [building and loan associations] shall have power:
""* * *

"(2) To borrow money for temporary purposes, not inconsistent with the objects of the association, and issue its evidence of indebtedness therefor, but for no longer term than one year and not exceeding in the aggregate amount one-fifth of the assets on hand."

It is the opinion of this department that this subsection refers to assets before borrowing. The law grants to building and loan associations the power to borrow not in excess of twenty per cent of their assets; and twenty per cent is all that they can borrow, directly or indirectly. If a building and loan
association has assets of $100,000 and no bills payable, it may borrow $20,000. If the borrowed $20,000 could be included in the assets, then an additional $4,000 could be borrowed; and the borrowing of the $4,000 would create an additional borrowing power of $1,600, and so on. The result would be that a Building and Loan Association having assets of $100,000 would be able to borrow about $25,000, or about twenty-five per cent—which, of course, would be in excess of the amount permitted by law.

ML

Banks and Banking—State Banks—Notice given under provisions of subsec. (7), sec. 221.01, Stats., although somewhat informal, is sufficient to call into action board of review on refusal of banking commissioner to approve application to organize bank.

HONORABLE JOHN J. BLAINE,
Governor.

You say that on September 16, 1926, the commissioner of banking disapproved application for the organization of a certain bank, and that on October 14, 1926, one of the applicants wrote to the commissioner of banking:

"Inasmuch as our time will be up the 16th of this month, we wish to file this notice with you that it is their desire to appeal your decision to the board of review."

You ask whether this is sufficient notice under the provisions of subsecs. (7) and (8), sec. 221.01, Stats.

Subsecs. (7) and (8), sec. 221.01, Stats., provide:

"(7) APPEAL. In the event of the disapproval of the application for authority to organize a bank and the applicants feel aggrieved at such decision, they may appeal to the board of review, hereby constituted, which shall consist of the governor, the secretary of state, and the attorney-general. The governor shall be chairman of the board of review. The applicants so appealing shall file a notice, within thirty days of the date of the disapproval, with the commissioner of banking that they appeal from his decision made on such application to the board of review hereinbefore constituted.

"(8) PROCEDURE. Upon the filing of such notice the commissioner of banking shall certify such application, together with his decision thereon and his reasons therefor, and the notice of
Appeal, to the governor. Upon the filing of such proceedings with the governor, the said board of review shall fix a time and place for the hearing of such appeal and shall notify the applicants and commissioner of banking thereof. The proceedings shall be reviewed by the board of review, and the board by majority vote shall make an order either affirming or reversing the order of the commissioner of banking. Such board of review shall prescribe the rules and procedure under which all appeals shall be heard, and may from time to time amend the same and may consider and act on any affidavits, records, or documents certified to it by the commissioner of banking.”

While the notice given to the commissioner of banking is exceedingly informal, it does show a desire to appeal; and that, after all, is the essential thing. Frequently the taking of an appeal in a certain form is necessary to the jurisdiction of the reviewing body. There is nothing in the sections above quoted, however, which makes the jurisdiction of the board of review depend upon the taking of an appeal in a strictly formal manner. It is the opinion of this department, therefore, that the notice above set forth is sufficient under the statutes to call into action the board of review.

ML

Counties—County Board—Courts—Municipal Courts—County board has power under sec. 254.02, Stats., to abolish municipal court.

Municipal court ceases to exist at time fixed therefor by county board; municipal court does not continue to exist until end of term of municipal judge.

Municipal judge does not continue to have powers of court commissioner after court has been abolished.

Resolutions adopted by county board must receive liberal interpretation.

December 10, 1926.

L. L. Bruemmer,
District Attorney, 
Crandon, Wisconsin.

The material facts presented in your letter of November 17 are as follows:

In accordance with the provisions of sec. 254.01, Stats., the county board of Forest county on February 9, 1920, created a municipal court of Forest county. In June, 1926, the county board adopted the following resolution:
"Therefore, be it resolved by the Forest County Board of Supervisors, that the resolution adopted at the said session of the County Board on the 9th day of February, 1919, creating and establishing a Special Municipal Court for Forest County, be and the same is hereby repealed, and the Municipal Court is hereby continued to July 1st, 1926, for the purpose of completing all trials of action, examinations, and proceedings pending and undetermined in said Municipal Court at the time this resolution goes into effect; and it is further provided that all dockets, both civil and criminal, together with all papers, records and files, shall be deposited and kept with the County Judge of said County of Forest, who is hereby made the legal custodian thereof; and further, that no county order be drawn or paid for any salary or other expenses in connection with this special Municipal Court, after July 1, 1926."

You raise several questions growing out of the adoption of the resolution in 1926, which I will answer in order.

1. Is the municipal court of Forest county still in existence?

Subsec. (1), sec. 254.02, grants to a county board the power to provide for a special municipal court. This section further provides that the board may "by a resolution of said board, adopted by a majority of the members-elect, at any time thereafter rescind its action and abolish the same."

In State ex rel. Smith v. Outagamie County, 175 Wis. 253, the court held that it was competent for the county board under sec. 254.01 to abolish the municipal court. This question, therefore, is answered in the negative.

2. If the county board has the power to abolish the municipal court does the court pass out of existence at the date set by the county board, or does the court continue to exist until the end of the term for which the judge thereof has been elected?

In State ex rel. Smith v. Outagamie County, 175 Wis. 253, 263, the court held that the county board might set the date on which a municipal court should cease to exist. In this case it was contended that such action on the part of the county board would be in violation of sec. 26, art. IV, Wis. Const., which provides that the compensation of public officers shall not be increased or diminished during their term of office. The court held that "this provision of the constitution does not apply, since the office of judge of the special municipal court is not a constitutional office, but one which may be created and abolished by the legislature at will."

The answer to this question is that the court ceases to exist on the date set by the county board.
3. The term of the present judge of the municipal court extends to the first Monday in June, 1928. You inquire whether, if the court is abolished before the expiration of the term of the judge, the judge may continue to exercise the powers of a court commissioner until the end of his term.

This question is answered in the negative. Sec. 254.07 provides that the judge of a municipal court “shall be ex officio a court commissioner and shall have and may exercise all of the powers conferred upon court commissioners by the laws of this state.”

It is apparent from the provisions of the statute that the office of municipal judge ends at the moment the municipal court is abolished by the county board. The judge may exercise the powers of court commissioner only by virtue of sec. 254.07. The power to act as a court commissioner depends upon the party’s being judge of the municipal court. As soon as he ceases to be judge he loses all the powers of a judge, including those of court commissioner.

4. The resolution adopted in June, 1926, states that the resolution adopted by the county board on the 9th day of February, 1919, creating and establishing a special municipal court is hereby repealed. The resolution creating the municipal court was adopted February 9, 1920. You inquire whether the resolution adopted in 1926 is sufficient under subsec. (1), sec. 254.02.

While it is true that the resolution adopted in 1926 refers to a resolution adopted in 1919, yet the resolution taken as a whole indicates a clear intent on the part of the county board to abolish the municipal court. The general rule is that resolutions of deliberative bodies, such as county boards, must receive a liberal construction in order to effectuate their intent. Hark v. Gladwell, 49 Wis. 172; Wis. Cent. R. Co. v. Ashland Co., 81 Wis. 1; Burgess v. Dane County, 148 Wis. 427; State ex rel. Smith v. Outagamie County, 175 Wis. 253

SOA
Bonds—Town Treasurer's Bond—Taxation—Income Taxes—
Bond to be furnished by town treasurer to county treasurer
under sec. 70.67, Stats., covers only state and county funds
which come into hands of town treasurer.

Where income taxes in town amount to $42,000 and one-half
said amount remains in town treasury, bond to county treasurer
needs include only one-half of this amount, in addition to other
state and county taxes which come into hands of town treasurer.

December 11, 1926.

W. E. Atwell,
District Attorney,
Stevens Point, Wisconsin.

In your letter of November 27 you state:

"In the town of X there is an income tax of approximately
$42,000. One-half of this amount is retained by the town."

You inquire whether under sec. 70.67, Stats., the county
treasurer shall require a bond covering the entire amount of the
income tax or whether such bond shall merely cover the amount
paid by the town treasurer to the county treasurer.

Sec. 70.67, Stats., provides:

"The treasurer of each town, city or village shall execute and
deliver to the county treasurer a bond, with sureties, to be ap-
proved, in case of a town treasurer, by the chairman of the
town, and in case of a city or village treasurer by the county
treasurer, in the sum of double the amount of state and county
taxes apportioned to his town, city or village, not exceeding
five hundred thousand dollars, conditioned for the faithful per-
formance of the duties of his office and that he will account for
and pay over according to law all state and county taxes which
shall come into his hands. Provided, that when such bond is
executed, or the condition thereof guaranteed, solely by a surety
company as provided in section 204.01, such bond shall be in a
sum equal to the amount of such state and county taxes. The
county treasurer shall give to said town, city or village treasurer
a receipt for said bond, and file and safely keep said bond in his
office."

This section provides that the town treasurer shall furnish
a bond to the county treasurer in a sum of double the amount
of state and county taxes apportioned to his town conditioned
for the faithful performance of the duties of his office and that
he will account for and pay over all state and county monies
which shall come into his hands. So far as the county treasurer
is concerned the bond by the town treasurer is given primarily to secure the payment by the town treasurer to the county treasurer of "all state and county taxes which shall come into his hands." It is clear that one-half of the sum of $42,000 is not "state and county taxes" within the meaning of sec. 70.67. Consequently the bond to the county treasurer need include only one-half of the amount of $42,000 in addition to other state and county taxes which may come into the hands of the town treasurer. Of course, unless a surety bond is given as provided in sec. 70.67 the amount of the bond so far as the income taxes are concerned should be double the amount of state and county taxes, that is, so far as income taxes are concerned, $42,000.

It might be well to point out that ch. 60 of the statutes provides that the town treasurer shall furnish a bond covering the estimated amount of money which will come into the hands of the town treasurer. There is, therefore, no reason why the county treasurer should insist on a bond covering money which does not form a part of state and county taxes.

SOA

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**Counties—County Board—Public Officers—County Treasurer**

—Power to appoint county treasurer cannot be delegated by county board to committee composed of its own members.

December 11, 1926.

**Bruce M. Blum,**

*District Attorney,*

Monroe, Wisconsin.

The material facts presented in your letter of November 30 are as follows:

The county treasurer elect of Green county has declined in writing to qualify for the office. The intention not to qualify was communicated to the county board before the adjournment of the 1926 meeting. The county board thereupon elected a committee of five members to appoint a county treasurer to fill the vacancy, should any vacancy exist. You inquire whether a committee of the county board has the power to fill the vacancy.

You state that in your opinion the committee of the county board has no power to fill the vacancy. You further state that your opinion is based on the provisions of secs. 17.21 and 17.22,
Stats., and on the principle that a power involving discretion cannot be delegated.

Subsec. (3), sec. 17.21, provides that a vacancy in the office of county treasurer shall be filled “by appointment by the county board.” Sec. 59.02 specifies the manner in which the powers of the county board may be exercised. Subsec. (1), sec. 59.02, provides:

“Except as provided in subsection (2) of this section, the powers of a county as a body corporate can only be exercised by the county board thereof, or in pursuance of a resolution or ordinance adopted by such board.”

Subsec. (1), sec. 59.06, provides:

“Any county board may, by resolution designating the purposes and prescribing the duties thereof and manner of reporting, authorize their chairman to appoint before the first day of November in any year a committee or committees from the members of the county board elect, and the committees so appointed shall perform the duties and report as prescribed in such resolution.”

Subsec. (18), sec. 59.07, confers the power on the county board to “perform all other acts and duties which may be authorized by law.”

The statutes thus provide for the appointment of committees of the county board. The legislature undoubtedly contemplated that certain powers of the county board might be delegated to and exercised by a committee chosen from its own members. The statutes, however, make no attempt to define the extent of the power of delegation. First Savings and Trust Co. v. Milwaukee Co., 158 Wis. 207.

But in First Savings and Trust Co. v. Milwaukee Co., 158 Wis. 207, the court expressly held that there are limitations on the power of the county board to delegate functions to a committee. The question as to the extent of the power of delegation was not presented to the court, and consequently the court did not define the limits of the power of delegation. The court confined its opinion to the question presented, namely, whether the county board might delegate to its committee the power to make changes in plans and specifications, so long as such changes would not substantially alter the character of the structure or increase its cost to an unreasonable amount. The court
held that this power might be delegated to a committee of the county board.

So far as the powers of a municipal corporation are legislative, they rest in the discretion and judgment of a municipal body entrusted with them, and the general rule is that that body cannot delegate or refer the exercise of such powers to the judgment of a committee. 15 Ann. Cas. 1095 and cases cited; Dillard v. Webb, 35 Ala. 468; Hengst v. Cincinnati, 9 O. Dec. 730; Loispeich v. Mayor, etc., of Watertown, 207 S. W. 719; Whyte v. Mayor and Aldermen of Nashville, 2 Swan (Tenn.), 364.

Functions which are purely executive, administrative, or ministerial may be delegated to a committee. It is only such functions as are governmental, legislative, or discretionary which cannot be delegated. 20 Am. and Eng. Enc. Law, 2d ed., 1218; Biddeford v. Yates, 104 Me. 506, 15 Ann. Cas. 1091.

Dillon on Municipal Corporations, 4th ed., sec. 96, 5th ed., sec. 244, says:

"The principle is a plain one, that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. This principle, its scope and limitations, is best shown by examples of its application to actual cases. Thus, where, by charter or statute, local improvements, to be assessed upon the adjacent property owners are to be constructed in 'such manner as the common council shall prescribe' by ordinance, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation, the power to determine the mode, manner, or plan of the improvement. * * *"

Tiedeman on Municipal Corporations, sec. 113; says:

"The rule, forbidding the delegation of corporate power, does not apply to the delegation of ministerial or administrative powers to a subordinate official or committee: nor does it prevent the performance of ministerial and routine duties by agents appointed by the council. * * *"

The quotations from Dillon and Tiedeman were cited with approval in Hengst v. Cincinnati, 9 O. Dec. 730, 734.

In his work on municipal corporations (Vol. 1), McQuillin says:

"The legal conception early obtained that the powers possessed by public and municipal officers 'must be viewed as public trusts, not conferred upon individual members for their
own emolument, but for the benefit of the community over which they preside.' Therefore, the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others. * * * So the power to contract for the erection of public buildings cannot be surrendered to private individuals. * * * In every case where the law imposes a personal duty upon an officer in relation to a matter of public interest, he cannot delegate it to others, as by submitting it to arbitration.

"""* * * Such powers belong emphatically to that class of objects which demand the application of the maximum \textit{salus populi suprema est lex}; and they are to be attained and provided for by such appropriate means as the discretion of those who officially represent and act for the municipal corporation may devise from time to time. 'The discretion can no more be bargained away than the power itself.'"" (Sec. 382.)

McQuillin in distinguishing between discretionary and ministerial powers, says:

""There is a clear distinction to be observed between legislative and ministerial powers. The former cannot be delegated; the latter may. Legislative power implies judgment and discretion on the part of those who confer it.'"" (Sec. 384, quoting from \textit{Ruggles v. Collier}, 43 Mo. 353, 355.)

Again the learned author says:

""The rule forbidding the delegation of power, stated and illustrated in prior sections, does not apply to the performance of purely ministerial duties. Such duties may be delegated. The law has always recognized and emphasized the distinction between instances in which a discretion must be exercised by the officer or department or governing body in which the discretion is vested, and the performance of merely ministerial duties by subordinates and agents. Therefore, the appointment of agents to carry out the authority of the council is entirely competent and does not violate the rule, \textit{delegatus non potest delegare}. Thus the council may create committees or other bodies to investigate given matters, to procure information, to make reports and recommendations, and not exceed its power in the manner under consideration, but the council alone must finally determine the subject committed to its discretion and judgment. * * *"" (Sec. 387.)

The foregoing citations from McQuillin were quoted with approval in \textit{Lotspeich v. Mayor, etc., of Town of Morristown}, 207 S. W. 719, 721.

It is clear that the appointment of a county treasurer involves discretion on the part of the appointing body, and is
not a mere ministerial act. Consequently, the power is one which cannot be delegated to a committee. The county board is chosen by the people to represent the county and is charged with a public trust and with the faithful performance of its duties. The public is entitled to the judgment and discretion of each member of the county board in all matters where such elements enter into transactions on behalf of the county.

SOA

Public Officers—Sheriff is not entitled to compensation for investigations of questions and matters for which no fees are provided by statute.

Under sec. 51.06, subsec. (2), Stats., sheriff may receive compensation for conveying insane persons to northern hospital for insane when he uses his own automobile, measure of compensation being railroad fare.

He is entitled to per diem at $5.00 for services and $3.00 for his assistant, but he cannot charge for more than one day when services are all performed within calendar day, but he may charge for full day although he has not been occupied with work during all times of day.

Sheriff cannot recover $5.00 for serving warrant for arresting insane person. For executing search warrant he is entitled to same fees that he is for serving any other warrant. He is not entitled to be paid per diem fee for time expended in searching premises.

Sheriff is not entitled to compensation for raiding soft drink parlor, but can only charge fee provided for by statute for making arrest.

December 13, 1926.

GEORGE B. NELSON,
Special Assistant District Attorney,
Stevens Point, Wisconsin.

You state that you have been appointed special investigator to assist the county board in adjusting all claims of the sheriff of Portage county filed with said board, and you have submitted a number of questions for an official opinion of this department.

The first question submitted is: Can the sheriff recover from Portage county where the sheriff has made investigations in questions such as these:
"Death of Dan Kosibucki.
"Getting belongings of Everett Russell after being shot.
"Disturbing of girls by moron.
"Raiding of saloon of Koss on public square.
"Selling of liquor at Garfield store.
"Searching for drunken driver.
"Searching for Stella Smith, reported missing.
"Riot call at Richter’s dance in Carson.
"Getting witnesses and bringing them to court in matter of padlocking place of Anton Pionkowski.
"Inspecting numerous saloons.
"Death of man killed by motorcycle.
"Searching for holdup man.
"Burglary at Arnott.
"Stabbing affair and looking for L. Whitman.
"Searching for robbers of Walker’s store, etc.

You say that it is argued that he is entitled to charge on the basis of $5.00 per day and travel at the rate of 10¢ per mile, and for assistants on the basis of $3.00 per day and conveyance.

You have cited a number of authorities and opinions of this department, which hold universally that officers take their offices cum onere, and services required of them by law for which they are not specifically paid must be considered compensated for by the fees allowed for other services. See Crocker v. The Supervisors of Brown County, 35 Wis. 284, 286; McCumber v. Waukesha Co., 91 Wis. 442; State v. Cleveland, 161 Wis. 457; St. Croix Co. v. Webster, 111 Wis. 270; VIII Op. Atty Gen. 833; X Op. Atty. Gen. 22; Douglas Co. v. Sommer, 120 Wis. 424.

There is no compensation provided for in the statute for such services and in the absence of such provision in the statute he is not entitled to any. It must be assumed that the fees that he receives for other services compensate him for services that are required by law from him, for which no special compensation is provided.

The second question may be stated as follows: Can the sheriff receive compensation for the conveyance of insane persons to the northern hospital for the insane when he uses his own automobile, from Stevens Point to said hospital, and what fee can he receive for himself and assistant?

Sec. 51.06, subsec. (2), provides in part:

"The sheriff shall be allowed the following fees for services performed under this chapter: * * * for taking an insane person to the hospital or removing one therefrom, five dollars per day, railroad fare and other actual expenses and the actual
expenses for the support and transportation of such person and three dollars per day, railroad fare and necessary expenses of such assistants as may be ordered by such judge," * * *.*"

When the sheriff goes by railroad he is entitled to railroad fare under this section of the statutes. If, however, he uses his own automobile, then we have a different situation.

In the case of *McCumber v. Waukesha Co.*, supra, our supreme court held that a village marshal or constable cannot recover from the county for the transportation of prisoners in his own conveyance, his charges therefor, even if reasonable in amount, not being for necessary disbursements actually made within the meaning of sec. 843, Stats., now 60.55. See also *Parsons v. Waukesha Co.*, 83 Wis. 288.

You will note that under sec. 51.06, subsec. (2), the statute expressly provides for railroad fare, besides other actual expenses. I believe that will make it possible to lay down a different rule than the one laid down in the *McCumber* case. There the constable fees were under consideration and a constable only serves process and travels in his own county or municipality. Here it is contemplated that the sheriffs shall be reimbursed for their traveling expenses which were, at the time the law was enacted, generally incurred on the railroad. I believe it is the universal practice in the state for sheriffs to charge railroad fare, even though they use their automobiles, in such cases. I therefore hold that the sheriff is entitled to be reimbursed for traveling expenses and that the measure of such expense is the railroad fare as provided by statute. He is clearly entitled to $5.00 a day for his services, and $3.00 per day for his assistant. He cannot charge for more than one day, however, when the services are all performed within a calendar day, but he may charge for a full day, although he has not been occupied with the work during all times of the day. See *Northern Trust Co. v. Snyder*, 113 Wis. 516.

The third question is: Can the sheriff recover from Portage county the sum of $5.00 for services for executing a warrant and arresting an insane person?

Sec. 51.06, subsec. (2), provides, with reference to fees for sheriff in insanity cases:

"* * * For arresting and bringing a person alleged to be insane before the judge and subpoenaing witnesses the same fees as are allowed in other cases; * * *.*"
Sheriffs’ fees are provided for in sec. 59.28. Subsec. (27) provides fees for traveling to serve any criminal process, for every mile actually traveled ten cents per mile, and actual and necessary disbursements for board and conveyance of prisoner. Subsec. (32) provides, for attending any court with a prisoner, $1.50 per day, and 75¢ for each one-half day.

Sec. 60.55, subsec. (1), provides a 25¢ fee for serving a warrant. These various statutory provisions are the ones controlling in fixing the fees under question 3.

Question 4 relates to the fees that the sheriff may charge in the execution of a search warrant. Following is a typical bill presented for such services:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>For services</td>
<td>$5.00</td>
</tr>
<tr>
<td>To travel</td>
<td>1.40</td>
</tr>
<tr>
<td>To conveyance</td>
<td>2.50</td>
</tr>
<tr>
<td>To assist</td>
<td>9.00</td>
</tr>
<tr>
<td>To storage</td>
<td>1.00</td>
</tr>
</tbody>
</table>

You state that you have struck out the item of “storage,” as the liquor was stored in the county jail, and you have also struck out the charge of $2.50, as the sheriff used his own conveyance. This is correct.

You say that you can find no statute which authorizes the sheriff to be paid on a per diem basis or on a basis of reasonable pay for the services rendered in executing search warrants; that the typical charge of $5.00 for executing a search warrant is not at all unreasonable. I find no provision which authorizes a $5.00 fee for the service of a search warrant. I believe, however, that the sheriff is entitled to reimbursement for expenses when he seizes goods and takes possession of them under subsec. (25), sec. 59.28, which reads:

“All such necessary expenses incurred in taking possession of any goods or chattels and preserving the same as shall be just and reasonable in the opinion of the court.”

Your fifth question is whether the sheriff and his assistants can receive fees for raiding a soft drink parlor when they do not arrest the proprietor until after a warrant has been sworn out after they have found liquor in his possession. This question must be answered in the negative. I find no provision in the statute which authorizes the payment of fees to the sheriff for raiding a soft drink parlor. It is true, as you say, that the sheriff should receive pay for serving a search warrant and for making
searches of premises either with a warrant or without a warrant, but this is a matter which should be brought to the attention of the legislature if it is thought necessary that a fee should be provided for such services.

JEM

Banks and Banking—Employer who provides employe's savings fund wherein employes may deposit money and receive interest therefor is doing banking business in violation of law.

December 14, 1926.

W. H. Richards,
Deputy Commissioner of Banking.

You submitted to this department the rules and regulations of a certain company's Employes' Savings Fund and you ask whether this fund conflicts with the state banking laws of Wisconsin. The object of the savings fund is "to provide a safe and convenient means by which employes may save a portion of their salaries or wages, subject to withdrawal." Only officers and employes who have been in the service of this company for at least three months may become depositors. Pass books are issued but are retained by the superintendent of the fund. Interest is paid according to a rate established by the board of directors of this company and is credited twice a year. "Deposits, in even dollars, may be made in cash, or by deduction from payroll, on any regular pay day." Withdrawals may be made by the person in whose name the account stands, but the company reserves the right to require fifteen days' notice of the withdrawal of the entire amount of any account.

Enough of the rules and regulations have been indicated to bring the scheme within the scope of the opinion rendered by this department in III Op. Atty. Gen. 28, wherein a somewhat similar scheme was held to be in violation of the state banking laws.

Sec. 224.02, Stats., which defines banking, provides:

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

There can be no question but that this company is receiving money on deposits. Since it receives deposits from all of its employees, it is undoubtedly receiving deposits as a regular business. It follows, therefore, that the system outlined violates sec. 224.03, Stats., which provides a penalty for the doing of banking business without being regularly incorporated as a bank. See *MacLaren v. State*, 141 Wis. 577.

**Bridges and Highways—Damages—County is not liable when automobile is demolished by branch breaking from tree growing in field adjoining county trunk highway.**

December 16, 1926.

**PETER M. HUIRAS,**

*District Attorney,*

Port Washington, Wisconsin.

The following is copied from your letter of recent date:

"On a county trunk highway in this county a large tree stands about four feet inside of the fence line of the highway, in the adjoining farmer's field. Some weeks ago during a little storm a branch broke off and struck an automobile and demolished the automobile. At the time the automobile was struck it was traveling on the highway. The owner of the automobile is asking damages of the county."

You ask: Is the county liable for damages sustained by the owner of the automobile?

In *Jensen v. Oconto Falls*, 186 Wis. 386, 390–391, the court said:

"* * * It has long been settled in this state that at common law travelers have no right against a town for injuries caused by insufficiency or want of repair of highways, and the right to maintain such actions is purely statutory."

What was said of towns applies with equal force in regard to counties. Liability in the case presented depends, therefore, entirely upon the existence of a statute creating the liability. Sec. 81.15, Stats., provides in part:

"If any damage shall happen to any person, his team, carriage or other property by reason of the insufficiency or want of re-
pairs of any bridge, sluiceway or road in any town, city or village, the person sustaining such damage shall have a right to sue for and recover the same against any such town, city or village, provided, however, that no action shall be maintained by a husband on account of injuries received by a minor child; but 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."

An injury resulting from the falling of a tree cannot be considered as happening by reason of the "insufficiency or want of repairs" of the road; and consequently such accident creates no liability against the county.

In VIII Op. Atty. Gen. 798, it was held that the county was not liable for damage for injury done by fire caused by sparks from an engine used by county employes to pull a road grader, because there was no statute making the county liable.

In Andresen v. Town of Lexington, 240 Mass. 517, 134 N. E. 397, 398, a limb of a shade tree growing on private property fell on a person who was using the sidewalk. A statute required the town to keep the public ways "safe and convenient for travelers." The court said:

"* * * Without undertaking to define the precise limits of the duty of towns in keeping public ways safe and convenient for public travel, it seems plain that where the walls of a house or other structure on private land adjoining a city street, are so insecure as to be liable to fall upon persons passing by, the way is not thereby rendered defective within the meaning of the statute. Such objects, although in the nature of a nuisance, do not obstruct public travel. They are likely to injure persons other than travelers, and while off the way as well as while on it. They expose a person to danger, not as a traveler, but independent of the highway."

ML

Trade Regulation—Trading Stamps—Coupon which when presented to grocer with five cents entitles holder to loaf of bread does not violate trading stamp act.

HARRY KLUETER,
Dairy and Food Commissioner.

You have submitted a coupon published in a newspaper advertisement which when presented to a grocer with five cents
is good for one loaf of bread. The grocer, by the provision on
the face of the coupon, is authorized to take the coupon as a
credit of five cents only on the purchase of one loaf of bread.
The coupons are good for cash with the baker when presented
by a grocer at any time, and you inquire whether this coupon is
a violation of the trading stamp law.

This coupon does not violate the trading stamp act because
it is not a rebate and it is not given in connection with a sale of
goods, wares, and merchandise. You are referred to XV Op.
MJD

Counties—County Board—County Salaries—Under sec. 59.15,
subsec. (3), Stats., county board may at any time fix or change
number of deputies, clerks and assistants that may be ap-
pointed by any county officer and fix or change salaries of such
appointees with exceptions named.

John A. Thiel,
District Attorney,
Mayville, Wisconsin.

You state that in January, 1922, a resolution was adopted by
the county board of your county fixing the salary of the county
clerk and his deputy at $2,500 per annum and the salary of the
county treasurer and his deputy at $1,700 per annum, and it
then provided:

“'The salaries hereinbefore mentioned shall be in full payment
for services of all kinds in their respective offices as well as for
the officer as his deputy or clerk or stenographer, and that the
officer shall pay his deputy or clerk or stenographer from his
salary, except where a separate salary is herein provided for a
deputy clerk or stenographer.’

You state that a resolution is now pending in the county
board providing for additional sums for clerical help in the
offices of county clerk and county treasurer, and you ask if that
can be legally done.

The question has no doubt arisen because of the provisions of
subsec. (1), sec. 59.15, Stats., which provides that the county
board at its annual meeting shall fix the annual salary of each
county officer to be elected during the ensuing year and then
provides that the salary so fixed shall not be increased or dimin-
ished during the officer’s term. And under that provision the supreme court held in a number of cases that the salary so fixed could not be increased during the term either directly or indirectly, and that the county board could not employ anyone to assist the officer and pay an additional salary therefor. Because of that rule the legislature added to that subsection the last clause, “except the following additions,’” and since that time it has been adding new exceptions from time to time.

Subsec. (3) provides that the county board may at any time fix or change the number of deputies, clerks and assistants that may be appointed by the county officers and fix or change the annual salary of each such appointee, etc.

That exception puts the question of fixing or changing the number of deputies, clerks and assistants in the discretion of the county board, which may be exercised at any time. Of course, it is to be assumed that the county board will act in good faith and will only provide for additional deputies and clerks in case the duties of the office are too great to be properly performed by the officer and his deputy, but that is a matter for the honest judgment of the board. Of course, it could not be used as an excuse to increase the salary of the officer and such additional salary should be fixed for the salary of such new appointee and payable to him or her and not to the principal officer.

TLM

Courts — Garnishment — Quasi-Garnishment — Taxation — Provisions of sec. 304.21, Stats., providing for quasi-garnishment of money due from state and governmental subdivisions thereof to any person, firm or corporation, apply to tax redemption money due from county to any such person, firm or corporation.

John W. Kelley,
District Attorney,
Rhinelander, Wisconsin.

You state that under the provisions of sec. 304.21, Stats., certain judgment creditors have filed with the county clerk certified copies of judgments against judgment debtors for whom the county holds certain tax redemption money on account of canceled tax certificates; that the judgment debtors claim that the provisions of said section do not apply to such tax

December 22, 1926.
redemption money held for them, but that the county clerk is withholding payment, and you ask whether money so held by the county for such judgment debtors is exempt from the operation of the provisions of said section.

The question is answered in the negative.

That the tax redemption money referred to is attached and held, up to the amount due or to become due on the judgments, by the filing of the certified copy (assuming that the judgment was entered after June 4, 1917) seems clear not only from the plain terms of the statute itself but also from its history.

The statute, as originally enacted by ch. 360, Laws 1915 (creating sec. 3716a), was limited in its application to officers and employes of the state and governmental subdivisions and the filing of a certified copy of a judgment held only the amount due at the time of the filing or thereafter becoming due to the judgment debtor as salary or wages; but by ch. 332, Laws 1917 (published June 4, 1917), said sec. 3716a was repealed and a new section 3716a (now 304.21) was created, which very broadly extended its provisions so as to apply to any person, firm or corporation, instead of merely to officers and employes, and to any money due at the time of the rendition of the judgment or at any time thereafter during the life of the judgment from the state or any of the named governmental subdivisions, including counties, to such person, firm or corporation.

I perceive no ground of public policy upon which the application of the statute in question to tax redemption money due from the county to any person may be doubted, such as exists in the case of its application to the compensation of members of the legislature provided by the constitution and which is expressed in an opinion of even date to the secretary of state, a copy of which is enclosed for your information.

FEB
Banks and Banking—County Depositories—Where banks are unable to furnish surety bond required by county board, committee on approval of depository bonds may designate depositories and accept personal bonds.

C. E. Soderberg,
District Attorney,
Rice Lake, Wisconsin.

You say that the county board at its last meeting required all county depositories to furnish surety bonds. Six banks filed proposals to receive county funds, all providing for the giving of surety bonds. Because the banks have not sufficient capital, they now find themselves unable to procure surety bonds. You ask whether the committee for the approval of depository bonds may accept these depositories with personal bonds.

Subsec. (5), sec. 59.74, Stats., provides:

"If after a depository has been designated by the county board, it shall fail to furnish a bond, as provided in this section, or if at any time after a depository has been designated and has filed the bond herein provided for, such bond is withdrawn by the sureties thereon, or is deemed insufficient by the committee provided for in subsection (3), said committee shall have power to vacate, revoke or modify the designation of the county board, and such committee shall have power to designate a depository or depositories for the remainder of the calendar year. In making such designation, such committee shall be governed by the procedure outlined in this section to be followed by the county board, and such committee shall, for the purpose of making such designation, have all the powers conferred upon the county board by this section. The bond of any depository designated as provided in this subsection shall be subject to the approval of the committee."

Since the depositories designated by the county board have failed to furnish the required bond, the committee should proceed to procure proposals, using the same procedure "outlined * * * to be followed by the county board." The committee in making its designation has all the powers conferred by sec. 59.74 on the county board and it therefore has the right to ask for proposals based upon the giving of personal bonds.

Attention should be called to the opinion in XIII Op. Atty. Gen. 91, where it was held that the committee on the approval of depository bonds has no power to approve a personal bond.
where the bank designated by the county board contracts to furnish a surety bond. That opinion, however, dealt with limitations rather than ways and means.

ML

*Courts—Garnishment—Quasi-garnishment—Legislature—Application of provisions of sec. 304.21, Stats., providing for quasi-garnishment of money due from state to any person, to compensation secured by members of legislature by sec. 21, art. IV, Const., is regarded as doubtful; secretary of state should require parties, or one of them, to obtain judicial determination of question before paying amount due on judgment, certified copy of which has been filed with him under said section, to either judgment creditor or judgment debtor out of latter’s compensation as member of legislature.*

December 22, 1926.

Fred R. Zimmerman,
Secretary of State.

You state that recently there has been filed with you (presumably under the provisions of sec. 304.21, Stats.) a certified copy of a judgment rendered against a person who has been elected a member of the legislature and who will serve during the 1927 session thereof, and you ask, in effect, whether it becomes your duty, under the provisions of said section, to cause to be paid to the judgment creditor the amount due on said judgment out of the compensation provided by sec. 21, art. IV of the constitution, to become due to such member of the legislature, who is the judgment debtor.

The question is not without difficulty, and I am not prepared to give you a categorical answer, and I think that, for your own protection, you should withhold the amount due on the judgment from the member’s compensation, and that you should not pay the amount so withheld either to the judgment creditor or to the member until a judicial determination of the question is obtained. Such a determination may be had in an action of mandamus brought against you by either the judgment creditor or the member.

The reading of the statute under which the certified copy of the judgment was filed discloses the fact that the language is broad enough to include and apply to any person whomsoever and to any money whatsoever due or to become due from the
state, and therefore, in terms, applies to a member of the legis-
lation and to his compensation provided for by the constitu-
tion; so far as it does so apply at least, it may be held void on
the ground of being repugnant to public policy under the con-
stitution.

Sec. 304.21, Stats., provides:

“(1) Whenever any person, firm or corporation shall recover
a judgment against any person, firm or corporation, and said
judgment debtor at the time of the rendition of said judgment,
or at any time thereafter during the life of said judgment, shall
have money due, or to become due, from the state or any city,
county, village, town, school district or other municipal cor-
poration, said judgment creditor may file a certified copy of
such judgment with the secretary of state or with the clerk of
such county, city, village, town, school district or other mun-
icipal corporation, as the case may be.

“(2) It shall thereupon become the duty of the proper officers
of such state, county, city, village, town, school district or other
municipal corporation, after the expiration of thirty days from
the date of filing the certified copy of said judgment, to pay to
the owner of such judgment such sum as at the time of said
filing is due, and thereafter and until said judgment is fully paid
to pay to the owner of said judgment such sum or sums as may,
at any time or times be due from the state, or any such county,
city, village, town, school district or other municipal corpora-
tion to such person, firm or corporation, and to deduct the sum
or sums so paid as aforesaid from the amount due; provided
that if the sum or sums due as aforesaid is for salary or wages of
any officer or employe of any state, county, city, village, town,
school district or other municipal corporation, the same shall be
exempt from the provisions of this section to the same extent as
salaries and wages are by law exempt from garnishment; pro-
vided, further, that if any such judgment debtor shall have ap-
pealed from said judgment, at the date of the filing of said certi-
fied copy of said judgment, or if the time for appealing has not
expired at the date of said filing, then and in either such case,
if the said judgment debtor shall within thirty days from the
date of filing of said certified copy of said judgment file with such
secretary or such clerk an affidavit, that an appeal has been,
or will be taken from such judgment within the time prescribed
by law, such payment shall not be made until the final determi-
nation of such appeal, and if such affidavit is not filed, payment
made as herein provided shall be a final discharge of any lia-
bility of the state, or any such county, city, village, town, school
district or other municipal corporation to such officer or em-
ploye to the extent of such payment. This section shall apply
only to such judgments as may hereafter be entered and shall
in no way be construed as affecting any rights which any person may have at the time of its taking effect.”

The compensation of a member of the legislature for his services is not fixed by statute or by contract but by the constitution itself (sec. 21, art. IV) in the following language:

“Each member of the legislature shall receive for his services for and during a regular session the sum of five hundred dollars, and ten cents for every mile he shall travel in going to and returning from the place of meeting of the legislature on the most usual route. In case of an extra session of the legislature, no additional compensation shall be allowed to any member thereof, either directly or indirectly, except for mileage, to be computed at the same rate as for a regular session. No stationery, newspapers, postage or other perquisites, except the salary and mileage above provided, shall be received from the state by any member of the legislature for his services or in any other manner as such member.”

Sec. 15, art. IV, provides:

“Members of the legislature shall in all cases except treason, felony and breach of the peace, be privileged from arrest; nor shall they be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.”

Sec. 16 of the same article provides:

“No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate.”

It is evident from these provisions that it was intended by the framers of, and by the people in adopting the constitution that members of the legislature should, so far as otherwise compatible with public policy, be free from anything that would tend to interfere with the performance of their duties. It has been held that the privilege of exemption from arrest and from service of any civil process is a privilege of the people as well as of the individual member of the legislature and of the house thereof of which he is a member; that such privilege is an exemption from burdens with which the member is indulged because of the supposition of the law that the station filled by him is such as requires all his time and care, and that, therefore, without this indulgence, it would be impracticable to execute his office to that advantage which the public good requires. See the discussions in Doty v. Strong, 1 Pin. 84; Anderson v. Rountree, 1
It is conceivable that by attachment of his compensation due from the state (which in the absence of sec. 304.21 or some similar statute, certainly could not be done) a member of the legislature might be effectively prevented from attending the sessions thereof because of lack of funds with which to maintain himself during the sessions. If, therefore, sec. 304.21 should be held to apply to such compensation, a judgment of more than five hundred dollars would take from the member entirely the amount the constitution secures to him presumably in order to insure his ability to serve. The public interests are, of course, paramount to those of the creditors of a member of the legislature.

Apart from the foregoing, if the member of the legislature against whom the judgment in question was taken has a family dependent upon him for support, he would be entitled to the exemption provided by subsec. (15), sec. 272.18, Stats., under the express terms of the proviso contained in sec. 304.21 above quoted.

FEB

Appropriations and Expenditures—Counties—County board has no authority to appropriate money for arms and ammunition to equip members of so-called vigilance committee.

D. K. Allen,
District Attorney,
Oshkosh, Wisconsin.

You inquire whether the county board has the right to appropriate money for arms and ammunition to equip the members of the so-called vigilance committee, such members to be named by the sheriff, from various parts of the county, and to be armed for prompt action in catching bank robbers.

You say that you find no authority for the board to make the appropriations for such purpose. You refer me to sec. 59.21, Stats., which authorizes the sheriff to appoint as many deputies as he may deem proper, and also to sec. 59.07, subsec. (18), which provides that the county board may perform all acts and duties which may be authorized or required by law. The county board has only such powers as are given to it by express provi-
sions of the statutes or those necessarily implied from such express provisions of statutes.

I have been unable, as you have, to find any authority for the appropriation of money for this purpose by the county board, and it necessarily follows that the county board has no such authority.

JEM

Indigent, Insane, etc.—Board of control has no power to direct operation performed on patient who does not give his consent thereto. Board of control assumes no liability for conditions arising through failure to perform such operation.

December 23, 1926.

BOARD OF CONTROL.

The material facts presented in your letter of June 1 are as follows:

An insane patient was admitted to the northern hospital for the insane at Winnebago. Prior to the time he was admitted he had suffered a fractured leg, and the leg had been set by a physician. The leg had not been set properly and it is now deemed advisable to rebreak the leg and have it reset. The patient, while insane, has sufficient mentality to appreciate his condition and he refuses to allow the operation. The patient’s wife has consented to the operation, but the patient’s mother refuses to allow the operation. No guardian has been appointed for the patient. It is now feared that gangrene may set in and that the patient’s life may be in danger. You inquire whether the board of control has the power to proceed with the operation in spite of the fact that no consent for such operation has been obtained.

It is well settled that the legislature has conferred upon the board of control the power to care for patients committed to state institutions and that the board of control is charged with the duty of promoting the welfare of such patients. There is no statute which confers upon the board of control the power to perform operations without the consent of patients or the guardians of patients.

Both the federal and state constitutions guarantee to each and every citizen security of life, health and property. Likewise, the federal and state constitutions provide that no man shall be deprived of his life, liberty, or property without due process of law. It appears clear that in cases where a major
operation is involved, which operation may or may not terminate successfully, a patient committed to a state institution has the right either to accept or reject such operation and that such right is a constitutional right. While, therefore, the board is charged with promoting the welfare of the patient in exercising this right, the board must observe the constitutional rights of the patients. If a patient refuses to submit to an operation, the board is under no duty to perform the operation.

It is the opinion of this department that under the facts stated the board of control has no right to perform the operation on the patient until such time as he shall give his consent there-to. The board will incur no liability in case the patient’s condition, by reason of the failure to operate, becomes aggravated or acute. The board has discharged its duty after it has offered to have the operation performed.

SOA

Bridges and Highways—Where by reason of relocation portion of state trunk highway system ceases to become portion of system and is not used for ingress and egress of abutting property owners, such portion of highway becomes automatically discontinued and may be closed to travel by county highway committee or any other public authority or by owners of land on which such discontinued portion is located.

Henry J. Bohn,
District Attorney,
Baraboo, Wisconsin.

In your letter of November 18 you state that the state highway commission has decided on a relocation of a portion of the state trunk highway system. You inquire how the portion of the highway no longer on the state trunk highway system by reason of such relocation may legally be discontinued, so that the township is not liable for accidents occurring thereon.

In XI Op. Atty. Gen. 424, 425 it was held “that when a relocation of a public highway has been made by competent authority such relocation, by operation of law, vacates such portions of the old road as are not embraced within the limits fixed by the relocation and as are rendered unnecessary by the alteration, and operates as a discontinuance thereof without any
special order of discontinuance as soon as the relocation has been laid out and made practicable for travel."

In Bosshard v. Hotchkiss, 207 N. W. 695, 696, the court held:

"* * * While abandonment of the old highway is usually an incident to a relocation, it is not necessarily so. There may be a relocation without the abandonment of the old highway. This is evidenced by the frequent conditions we have where a right-angle turn at a crossroad is avoided by a gentle curve from one road to the other. Usually the old highway to the crossroad is kept in use to permit those who wish to depart from the state highway at such point to do so."

The rule is that property owners cannot be deprived of access to their property by the discontinuance and abandonment of an existing highway. I assume that the question of ingress and egress is not involved here. Such being the case, after the relocated portion of the highway has been laid out and open for travel the portions of the old road rendered unnecessary by the relocation are automatically discontinued and may be closed to travel by the county highway committee or by any other public authority or by the owners of land on which the old road was located. XI Op. Atty. Gen. 424.

SOA
Opinions of the Attorney General 483

Education—Religious Instruction—Plan under which cards to be signed by parents asking that their children be excused from school one hour each week to receive religious instruction are handed to pupils by teachers and returned to and sorted by teachers and passed on to ministers of churches designated by such parents, violates sec. 18, art. I, and sec. 3, art. X, Wis. Const., prohibiting any interference with freedom of conscience or use of public moneys for religious purposes or dissemination of sectarian instruction in public schools.

School board has power to fix hours during which school shall be held and to excuse all pupils, or any group of pupils, for any reasonable periods provided that neither school board nor teachers, as part of their school work, shall have any connection, directly or indirectly, with dissemination of religious instruction, and no part of school machinery is used for that purpose.

December 23, 1926.

John Callahan,
State Superintendent of Public Instruction.

You have submitted a resolution of the school board of the city of Waukesha with a letter requesting an opinion, in which you say:

"About ten days ago I wrote you withdrawing my request for an opinion for the school board at Waukesha on religious education. Since that time I have received a resolution passed by the board of education requesting me to ask you for an opinion. You have a copy of this resolution.

"Previous to writing the letter withdrawing the former request I visited Waukesha and went into the matter with a committee of the school board. I found that for two years previous to the present year they had been excusing the children for one hour during the week to go to their respective churches for this religious education. The arrangements under which they were doing this were as follows:

"Cards were provided on one side of which was an enrollment blank giving the name of the pupil and the church which was chosen and this was signed by the parent. On the back was some explanation ending with the statement that the privilege would be withdrawn by the school authorities in case of truancy or any other violation of the privilege. These cards were given by the superintendent to the various teachers who distributed them to the pupils by whom they were taken home. In the cases where parents chose to take advantage of the opportunity they were returned signed to the teacher. After collecting them the teacher returned them to the superintendent who sorted
them and passed on to the ministers the cards of those who had chosen his particular church.

"During the past summer several of the ministers got together and planned to have one school in place of the several schools that had been running in order that they might grade the children and thereby do a better piece of work and get better results as they saw it. This was objected to and led to the question being raised by the school board, as to whether or not what they were doing was legal.

"I am now submitting the resolution of the board with a request for an opinion in accordance with their request to me."

The material part of the resolution reads as follows:

"RESOLVED, that the report of the school welfare committee, is hereby adopted and the said state superintendent of public instruction is hereby requested to secure from the attorney general of Wisconsin, an official opinion as to whether or not the school board has a right to dismiss pupils from their respective classes and at the request of parents, for the purpose of securing religious week-day instructions at their respective churches for the period of one hour per week during the statutory school month period of twenty days, and as to whether or not such practice and custom is a violation of the constitution of the United States, the constitution of the state of Wisconsin, or the laws of Wisconsin, relative to the conduct of education in the public schools of the state."

The original request for an opinion, to which you have referred, was similar in phrasing to the resolution quoted above and it was agreed that you would investigate and obtain the facts as to the plan of operation in the particular case involved. The results of this investigation as stated by you have been set out above.

The question presented is of the greatest importance in that it involves the fundamental American doctrine of the separation of church and state and the constitutional guaranty of religious freedom for all.

The first amendment to the federal constitution, in guaranteeing the fullest enjoyment of religious freedom, provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * * ."

The state of Wisconsin has likewise made ample provision for religious freedom. Sec. 18, art. I of the constitution of the state of Wisconsin, provides:
"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; * * *"

Though both the federal and state constitution in general terms guarantee the right of religious freedom to the utmost extent, the framers of our constitution carefully provided that the schools should be free from religious influence or control. Sec. 18, art. I, contains the following provisions:

"* * * Nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

This section prohibits in express terms the payment of any money from the state treasury for the benefit of religious organizations.

Sec. 3, art. X, Wis. Const., provides as follows:

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein."

The framers of our constitution have thus studiously prohibited the dissemination of sectarian instruction in the public schools. Our supreme court has given this constitutional provision a strict construction. State ex rel. Weiss and others v. District Board, 76 Wis. 177. Justice Orton in his opinion in this case said, p. 219:

"The clause that 'no sectarian instruction shall be allowed therein' was inserted ex industria to exclude everything pertaining to religion."

Again, p. 220, Justice Orton said:

"No state constitution ever existed that so completely excludes the possibility of religious strife in the civil affairs of the state, and yet so fully protects all alike in the enjoyment of their own religion. All sects and denominations may teach the people their own doctrines in all proper places. Our constitution protects all, and favors none. But they must keep out of the common schools and civil affairs."
It should also be noted that subsec. (2), sec. 14.57, Stats., gives the state superintendent the power to prohibit the use of sectarian books and sectarian instruction in the public schools.

In your letter you refer to cards which are handed by the superintendent to the teachers, and by them to the pupils. These cards are not furnished by the school.

In Stein v. Brown, 211 N. Y. S. 822, a question similar to that contained in your letter was presented to the New York court. The statement of facts is so well presented by the court that I quote it. The court said, p. 823:

"Motion for injunction pendente lite in an action brought by a taxpayer to restrain the defendant from allowing the pupils of the fifth and sixth grades of the public schools of the city of Mt. Vernon to be excused from school instruction for 45 minutes once in each week for the purpose of enabling them to receive instruction in the churches to which their parents desire them to be sent; also a motion to enjoin the defendants from having printed in connection with said plan any more cards to be filled in by the parents of such children, in order to notify the school authorities what church such parents wish their children to attend, and from having printed any more cards to be filled out by the teachers of religious instruction in the various churches of the city, in order to notify the school authorities when such children were present and received religious instruction at church, and, in addition thereto, to enjoin the distribution of cards already printed at the expense of the board of education of Mt. Vernon."

The court held that the printing of the cards constituted a violation of art. 9, sec. 4, of the constitution of the state of New York, which forbids the granting of state aid to denominational schools, a provision similar to sec. 18, art. I of our constitution. The court also held that under the education law of the state of New York it was unlawful to give religious instruction in the schools. The court said, p. 826:

"Education Law, section 620 (as amended by Laws 1921, c. 386, section 1), prescribes the instruction required in public schools. Religious instruction is not one of them. Consequently it would be unlawful and unauthorized for a board of education to substitute religious instruction in the school in place of the instruction required. To permit the pupils to leave the school during school hours for religious instruction would accomplish the same purpose, and would in effect substitute religious instruction for the instruction required by law."
The court also held that the scheme was unlawful on the ground that it required the time of the teacher or teachers which should be devoted to the regular school work. The court said, p. 827:

"* * * In all cases the time of teachers would be taken up to some extent with the examination of cards and the determination of the question whether the pupils had really attended religious instruction, or whether they had merely availed themselves of the opportunity thus afforded of playing truant. Such additional labor imposed upon teachers would divert their attention from other necessary work, and indirectly impose expense upon the school board for the purpose."

The court called attention to the fact that the pupils who left the school for religious instruction were likely to fall behind those that remained the full time, and that this might cause embarrassment to some of the pupils and prevent them from keeping up with their classes. Finally the court said, pp. 827-828:

"The determination of the questions involved in this application gives effect to the well-established policy of the state that religious instruction shall not be given in the public schools, or under their auspices. Religious instruction belongs to the parents of the children and the churches and religious organizations of the country. It should be given outside of the public schools and outside of school hours. The resolution of the defendants was undoubtedly well-intended, and is doubtless an outgrowth of the feeling that many well-intentioned persons entertain that the religious instruction of the young is being neglected, and that something should be done to remedy this condition, and that it should be done under the auspices of, and in co-operation with, the schools, as in effect it would be if the defendants' resolution here attacked were carried out; but the difficulty with it is that it violates the policy above referred to, fundamental with the state, and for the reasons indicated their desires cannot be legally carried into effect."

Sec. 40.73, Stats., provides that a parent of a child between the ages of 14 and 16 years not regularly and lawfully employed in any useful employment or service at home or elsewhere, "shall cause such child to be enrolled in and to attend some public, parochial or private school regularly (regular attendance for the purpose of this statute shall be an attendance of twenty days in each school month, unless the child can furnish some legal excuse), * * * during the full period and hours of the calendar year * * * that the public, parochial or private school in which such child is enrolled may be in session."
The statute does not contain a provision found in the New York law which requires the pupils to attend school for a specified number of hours each day. Our statute merely defines the term “school month” as consisting of twenty days. The number of hours during which school shall be in session each day must under the statute be determined by the school board.

Under the broad general powers given by the statute the school board undoubtedly has a reasonable discretion in prescribing school hours, including the power to dismiss all or any group of pupils for any reasonable period. So long as neither the school board nor the teachers, as a part of their school work, have any connection whatever with the dissemination of religious instruction, there will be no violation of the constitution. As pointed out in this opinion the constitution is violated only when the teachers or the school machinery are connected either directly or indirectly with the dissemination of religious instruction.

SOA

Public Officers—County Highway Committee—Maximum sum payable to member of county highway committee includes per diem and expenses.

County board may provide by resolution for maximum amount of compensation to be so paid.

Sum payable to county highway committee members is maximum sum payable annually to member and his successor.

December 23, 1926.

FULTON COLLIPP,
District Attorney,
Friendship, Wisconsin.

You state that in Adams county the amount of construction supervised in one year by the county highway committee is less than $150,000, and you inquire what is the maximum that may be paid to the county highway committee members as compensation.

Sec. 82.05, Stats., provides:

"* * * The members of such committee shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties, and shall be paid the same per diem for time actually and necessarily spent in the perform-
ance of their duties as is paid to members of other county board committees, not, however, exceeding three hundred dollars in counties in which the committee will supervise less than one hundred fifty thousand dollars' worth of construction and maintenance the succeeding year; * * * for both per diem and expenses to any one member in any one year; provided, that a different amount may be fixed as the maximum by any county board. * * *"

It is clear from the foregoing provision that the members of the Adams county highway committee are limited to $300 as compensation and expenses. You are referred to XIII Op. Atty. Gen. 558, and Henry v. Dolen, 186 Wis. 622, the latter case holding that compensation in excess of the amount fixed by statute is unlawful. Although the word "compensation" appeared, an examination of the printed case revealed that the defendant in this case filed a claim for services and expenses, and this will clarify the use of the term "compensation" by the court.

You further inquire whether the passage of the following resolution establishes a maximum within the terms of the statute:

"Be it resolved, by the county board of supervisors of Adams county, Wisconsin, that the per diem of the county highway committee from and after date be fixed at the sum of four ($4.00) dollars per day with mileage at the rate of six (6) cents per mile. Dated this 19th day of November, 1925.

................., Supervisor."

This is answered in the negative, since it does not determine the maximum amount to be paid to the committee members for salary and expenses.

You finally inquire whether the maximum amount shall be paid as salary and expenses of the member of the committee for the entire year or whether receipt of $85 by one member before resigning automatically applies to reduce the amount of compensation and expenses which his successor may receive. This is answered in the affirmative, since it appears that the statute names the amount payable to the member and his successor during the year.

MJD
Appropriations and Expenditures—Public Lands—Fire Protection—State is not liable for expense where deputy state fire warden employs number of men to suppress fire outside his district.  

Conservation Commission.

You have submitted what purports to be a pay roll sworn to by Wm. B. Clawson, in which he swears that the following pay roll, consisting of forty-three names and amounting to $235.75, was incurred in the fighting and prevention of forest fires.

I assume from some of the correspondence submitted that the commission has organized, designated and established special fire protection districts in the territory in question and has employed wardens or forest rangers to have charge of such districts as provided by sec. 26.125, Stats., and that Mr. Clawson is the state warden in charge of one of such districts; that assuming to act under the provisions of sec. 26.13, he called upon the men in question to assist in extinguishing a forest fire in a district.

The men so called upon were in the employ of the Menomonie Bay Shore Lumber Company, most of them being paid on a monthly salary, and the company thereafter paid its men full time, including the time spent in suppressing the fire. It now wants to recover the amount so paid from the state, either directly or through the men so employed. It appears that this fire occurred and the services were so rendered in a district other than the district for which Mr. Clawson was appointed and acting as such fire warden.

Under such circumstances, you are advised that neither the lumber company nor the men can recover from the state compensation for the services so rendered.

Under the provisions of the statute, a district fire warden can employ men and incur expense in suppressing fires only in the district for which he was so appointed, and it appears from the correspondence submitted that this fire was located in another district and the services were so rendered outside of the district in which the warden had power to act. So he would have no power to bind the state for such expense.

Public officers are not like individuals; they can act only within their districts and within the scope of their legal powers and duties and cannot act upon what may seem to them to be an urgent necessity or a strong moral or equitable claim.
There is a special reason why the state should keep strictly within the provisions of the law in this case. Under the provisions of sec. 26.14, subsecs. (1) and (3), where the state legally incurs an expense in suppressing a fire under the provisions of this law, one-half of the expense, if legally incurred, is chargeable to the county. Of course the county could not be made liable for one-half of this expense if the warden was acting outside of his district.

TLM

Intoxicating Liquors—Physicians and Surgeons—Conviction of physician of crime of conspiracy to violate national prohibition law by issuing false prescriptions for whiskey is ground for revocation of physician’s license as crime involves moral turpitude.

December 23, 1926.

Dr. Robert E. Flynn, Secretary,
Board of Medical Examiners,
La Crosse, Wisconsin.

You have enclosed with your letter of June 9 a transcript of the court record in the case of United States v. Dr. F. M. Sauer, tried in federal court in the eastern district of Wisconsin. Dr. Sauer was convicted of conspiracy with others to commit offenses against the United States under the prohibition act, and in pursuance of said conspiracy committed six overt acts by issuing illegal permits or whiskey prescriptions to six different parties on different dates.

In a second count he was also charged with having unlawfully sold for beverage purposes certain intoxicating liquors. He was found guilty and sentenced to imprisonment in the penitentiary for the term of one year and six months, and to pay a fine of $2,000 to the United States.

You state that your board desires to know whether this man’s license can be revoked upon said conviction.

Under sec. 147.20, Stats., your board is empowered to revoke the license of a physician who is guilty of “immoral or unprofessional conduct,” which words are then defined, as used in said section, to mean a number of things. The only one here applicable would be “conviction of an offense involving moral turpitude.”
In order to answer your question we are confronted with the proposition as to whether Dr. Sauer has been convicted of an offense involving moral turpitude. "Moral turpitude" is defined in 27 Cyc. 912 as follows:

"Anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

In 20 Am. & Eng. Encyc. Law, 2d ed., p. 872, we find the following definition:

"Moral turpitude is defined to be an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general; an act contrary to the accepted and customary rule of right and duty between man and man."

In 3 Words and Phrases, 2d series, 444, we find the following:

"'Turpitude,' in its ordinary sense involves the idea of inherent baseness or vileness, shameful wickedness; depravity. In its legal sense, it includes everything done contrary to justice, honesty, modesty, or good morals. The word 'moral,' which so often precedes the word 'turpitude,' does not seem to add anything to the meaning of the term, other than that emphasis which often results from tautological expression, within the divorce statute." (Citing cases and Bouv. Law Dict.)

An attorney acting as notary public falsely certified to affidavits to be used in the prosecution of pension claims and was convicted and fined $500 and sentenced to imprisonment for a term not exceeding 5 years. It was held that he was convicted of an offense involving moral turpitude, justifying his disbarment. In re Hopkins, 54 Wash. 569.

In Bird v. State (Texas), 148 S. W. 738, 739, it was held that the keeper of a disorderly house, where liquors were kept for sale and women of bad reputation were permitted, is guilty of an offense involving moral turpitude.

The crime of extortion involves moral turpitude so as to justify the disbarment of an attorney who has practiced extortion. In re Disbarment of Coffey, 123 Calif. 522.

The same ruling was made where an attorney was disbarred for embezzlement, because that involved moral turpitude. In re Kirby, 10 S. Dak. 322.
In *Filber v. Dautermann*, 26 Wis. 518, our supreme court held that charging a woman with an attempt to procure an abortion on her daughter imputes a crime involving moral turpitude.

In *In re Henry*, 15 Idaho, 755, it was held that the crime of larceny whether grand or petit, undoubtedly involves moral turpitude as that term is commonly used.

On the other hand, it has been held that to charge one with being a dirty, drunken cur, lying drunk around the house more than half the time and to have poisoned all the cats and dogs in the neighborhood, and to have scalded defendant’s cat and kicked his dog, and to have persecuted a poor woman and robbed her of her rights are not words charging a crime involving moral turpitude. *Baxter v. Mohr*, 76 N. Y. S. 982.

“Fighting” was held not to be an offense involving moral turpitude. *Pollok v. State* (Texas), 101 S. W. 231, 232.

“Assault and battery” was held not to be an offense involving moral turpitude. *Gillman v. State*, 165 Ala. 135.

In *Fort v. City of Brinkley*, 87 Ark. 400, it was held that the illegal sale of intoxicating liquors is not a crime involving moral turpitude within the statute authorizing the revocation of a physician’s license on his conviction of crime involving moral turpitude, holding that the words “moral turpitude” imply something immoral, regardless of the fact that it is punishable by law, and that offenses against the liquor laws, such as illegal sales of liquor, are statutory crimes and merely *mala prohibita*.

Illegal sale of intoxicating liquors is not a crime showing moral turpitude. *Swope v. State*, 4 Ala. App. 83.

But in *Pullman Palace-Car Company v. Central Transportation Company*, 65 Fed. 158, 161, it was held that what constitutes moral turpitude, or what will be held such, is not entirely clear, and that a contract to promote public wrong, short of crime, may or may not involve it. If parties intend such wrong, as where they conspire against the public interests, by agreeing to violate the law or some rule of public policy, the act doubtless involves moral turpitude, but when no wrong is contemplated and it is unintentionally committed through error of judgment it is otherwise.

Dr. Sauer was convicted of a conspiracy to violate a statute duly enacted.

In *People v. Powell*, 63 N. Y. 88, 91, 92, in a careful opinion by Judge Andrews, the difference between the intent involved in the substantive offense, which intent the law will imply from
the act, and the corrupt intent necessary to make conspiracy, which intent does not necessarily follow from a plan to do the act, is clearly pointed out. This case has stood for fifty years as the leading one on the subject. The principle there enunciated has, so far as we know, never been questioned.


Dr. Sauer’s offense is therefore a more serious one than if he had simply violated the prohibition act by an illegal sale or transportation of intoxicating liquor for beverage purposes. He has conspired with others to violate the statute and it was necessary to prove that he was guilty of a corrupt intent. His offense was punished by imprisonment in the penitentiary for a term of one year and six months, and to pay a fine of $2,000 in addition thereto.

I am of the opinion that he was found guilty of an offense involving moral turpitude, and that your board is empowered by our statute to revoke his license to practice medicine.

JEM

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Public Health—Garbage Disposal—Municipality has right to regulate and outline definite methods of procedure for collection and disposal of garbage and may prohibit anyone from hauling garbage over city streets except certain persons authorized by such municipality.

December 23, 1926.

DR. C. A. HARPER,

State Health Officer.

You state that the question of the authority of a city, either through its health board or by ordinance, to regulate and outline definite methods of procedure for the collection and disposition of garbage frequently arises; that it appears that institutions having a large amount of good quality of garbage such as hotels and restaurants often claim the right to dispose of such garbage to private individuals, leaving the poorer type of garbage from the householders for the collector. You further state that there can be but little doubt concerning the authority of a municipality to regulate the manner of keeping, collecting and hauling garbage within the boundaries of the municipality; that such procedure can undoubtedly come under the provision of a health and safety program.

You further state:
"The point at issue, however, is whether a city, when it provides for a system of keeping, collecting and hauling garbage, can claim all the garbage within the city, or whether certain garbage from the larger institutions is still the property of the agency producing this garbage, and therefore, that they can dispose of it to private individuals providing of course that the method of disposal will not produce an insanitary condition.

"It might be put in other terms: Does the garbage produced in the municipality become, so to speak, the property of the city if the city has passed an ordinance regulating the method of keeping, collecting and hauling, as a health and safety measure, or, is the garbage still considered as owned by such individuals and may be disposed of by such individuals through other channels than those outlined by the city ordinance or health department of the city? An opinion on this would be greatly appreciated."

It has been held that an ordinance enacted in good faith, designed to safeguard the public health, which excludes the use of the city streets for the collection and hauling of garbage and refuse, except by the duly authorized contractor of the municipal corporation, is a proper exercise of the local police power. Ill McQuillin on Municipal Corporations, sec. 914.

In Smith v. City of Spokane, 55 Wash. 219, it was held that a city ordinance creating a crematory department and making it unlawful for any person other than the employes of such department to convey garbage, etc., through the streets is a lawful exercise of the police power in the interest of the public health, though it destroys the business of persons who had previously been engaged in hauling garbage. See also Atlantic City v. Abbott, 62 A. 999 (N. J.).

The proposition raised by your question as to the property right of the owner in the garbage was directly passed upon in a Michigan case, the City of Grand Rapids v. De Vries, 82 N. W. 269. The question of the validity of an ordinance providing for the collection and disposition of garbage was under consideration. In discussing this question the court said, pp. 272-273:

"It is contended that there are two reasons why the ordinance cannot be sustained under these charter provisions: (1) That the charter power is confined to nuisances, and to substances which are actually unwholesome or nauseous; while the ordinance extends to all garbage under the very broad definition of that term laid down in section 3, and irrespective of whether the same is a nuisance, or whether it is in fact wholesome or unwholesome. (2) That the power conferred to remove these
substances can be exercised only in case of neglect or refusal of
the householder to remove them himself; while the ordinance
attempts to confer on an individual the right of immediate
removal against the protest of the householder, and without
giving him an opportunity to make such removal himself; and,
if construed as the city now asks, positively forbids the house-
holder, either personally or by any one employed by him for
that purpose, to remove such garbage, and subjects the house-
holder to a penalty if he attempts immediately to remove from
his premises entirely wholesome table refuse. We think counsel
is in error in both these propositions. The charter provisions
empower the council to pass ordinances to regulate the collec-
tion, removal, and disposal of garbage, etc. In section 3 of
the ordinance the words 'garbage' and 'offal' are defined to
include every refuse accumulation of animal, fruit, or vegetable
matter, liquid or otherwise, that attends the preparation, use,
cooking, dealing in, or storing of meat, fish, fowl, fruit, or
vegetables. These matters in and of themselves are regarded
as nuisances; that is, the ordinary and accepted meaning of
the words 'garbage' and 'offal' is such refuse matters that in
and of themselves are nuisances. As to the second proposition,
it may be said that the ordinance does not attempt to regulate
in any manner whatever the disposition of wholesome substances
by the householder. It is aimed only at refuse; that is, dis-
carded, worthless matter—matter unfit for food. The house-
holder has perfect liberty, under the ordinance, to consume, or
to sell or give away, all the leavings of his table or kitchen
that are fit for food; but he is not supposed by the ordinance to
have around his premises in open baskets, pans, pails, or heaps
that which is known as 'refuse.' Matter of this character he
is required to care for by depositing the same in water-tight
vessels or tanks, and dispose of it in such a way that will not
endanger the public health."

Garbage as ordinarily understood under this decision is
regarded as a nuisance and may be abated without compensat-
ing the owner for any property right therein. While the owner-
ship of the garbage does not directly pass to the city, the city
has the right to dispose of the garbage. It has also been held
that the city has the right to prohibit the burning of garbage
as offensive smells created thereby are considered a nuisance
at common law. See III McQuillen on Municipal Corpora-
tions, sec. 907.

I believe this answers your question.

JEM
Mothers' Pensions—All conditions in law for mother's pension apply as well when grandparent has custody of child as when mother has.

December 23, 1926.

W. R. Kirk,
District Attorney,
Hudson, Wisconsin.

At the request of the county judge you inquire as to the scope of sec. 48.33, Stats., granting mothers' pensions. You state:

"The particular case in which I ask advice discloses the following: Three children within the required age limit, whose mother is dead, and whose father resides in another state and refuses to support them, are living with their grandmother. She has made application to the county judge for relief under the section cited."

In a subsec. (5) of said section we find the following condition stated:

"* * * The mother or grandparent or such other person must have resided in the county in which application is made for aid for at least one year prior to the date of such application; the mother must be without a husband or the wife of a husband who is incapacitated for gainful work by permanent mental or physical disability, or of a husband who has been sentenced to a penal institution for three months or more, or of a husband who has continuously deserted her for three months or more during which time all provisions of law have been used to enforce support and none has been obtained, or such mother must be divorced from her husband and must show that she has used all provisions of law to compel her former husband to support her and has not been able to do so. Such deserted or divorced woman need not show that she has used all provisions of law to enforce support, if the court shall be of the opinion that such procedure on her part would be of no avail; * * *"

You will note that the aid is not given to the mother or to the grandparent, but the aid is given to the child itself. (See subsec. (1).)

I take it, if there is a husband living, if the wife is dead, or if the husband, if living, is not incapacitated for gainful work by permanent mental or physical disability, and has not been sentenced to a penal institution for three or more months, and if the husband has not deserted his child and has not refused to provide for her three or more months and all provisions of law have
been applied to enforce support and none has been obtained, then the child in the custody of the grandparent can get support. It seems to me that all these conditions in the law apply, irrespective of the fact as to whether the mother or grandparent has custody of the children. These provisions apply to the grandmother as well as to the mother, in my opinion, although the grandparent is not specifically mentioned.

If all provisions of law have been used to enforce support and none has been obtained or if the judge is of the opinion that such procedure on the part of the grandmother would be of no avail, then a mother's pension may be granted.

JEM

Bridges and Highways—Damages—County is liable for damages caused by limb of tree growing at side of county highway to automobile traveling on paved portion of highway only in case notice is served as required by statute.

December 23, 1926.

Otto Glen,
District Attorney,
Clintonville, Wisconsin.

You say a limb from a tree growing at the side of a county highway was blown and broken down over the highway in such a way that it caught the top of an automobile which was being driven along on the paved part of the highway and injured the automobile and you ask if the county can be held liable for such damages if no notice was served as required by section 81.15, Stats.

On such statement of facts you are advised that it cannot. Municipalities maintain the streets and highways as arms of the state government and in a public and not in a proprietary capacity, and, because of that fact, under the general rule, neither the municipality nor the state would be liable for the failure of its officers to properly perform such duties, in the absence of a statute fixing such liability.

Sec. 81.15 creates a liability for damages caused by a defective or insufficient street or highway under the conditions of that section, but that being a statutory liability the conditions upon which it is based must be complied with and the notice being required must be given.
This is not a case where the officers created, authorized or licensed a nuisance in the street or highway so as to permit a suit without notice as held by some cases, so this suit must be maintained if at all, because of and under the provisions and conditions of the statute.

TLM

Criminal Law—Worthless Checks—As rule, check given for past due debt cannot be offense under sec. 343.401, Stats., and postdated check may come under statute provided fraud can be shown. In both classes of cases it is necessary to show fraud beyond reasonable doubt.

December 24, 1926.

FREDERICK C. AEBISCHER,
District Attorney,
Chilton, Wisconsin.

Under date of November 30 you submit the following:

"A owes B on an open garage account, running from September 10, 1923, to May 3, 1924, the sum of $85.55; B is the owner of the garage; on the 15th of October, 1924, A gives to B a postdated check, bearing date of November 1st, 1924, telling B that on November 1st, as called for by the check, he, B, should cash the same, as at that time, November 1st, there would be sufficient funds to cover the amount of the check. Accordingly, B held the postdated check until November 1st, presented it to the bank for payment, and found that there were no funds at the bank to cover the check. In 1925 A filed petition in bankruptcy and later received his discharge. The check was listed among the liabilities in the petition in bankruptcy.

"Query: Can A be held under sec. 343.401 on a postdated check?"

Said section reads thus:

"(1) Any person who, with intent to defraud, shall make or draw, or utter or deliver, any checks, drafts, or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or credit with, such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of a misdemeanor, and punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both fine and imprisonment."
“(2) As against the maker or drawer thereof, the making, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee.

“(3) The word ‘credit’ as used herein, shall be construed to mean an arrangement or understanding with the bank or depository, for the payment of such check, draft or order.”

Our court has not passed upon the question submitted by you. In the state of California where a statute is in force which contains the same provision of the above quoted statute, with the exception of subsec. (2), which is omitted, it was held in People v. Bercovitz, 163 Calif. 636, 126 Pac. 479, 43 L. R. A. (N. S.) 667, that a postdated check is within the operation of said statute. The court said, p. 638:

“* * * There is nothing in the language used having the effect of excepting a case from the operation of the statute, merely because the ‘check or draft’ is postdated. It is essential, of course, that there should be on the part of one giving the check or draft both present knowledge of the insufficiency of funds and absence of credit with such bank, etc., to meet the check or draft in full upon its presentation, and an intent to defraud; but no reason is apparent why both of these elements may not exist as well in the case of a postdated check or draft as in the case of one bearing the date of its delivery.”

The court further said, however, pp. 638–639:

“We are not here concerned with a case where the fact of want of sufficient funds and credit is made known by the drawer to the person to whom he delivers the check or draft at the time of the delivery, and the payee chooses, with such knowledge, to rely on a promise or representation of the drawer that he will make such provision that the amount thereof will be paid on presentation. It may be that, as to such a case, a conviction could not properly be had under the section in question. In the case at bar, the evidence was ample to support the conclusion that nothing was said from which it might be inferred by the person to whom the check or draft was given that the drawer did not then have sufficient funds in the bank to pay the amount named therein on its presentation.”

See also 11 R. C. L. 853, where it is said that a postdated check is within the operation of a statute such as here under
consideration. Under the subject of false pretenses in 25 C. J. 613, we find the following:

"It is usually held that the fact that a worthless check is postdated does not protect defendant, but there is authority to the contrary. [Cases are cited in Note 52 in favor of the proposition and in note 53 against the proposition] * * *

The overwhelming weight of authority seems to be in favor of the proposition.

Under your statement of fact the drawer of the check informed the drawee that there would be money in the bank on November 1, 1924, the date of the postdated check. The inference may therefore be drawn that the drawee was informed that there was no money in the bank at the time that the check was drawn. It may be difficult to convict in such a case, but still it will depend upon the facts in the case. It will probably be difficult to prove fraud in this case, and the intent to defraud is a necessary element of the offense.

Under your statement of facts it also appears that the check was given for a past due debt. In an official opinion of this department, XI Op. Atty. Gen. 137, it was held that a check for a past due debt, as a rule, cannot be an offense under said section. In said opinion it was said, p. 140:

"From the wording of this statute and from the history of it it is manifest that the intent to defraud is a necessary element of the crime. When credit has been extended to the debtor it is difficult to see how he can defraud the creditor by issuing a check on a bank where he has no funds. He does not obtain money or other property by his implied false representations."


While a check given for a past due debt, as a rule, cannot be an offense under this statute, still if the facts and circumstances are such that it is manifest that there was an intent to defraud, then it would seem that a conviction would be secured, even in such a case.

My answer to your inquiry, therefore, is: If the facts and circumstances are such that they prove, beyond a reasonable doubt, that the defendant intended to defraud, then I believe a conviction may be sustained.

JEM
Minors—Sentence of boy seven years of age to state public school until he arrives at age of eight years, when he shall be committed to industrial school for boys at Waukesha until he is eighteen years of age is legal as far as sentencing boy to state public school, but that part of sentence which provides that he shall be sent to industrial school at end of one year is void as in excess of powers of court.

This irregularity being apparent on face of commitment, board is not bound to transfer such child in compliance therewith.

December 24, 1926.

BOARD OF CONTROL.

You state that a court committed a seven year old boy to the state public school with the following provision:

“Until he arrives at the age of eight years when he shall be committed to the industrial school for boys at Waukesha, Wisconsin, until he is eighteen years of age.”

You inquire:

“1. Is it a proper legal procedure for a court to commit to the state public school for a time certain?

“2. Is the board of control bound to transfer this child from the state public school to the industrial school for boys in accordance with the directions of the commitment?”

A child may be committed to the state public school under the provisions of sec. 48.07, Stats. Under sec. 48.15, subsec. (2), it is provided:

“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.”

This boy, not having arrived at the age of eight years, cannot be committed to the industrial school for boys under the above statute. When he becomes eight years of age he may not be incorrigible and vicious. He may not even be a vagrant, and the court cannot sentence the boy before he is eight years of age to the industrial school.
Until a boy has arrived at the age of eight years he is not mature enough, in contemplation of this statute, to become a vagrant or incorrigible or vicious. The sentence here referred to may be considered a valid commitment to the state public school, but in so far as the sentence attempts to remove the boy to the industrial school when the boy arrives at the age of eight years is in excess of the powers of the court and this irregularity appears upon the face of it. It follows that the board of control is not bound to transfer this boy from the state public school to the industrial school as directed in said commitment.

JEM

_Bridges and Highways—Counties—Taxation—Two mill tax provided for by sec. 83.06, subsec. (4), Stats., is maximum tax which may be levied by county board in any year for improvement and maintenance of highways under provisions of ch. 83, Stats.; county board, in addition to amount so raised, may appropriate for highway purposes any surplus money in general fund not required for other county purposes._

December 24, 1926.

J. A. LONSDORF,
District Attorney,
Appleton, Wisconsin.

You present four questions relating to the power of the county board to levy taxes for the improvement and maintenance of highways under the provisions of ch. 83, Stats., which are as follows:

(1) In view of the two mill limitation in sec. 83.06, may the county board, if they have levied the full two mill tax, also levy additional taxes for construction or maintenance of county trunk highways which are a part of the system of county trunk highways selected by county boards in 1925, under the provisions of 83.01?

(2) May the county board levy, in addition to the two mill tax aforesaid, other taxes to meet improvements on town and village initiative under the provisions of 83.14?

(3) May the county board, in addition to the two mill tax, levy a tax to meet town petitions for improvement of highways on the prospective state highways or on the county trunks adopted as such in 1916 under 1317m-5?
(4) Assuming that the two mill tax levy has been made, may the county board appropriate surplus moneys in the general county fund for the purpose of improving or maintaining highways on the county trunk highway system or on any of those highways mentioned in the first three questions above?

Questions numbered (1), (2) and (3) are each answered in the negative.

Practically the same questions were presented and answered in opinions to you and to your predecessor in office and found in X Op. Atty. Gen. 758 and XII Op. Atty. Gen. 553. See also XIII Op. Atty. Gen. 442. Those opinions, to the effect that the maximum amount of all taxes which may lawfully be levied by the county board in any year for highway construction and maintenance under the provisions of ch. 83, Stats., is two mills on the dollar of the assessed valuation of all the property in the county, as expressly limited by subsec. (4), sec. 83.06, are hereby adhered to.

Public Officers—County Board—County Highway Committee—

Question of whether member of county board has changed his residence so as to vacate his office is one of fact, which attorney general has no power to decide.

Member of county board who ceases to be inhabitant of city from which he was elected vacates his office and has no right to sit or vote as member of such board.

Unless it be shown and found in proper proceeding that result of election or other action by county board would have been different had vote of one who is no longer legally member of board not been received or counted, validity of such election or other action is not affected.

Member of county highway committee holds his office until his successor is legally elected or appointed.

December 24, 1926.

J. A. LONSDORF,
District Attorney,
Appleton, Wisconsin.

I quote your statement of facts and questions, as follows:

"One 'X' was a member of the county board of supervisors representing a city of the fourth class. In September, this supervisor moved his household goods from Outagamie county to the city of Madison. His family moved at the same time taking up their residence in an apartment in the city of Madison; at the time he moved his household goods to Madison he made the admission that he was moving to Madison and that it was undecided who was to be his successor on the county board, naming then two probable successors. 'X' himself opened a business office at Madison. It appears that 'X' had business matters to attend to at the place of his former residence in Outagamie county and came back there off and on. At the November session of the county board, 'X' appeared and took an active part in the proceedings with the approval of the city council from the city represented by him and without any protests from the county board of supervisors.

(1) "It appears this county board elected a highway committee by ballot and one of the highway committee men was elected by the vote of 21 to 20. The election was by secret ballot and the defeated committee man is of the impression and has reason to believe that this supervisor is against him. Would you consider this election of highway committee man a legal election and if not a legal election, does the old committee man hold over in view of the provisions of 82.05?"

(2) "It appears that at this same session of the county board, a bond issue was voted for the improvement of highways, and
that the vote thereon was unanimous and the vote of each supervisor recorded by the clerk. If it is your opinion that supervisor ‘X’ had no right to vote at that session of the county board, would such a state of affairs in any way invalidate the bond issue? * * *”

The facts stated are quite persuasive in favor of the conclusion that X’s intention at the time of his removal to Madison was to change his residence to that place. If he did in fact so change his residence, his office as supervisor representing the city of his former residence, ipso facto, became vacant, and he thereafter had no right to sit as a member of the county board. Subsec. (4) sec. 17.03, Stats. But whether his residence in Madison was merely temporary and without intent to effect a change of legal domicile, or otherwise, is purely a question of fact which can only be authoritatively determined by a court of competent jurisdiction in an action or proceeding (as, for example, an action to test the validity of the election of the committee man referred to in your first question) in which that fact is in issue. The attorney general has no power to decide such a question by an opinion to a district attorney.

If it were found in a proper proceeding that one of the votes of the 21 cast for the successful candidate for committee man was cast by one who was not a legal member of the county board the vote would stand 20 to 20, and it might be held that there was no legal election of a successor to the committee man in question, and the latter would hold office until his successor is legally elected, under the express provision of subsec. (1), sec. 82.05, Stats., which reads:

“Each county board at the annual meeting shall by ballot elect, or instruct the chairman of said board to appoint, a committee of not less than three or more than five persons, of which said chairman may be one, to serve for one year and until their successors are elected or appointed. * * *”

The second question is answered in the negative, because since the vote in favor of the bond issue was unanimous one illegal vote would not change the result.

FEB
Taxation—Income Taxes—Sec. 71.10 (and sec. 71.11) and sec. 71.24, Stats., must, in order to safeguard public interests, be construed to prohibit tax commission from making corrections in assessments of income after December 31, 1926, for any year which is not within six-year period of proviso in fourth sentence of secs. 71.10 and 71.11, which period as to assessments made in 1926 should be regarded as beginning with year 1921.

December 24, 1926.

TAX COMMISSION.

With your letter of December 8 you enclose a letter which presents five questions with reference to a large assessment of back income and surtaxes. The back assessment involves returns for the years 1916 to 1919, inclusive.

In accordance with the provision of sec. 71.10, Stats., the commission is prepared to hear an appeal on this case and dispose of it prior to January 1, 1927.

It has been suggested by the company against whom the assessment has been made that the time for hearing the appeal be extended beyond January 1, 1927. The commission hesitates to make the appeal on account of the provisions of sec. 71.10, Stats.

Sec. 71.10 (1), Stats, provides:

"Whenever it shall appear probable that a corporation has been over or underassessed, or that no assessment has been made when one should have been made in any of the years following January 1, 1916, the tax commission may require such corporation to furnish such information with reference to its capital, surplus and business transacted as it may deem necessary to enable it to ascertain the amount of taxable income such corporation received during the year or years in question. Upon such information and such other information as it may be able to discover the commission shall determine the true amount of taxable income received during the year or years under investigation. Any part of the income so ascertained and not previously assessed, shall be assessed and entered upon the next assessment rolls. If it shall be found that the prior assessment was in excess of the actual taxable income received in any of such previous years, the tax commission shall credit such corporation with such excess and apply the same as a payment upon any tax or taxes assessed in the current year or the next succeeding assessment; provided, however, that after January 1, 1927, assessments and corrections in assessments may be made only for the six years immediately preceding the current assessment. No additional assessment shall be made under this section.
without giving at least ten days' notice in writing of the pro-
posed assessment to the corporation to be subjected thereto.
Such notice shall be served as a circuit court summons is served,
or by registered mail."

It is conceded by the company that the assessment must be
made by the commission and entered on the assessment roll by
December 31, 1926.
The questions arise under sec. 71.24, Stats., which provides
as follows:

"Whenever an error has been made in any income tax assess-
ment that shall be discovered after the income tax roll has been
certified to the county clerk, the tax commission, in case of
assessments made by it, and the assessor of incomes, in case of
assessments made by him, may correct such error at any time
before the tax becomes delinquent by certifying the tax properly
due, or if no tax is due, by certifying that fact to the treasurer
of the town, city or village where the same is payable. Where-
upon such treasurer shall enter upon the tax roll the words
'reduced to ........ dollars,' or 'increased to ......... dollars,' or 'canceled,' 'by direction of the assessor of incomes,' or
'by direction of the tax commission,' as the case may be, and
shall be required to account in his annual settlement with the
county treasurer only for the amount appearing on the roll as
corrected. No assessment shall be increased under this section
except on five days' notice to the person to be subjected
thereto."

1. Can the commission enter the assessment on December 31
and hold a hearing subsequently and correct the assessment
after January 1?

While the letter raises five questions, the only question neces-
sary to be answered here is the first. In view of the uncertainty
as to the jurisdiction of the commission to proceed under sec.
71.24 after December 31, 1926, it is the opinion of this depart-
ment that in order to safeguard public interests it must be held
that the tax commission will have no power after December 31,
1926 to proceed under sec. 71.24, Stats., to correct assessments
of income for any year which is not within the six-year period
of the proviso in the fourth sentence of sections 71.10 (italicized
above) and 71.11.

For the purpose of the application of this ruling to the assess-
ments of back income made in 1926, I think that such six-year
period should be considered as beginning with the year 1921,
in spite of the opinion expressed in XV Op. Atty. Gen. 393,
that it begins with the year 1920, for the reason that the latter is only an opinion of the attorney general, not yet judicially confirmed, and was written as a guide for the assessments of back income to be made after January 1, 1927.

FEB

_Railroads—_Railroad corporation cannot dissolve under sec. 181.03, Stats.

**Fred R. Zimmerman,**
**Secretary of State.**

You have inquired whether a railroad corporation may dissolve under the provisions of sec. 181.03, Stats., and you have submitted the proposed dissolution of the Chicago, Kenosha and Milwaukee Electric Railway Company. The resolution submitted shows that the corporation never had other assets than a strip of land unimproved, but fenced, and that no railroad was ever built or operated thereon or any part thereof, and no railroad was ever owned or operated by said company, and that this land has been disposed of and the railroad has no property at this time. In 1908 Op. Atty. Gen. 225 and in 1910 Op. Atty. Gen. 200, Honorable Frank L. Gilbert, then attorney general, held that a railroad corporation had the power to dissolve under the provisions of sec. 1789, Stats., renumbered sec. 181.03.

Sec. 181.03, Stats., provides as follows:

"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. Provided, that no corporation engaged in the business of owning or operating a public utility shall be dissolved, except upon order of the railroad commission to be issued only after hearing by the commission, at least thirty days' notice of which shall be given to each municipality in which such utility is operated, and an opportunity to be heard is furnished to all such municipalities and stockholders in such corporation; but the provisions of this section especially regulating the dissolution of a corporation owning or operating a public utility shall not affect the dissolution of such corporation as to which a resolution for dissolution has been heretofore adopted. Duplicate copies of
such resolution, with a certificate thereto affixed, signed by the president and secretary, or, if none, the corresponding officers, and sealed with the corporate seal, if there be any, stating the fact and date of the adoption of such resolution; that such is a true copy of the original, the whole number of shares of stock, and of members of such corporation, and the number of members who, or of the shares of stock whose owners, voted for its adoption, shall be forwarded to the secretary of state, one copy to be filed by the secretary of state and the other copy to be returned with certificate of the secretary of state attached, showing the date when such copy was filed and accepted by the secretary of state, which said copy shall be recorded by the register of deeds of the county in which such corporation is located within thirty days after filing with the secretary of state, and thereupon such corporation shall cease to exist except for the winding up of its affairs. And the register of deeds shall note on the margin of the record of the articles of incorporation, the volume and page where such resolution is recorded. The register of deeds shall forthwith transmit to the secretary of state a certificate stating the time when such resolution was recorded and shall be entitled to a fee of twenty-five cents therefor, to be paid by the person presenting such resolution for record. Whenever the articles of organization shall provide a term to the duration of a corporation it shall cease to exist at the time so fixed except as aforesaid."

The statute thus provides that any corporation organized under any law may dissolve, but that no corporation engaged in the business of owning or operating a public utility may dissolve except upon order of the railroad commission. Duplicate copies of the resolution authorizing dissolution shall be forwarded to the secretary of state, one copy to be filed by the secretary of state and the other copy, accompanied by a certificate of the secretary of state, to be filed by the register of deeds in the county in which such corporation is located.

Ch. 180, Stats., authorizes the formation of corporations except railroad corporations. Ch. 190, Stats., authorizes the formation of railroad corporations. Sec. 190.01, Stats., provides that any number of persons, not less than five, may form a railroad corporation. Subsecs. (1), (2), (3), (4), and (5), sec. 190.01, Stats., specify what the articles of organization must contain. Subsec. (5), sec. 190.01, Stats., also provides that the articles of organization must be filed with the secretary of state, after which a patent signed by the governor and secretary of state will be issued.
Subsec. (7), sec. 180.02, Stats., provides that a copy of the articles of organization of a corporation organized under ch. 180, Stats., shall be filed with the secretary of state. A verified certificate of the secretary of state, showing the date when such articles were filed and accepted shall be recorded by the register of deeds of the county in which the corporation is located. The register of deeds shall transmit to the secretary of state a certificate stating the time when such copy was recorded. Upon receipt of such certificate the secretary of state shall issue a certificate of incorporation.

It thus appears that there are marked differences between the organization of a corporation under ch. 180, Stats., and the organization of a railroad corporation under ch. 190, Stats. A railroad corporation receives a patent signed by the governor and the secretary of state. A corporation organized under ch. 180, Stats., receives a certificate of incorporation signed only by the secretary of state.

Again, a corporation organized under ch. 180, Stats., must file a copy of its articles of organization with the register of deeds of the county in which the corporation is located. The articles of organization of a railroad corporation are filed only with the secretary of state.

Chs. 180 to 188, inclusive, of the statutes deal with the organization of corporations generally. Ch. 190, which deals with the organization of railroad corporations, is entirely separate from chs. 180 to 188, inclusive. With but a few exceptions, which will hereafter be noted, ch. 190 contains all the statutory provisions with reference to the organization, operation and dissolution of railroad corporations.

Subsec. (6), sec. 190.01, Stats., provides that the secretary of state shall receive the same fee for filing articles of organization of a railroad corporation as for filing articles of organization of corporations organized under ch. 180. Sec. 190.06, Stats., provides that amounts unpaid upon the capital stock may be collected in the same manner as provided in sec. 182.07, Stats. Sec. 190.12, Stats., confers upon railroad corporations the powers conferred on ordinary corporations in ch. 182, Stats. Subsec. (10), sec. 190.12, Stats., gives to railroad corporations the power to reorganize under sec. 181.05, Stats.

The provisions of ch. 190, Stats., conclusively establish the fact that a railroad corporation has none of the powers con-
ferred upon corporations organized under ch. 180, Stats., except such as have been expressly conferred in ch. 190, Stats.

Undoubtedly the rule with respect to private corporations organized under ch. 180, Stats., is that they may dissolve without approval of the state, but, in the case of a railroad corporation, which by the act of incorporation obtains not only a franchise authorizing corporate existence, but also a franchise to operate a railroad, there must be an acceptance by the state of the surrender of the franchise. 1 Elliott on Railroads, 3d ed., sec. 700; Combes v. Keyes, 89 Wis. 297; The Atty. Gen. v. The Superior & St. Croix Railroad Co., 93 Wis. 604; Freeo Valley Rd. Co. v. Hodges, 105 Ark. 314.

In Freeo Valley Rd. Co. v. Hodges, 105 Ark. 314, 316, the court said:

"* * * In the absence of a statute on the subject, the decided weight of authority is that strictly private corporations may surrender their charters and dissolve themselves except so far as creditors have a right to object. On the other hand, railroad corporations are invested with certain powers not enjoyed by strictly private corporations, and they also are required to perform certain duties to the public which the latter do not owe."

The provisions of sec. 181.03, Stats., are prima facie very broad. The language of the statute is that "any corporation organized under any law" may dissolve, except corporations owning or operating a public utility. The statute, however, is ambiguous not only because a railroad corporation owes certain duties to the public, but because it contains the provision that the resolution authorizing dissolution shall be filed with the register of deeds in the county in which the corporation is located; consequently the statute is open to construction.

Construing sec. 181.03, Stats., in connection with the various provisions of ch. 190, Stats., and with reference to the well established principle that a railroad corporation cannot dissolve except with the consent of the state, we reach the conclusion that a railroad corporation cannot dissolve under ch. 181, Stats.

It should be remembered that sec. 181.03, Stats., contains a provision that corporations shall file a copy of the resolution authorizing dissolution with the register of deeds of the county in which the corporation is located. It is clear that this provision relates to subsec. (7), sec. 180.02, Stats., which provides
that the articles of organization of a corporation organized under ch. 180 must be filed with the register of deeds of the county in which the corporation is located. A railroad corporation is not located in any particular county. The legislature recognized this fact when it enacted subsec. (6), sec. 190.01, which provides that the articles of incorporation need be filed only with the secretary of state.

In *Freeo Valley Rd. Co. v. Hodges*, 105 Ark. 314, a very similar question to the one here was presented to the supreme court of Arkansas. The railroad company presented to the secretary of state a resolution adopted by its stockholders for the purpose of surrendering its charter. The secretary of state declined to file the resolution. Thereupon the railroad company filed a petition in the supreme court asking for a writ of mandamus to compel the secretary of state to file the resolution. The secretary of state's demurrer to the petition was sustained by the circuit court and affirmed by the supreme court on appeal. The Arkansas statute provided as follows:

"Any corporation may surrender its charter by resolution adopted by the majority in value of the holders of the stock thereof and a certified copy of such resolution filed in the office of the Secretary of State, and a copy thereof filed in the office of the county clerk of the county in which such corporation is organized shall have effect to extinguish such corporation."

(105 Ark. 314, 316.)

The decision of the *Hodges* case is squarely in point here. It is, in our opinion, correct both as to law and reason.

A further reason for holding that a railroad corporation cannot dissolve under sec. 181.03, Stats., is found in the fact already referred to that the articles of organization of a railroad corporation are signed by the governor and the secretary of state. The certificate of organization of a corporation under ch. 180, Stats., is signed only by the secretary of state. Here, again, we find a further indication of an intent on the part of the legislature to place a railroad corporation in a class by itself, separate and distinct from a corporation organized under ch. 180, Stats.

It remains to be considered whether a railroad corporation is a corporation owning or operating a public utility within the meaning of sec. 181.03, Stats.

Sec. 196.01, subsec. (1), Stats., defines the term "public utility" as used in secs. 196.01 to 197.10, inclusive as follows:
The term ‘public utility’ as used in sections 196.01 to 197.10, 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.

The above is the only definition of the term “public utility” found in the statutes, and it will be noted that a railroad corporation does not fall within the definition.

Sec. 32.03, subsec. (1), Stats., provides that the power of condemnation conferred in ch. 32 does not extend to the condemnation by one railroad or public utility over the property of another. There is, thus, a clear manifestation of an intent on the part of the legislature to make a distinction between a public utility and a railroad corporation.

The term “public utility” is not a generic term. The definition of the term, therefore, must be statutory. Since there is no statutory definition of public utility which is broad enough to include a railroad corporation, it is our opinion that the term as used in sec. 181.03, Stats., refers only to a public utility in sec. 196.01, subsec. (1), Stats.

SOA

Minors—Sec. 48.20, Stats., does not authorize court to commit children to state public school without following procedural steps provided for in secs. 48.06 and 48.07, Stats.

December 29, 1926.

Board of Control.

You state that several of the courts of the state making commitments to the state public school at Sparta for neglected and dependent children give as the authority for such commitments sec. 48.20, Stats. You state that as you read this statute the commitments to the state public school are authorized only under secs. 48.06 and 48.07, Stats., and you inquire whether the board should accept children who are brought to the state public school and committed under sec. 48.20.
Secs. 48.06 and 48.07 provide for the procedural steps to be taken in order to give the court jurisdiction in sentencing children to the state public school and empowers the courts to make such commitments.

Sec. 48.20 simply provides that the board of control shall admit to said school such children under sixteen years of age who shall be found dependent upon the public for support. I do not consider this a grant of power to the court to commit the child to said school without acquiring jurisdiction as provided in sec. 48.06 and 48.07. I am of the opinion that commitment under sec. 48.20 is void and the board should not accept children who are committed under said section only.

JE M

Dairy and Food—Municipal Corporations—City Ordinances—
City has right to prohibit sale of milk and its products in municipality unless license from designated officer in municipality is obtained, although sec. 98.06, Stats., provides for licensing of condensaries, canneries, or butter and cheese factories as state regulation.

Harry Klueter,
Dairy and Food Commissioner.

You state that a dealer in milk establishes a receiving station in the country outside of the jurisdiction of a city or village, complying with the provisions of sec. 98.06, Stats., and thereby obtaining a license authorizing the operation of such business; that he also obtains a license to operate a butter factory in compliance with the provisions of the same section; that a city passes an ordinance requiring a license for the sale of milk or its products within the city limits, and the question raised is: Has the city a right to forbid, within the city limits, the sale of the products of the factories licensed by the state unless sold by a person licensed by the city? You ask for an official opinion as to the rights of the city in bringing about the above mentioned conditions by ordinance.

Sec. 98.06 provides that no person shall operate a condensary, cannery or butter or cheese factory or a receiving station without a license therefor from the commissioner. It then provides for the application of a license and how the same shall be granted and by whom, and provides for other regulations.
There is nothing in the statute which would in any way prohibit a city from regulating the sale of milk within its borders. The powers of cities in this state are very broad. See sec. 62.11, subsec. (5).

In the case of *State ex rel. Nowotny v. Milwaukee*, 140 Wis. 38, an ordinance passed by the city council of Milwaukee, vesting the power of issuing and revoking licenses in the city health officer with the right to exercise the power of revocation summarily and even without notice, was upheld. It was also held that the words "regulating" and "restraining" in the municipal charter of Milwaukee were broad enough to include the right to revoke.

To regulate and license the sale of milk in cities is a power vested in the municipality. See III McQuillin on Municipal Corporations, sec. 969.

This is not an analogous case to the regulation of the sale of bread within the city limits by ordinance where the state provided for licensing bakers as considered by our court in the case of *Wisconsin Association of Master Bakers et al. v. City of Milwaukee et al.*, 210 N. W. 707.

It was apparent there from the wording of the statute that the power of the state was exclusive. No such conclusion can be drawn from the provisions of sec. 98.06 considered in connection with the powers of cities as granted in sec. 62.11, subsec. (5).

You are therefore advised that the city has the right to prohibit the sale of milk unless duly licensed within its corporate limits, and that sec. 98.06 does not militate against this power.

JEM

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**Corporations—Co-operative Associations**—Co-operative association may declare dividends in form of capital stock within limits prescribed by sec. 185.16, Stats.

**Edward Nordman,**

*Commissioner of Markets.*

In your letter of December 15 you request an opinion on the following question: May a co-operative association organized with capital stock under secs. 185.01 to 185.22, inclusive, Wis. Stats., declare dividends in the form of capital stock?
Unless otherwise indicated, section references below are to sections of the Wisconsin statutes, and the term “co-operative association” refers to a co-operative association organized under secs. 185.01 to 185.22, inclusive.

In my opinion the provisions of sec. 185.16 supply the answer to your question. Such section relates to the apportionment of the net proceeds of a co-operative association and provides, in part, as follows:

"(1) The directors in any association organized with capital stock shall apportion the net proceeds of the business at least once annually by first setting aside such an amount for a reserve fund as they see fit or none, in their discretion; * * * The directors may then declare a dividend upon the paid-up capital stock at a rate per annum not to exceed eight per cent; provided, that no such dividend upon common stock shall be cumulative. * * * The directors shall distribute all remaining net proceeds uniformly to patrons of the association, * * * provided, further, that any such distribution to a nonstockholder may be in the form of capital stock, until the amount thereof equals the par value of one share of the association’s stock, distribution thereafter to such patron being made in the same manner as distribution to all stockholders; * * *

"(2) Any bonus to employes or dividend declared under this section may, in the discretion of the directors, be in the form of capital stock of the association.

"(3) * * *

"(4) * * *"

The above quoted section limits the rate of dividend upon the capital stock of a co-operative association to eight per cent per annum, and forbids any dividend upon common stock to be cumulative. Subject to the foregoing limitations, the section permits the dividend upon the capital stock of a co-operative association to be in the form of capital stock.

If the co-operative law did not cover the subject of dividends by co-operative associations in the form of capital stock, then sec. 182.19, which authorizes corporations to declare dividends in the form of capital stock (but contains no such limitations as are contained in sec. 185.16) would apply. Sec. 185.20. See also Breon v. Genger, 182 Wis. 616. Since, however, sec. 185.16 expressly limits the rate of dividends upon the capital stock of a co-operative association, whether in the form of cash or in the form of capital stock, I am of the opinion that sec. 182.19 is inconsistent with sec. 185.16 and does not apply in the premises. Sec. 185.20.
The following conclusions may be made:
1. With respect to the declaration of dividends by co-operative associations in the form of capital stock sec. 185.16 governs exclusively.
2. A co-operative association may, in the discretion of its directors, declare, out of the net proceeds of the business, dividends in the form of capital stock at a rate per annum not to exceed eight per cent upon its paid-up capital stock. No such dividend upon common stock may be cumulative.
3. Patronage distribution (which is not properly speaking a dividend) to a nonstockholder may be in the form of capital stock until the amount thereof equals one share of the association's stock, distribution thereafter to such patrons to be made in the same manner as distribution to all stockholders.

_Fish and Game—Bounties—_ Where claim for bounty provided by law for killing of wild animals is duly made, certified and presented to secretary of state, in all respects in compliance with statutes, it is his duty to audit and certify same for payment to claimant notwithstanding notice by letter to commissioner of conservation and secretary of state that others claim that by rules of chase they were entitled to animal and to bounty. Secretary of state has no judicial function or power and must leave such other claimants to their remedy in courts against duly certified claimant to whom bounty is paid.

December 29, 1926.

_Fred R. Zimmerman,_

_Secretary of State._

You submit the affidavit of one J. F. for the $30 bounty for killing a mature wolf and a certificate of the county clerk of Buffalo county, made and issued on December 10, 1926, within the time and in the form required and duly presented to the commissioner of conservation and by the latter transmitted to you for payment to the said J. F. as provided by sec. 29.60, Stats.; you also submit a letter of an attorney of Alma, Wisconsin to the state conservation commission, dated December 11, in which the statement is made that his clients, M. and B., were hunting wolves and that their dog chased the wolf described in the affidavit of J. F. and the certificate of the county clerk into a hole and that said J. F. came up and shot the wolf before the
said M. and B. could get to it, in which the claim is made that under the decisions of this state the wolf was the property of said M. and B. and that they are entitled to the bounty thereon under the rules of the chase, and in which it is requested that payment of the bounty be withheld until such time as it is determined who is entitled thereto; you also submit a copy of a letter of the state conservation commission to said attorney dated December 13, stating that that department has only the presenting of the claim to the secretary of state and does not have the auditing of the claim or the withholding of the draft and that the attorney's letter has been attached to the claim as presented to the secretary of state; you also submit the letter of said attorney to you, dated December 22, written in response to your letter requesting a citation to the case or cases relied upon by him in support of his claim, in which he cites the case of Liesner v. Wanie, 156 Wis. 16, holding, p. 20:

"* * * The instant a wild animal is brought under the control of a person so that actual possession is practically inevitable, a vested interest accrues which cannot be divested by another's intervening and killing it."

You ask to be advised in the matter, from which request I assume that you desire an opinion as to whether you should withhold the auditing and payment of the bounty to J. F. as requested by the attorney for M. and B.

It is my opinion that on the papers before you, the claim for bounty should be audited and paid to J. F., and that you are without authority to withhold payment to him.

The sworn claims for the bounty, stating unequivocally that the wolf was killed by J. F., accompanied by the certificate of the county clerk received by the commissioner of conservation and presented by him to you being in all respects in compliance with the provisions of sec. 29.60, Stats., there would seem to be nothing for you to do except to perform the ministerial or administrative duty of auditing the claim and certifying the same to the state treasurer for payment in accordance with the certificate and the provisions of the statute. You have no judicial powers in the matter, and cannot decide a controversy between the duly certified claimant and other persons who claim that they, under the rules of the chase, were entitled to the carcass of the wolf and to make claim for the bounty. If M. and B. can establish a vested right in the animal under the decision
cited by their attorney (as to which I express no opinion, his statement of facts in and of itself being altogether too meager to form an opinion) and right to the bounty, they can do so in a proper action at law brought by them against J. F.

FEB

Indigent, Insane, etc.—Minors—Child permanently committed to state public school either or both of whose parents have been legally determined insane of feeble-minded may not be returned to his home unless one parent is sane and capable of protecting child.

December 30, 1926.

BOARD OF CONTROL.

You inquire whether a child who has been permanently committed to the state public school, either or both of whose parents have been legally determined to be insane or feeble-minded, may be returned to the home of such parents. This question must be answered in the negative, unless the legal determination by the court of insanity or feeble-mindedness has been considered and reversed by the court and they have been found sane or *compos mentis*. The presumption of law is that their condition continues until another determination has been made by the court and, of course, a person who is insane or feeble-minded is not a fit person to whom a child can be entrusted. There may be homes, however, where one of the parents is living and to which it would be proper to send the child if it is apparent that the child will be protected by the parent who is sane.

JEM

Contracts—Corporations—Securities—Contract whereby pair of foxes are sold and are to be farmed either for definite sum or share of increase, foxes being set aside and transaction involving only buyer and seller, is not security under securities act.

December 30, 1926.

Harry W. Harriman,
Railroad Commission.
Securities Division

You have submitted a copy of an agreement for the purchase of foxes and the major provisions are briefly as follows:
Blank company, a Wisconsin corporation, owning and operating a fox ranch, sells, assigns, and sets over unto John Doe a pair of foxes and agrees to properly earmark for identification, and officially register the same. The terms of payment do not appear, but the farming of the foxes is done by the company, either for a definite sum per year or for a share of the increase. It does not appear from the agreement that there is any co-operative scheme, but is merely an individual transaction. You inquire whether this is within the definition of security under the securities law.

Sec. 189.02, subsec. (7), Stats., provides as follows:

"'Security' or 'Securities' include all bonds, stocks, certificates of interest in a profit-sharing agreement, notes or other evidences of debt, or of interest in or lien upon any or all of the property or profits of a company; and all interest in the profits of a venture and the notes or other evidences of debts of an individual; and any other instrument commonly known as a security."

It is apparent from the contract that there is no element of chance when the buyer pays for the foxes and pays a definite sum per year for their care. There can, in that instance, be no interest in the profits of the venture. The sale is outright. If the company farms, receiving as its compensation a share of the increase, it would still not come within the definition of security, because the purchaser is not interested in the profits of a venture since he has already purchased his fox and has no co-operative interest of any sort with any of the other purchasers of the company. As compensation for raising the foxes he merely agrees to divide the young.

We conclude, therefore, that this contract is not within the definition of a security as set forth above.

MJD
Criminal Law—Fish and Game—Searches—Game warden has right to enter private land of any owner without permission for purpose of searching for evidence to be used in criminal prosecution in enforcing game laws. He has no right to hunt on said and without permission.

December 30, 1926.

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

You direct my attention to the provision of sec. 348.386, Stats., which contains a prohibition for hunting on land where the owner has notified the public not to trespass upon his land, and which provides that anyone trespassing upon the land shall be guilty of a misdemeanor, punished by fine, not less than $5.00 nor more than $10, and in default of payment shall be imprisoned in jail not less than 4 days nor more than 30 days. You state that on a marsh forty of land the owner has complied with the above statute, giving notice that no trespassing would be allowed, which notice is known to the game warden and to the public generally. You inquire:

"Has the game warden a right to go on said lands without permission of the owner for the sake of seeing that the law is being enforced?"

Under sec. 29.02 it is provided:

"(1) The legal title to, and the custody and protection of, all wild animals within this state is vested in the state for the purposes of regulating the enjoyment, use, disposition, and conservation thereof."

In sec. 29.05, subsec. (1), it is provided:

"The state conservation commission and its deputies are hereby authorized * * * to arrest, with or without a warrant, any person detected in the actual violation, or whom such officer has reasonable cause to believe guilty of the violation of any of the provisions of this chapter, and to take such person before any court in the county where the offense was committed and make proper complaint."

Subsec. (6) of this same section provides as follows:

"They shall seize and confiscate in the name of the state any wild animal, or carcass or part thereof, caught, killed, taken, had in possession or under control, sold or transported in violation of this chapter; and 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, cars, stages, tents, suit cases, valises, packages, and other receptacles 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."

This statute authorizes the game warden and the deputies to enter any place without a warrant where they have reason to believe that wild animals are taken or held in violation of the statute, except dwelling houses or sealed railroad cars.

In art. I, sec. 11, Wis. Const., we find the following provision:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; * * *

You will note that this provision protects us only against unreasonable searches and seizures. We are confronted with the question here whether the statute above quoted, authorizing the search of any place outside of a dwelling house or a sealed railroad car, without a search warrant, is in violation of this provision of the constitution. The game laws are enacted under the police powers of the state, and it is held in Kidd v. Pearson, 128 U. S. 1, that the police power of a state is as broad and plenary as the taxing power.

In McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316, Chief Justice Marshall, speaking for the court, said, p. 429:

"* * * It may be exercised upon every object brought within its jurisdiction.

"This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident."

In Geer v. Connecticut, 161 U. S. 519, 534, the court said:

"Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. Kidd v. Pearson, 128 U. S. 1; Hall v. De Cuir, 95 U. S. 485; Sherlock v. Alling, 93 U. S. 99, 103; Gibbons
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v. Ogden, 9 Wheat. 1. Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the State to preserve for its people a valuable food supply. Phelps v. Racey, 60 N. Y. 10; Ex parte Maier, ubi sup.; Magner v. The People, ubi sup., and cases there cited. * * *.

I have not been able to find any decision in the courts directly in point on the question here under consideration, but since it is the duty of the state to regulate and conserve game for the people and since the power which it has for this purpose, being the police power, is as broad and plenary as the taxing power, I am constrained to answer your question in the affirmative. It is well known that under the taxing power searches may be made for property without search warrants.

You also inquire:

"If he has a right to go on the land then has he also a right without the permission of the owner to shoot ducks from said posted lands, the same as he could from lands he owned himself?"

He has no right to shoot ducks on the land of another, unless he has permission from the owner.

JEM

Municipal Corporations—Taxation—Municipal corporation has no implied power to compromise taxes. In this state there is no express statutory authority conferred upon municipal corporations to compromise taxes. Hence, compromise of taxes between city of Racine and J. I. Case Plow Works and Wallis Tractor Company is invalid.

December 30, 1926.

TAX COMMISSION.

Attention Mr. A. J. Myrland.

You inquire whether the city of Racine had a right to compromise the payment of income taxes due from the J. I. Case Plow Works and the Wallis Tractor Company. You state that by agreement with H. M. Wallis, sole liquidating trustee of the two companies, the city of Racine accepted a compromise on the basis of approximately 50 per cent of all the income taxes assessed against the above named firms.

It is generally held that a municipality has implied power to compromise claims against individuals and to accept in full
satisfaction less than the sum due. This principle, however, does not apply to taxes. Taxes are assessed by public officers in accordance with law, and, if excessive, provision is usually made for their abatement by a court or some other appropriate tribunal. A municipal corporation has no power to disregard the assessment made in accordance with law or to distribute the burden of taxation in any other manner than the law has provided. Hence, a municipal corporation cannot, without express statutory authority, compromise a claim for taxes.

In a note in Ann. Cas. 1912 A, 754, in touching upon this matter, the author says:

"It is generally held that public authorities have no power to compromise taxes in the absence of a statute granting such authority."

Your attention is called to the following cases: Peter v. Parkinson, 93 N. E. (Ohio) 197; Cincinnati So. Ry. Co. v. Gunther, 19 Fed. 395; State v. Central Pacific R. Co., 9 Nev. 79. See also 26 R. C. L. 377-378; 3 Cooley on Taxation (4th ed.), sec. 1254.

Thus a general authority to compromise civil actions does not include an authority to compromise taxes, and authority to compromise taxes must be specifically granted. Sec. 75.60, Stats., specifically authorizes counties to compromise illegal taxes. But, nowhere in the statutes is there any specific grant of authority to municipalities to compromise taxes. It follows that the settlement of income taxes between the city of Racine and the J. I. Case Plow Works and the Wallis Tractor Company was without authority and invalid.

HHN

Railroads—Taxation—Income Taxes—In view of the proviso of sec. 71.10, Stats., tax commission should now assess nonoperating income of railroads for years 1916 to 1920, inclusive, which was not reported or assessed for those years; objections made by railroads to such assessment at this time raise questions which can be settled only by judicial determination.

December 30, 1926.

TAX COMMISSION.

I quote your statement and inquiry as follows:

"The legislature of 1911 passed chapter 658, the income tax law. Section 1087m—5.3 exempted: 'Incomes from property
and privileges by persons required by law to pay taxes or license fees directly into the treasury of the state in lieu of taxes. This section is now numbered 71.05 (3).

"Railroads and other public utilities paid then and still pay taxes direct into the state treasury.

"In May, 1913, the question of taxing railroads on income from other sources than that of railway transportation or business immediately connected therewith was taken up by the tax commission, and the railroads were advised under date of May 8, 1913, that "any income which a railroad might have from rentals of other than railroad property, such as buildings, elevators, docks and terminals not included in the railway assessment would be subject to our income tax law," and railroads were requested to file returns for 1911 and 1912. This was done by the railroads and assessments were made against such companies as showed taxable incomes, and continued for 1913, 1914, and 1915, and so far as known the taxes were paid in cash.

"In 1913 the tax commission requested an opinion from the attorney general as to whether the railroads and other public utilities paying their taxes into the state treasury could use such taxes (utility property having been by law designated as personal property for the purposes of taxation) as offset under the provisions of section 1087m—26. The attorney general concluded in the negative, but apparently the commission was in doubt as to the correctness of this conclusion.

"From May, 1911, until September 20, 1915, the commission consisted of Nils P. Haugen, Thos. E. Lyons, and T. S. Adams. At the date above mentioned Commissioner Adams resigned and was succeeded by Carroll Atwood, of Milwaukee. The latter was strongly of the opinion that the commission had no power to assess any income tax against public utilities on non-operating property. Commissioner Lyons was of the opinion that the companies were entitled to use the 'offset' and hence an income assessment was 'but idle ceremony.' Hence the railroads were not assessed on their 1916 income report, but the returns marked 'exempt.'

"In February, 1918, the railroads were informed that the commission 'will not require railroads to file report of their income from non-operating assets.'

"In the 1916 tax commission report the majority view of the matter is set forth on pages 51 and 52.

"At the 1917 legislative session Senator W. M. Bray introduced Bill 71, S., amending the exemption statute so as to except 'such income as is derived by the companies mentioned from property or business not assessed by the Wisconsin tax commission.' This bill was indefinitely postponed.

"In April, 1916, the question of the taxability of such income of railroads was submitted to the commission, and under date of April 21, 1926, the matter of assessing and taxing income from non-operative sources was submitted to you, and under
date of October 11, 1926, you advised us that 'income derived from royalties, rentals or sales or real estate of railway companies assessed locally under sec. 76.02 (7), since not used for railroad purposes, is subject to taxation.'

"In conformity with that opinion the tax commission has now required railroads to report income from such non-operative sources from 1916 to 1920, inclusive, and has made an assessment against those showing taxable income.

"The railroads object to such assessment on several grounds among others:

1. Non-operating income is not subject to taxation under the law.
2. It is illegal and non-equitable to assess interest on such assessments.
3. The commission cannot legally assess such income now, having refused to assess in earlier years with all facts before it.
4. That it is inequitable to assess them now for the years in which they might have used the 'offset' to pay such income taxes.

"In the light of the additional facts above set forth that were not recited in our letter of April 21, 1926, will you kindly give us your opinion as to the validity of the above objections, and any other advice as to the course the commission should legally pursue in the premises?"

Some of the questions, expressed and unexpressed, involved in your inquiry are such that they can be authoritatively settled only by a judicial determination, and inasmuch as under the existing statute (sec. 71.10) no assessment of income for the years in question can be made after January 1, 1927, I think that in order that the rights of the state may be fully protected, the commission should, before that date, confirm the assessments made by it, except in so far as errors in the amounts of the assessments may be discovered and corrected. Only by that course can the public interests be conserved, because, after the date stated, the state will have no remedy as to assessments which should have been made and which were not made; whereas the railroads may, by recourse to the courts, secure relief if their objections to the assessments have any merit in law.

The facts now stated by you additional to those stated in your letter of April 21, 1926, are not such as to force a change in the conclusion reached in the former opinion to you to which you refer. With reference to objections 1 and 4, the opinion expressed in II Op. Atty. Gen. 842 (December 23, 1913) and in XV Op. Atty. Gen. 394 (advance sheets, October 11, 1926)
to the effect that non-operating income of railroads, etc., is, and has been since the enactment of the income tax law, subject to taxation thereunder, and that the taxes paid directly into the state treasury in lieu of local taxes could not be offset against such income taxes as are assessed on non-operating income, are adhered to.

With reference to objection 2, I am of the opinion that interest must be added to back taxes assessed, pursuant to the express commands of the statute, sec. 71.06, subsec. (3), and that the commission has no discretionary power in the matter. *State ex rel. Globe Steel Tubes Co. v. Lyons*, 183 Wis. 107, 123. The tax commission has no equitable jurisdiction, and must act within its statutory powers. *State ex rel. Crucible Steel Casting Co. v. Tax Commission*, 185 Wis. 525, 533.

With reference to objection 3, it seems quite doubtful that the tax commission had any power to relieve the railroad companies from filing returns of taxable income from non-operating sources, or to exempt from taxation income actually received which was not exempt under the law; and if the power was lacking the letter of the commission in February, 1918, would seem to be without effect upon the duty of the commission to now assess all discovered income which should have been assessed but was not assessed for the years under consideration.

FEB

Courts—Minors—Juvenile court which has temporarily committed child to state public school may permanently commit such child to such school even though residence of mother of such child is in another county.

December 31, 1926.

A. W. Bayley, Secretary,
Board of Control.

The material facts presented in your letter of October 26 are as follows:

A child was committed to the state public school on a temporary commitment by the county court of Fond du Lac county. The county court found that the residence of the mother was in Milwaukee county. You inquire whether the county court of Fond du Lac county has jurisdiction to determine whether the temporary commitment should be changed to a permanent commitment.
Subsec. (1), sec. 48.06, Stats., provides that any resident of any county who has knowledge of a child in said county who appears to be neglected, dependent, or delinquent may file with the juvenile court a petition setting forth such facts. Subsec. (4), sec. 48.06, and sec. 48.07, confer on the juvenile court the power to commit such child to the state public school. Subsec. (1), sec. 48.07, provides that the disposition of any child under the provisions of this section shall be deemed temporary unless otherwise specified in the order of commitment.

It is clear that the juvenile court of Fond du Lac county had the power to commit the child in question to the state public school. Sec. 48.06 and sec. 48.07; State ex rel. Spritka v. Parsons, 153 Wis. 20.

The general rule is that the court having once assumed jurisdiction retains such jurisdiction until the particular matter is disposed of. In accordance with the general rule, the county judge of Fond du Lac county, having once obtained jurisdiction of the commitment of the child, retains that jurisdiction and has the power to commit such child permanently to the state public school.

SOA

Criminal Law—Second Offenses—Prisons—Parole—One who escapes from Wisconsin state reformatory while serving sentence therein and who is subsequently apprehended and sentenced for breaking jail is second offender under subsec. (1), sec. 57.06, Stats.

A. W. Bayley, Secretary,
Board of Control.

The material facts presented in your letter of November 20 are as follows:

One L was sentenced to the Wisconsin state reformatory for burglary in the night time to serve a term of one year. While serving such sentence L escaped from the reformatory, was subsequently apprehended and was sentenced to serve one to two years in the Wisconsin state prison for breaking jail. Subsequently the court resentenced L to the Wisconsin state reformatory. You inquire whether L should be considered a second offender under the provisions of subsec. (1), sec. 57.06. Subsec. (1), sec. 57.06, Stats., provides as follows:
"The board of control, with the approval of the governor, may, upon ten days' written notice to the district attorney and judge who participated in the trial of the prisoner, parole any prisoner convicted of a felony and imprisoned in the state prison or in the house of correction of Milwaukee county, who, if sentenced for less than life, shall have served at least one-half of the term for which he was sentenced, not deducting any allowance of time for good behavior, or who, if sentenced for life, shall have served thirty years less the diminution which would have been allowed for good conduct, pursuant to law, had his sentence been for thirty years, or who if he is a first offender and is sentenced for a general or indeterminate term, shall have served the minimum for which he was sentenced not deducting any allowance for time for good behavior."

The crime of burglary in the night time is a felony under sec. 353.31. So also is breaking jail while serving a sentence in the Wisconsin state reformatory a felony. Sec. 346.40. It is clear that L was guilty of two separate offenses, both felonies. It follows that L is a second offender.

SOA

**Criminal Law—Indeterminate Sentences**—Where minimum sentence imposed by court is more than minimum provided for in subsec. (1), sec. 54.03, Stats., portion of such sentence thus fixing minimum may be disregarded and sentence treated as indeterminate sentence imposed under provisions of sec. 54.03, subsec. (1).

December 31, 1926.

**BOARD OF CONTROL.**

The material facts presented in your letter of October 13 are as follows:

On October 13, 1925, there were sentenced to the Wisconsin state prison by the circuit court of Dane county three men to serve a term of from seven to twenty years each for assault with intent to rob while being armed with a dangerous weapon. The offense with which they were charged and to which they pleaded guilty is covered by sec. 340.40, Stats. You inquire whether your board may consider the sentence of these persons as an indeterminate sentence with a minimum of one year and a maximum of twenty years.

Sec. 340.40 provides:

"Any person being armed with a dangerous weapon, who shall assault another with intent to rob or murder, shall, upon con-
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viction thereof, be punished by imprisonment in the state
prison not more than thirty years nor less than one year.”

Subsec. (1), sec. 54.03, Stats., provides that a sentence shall
be for a term not less than one year and shall be for a general
or indeterminate term not less than the minimum nor more than
the maximum term of imprisonment prescribed by law for the
offense. In imposing the maximum term the court may fix
a term less than the maximum prescribed by law for the offense.

The court clearly had the power to prescribe the maximum
sentence less than the maximum fixed by sec. 340.40, Stats.
The court, however, erred in not fixing the minimum of the
sentence at one year. In view of the provisions of subsec. (1),
sec. 54.03, which provides that the minimum sentence shall be
the minimum prescribed by law for the offense, you may dis-
regard the portion of the sentence fixing the minimum at seven
years. The sentence may thus be considered as a general in-
determinate sentence of from one to twenty years.

SOA

Fish and Game—Muskrat—Navigable Waters—Exclusive right
cannot be granted to trap muskrats in navigable waters, but
can be given to owners of lands submerged under nonnavigable
waters.

Elmer S. Hall,
Conservation Commissioner.

You state that you have received a number of applications
for licenses to establish muskrat farms from owners of land
which is submerged. Some of this submerged land is under
navigable waters and some of it is under nonnavigable waters.
You ask whether in either or in both of these cases a license can
be issued under sec. 29.575, Stats., granting the exclusive right
to trap muskrat.

Subsec. (1), sec. 29.575, provides:

“The owner or lessee of any lands within the state of Wiscon-
sin suitable for the breeding and propagating of muskrats shall
have the right upon complying with the provisions of this sec-
tion to establish, operate and maintain on such lands a muskrat
farm, for the purpose of breeding, propagating, trapping and
dealing in muskrats.”
It is provided in subsec. (4) that “the licensee shall become the owner of all of the muskrats on said lands and of all of their offspring remaining thereon.”

Subsec. (7) provides in part:

“Such license * * * shall entitle the licensee * * * to the exclusive and sole ownership of any property in all muskrats caught or taken therefrom.”

Subsec. (10) provides as follows:

“Nothing in this section shall be construed to affect any public right of hunting, trapping, fishing or navigation except as herein expressly provided.”

In the case of *Mendota Club v. Anderson*, 101 Wis. 479, it was held that the public had a right to hunt ducks over submerged lands in Lake Mendota, even though such lands were owned by a private person. It was further held that although the depth of the lake had been increased by a dam, the public, nevertheless had a right to navigate the overflowed portion and to fish and hunt thereon. The court said, p. 493:

“* * * Certainly, persons navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam.”

See also *Whisler v. Wilkinson*, 22 Wis. 572; *Smith v. Youmans*, 96 Wis. 103.

In the case of *Willow River Club v. Wade*, 100 Wis. 86, it was held that the public had a right to fish in a navigable river even though the bed of the stream was owned by a private corporation.

The rule is well settled that the state holds title to fish and game in trust for all of the public. The right to fish and to hunt on navigable waters is an incident to the right of navigation. *Doemel v. Jantz*, 180 Wis. 225.

In the case of *Diana Shooting Club v. Hustinig*, 156 Wis. 261, it was held that the public has a right to hunt upon a navigable stream, the bed of which is owned by a private party. The court said, p. 268:

“* * * So far as the right of navigation, and the rights incident thereto, are concerned, it is entirely immaterial who holds the title, the state or the riparian owners. Such title is
equally subject to the rights mentioned. It is beyond the power of the state to alienate it freed from such rights."

I am therefore of the opinion that you cannot lawfully issue a license granting the exclusive right to trap muskrats on navigable waters even though the land underneath such waters is privately owned.

The situation is different however, with respect to land lying under nonnavigable waters. The public does not have a right as an incident of navigation to enter nonnavigable waters and the owner of the submerged land could therefore be given an exclusive right to trap muskrats in such waters.

CAE

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Civil Service—Fish and Game—Public Officers—Special Deputy Conservation Warden—Appointment to office of special deputy warden under provisions of subsecs. (3) and (4), sec. 29.22, Stats., must be made from list of candidates prepared by civil service commission.

Office of special deputy warden comes within provisions of civil service law.

Elmer S. Hall, Conservation Commissioner.

The material facts presented in your letter of December 10 are as follows:

It has been the custom of your department during past years to employ special deputy conservation wardens during the fall hunting season. The special wardens thus appointed are chosen from persons holding guide licenses under the provisions of subsec. (3), sec. 29.22, Stats. Such special wardens have not taken civil service examinations. You state that the secretary of the civil service commission holds that your commission has no power to appoint a special warden unless such special warden is on the civil service list. You state that the available men on the civil service list have been exhausted in building up the extra force of wardens, and that you believe that such special wardens need not be on the civil service list. You inquire whether the conservation commission has the power to appoint special wardens for a period not exceeding fifty days from the list of persons holding guide licenses under the provisions of subsec. (3), sec. 29.22.
Subsec. (3), sec. 29.22, provides as follows:

"No person shall engage, or be employed, for any compensation or reward, to guide, direct, or assist any other person in hunting, trapping, or fishing unless a license therefor, subject to the provisions of section 29.09, has been duly issued to him by the state conservation commission. The fee for such license is one dollar. The applicant shall deliver to the state conservation commission an oath of office that he shall well and faithfully perform the duties of his office as a guide licensed by the state conservation commission to guide, direct and assist other persons in hunting, trapping and fishing, and observe and comply with all the requirements of chapter 29 of the statutes, and of his said guide license. But this subsection does not apply to the employment of labor by, or services rendered to, the licensee of any net fishing license."

Subsec. (4), sec. 29.22, provides as follows:

"Each licensed guide may be a special deputy conservation warden, appointed by the commission and shall execute the same oath of office and bond as required by regularly salaried wardens. Licensed guides may be employed for temporary service as a regular deputy conservation warden, for any period not exceeding fifty days in any one year, at a compensation to be fixed by the commission."

It will be noted that the legislature has not specifically provided that the special wardens appointed under subsec. (4), sec. 29.22, shall be exempt from the provisions of the civil service law.

Sec. 16.07, Stats., classifies the civil service into two general classes, namely, the unclassified service and the classified service. This section also specifies the composition of the unclassified service and provides that the classified service shall comprise all positions not included in the unclassified service. The position of special deputy warden does not fall in the unclassified service, and therefore under the provisions of sec. 16.07 falls within the classified service.

Sec. 16.08, Stats., classifies the classified service as follows:

1. The exempt class
2. The competitive class
3. The noncompetitive class
4. The labor class

The position of special deputy warden does not fall within the exempt class under sec. 16.08.

Subsec. (3), sec. 16.08, defines the competitive class as follows:
The competitive class shall include all positions for which it is practicable to determine the merit and fitness of applicants by competitive examinations, and shall include all positions and employments of whatever functions, designations or compensation, in each and every branch of the classified service, except such positions as are in the exempt class, the noncompetitive class, or the labor class.

Subsec. (4), sec. 16.08, defines the noncompetitive class as follows:

"The noncompetitive class shall include such positions as are not in the exempt class or the labor class, and which it is impracticable to include in the competitive class."

Subsec. (5), sec. 16.08, defines the labor class as follows:

"The labor class shall include ordinary unskilled laborers."

The position of special deputy warden falls within the competitive class as defined in sec. 16.08.

Subsec. (1), sec. 16.16, Stats., provides:

"Appointments in the exempt class may be made without examination, but no office or position shall be deemed to be in the exempt class unless it is specifically exempted by law or is named in such class in the rules, and if so named, the reasons for such exemptions shall be stated separately in the reports of the said commission. Not more than one appointment shall be made to or under the title of any such office or position unless a different number is specifically authorized by law or mentioned in the rules."

The position of special deputy warden is one which falls within the competitive class, and under subsec. (1), sec. 16.16, such position is under the civil service law unless "it is specifically exempted by law." The provisions of subsecs. (3) and (4), sec. 29.22, do not specifically exempt special deputy wardens from the provisions of the civil service law. Consequently the position falls within the provisions of ch. 16, governing the civil service law, and appointments to the office must be made from a list of eligible candidates prepared by the civil service commission.

SOA
Trade Regulation—Trading Stamps—Facts stated show that use of card punched until certain amount has been purchased and kept by merchant as record of sales is not violation of trading stamp act.

Harry Klueter,
Dairy and Food Commissioner.

You have submitted a credit card and you wish to know whether the use of such card, as hereinafter set forth, violates the trading stamp act, sec. 134.01, Stats.

The card contains spaces to be punched when purchases are made. The purchaser's name is inserted by the merchant and the merchant keeps the card, punching the spaces until the card is filled. When ten dollars has been punched and all punches made, the purchaser, by using the card and presenting ninety-nine cents, may receive a three dollar doll.

Sec. 134.01 provides in part:

"No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares, or merchandise, any trading stamp, token, ticket, bond, or other similar device, * * *"

The use of this card in the opinion of this department does not violate the above mentioned statute. Since the card is not delivered to the purchaser but is retained by the merchant and merely constitutes a record of sales made to the purchaser, similar in that respect to a ledger account, the card is not such an article as comes within the purview of the trading stamp act.

MJD
Peddlers—Baking company operating local plant which distributes its baked goods from such plant to its regular customers on standing orders for its products, through its service men who are drivers of delivery vehicles and who are prohibited from selling to others than such regular customers, in substantially same way that ice and milk dealers supply their regular customers according to their periodic needs, does not come within provisions of sec. 129.01, Stats., requiring peddlers to be licensed.

December 31, 1926.

Geo. W. Meggers,
State Treasury Agent.

You submit several documents relating to the O. Baking Company, of Milwaukee, and its proposed method of selling its baked goods to its customers in that city, and inquire whether under its plan of operation it comes within the provisions of sec. 129.01, Stats., so that such method of selling is peddling under that statute, and requires the company and the drivers of the company's distributing vehicles to be licensed as peddlers.

From the documents submitted (which include copies of the form of a standing order by customers for the company's goods, of the contract between the company and its "service men" or drivers who deliver the goods to the customers, of the service cards which the customers display to notify the drivers to make deliveries, a photograph of the company's plant, etc.) it appears that the company in question has purchased a large tract of land in the city of Milwaukee, upon which it has caused to be erected a modern bakery where its products are to be manufactured, and that the investment of the company in its real estate, plant and fixtures aggregates approximately $300,000; that the company proposes to distribute its products among its regular customers under standing orders, in the same manner that milk and ice are distributed generally by dealers in those commodities; that the company sends out solicitors who interview prospective customers of the company and secure their orders for daily delivery of baked goods; that a card identifying the customer and the scope of the order is made out and filed by the company; that the employes designated to make deliveries are furnished with a list of customers of the company and instructed to call upon such customers and furnish their daily needs for the baked goods of the company, and that such employes engaged in making such deliveries are prohibited from
selling or distributing baked goods other than to regular customers of the company upon standing orders placed with it under penalty of dismissal from the company’s employment; that in addition to the customer’s card, referred to, the customer is supplied with a card similar to the one used by ice men, which card is to be exhibited in an appropriate place when the customer is in need of baked goods, and that this method is similar to that used by ice men in the city of Milwaukee in making distribution of ice to their regular customers under standing orders placed with the company; that it is the position of the company that it is engaged in the bakery business, and that the above outlined method of distributing its products is a mere incident to such bakery business, and is not peddling within the meaning of the statute.

On the facts appearing from the documents submitted, the conclusion has been reached that the proposed selling method of the company does not come within the provisions of the statute regarding the licensing of peddlers; that such method is substantially the same as that generally in use by ice and milk dealers throughout the state, which has heretofore been held by the attorney general not to be peddling within the meaning of the statute. Op. Atty. Gen. for 1908 602, 607. See also VI Op. Atty. Gen. 253; VII Op. Atty. Gen. 560; XII Op. Atty. Gen. 162.

It is recognized that the line of demarcation between what is peddling under the statute and what is not is not always easy to draw. It must be drawn solely with reference to the method of disposing of the goods. DeWitt v. State, 155 Wis. 249. In XV Op. Atty. Gen. 100 (adv. sheets, March 10, 1926) the opinion was expressed that a baking firm whose drivers are engaged in canvassing from house to house selling bread, under facts which indicated a practice of individual solicitations and sales from stocks of goods carried by the drivers, is peddling within the meaning of the statute and in XV Op. Atty. Gen. 372 (adv. sheets, September 1, 1926) it was held that the making of concurrent sales and deliveries of meat on commission by one traveling from place to place, carrying with him the goods offered for sale without prior orders therefor, is peddling; but there is a clear distinction between the facts on which those opinions were predicated and the facts under consideration here, which has often been recognized by the courts, in this, that here
the products of the company are not hawked on the streets and sales are not made to any one who will buy but deliveries are made solely to regular customers of the company who have left standing orders for periodical deliveries of baked goods to supply their needs. Some of these cases are cited in the several opinions to which reference has already been made, and in XIV Op. Atty. Gen. 406, to which may be added the following:

Commonwealth v. Standard Oil Co. (Ky.), 112 S. W. 902, where the weekly deliveries of oil to its regular customers by the oil company was held not to be peddling, in which the case of Standard Oil Company v. Commonwealth, 80 S. W. 1150, in which sales to anyone who would buy had been held to be peddling, was distinguished.

Newport v. French Bros. Bauer Co. (Ky.), 183 S. W. 532, in which the facts were quite similar to those here under consideration and in which it was held that delivery of bread to regular customers was not peddling.

State ex rel. Brittain v. Hayes (La.), 78 Southern 143, in which it was held that a person engaged in delivering milk to his regular customers is not a peddler.

Commonwealth v. Reid, 175 Mass. 325, 56 N. E. 617, and Commonwealth v. Deinno, 20 Pa. Co. Ct. 371, in which the sale and deliveries of ice and fruit, respectively, concurrently to anyone who would buy, constitutes peddling. See also the note at page 1296 of L. R. A. 1916 B.

FEB

School Districts—Taxation—Equalization of taxes under sub-
sec. (1), sec. 40.07, Stats., applies only to assessment of year during which equalization is had.

December 31, 1926.

V. M. STOLTS,

District Attorney,
Eau Claire, Wisconsin.

In your letter of December 9 you inquire whether after an equalization of taxable property in joint school districts has been made in accordance with the provisions of sec. 40.07, Stats., the equalized valuation continues to be in effect until there has been another equalization, or whether such equalization is used only during the year for which it is made. You state that the tax commission has ruled that the equalization
is good for one year only, and that the state superintendent has ruled that it is in effect until changed by another equali-
ization.

Subsec. (1), sec. 40.07, Stats., provides:

"The relative valuation of taxable property in the several parts of any joint school district or of any joint high school dis-
trict, shall not be equalized except as herein provided. At any time prior to the fifteenth day of October of any year any three freeholders resident in that part of any town, city or village forming a part of any joint school district, or forming a part of any high school district, or if the number of freehold-
ers in such part of any town, city or village be less than three then all of such freeholders, may file with the clerk of such dis-
trict a petition praying for an equalization of the relative valu-
ation of taxable property in the several parts of such district. The clerk shall thereupon and prior to October twenty-fifth of such year notify in writing the assessor of every town, city and village in part embraced in such district to meet as provided in subsection (2) of this section."

Sec. 40.07 formerly was sec. 471, Stats. 1898. Sec. 471, Stats. 1898, provided that the assessors of the various units in which the joint school district was located should meet annually in order to equalize the respective assessments. Sec. 471, Stats. 1898, was amended by ch. 307, Laws 1905, and again amended by ch. 90, Laws 1907. The latter amendment re-
pealed the provisions requiring assessors to equalize the valua-
tions annually and substituted therefor a provision empowering the electors by petition to have an equalization made by the various assessors.

It is apparent that the equalization provided for in sec. 40.07 cannot extend over a greater period than one year. The theory of equalization under sec. 40.07 is that the assessors of the various units have not complied with the statutory duty imposed under secs. 70.32 and 70.34, which requires the assessors to assess both real and personal property at its true value. There can be no presumption that the assessors will not perform the duties imposed by statute. Rather, the presump-
tion should be that the assessors would in fact perform their duties in accordance with the statutory mandate. In other words, the fact that an equalization is necessary one year does not necessarily lead to the conclusion that the assessment for the following year will be so defective that it must be equalized.
If sec. 40.07 were to be construed as fixing an equalization or proportion extending over until such time as the electors again proceed to petition for an equalization, greater injustice would be worked than if sec. 40.07 had never been enacted. It is possible that in any particular year the assessors of the respective units may assess property on totally different bases. For instance, one assessor may assess the property at 110% of its value; another may assess the property at 40% of its value, and another may assess the property at 90% of its value. Manifestly, such assessments should properly be equalized under the provisions of sec. 40.07. If, however, the equalization should continue for the following year it might happen that the various units might have different assessors. It is possible that the assessors of the unit who during the preceding year assessed the property at 110% might now assess the property at 40% and the other new assessors might be guilty of over- or under-assessing. If the assessed valuation were to continue over there would be a duty imposed on the taxpayers to maintain an attitude of eternal vigilance or be compelled to pay an excessive portion of the school tax. Again, it is entirely possible under such a theory of construction that assessors who perform their duty conscientiously and in accordance with the statutory mandate might be penalized by reason of inability to induce taxpayers to petition for an equalization.

The theory of equalization is that it applies to a tax assessed in a particular year. There can be no equalization unless a tax has been assessed. A proportion of taxes to be paid by the various municipalities may be fixed which will continue over it from year to year, but such proportion, if continuing over, could not in any sense be termed an equalization. Sec. 40.07 provides for an equalization; it does not necessarily provide for any particular proportion. In view of the fact that an equalization can apply only to taxes assessed for any particular year, it is clear that such equalization cannot extend over and apply to the assessment for the following year.

This department, therefore, concurs in the opinion of the tax commission to which you refer and holds that the equalization provided for in sec. 40.07 applies only to the year during which a petition is filed asking for such equalization.

SOA
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Bridge on portion of town line highway maintenance of which is, by agreement between two towns, charged to one town must be maintained by town charged with maintenance of highway.

County board may aid in reconstruction of bridge on portion of town line highway only after electors of town have voted to rebuild bridge and have provided necessary funds.

Arterials—counties and cities must install stop signs along state trunk highways and connecting streets declared by order of highway commission to be arterials for through traffic and must pay cost of such signs and installation from funds appropriated to them for maintenance of arterials; commission may furnish uniform signs at cost to counties or other municipalities but may not draw directly against maintenance appropriation.

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County treasurer should transfer fund made available by county board for improvement of state trunk highway system but not used for such purpose to credit of subdivision which appropriated, on proper certification of facts by county highway committee with approval of state highway commission.

Highway may be established by 20 years' adverse user alone.

Public is entitled to fish on lakes provided it can get to water without trespassing on private land.

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Land owner shut off from public highway should file necessary affidavits under 80.13 to obtain highway from his land.

Town board has discretion and is not liable in action of damages for refusing to lay out highway.

Highway laid out pursuant to 80.13 is public highway, to be maintained by town.

County highway committee, with approval of Wisconsin highway commission, may relocate, and may condemn land therefor, portion of county trunk highway forming part of county system of county trunk highways selected by county board and approved by highway commission, as provided in 83.01 (6).

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