ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manito-woc from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O’CONNOR, Madison from Jan. 5, 1891, to Jan. 7, 1896
WILLIAM H. MYLREA, Wausau from Jan. 7, 1895, to Jan. 2, 1899
EMMETT R. HICKS, Oshkosh from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT, Neillsville from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel from Jan. 6, 1919, to Jan. 3, 1921
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

JOHN W. REYNOLDS  Attorney General
H. A. MINAHAN  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
FRANK W. KUEHL  Assistant Attorney General
HERBERT H. NAUJOKS  Assistant Attorney General
ADELINE J. MEYER**  Assistant Attorney General

*Resigned October 1, 1928.
**Appointed May 1, 1928.
MINUTES OF EIGHTH (SEVENTH REGULAR) MEETING OF THE DISTRICT ATTORNEYS' ASSOCIATION OF WISCONSIN

HELD AT

Sheboygan, Wisconsin, June 14 and 15, 1928

Meeting called to order by President Raymond E. Evrard at the Association of Commerce Rooms, Sheboygan, Wisconsin, at 10 o'clock a. m., June 14, 1928.

Minutes of the 1927 meeting were read and approved.

H. C. Runge, district attorney of Sheboygan county, introduced Mr. Timmer, county clerk, and Mr. Dockrow, undersheriff. Each addressed the convention briefly.

Mr. Runge welcomed the members of the association to Sheboygan.

President Evrard responded, and then read the president's address dealing with problems in law enforcement.

The meeting adjourned until 2:00 p. m.

The meeting was called to order at 2:00 p. m.

J. E. Messerschmidt, assistant attorney general, spoke on Criminal Law.

The meeting adjourned until 8:00 p. m.

The members then visited the Sheboygan County Sanitarium.

The meeting was resumed at 8:00 p. m.

Honorable Edward Voigt, circuit judge elect, spoke on the Cost of Crime.

The meeting adjourned until 9:00 a. m., June 15.

JUNE 15

Meeting called at 9:00 a. m.

Honorable John W. Reynolds, attorney general, spoke on Humor in the Office of the Attorney General.

The following officers were elected for the coming year:

President: H. C. Runge
Vice-president: Hy. P. Schmidt
Secretary-treasurer: K. J. Callahan

The meeting adjourned until 2:00 p.m.

Upon the adjournment at 11:30, Mr. Runge, district attorney of Sheboygan county took all the district attorneys to the Kohler plant at Kohler, Wisconsin. After a tour of the Kohler plant the district attorneys were guests of the Kohler Company at dinner, after which a drive was taken through the model village of Kohler.

Meeting called to order at 2:00 p.m. and Mr. Arthur Johnson invited the Association to hold its next meeting in 1929 at the city of Ashland.

An invitation from Mayor Daniel W. Hoan was read asking the Association to hold the 1929 convention at Milwaukee.

Mr. Gad Jones of Wautoma endeavored to lure the convention to Wautoma by expounding the merits of Silver Lake and the numerous trout streams.

General discussion on the above invitations.

Motion made and seconded that the 1929 meeting of the Association be held in Ashland. Motion carried.

Motion made and seconded that a rising vote of thanks be given to the Sheboygan Chamber of Commerce and to Mr. Herman C. Runge for the hospitality shown to the members of the Association while in Sheboygan.

Motion made and seconded that Herman C. Runge be empowered to appoint a legislative committee and any other committees that he may deem necessary for the ensuing year. Motion carried.

Motion made and seconded that a registration fee of $3.00 be charged to each district attorney in order to defray the expenses which are incurred during the year, and that the president appoint a committee to determine the registration fee for the future. Carried.

Motion made and seconded that K. J. Callahan, secretary, be instructed to write a communication to the Kohler
District Attorneys' Association of Wisconsin

Company, thanking said company for the courtesy extended on June 15. Motion carried.

Motion made and seconded that the secretary send a telegram to President and Mrs. Coolidge welcoming them to Wisconsin.

Motion carried.

Motion made and seconded that the district attorneys present express their thanks to the past president, vice-president and secretary and treasurer for their services rendered during the past year. Motion carried. A rising vote of thanks was given.

Judge F. E. Bump, assistant attorney general of Madison, gave a very interesting and enlightening talk on taxation. He expressly called to the attention of the district attorneys the income tax law, relating to the duties of the attorney general's department. He further discussed the steps necessary to be taken in promoting a bond issue by the counties.

Questions were asked and discussion had on Judge Bump's talk.

Meeting adjourned.

K. J. Callahan,
Secretary.

The following were in attendance: Fulton Collipp, Adams; G. Arthur Johnson, Ashland; C. E. Soderberg, Barron; R. E. Evrard, Brown; G. L. Broadfoot, Buffalo; F. C. Aebischer, Calumet; L. E. Gooding, Fond du Lac; H. W. Krueger, Forest; E. H. Reid, Iron; D. M. Perry, Jackson; Clinton Price, Juneau; K. J. Callahan, Marquette; A. J. Byer (assistant), Milwaukee; W. M. Gleiss, Monroe; S. A. Staidl (assistant), Outagamie; J. V. Ledvina, Price; V. R. Coppernoll, Richland; H. C. Runge, Sheboygan; E. E. Barlow, Trempealeau; A. C. Barrett, Washburn; H. P. Schmidt, Washington; Gad Jones, Waushara; M. S. King, Wood; J. W. Reynolds (attorney general); J. E. Messerschmidt (assistant attorney general); F. E. Bump (assistant attorney general); M. J. Dunn (assistant attorney general); M. A. Levitan (assistant attorney general); S. O. Arnold (assistant attorney general); O. J. Schmiege (assistant district attorney).
Outagamie; Lee H. Cranston (assistant district attorney), Brown.

The following members paid $3.00 each: Lee Cranston, assistant, Brown; Gad Jones, Waushara; K. J. Callahan, Marquette; Lawrence Gooding, Fond du Lac; A. C. Barrett, Washburn; Mr. Staidl, assistant, Outagamie; Hy. P. Smith, Washington; H. C. Runge, Sheboygan; Van R. Coppernal, Richland; G. Arthur Johnson, Ashland; Suel Arnold, assistant attorney general; Judge Bump, assistant attorney general; Mortimer Levitan, assistant attorney general; A. J. Beyer, Milwaukee; F. C. Asbischer, Calumet; Jerome Ledvina, Price.

To the District Attorneys of the State of Wisconsin:

The Wisconsin District Attorneys' Association, of which many of you are members, decided at the last annual convention to establish and create a closer association among the district attorneys of this state; and, as an association, to be of more and greater service.

The support and assistance of all the district attorneys throughout this state is essential for the accomplishment of this aim. It was decided, among other things, to prepare a monthly bulletin, for our mutual benefit and as a means of creating an effective and efficient organ for the solution of some of the district attorneys' many problems. The attorney general volunteered to distribute our bulletins with his monthly opinions.

It was also decided that a registration fee of $3.00 be charged to each district attorney in order to defray the expenses which are incurred during the year 1928-1929. Practically all in attendance at the convention paid the fee for the ensuing year. It is my request that all district attorneys, including those newly elected, who have not as yet paid their fee, which is in effect dues for membership in the association, start the new year right, and send their check to K. J. Callahan, Montello, Wisconsin, treasurer of the Wisconsin District Attorneys' Association.

In connection with the monthly bulletins a committee will be appointed each month; the subject matter to be covered will be announced, from time to time, in our
monthly bulletins. It is my hope and desire that you will communicate with the officers of your association or with the committee members, pertaining to problems or suggestions that you may have dealing with the subject matter at hand, or any other matter of interest or importance. For the month of February L. E. Gooding, district attorney for Fond du Lac county will be the chairman, and the district attorneys of the neighboring counties will be on his committee to take up the matter of preparing complaints, warrants and informations.

This association is yours. This association cannot rise above the character, ability and accomplishments of its members; but, by a mutual bond and mutual endeavor to serve, our association will be able to develop, accomplish and assist all who are interested or engaged in the administration of the law. Through co-operation we will have a better and more thorough knowledge and understanding of the administration of the law; and, as a result, both as individuals and as an association, we will be in a better position to lend some assistance or suggestions to those engaged in the making of the laws for our state.

The field of opportunity to be of greater and better service lies before us. Permit me to add that, in my opinion, there are no shirkers among the district attorneys of this state.

Now in conclusion, it is my sincere hope and wish that the district attorneys of this state will grasp the situation at hand.

(1) Those who are not members—permit me to request your membership.—you owe it to yourself, your community and your association.

(2) Let your problems be fertile fields for your brother district attorneys. Your problems will not be disclosed in a personal way unless there is an understanding to that effect. Always remember that your problems today have been the problems of district attorneys of yesterday, and will be the problems of district attorneys of tomorrow.

(3) Your co-operation and assistance is essential. Bearing in mind that this association is yours, your
Minutes of Eighth Meeting

officers welcome the opportunity to serve you. Surely you will serve your association. Let us hear from you.

Dated, Sheboygan, Wisconsin, December 22, 1928.

Respectfully submitted

HERMAN C. RUNGE,
President, Wisconsin District
Attorneys' Association.

Abandonment—Courts—Civil and criminal jurisdiction of county court of La Crosse county is to be exercised under procedure governing justice court practice, including procedure of such court in jury cases.

Procedure in such court for trying person charged with abandonment of wife or child is special jurisdiction imposed by secs. 351.30 and 351.31, Stats.; jurors for trial of such case are obtained as provided in sec. 324.17, subsec. (5), from list of jurors furnished such court by jury commission as provided in sec. 255.03; or such county court may transfer case to circuit court for trial under provisions of subsec. (3), sec. 324.17.

January 3, 1928.

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

You ask to be advised if the county court of La Crosse county has trial jurisdiction in criminal cases where the punishment is in excess of six months in the county jail, and if so, how to proceed to select a jury in such case.
The county court of La Crosse county, by ch. 129, laws of 1897 as amended by ch. 8, laws of 1899, is given criminal and civil jurisdiction described in said act.

Sec. 5, ch. 129 provides that trial by jury may be had in said county court in all actions brought therein by virtue of the jurisdiction therein conferred and imposed in the same manner as now had in justice courts.

That gives the justice practice, which would include the manner of obtaining juries in justice court in all cases where jurisdiction is conferred upon said court by said chapter, including all cases of misdemeanor as provided therein.

You then refer to secs. 351.30 and 351.31, Stats., which give county courts concurrent jurisdiction with circuit courts in cases of abandonment of wife or child and provide for summoning a special venire of jurors in all such cases therein. You ask if the county court of La Crosse county can conduct such trials and summon jurors with circuit court pay and proceed with the trial under the practice of the circuit court and, if so, how jurors are to be drawn in such cases, and if it is necessary to draw a full venire of thirty-six jurors and select a jury exactly as in circuit court.

The sections referred to specifically confer jurisdiction upon county courts concurrent with the jurisdiction of the circuit court of offenses arising under sec. 351.30. As that is a jurisdiction not conferred by ch. 129, laws of 1897, the provision for obtaining jurors in justice court does not apply to such trials.

Sec. 351.31, subsec. (1), gives county courts and municipal courts concurrent jurisdiction with circuit courts, so the county court of La Crosse county has jurisdiction to commence and prosecute such cases in the manner prescribed in those sections and, in case juries are called for, I think the jurors for such court would have to be obtained in such cases as prescribed by sec. 324.17 (5), which says that jurors and trial juries shall be drawn in the manner prescribed by secs. 255.03 to 255.09, except as otherwise provided therein and trial by jury shall be in the manner provided by secs. 270.15 to 270.31.
By that provision I think the provisions of sec. 255.03 and 255.04 are made applicable to the trial of such cases in county court where a jury is called for. So I think the jury commission should furnish a separate list of jurors for county courts for such cases and they should be tried according to law and practice of circuit courts unless the county court transferred them to the circuit court for trial under the provisions of subsec. (3), sec. 324.17 which says:

"* * * Provided, however, that the county court may, thereafter, in its discretion, by order transfer the matter or cause, and the record thereof, to the circuit court of such county to be tried therein as provided by law."

Where such cases are not numerous, that might be the better method for handling such cases, for I can see where it might be quite an extra expense to summon a full jury for a term of such court where no other cases are pending to be tried by such a jury.

TLM

Agriculture—Agricultural Fairs—Public Officers—Commissioner of Agriculture—Games that are gambling devices and immoral shows are prohibited at county fairs; commissioner of agriculture has authority and duty to prohibit them.

If commissioner of agriculture is not satisfied that county fairs have been maintained according to regulations he may withhold state aid.

January 3, 1928.

W. A. DUFFY,
Commissioner of Agriculture.

Your communication requesting an opinion reads as follows:

"Section 20.61 (11) (a) to (g) inclusive prescribes certain definite duties and grants certain powers to the commissioner of agriculture relative to the conduct of agricultural fairs receiving state aid. I would like to know if the law implies that the commissioner shall have general supervision of the conduct of fair associations."
"For example, may the commissioner notify fairs as to what games, devices, shows and concessions he feels are objectionable, and, in case fair associations permit such features, can state aid be withheld? May the commissioner limit the amount of space which may be devoted to fair midways, or limit the amount of money which may be expended for special attractions, premiums, permanent improvements, and other purposes?

"In case the proper fair official makes the statement verified by oath as provided by paragraph (d), and the deputies of this department for citizens of the state satisfy the commissioner that gambling devices and exhibitions of an immoral character were permitted, may state aid be withheld by the commissioner?"

The appropriation made to agricultural fairs by sec. 20.61, subsec. (11), reads as follows:

"Annually, beginning July 1, 1925, such sums as may be necessary for state aid to counties and agricultural societies, associations, or boards that have fully complied with the rules and regulations prescribed by this subsection, as follows: * * *"

The rules and regulations are then prescribed in detail. Such rules and regulations, by the same section, are administered by the commissioner of agriculture, and upon violation of such rules and regulations, the commissioner of agriculture may withhold payment of state aid.

Par. (a) of this subsection provides that no fair association shall receive state aid, "unless its premium list, entry fees, and charges shall have been submitted to the commissioner of agriculture on or before May 1, and approved by him in writing, both as to premiums offered, amounts to be paid, entry fees to be charged, and all other charges for exhibiting."

Par. (c) provides that the county agricultural society's accounting system be approved by the agricultural commission before state aid be granted.

Par. (d) reads as follows:

"* * * The county clerk * * * shall file with the commissioner of agriculture, on blanks provided by him, an itemized statement verified on oath, showing net premiums actually paid in cash at the preceding fair, which premiums must correspond with the list approved by the commissioner of agriculture. * * * This report shall
also include a statement of receipts and disbursements, attendance, and such other information as the commissioner of agriculture may require; including also a statement that at such fair all gambling devices whatsoever, the sale of intoxicating liquors, and exhibitions of immoral character were prohibited and excluded from the fairgrounds and all adjacent grounds under their authority or control."

This subsection authorizes the commissioner of agriculture to call for "such other information" as he may require.

Par. (e) provides that the commissioner of agriculture shall certify to the secretary of state for audit the amounts due county agricultural fairs for state aid, if it appears from the report submitted, and if "the commissioner of agriculture shall be satisfied that such * * * fairs have been maintained pursuant to the rules and regulations prescribed by him and that the premiums paid are the net amount actually paid," etc.

Par. (f) gives the commissioner or his deputies admission to all fairs and power to personally inspect them.

As indicated in the foregoing, subsec. (11) makes an appropriation for state aid to fair organizations that have "complied with the rules and regulations prescribed by" that subsection. Such rules and regulations are subsequently prescribed in subsec. (11). Nowhere is the commissioner of agriculture given power to prescribe additional rules and regulations other than those specifically granted him. The report submitted to the commissioner of agriculture must be in accordance with statutory provision and, in addition, the commissioner "shall be satisfied" that the fairs have been maintained pursuant to the regulations prescribed. Whenever the commissioner deems it necessary he, or his deputies, may make a personal inspection to ascertain if all regulations are being observed.

In answer to your first question, as to whether the commissioner may indicate what games, devices, shows and so on are objectionable, it is the opinion of this department that such ruling is directly within his jurisdiction with respect to games and devices that are of a gambling nature, likewise with respect to shows and exhibitions that are of an immoral character and within the statutory prohibition. Nowhere in the statutes is the commissioner given juris-
Opinions of the Attorney General

diction over entertainment that is not objectionable and prohibited by statute.

The answer to the first question I think makes unnecessary a discussion of the second.

In answer to your last question, as indicated above, it is not sufficient that the report indicates that fairs have been maintained according to rules but the commissioner must also be satisfied that such was the case. If he is not satisfied, regardless of whether this is based on information brought him by his deputies or by citizens generally, or through other channels, the commissioner has authority to withhold state aid.

FWK

Fish and Game—Mink—Muskrat—There can be no open season for mink and muskrat in Grant county until January 1, 1930.

Paul B. Conley,
District Attorney,
Darlington, Wisconsin.

You have asked a construction of the provision in sec. 29.18, subsec. (4), Stats., concerning the open season for mink and muskrat in Grant county.

Said subsection in part reads thus:

“For mink and muskrat there shall be an open season from January first to April tenth, in all counties excepting the counties of Calumet, Fond du Lac, Green Lake, Marquette, Outagamie, Shawano, Waushara, Waupaca, Marathon, Lincoln, Forest, Florence, Oneida, Langlade, Marinette and Winnebago, where the open season shall be from October twenty-fifth to April first. There shall be no open season in Grant county in odd-numbered years, where there shall be an open season each year for muskrat from January first to April tenth, and no closed season for mink.”

You state that in the second sentence of the above-quoted statute it is provided that there shall be no open season in

January 4, 1928.
Grant county until January 1, 1929, and the next sentence holds that there shall be no open season in Grant county in the odd-numbered years. You state that you have advised a local game warden that under these two provisions there can be no open season for mink or muskrat in Grant county until January 1, 1930.

You inquire whether your construction of this law is correct.

Your question must be answered Yes. Both of these provisions must be given effect. They are in pari materia, and you have arrived at the correct conclusion. The lawmakers might have made this law clearer, but as it reads effect can be given to both and thus the conclusion reached that you have expressed.

JEM

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**Appropriations and Expenditures—Counties**—County cannot pay out public funds for expense of taking exhibition carload of farm and other products of state to different states for advertising purposes.

January 4, 1928.

**George E. O'Connor,**

*District Attorney,*

Eagle River, Wisconsin.

You say that your county board by resolution authorized and directed the chairman of the board to appoint a committee to represent your county on the so-called "Good will tour" to the south with a carload of farm produce and other products of the state for the purpose of advertising, and you say you can find no authority for the county to make such expenditures, and you ask for an opinion of this office on the question. The question is answered in the negative. See II Op. Atty. Gen. 268.

JWR
Opinions of the Attorney General

Taxation—Tax Sales—Several questions answered as to right of county board to authorize redemption from tax sales for less than amount of tax and interest, power of county board to delegate power to sell tax certificates held by county and tax title lands held by county for such prices and on such terms as in their judgment was to best interests of county.

January 4, 1928.

Earl J. Plantz,
District Attorney,
Antigo, Wisconsin.

You submit two resolutions adopted by your county board, relating to delinquent taxes, tax certificates and tax deeds, and you ask for an opinion as to the legality of these resolutions.

Resolution No. 56 has six separate resolves in it and would in legal effect be the same as six separate resolutions, while resolution No. 58 has two parts or resolves, and you also inquire whether, if some of them are illegal, it would affect the legality of other separate parts of the resolution.

In this opinion I will attempt to answer the resolves separately.

No. 1. "Resolved by the county board of Langlade county, Wisconsin, that the county clerk and the county treasurer be, and they are hereby directed not to sell, transfer or otherwise dispose of any tax certificates held by the county except that owner may have the right to redeem."

Answer. Yes. That is expressly authorized by sec. 75.34. The right to redeem is an absolute, statutory right and the right to dispose of tax certificates held by the county is given to the county board.

No. 2. "It is further resolved, that whenever any of the tax certificates held by Langlade county become subject to tax deed, the county clerk be and he hereby is authorized and directed to take all preliminary steps required by law for the taking of tax deeds, and to take tax deeds on all lands which are subject to tax deed."

Answer. Yes. That is authorized by sec. 75.36.

No. 3. "It is further resolved, that the county clerk is hereby authorized to employ, in case of doubt, a competent
person to ascertain as to whether any such lands upon which deeds are to be taken are actually occupied.”

Answer. Yes. I think that is clearly implied from the provisions of sec. 75.12 because a valid deed could not be taken without proof or knowledge of such fact.

No. 4. “It is further resolved that the county treasurer be and he is authorized to assign such tax certificates for which applications for assignment have been made prior to the date hereof.”

Answer. Yes. That is authorized by sec. 75.34.

No. 5. “It is further resolved that after tax deeds are taken on land, the county clerk and the chairman of the county board, finance committee, and the chairman of each town, or the supervisor of each ward, where the land to be sold is located, shall act as a committee, and said committee is hereby authorized to sell such land upon which tax deeds are taken as they shall deem advisable, and for the best interests of the county, either at public or private sale, in whatever manner the committee shall deem the best price can be obtained, it being understood that said committee shall have the right to sell some of said land at public sale, and some of said land at private sale, if they feel this method of sale to be more advantageous to the county.”

Answer. No. Sec. 75.35 provides that the county board may, by order to be entered on its record prescribing the terms of sale, authorize the county clerk to sell such lands for which a deed has been executed to such county, but I do not think this resolution prescribes the terms of sale within the meaning of that section of the statutes. This resolution really delegates to the officers named the right to prescribe the terms of sale, and that power I do not think can be delegated in that way. I see no legal objection to the provisions of the resolution designating or naming the county treasurer and the other officers named to act with the county clerk. Of course the county clerk would be the officer required under the law to execute the deed. The other officers named would act simply in an advisory capacity, but I do not think the general power, to prescribe the terms of sale, which is required to be exercised by the county board, could be delegated to the county clerk or to any or all of the officers named.
No. 6. "It is further resolved that it is the intent of this board that the above resolutions are separate and the holding of any of said resolutions thereof as invalid shall not affect the remainder thereof."

Answer. That shows that each resolution stands separately and would be valid in so far as they can be carried out without the exercise of the discretionary power attempted to be delegated in resolution No. 5.

Resolution No. 58

No. 1. "Resolved, by the county board of Langlade county, Wisconsin, that the county clerk be and he is hereby authorized and directed to give notice of the intention of the county board of Langlade county, to sell, convey or transfer tax certificates owned and held by Langlade county at less than the face value thereof, by publication of said notice once a week for four successive weeks in the Antigo Daily Journal, as provided in section 75.34 of the Wisconsin statutes."

Answer. I do not think the resolution of the board prescribes the terms of sale as required by sec. 75.35; it attempts to delegate that power to the officers named. The form of notice is not objectionable, for it says the county board will sell or direct the sale at less than the face value, but it is not in accordance with the resolution. The county board could, in its discretion, sell or authorize the sale of tax certificates on applications or offers to purchase particular certificates for specified amounts, but I do not think that power to prescribe the terms of sale could be delegated to the county clerk or other county officers.

No. 2. "It is further resolved, that after said notice has been duly given, the finance committee, the county treasurer, the chairman of the county board, the county clerk, and the chairman of each town or the supervisor of each ward where the land in question is located upon which there are outstanding certificates sought to be redeemed, act as a committee, and said committee is hereby authorized to issue a redemption receipt to the record legal owner or owners of such lands as said committee shall deem it advisable, and for the best interests of the county, to be allowed to be redeemed. Said committee is authorized to issue redemption receipts for less than the face value of the tax certificates and they may sell the same for such prices as they shall deem it advisable and for the best interests of
the county. Provided, however, that as a condition for the redemption for less than the face value of the certificates, the owner or owners shall be required to redeem all certificates outstanding owned by the county against each parcel or description redeemed."

Answer. I think most of that resolution is open to the same objection as No. 5 of the first resolution. The owners of lands have an absolute right to redeem same by paying the tax and interest without any resolution of the board, and the resolution could not prevent them from doing so, or authorize them to do so in any other manner than that described by law, for that tax is assumed to be his proper proportion of the expense of maintaining the different branches of the government, which he is under obligations to pay in helping to support the government. If he had not commenced action to contest the amount, he would be estopped from questioning that as the proper amount assessable against the property. I see no legal objection to his being notified by letter or otherwise before selling a certificate on his property, if the county officers desire to do so, and also offering him the right to redeem before selling the certificate, but he would have to redeem it for the amount specified by law. While I think the county board could authorize the sale of certificates for less than face value, they could not delegate that power to other officers or committees to do so in their discretion in particular cases or for such amounts as they deem proper. For the reasons stated, I do not see that any part of No. 2 of that resolution would be valid, for the only right given that would be lawful is the right to redeem at face interest, which right is given by the statute and cannot be denied.

The form of notice which you say has been published is as follows:

"Notice is hereby given that the county board of Langlade county, Wisconsin, will sell, convey or transfer, or order or direct the sale, conveyance, or transfer of tax certificates owned or held by the county, at less than the face value thereof."

You ask if that is a proper notice under the provisions of the resolutions. I do not see any legal objection to the notice. It is not as broad as the resolution and it does not
say how the county board will so sell them. As above stated, the officers named cannot sell them for less than face and interest, so I do not see any effect of the notice published, except as notice that the board would receive offers to buy certain certificates for a specified amount and those offers would have to be submitted to the county board, and authority must be given by the county board as to each such offer, so it will probably not be very effective to carry out or accomplish the original plan or scheme, which evidently was to delegate discretionary powers to the committee and officers named. As above stated, I think that is absolutely void, except that it might authorize a redemption or sale at full value and interest.

TLM

Courts—Court Commissioner—Indigent, Insane, etc.—Court commissioner has not power to act in proceeding to hear application charging person with insanity and issuing order of commitment therein.

January 5, 1928.

Board of Control.

You state that you are in receipt of a commitment made to the Northern Hospital for the Insane of an insane person which is signed by F. Ryan Duffy, rather than by a county judge; that the question has arisen whether it is proper for a court commissioner to execute a commitment of an insane person and you ask to be advised as to this matter.

You have attached a communication from the district attorney of Fond du Lac county relative to this subject.

In sec. 51.01, Stats., it is provided:

"Whenever any person within this state is believed to be insane, application may be made * * * to the judge of the county court or of a district court which is a court of record, or in the absence or disability of such judge to the judge of any court of record acting in his place, for the county in which such person is found, for a judicial inquiry as to his mental condition and for an order of commitment."

Powers of court commissioners are prescribed in sec. 252.15.
Sec. 269.29 provides thus:

"Where these statutes authorize an order or proceeding to be made or taken by the court it must be done by the court in session; where they authorize an order or proceeding to be made or taken by the presiding judge or the circuit judge, using such words of designation, no county judge or court commissioner can act. Except as so provided or otherwise expressly directed in particular instances such judge or commissioner may exercise within his county the powers and shall be subject to the restrictions thereon of a circuit judge at chambers, according to existing practice and these statutes, in all actions or proceedings in courts of record, but all such orders may be reviewed by the court. No county judge or court commissioner shall have power to vacate or set aside any judgment of a circuit court."

In construing the above section we must bear in mind that court commissioners are connected with the circuit court and when the statute contains a provision which prescribes any proceeding or order to be made by the judge then the court commissioner may make the order and the proceeding may be had before him unless the statute uses the words "presiding judge" or "circuit judge" in authorizing the order or proceeding. It is true, as pointed out by the district attorney, that a court commissioner may act in supplementary proceedings and matters that are connected with other than circuit courts under the broad powers given in sec. 252.15.

But that will not authorize us to hold that when the statute gives the county court or any other court of record other than the circuit court power to make orders and issue commitments a court commissioner not connected with said court but appointed by the circuit court may also perform those duties.

I am of the opinion that the county judge cannot call in a court commissioner to take his place in making an order of commitment of an insane person, for the statute provides that the application must be made, in his absence or disability, to the judge of any court of record "acting in his place."

You are therefore advised that it is our opinion that a court commissioner has not the power to act in a proceed-
ing to hear an application charging a person with insanity and issuing an order of commitment therein.

JEM

Municipal Corporations—Public Officers—Mayor—Question in city council whether they will make compromise settlement involving payment by city of $13,000 requires majority vote of all members of council; if vote is tie mayor may cast deciding vote.

January 5, 1928.

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

You have asked for an interpretation of sec. 62.11, subsec. (3), par. (b), Stats., where it provides:

"* * * In case of a tie the mayor shall have a casting vote as in other cases."

You state that in this particular case the council was voting upon the question of whether they would make a compromise settlement involving the payment by the city of $13,000; that four of the aldermen voted "Yes" and four of them voted "No," and the mayor cast the deciding vote.

You ask whether under the circumstances he had a right to cast the deciding vote in view of the fact that it would mean the appropriation of money.

Sec. 62.11, subsec. (1), provides:

"The mayor and aldermen shall be the common council. The mayor shall not be counted in computing a quorum, majority or other proportion under the requirements of law for the same, and shall not vote except in case of a tie."

Subsec. (3), par. (b), of the same section reads thus:

"Two-thirds of the members shall be a quorum, except that in cities having not more than five aldermen a majority shall be a quorum. A less number may compel the attendance of absent members and adjourn. A majority of all the members shall be necessary to a confirmation. In case of a tie the mayor shall have a casting vote as in other cases."

In sec. 62.12, subsec. (6), par. (c), it is provided:
"No debt shall be contracted against the city nor evidence thereof given unless authorized by a majority vote of all the members of the council."

You do not state in your letter the number of aldermen in the council. If they were all present and the council consisted of eight members and the mayor, then the mayor's vote will be the deciding vote as the result gives a majority vote of all the members of the council and, the vote having been a tie, the mayor had the right to vote, as is clearly manifest from the above quoted provisions of the statute.

JEM

Public Health — Pharmacy — Aspirin — Words and Phrases—Retail—Use of word "retail" in sec. 151.04, subsec. (2), Stats., as applied to sale of aspirin as poison drug held not to refer so much to quantity sold as to character of sale for use or consumption.

January 6, 1928.

Board of Pharmacy,
Racine, Wisconsin.
Attention Frederick Kradwell, Inspector.

Your letter of December 21 to the attorney general is handed to me and I note your trouble in trying to enforce the law as to sale of aspirin tablets.

I think your judge is right in advising that the statute does not apply to wholesale transactions. If you will look at my opinion in XVI Op. Atty. Gen. 140, you will see that I stated in that opinion very distinctly that sec. 151.04, subsec. (2), Stats., provides that no person shall retail, compound or dispense drugs, medicines or poisons except in the cases there named.

That word "retail" seems to have been quite carefully used. In just what sense it was used, might be subject to quite serious controversy. Your judge must have construed it as modifying both compounding and dispensing.

If it had read "no person shall sell at retail or compound or dispense aspirin without a license" then I think there would be no question but what the word "retail" would only modify "sell," and while the word "sell" is implied in this
law, the court might easily construe the act as carrying the word "retail" to each of the subsequent terms, and that is the opinion of most of the members of the attorney general's force. It may be very difficult to effectively enforce the law if it is confined to selling at retail, yet that may be the effect of that peculiar use of the word "retail," so I doubt if you will get the courts to construe it as including wholesalers in view of the strict construction of criminal statutes. That may make it more difficult to enforce the law and may make it necessary for you to buy or get some one to buy for you a box of aspirin tablets in order to successfully prosecute.

The word "retail" would not refer so much to the quantity purchased or sold as it would to the character of the transaction. That is, it would refer more, I think, to the purchase or sale for use or consumption rather than sale. TLM

Physicians and Surgeons—Public Health—Basic Science Law—Sec. 147.20, subsec. (3), Stats., as amended by ch. 79, Laws 1927, authorizing board of medical examiners to revoke license of physician upon his conviction of crime committed in course of his professional conduct, is applicable only to convictions obtained after passage of amendment.

January 7, 1928.

DR. ROBERT E. FLYNN, Secretary,
Board of Medical Examiners,
La Crosse, Wisconsin.

You have referred me to ch. 147, Wis. Stats., relating to revocation of licenses as amended by the last legislature. You state that the section dealing with the revocation of licenses was changed materially and you inquire whether your board has now the power to revoke a license of a person who is convicted of a crime committed in the course of his professional conduct, which conviction occurred prior to the amendment of the law. In other words, does the law as amended give your board the right to revoke a license where the conviction was obtained prior to the 1927 law?
Sec. 147.20, subsec. (3), Stats., as amended reads thus:

"* * * When any person licensed or registered by the board of medical examiners is convicted of a crime committed in the course of his professional conduct, the clerk of the court shall file with the board of medical examiners a certified copy of the information and of the verdict and judgment, and upon such filing the board shall revoke the license or certificate."

Under the old law the court in which the conviction was obtained was required to revoke the license. It is a fundamental rule for the construction of statutes that they will be considered to have a prospective operation only, unless a legislative intent to the contrary is expressed or necessarily to be implied from the language used in the particular circumstances. 26 Am. & Eng. Encyc. of Law, 2d ed., 693.

Our court has often considered this principle of law and in Read v. Madison, 162 Wis. 94, 100, the authorities are collected and the rule is laid down that "statutes conferring new rights are generally held not to have a retroactive effect unless such intention is fairly expressed or clearly implied" but "as to statutes relating to remedies, however, this strict rule does not apply."

I believe that the wording of this statute as amended permits only one interpretation. It provides that when a licensed physician is convicted of a crime committed in the course of his professional conduct the clerk of the court shall file with the board of medical examiners a certified copy of the information and of the verdict and judgment and upon such filing the board shall revoke the license or certificate. There was no provision in the old law requiring the clerk to file a certified copy of the information and of the verdict and judgment with the board of medical examiners and this law provides, upon such filing, that the board shall revoke the license or certificate. This clearly implies that the revocation can only be predicated upon a conviction that was obtained after the new law went into effect.

You are therefore advised that it is my opinion that your question must be answered in the negative.

JEM
Opinions of the Attorney General

Corporations—Public Utilities—Taxation—Income received by telephone company for performing switching for another company constitutes part of gross receipts of switching telephone company.

License fee upon that portion of gross receipts received for such switching service should be paid to locality in which company performing switching service is located.

January 7, 1928.

Solomon Levitan,
State Treasurer.

You state that B is a telephone company located outside the city limits, which hires A, a telephone company, located in the city, to do its switching for $25. B pays to the state and town the regular telephone license fee prescribed by law. You inquire whether or not the $25 paid to A for switching is a part of the gross receipts of A on which A should pay a license fee under the provisions of sec. 76.38, Stats. This switching is clearly a telephone service rendered by the "exchange property" of A, and money thus received constitutes a part of the gross receipts of A.

You also ask whether A should pay the license fee upon that portion of the gross receipts received for switching, to the city in which A operates or to the town in which B is located? This question arises by reason of the wording used in subsec. (1) and subsec. (3) of sec. 76.38, Stats.

"(1) * * * And from the service of the local and rural exchange property of the company and the town, city, or village in which any portion of such local or rural exchange property is located, and any portion of the gross receipts therefrom are derived, with the true amount of the gross receipts of each such local or rural exchange derived from such exchange business in each town, city or village.

* * *

"* * * * "(3) * * * The license fee upon eighty-five per cent of the gross receipts from the local and rural exchange service or business in each such town, village or city, respectively, shall, on or before the first day of March, in each year, be paid to the respective treasurer of each town, city or village in which any portion of the local or rural exchange property is located, and any portion of the gross receipts therefrom are derived, for the use and benefit of each town, city or village; * * *"
The switch board of A is located within the city, the service of switching is performed in the city and the money is received also in the city. I am, therefore, of the opinion that the city should receive the benefit of the license fee therefrom. On the other hand if the license fees were paid to the town the town in the instant case would receive a license fee twice; I believe that the legislature did not intend that such a situation should arise under the provisions of the statute.

AJM

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Taxation—Forest Crop Lands—Ch. 77, Stats., relating to taxation of forest crop lands, its rule of taxation and exemptions, its withdrawal either by owner or by state, method and conditions of such withdrawal construed.

Conservation Commission.

You ask for the construction of sec. 77.05, Stats., as to what disposition is made of the tax of ten cents an acre paid to the town in which forest crop land is located. You ask:

"Would the proceeds of the tax go into the general fund of the town, to be expended under the direction of the town board, or would it go into the fund of the school district in which the land happens to be located?"

Ch. 77, Stats., provides a special rule for taxation of forest crop lands that are placed under the provisions of that chapter as provided therein and so as not to "hamper the towns in which such lands lie from receiving their just tax revenue from such lands," sec. 77.03 provides that lands set aside as therein prescribed for forestation purposes shall be taxed only as therein prescribed.

Sec. 77.05 requires the owner to such lands to pay ten cents per acre to the town treasurer on or before February 20 each year and also requires the state treasurer to pay the same amount to the town treasurer, and if that tax is not paid for three years the property becomes the property of the state.
Provision is thereafter made for a severance tax for certain purposes and also for withdrawal of such forestation lands under certain conditions.

With these general provisions I think your specific question must be answered by the laws applying to other taxes when collected. There is no specific separate provision for disposing of the tax funds so collected, so I think the tax must be regarded and treated as other taxes collected by the town treasurer and paid into the general funds of the town. The fact that it may have to be refunded in case of withdrawal would not affect that right.

You also ask for a construction of sec. 77.06, subsec. (1), which reads:

"* * * Merchantable wood products include all wood products having any commercial value when severed other than products personally used by the owner for the maintenance or improvement of his own premises, and "fuel wood."

You ask if a railroad company or a mining company owning such forest crop land may use the timber severed from such land in the improvement of its own property without paying the severance tax.

Yes, if used for the purposes there specified as there is no classification of owners in this law.

You refer to that part of sec. 77.10 (1) which reads as follows:

"* * * However, in case said withdrawal is accomplished by act of the conservation commission within five years from the date that said land became forest crop lands hereunder, the owner shall thereupon repay to the state treasurer the amount of all moneys with interest at five per cent per annum thereon paid by the state as specified in subsection (2) hereof."

You say that subsec. (2) of this section is not relevant and it appears from the contents that reference should be to subsec. (2), sec. 77.04, and you ask to be advised.

I think you are mistaken as to sec. 77.04 (2) applying to or covering either of the situations named in sec. 77.10.

Sec. 77.10 (1) gives the conservation commission the right on the application of the tax commission, the owner, or upon its own motion to cause an investigation to be made
and a hearing to be had as to whether any forest crop lands shall continue under this act, and if on such hearing it appears that said lands are not meeting the requirements of the act, the conservation commission should determine that fact and the provisions of the law should not thereafter apply to such lands; if done within said five years the owner is required to repay to the state treasurer the amounts of all moneys advanced with interest at five per cent per annum, and in case of his failure, land at the end of three years should become the property of the state.

That is a withdrawal by the conservation commission and is evidently based upon a failure of the owner to properly comply with the law so as to meet the requirements of sec. 77.02.

Sec. 77.10 (2) (a) provides for a withdrawal by the owner by his filing with the conservation commission a declaration withdrawing from the provisions of the law any description owned by him and by paying the amount of tax that would have been levied against such lands had they not been subject to the provisions of that chapter, with simple interest thereon at five per cent less the amount there specified to be determined by the tax commission, and upon the owner's paying such amount, the lands shall cease to be forest crop lands. Subsec. (b) provides for a division of such moneys between the state and the units of government that would have been entitled to such tax had it been originally levied and paid. Subsec. (3) provides that the lands shall thereafter be taxed as if they had never been under this chapter.

Sec. 77.12 provides for a review of the proceedings and determination by the circuit court of Dane county or of the county in which the land lies.

Your last question relates to the provisions of sec. 77.10 (2) (b), and you say this subsection provides the manner in which deferred taxes shall be distributed but omits any reference to a severance tax. The question raised is: In case a severance tax has theretofore been paid, would not this means of distribution be improper?

I do not think it would, if by that you refer to the fact that a part of the timber had been removed by the owner
for the purposes and in the manner authorized by that law, for if the owner pays the proper amount of tax that the land would have been assessed for if it had not been so withdrawn and takes the land back withdrawn from the provisions of that law, neither the state nor the local municipalities would be harmed because of the fact that part of the timber had been severed from the land while the land was so withdrawn, because he would then own the land and have paid his full taxes thereon so could do what he wanted with it. To enable that readjustment, sec. 77.11 requires a set of books to be kept showing payments made.

TLM

Education—Industrial Education—Loans from Trust Funds—Land commissioners are not authorized to make loans to vocational board of education.

January 11, 1928.

A. D. Campbell, Chief Clerk, Land Commission.

In your letter of January 5, you say:

"Please advise us of the proper answer to the following question asked by the city superintendent of Manitowoc:
"In the case of Manitowoc, for example, where we have the board of education and a vocational board of education, and both boards preparing to build buildings, is it possible for the vocational school board to get a loan of $50,000 and the board of education proper for the city to get a loan of $50,000 at the same time?"

Subsec. (3), sec. 25.01, Stats., which authorizes loans from the trust funds under your jurisdiction, enumerates in detail the municipalities to which such loans may be made. Vocational boards of education are not included in this authorization. While boards of education are authorized to secure loans, vocational boards of education are not authorized to do so. Boards of education and vocational boards of education are two different and distinct educational controlling bodies, and the names are not used interchangeably in the statutes. The fact that no loan has ever been made to a vocational board of education evinces a simi-
Opinions of the Attorney General

lar interpretation of the law in the past. It is submitted, therefore, there is no statutory authority for a loan to a vocational board of education.

FWK

Bonds—Municipal Corporations—Municipal Borrowing—Villages—Village has no power to borrow money and issue short time promissory notes therefor, except under provisions of sec. 67.12, Stats.; it has no power to issue bonds to provide money with which to pay short time notes whether issued under said section or otherwise.

Proceedings preliminary to issue of bonds by village for public improvements thereafter to be made only, and not for payment of obligations incurred for such improvements already made, may be approved and bonds certified by attorney general.

January 11, 1928.

W. D. Haseltine,
Village Attorney,
Wittenberg, Wisconsin.

You state that for the past year and a half the village of Wittenberg has been making very extensive improvements on its village hall, having almost entirely rebuilt the same, and that the costs of such improvements have been and are being met by short term borrowings in the form of promissory notes from a local bank; that during such time the village has also been installing a system of sewers and that the cost of the main outlet and street crossings have also been taken care of by short term notes at a local bank; that there remains some work yet to be done on the village hall, some further extensions of sewers to be made at village expense, and the erection of a proper sewage disposal plant which the village has promised the state board of health would be taken care of during the current year; that the notes given for loans for money paid out by the village on the village hall improvements and the sewerage system approximate eight thousand dollars, and that to provide the sewage disposal plant, and complete the improvements on the village hall will require the expenditure
of an additional four thousand dollars; that the village proposes to issue bonds in the sum of twelve thousand dollars for the purpose of repaying said eight thousand dollars outstanding in short term notes and for the purpose of financing the work of completing the improvements to the village hall, the extension of the sewerage system and the erection of a sewage disposal plant; that it is intended to submit the proceedings preliminary to the issue of such bonds to the attorney general for his approval and the bonds for his certification under the provisions of ch. 67, Stats., and that the state retirement system has advised that if such proceedings are approved and such bonds certified by the attorney general the bonds will be purchased by the annuity board. In effect, your question is whether, if the proceedings preliminary to the issuing of said proposed bonds are regular, the same will be approved by the attorney general for the purposes stated.

You are advised that it is my opinion that the village has no power to issue bonds for the purpose of refunding the so-called short term loans. The power of the village to make such short time loans existed only under the provisions of sec. 67.12, Stats., and had said section been complied with, there would be no need of refunding the loans, as it is a condition of the validity of such loans that the resolution authorizing the same shall levy a special tax for the amount thereof to be carried into the next tax roll and collected with the other taxes on that roll. Had the statute been followed, the money with which to retire the notes at the bank would be forthcoming on the collection of the current taxes. (See, however, validating provisions of sec. 67.02, subsec. (2).)

The general power of the village to issue bonds is confined and limited by the purposes enumerated in sec. 67.04 (4) and sec. 67.04 (2) (a), (b), (c), (f), (g), (j), (l), (m), (n), (o), (p) and (q), and no power to issue bonds to refund indebtedness is given by those provisions. The only refunding bonds that may be issued by a village or other municipality are bonds to refund bonds issued prior to 1913 under the conditions specified in sec. 67.04 (8).

Since by the express provisions of sec. 67.03, Stats., a village may borrow money and issue its obligations there-
Opinions of the Attorney General

for the purposes specified and by the procedure provided in ch. 67, Stats., "and for no other purpose and in no other manner" with certain exceptions not applicable to the facts involved in your inquiry, it follows from what has already been said that proceedings for the issuing of bonds for the purpose of paying the short time notes to which you refer could not lawfully be approved nor the bonds certified by the attorney general.

Separate, regular proceedings preliminary to the issuing of bonds for the separate purposes of providing for the cost of (1) improvements to the village hall, (2) extension of sewers and improvement of the sewerage system, or (3) for the construction of a sewage disposal plant, in the future (but not for the cost of construction of such public works already done or contracted to be done), may receive the approval of, and bonds of the separate issues certified by, the attorney general on compliance with the provisions of law relative thereto.

FEB

Trade Regulation—Trading Stamps—Cash register slip representing sales discount but no stated cash value violates trading stamp act.

January 12, 1928.

C. J. Kremer,

Dairy and Food Commissioner.

In your communication you state as follows:

"In a business establishment known as the University Co-operative Company, a card bearing a number and designated as a membership card is given to 'persons connected with the university of Wisconsin' upon payment of $2.50, for which the person to whom the 'membership card' is issued and who paid the money receives a fountain pen coupon, which may be exchanged for a $2.50 fountain pen or applied as part payment for a more expensive pen.

"The number on the card is designated as the 'membership number' of the person to whom it was made. If thereafter the person to whom this 'membership card' was issued makes a purchase at the store and informs the clerk of his number, the number is placed upon a cash register slip together with the amount of the purchase. The
slip consists of two parts, which show the purchaser's number and one is retained by the store. The other is given to the purchaser who is instructed to save it and bring it when applying for rebates. It does not bear a stated cash value.

" 'Rebates' are issued each spring on purchases made during the previous calendar year, and must be taken out by December 31 of the year in which they are issued.

" 'Rebates' are stated as 'amount credit' on slip bearing membership number and entitle the holder to apply the amount stated thereon on purchases made in the store and are not redeemable in cash.

"The business referred to appears to have originated and have been conducted as a co-operative corporation. In June, 1914, it was transferred and assigned to three trustees 'to be elected, take over and hold all the property, effects and credits of the company and hold the same in trust for the stock holders of said company,' and a trust agreement was executed. The trustees then elected are a self perpetuating body; that is, vacancies by death, resignation or removals are to be filled, not by election of stockholders, but by appointment of the remaining trustees.

"When the 'trust agreement' was made, the element of co-operation that was theretofore present in the organization, appears to have been abandoned. In substance the agreement provided, among other things, that 'The trustees shall manage the property and business in such manner as they shall deem best in the interest of the student body of the university of Wisconsin, that no dividends shall be declared, but that subject to such rules as the trustees shall prescribe purchasers may be allowed reductions in prices or such repayments in cash or merchandise as the said trustees shall determine may reasonably be made, due regard being had to the proper growth, continuance and management of the business.' Under this authorization the transactions of the store heretofore set forth are conducted and rebates are given, which however, are not payable in cash but must be taken out in merchandise.

"I was unable to find where any of the holders of the membership cards have any proprietary right, equity or interest in the business or any investment therein, or any claims to profits, enforceable in the courts. Neither do I find that purchasers connected with the university or alumni thereof have any claims for consideration or merchandise privileges which other purchasers in the store referred to, do not have.

"The question that confronts me and upon which I seek your official advice is whether, under the facts stated, the practice followed by the University Coop. in issuing to a certain group in connection with the sale of goods, wares
and merchandise tokens not redeemable in cash only, but entitling the purchasers receiving the same to things of value, namely a 'rebate slip' and subsequently, during a stated period, merchandise, constitutes a violation of section 134.01."

That part of sec. 134.01, Stats., which is material, 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, 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. * * *.

You state that whatever element of co-operation existed was abandoned subsequent to the trust agreement; also that purchasers received no proprietary right nor interest in the business. The rebates consequently cannot be dividends.

The statutory language, no "trading stamp, token, ticket, bond, or other similar device" is language that would include a cash register slip or any other similar device. It is hard to understand what language the legislature might have used to include all conceivable schemes that would better fit all cases. The sales slips represent sales discounts and, to comply with the law, should state on their face a cash value.

Without such stated cash value, there is a noncompliance with sec. 134.01, Stats.

FWK
Appropriations and Expenditures—Counties—Expenditure of public funds by county for promoting development of county should be done, if at all, by creating county board of immigration and appropriating money to such board to be used in advancement of agriculture as provided in sec. 59.08, subsec. (10), pars. (a), (b), and (c), Stats.

A. C. Barrett,
District Attorney,
Spooner, Wisconsin.

You say the opinion of this department, XVII Op. Atty. Gen. 7, that a county board cannot defray the expense of a member of the board on an advertising trip through the south has caused the chairman of your county board to question the legality of the appropriation made by the county board of Washburn county to defray the expenses of renting booth space at the “Out-Door Show” to be held at Chicago, Illinois, which has for its purpose the advertising of lake shore property and outing facilities offered by different communities throughout the state. You ask to be advised as to the legality of the matter.

This office has given several opinions, official and unofficial, against the power of the county boards to appropriate public money for advertising purposes except where it is specifically authorized by some act of the legislature like that found in sec. 59.08, subsec. (10), pars. (a), (b) and (c), Stats., and when the right is exercised under that authority, it should be exercised in the manner there provided by first creating a county board of immigration to promote settlement of vacant agricultural lands in the county and the other purposes there specified. The county board could then appropriate moneys to be used for carrying out that purpose. Just what that kind of a board could do or be authorized to do under that law is not attempted to be specified, so it would be left largely for the board to determine what would be proper or an advantageous expenditure of public funds in promoting immigration into the county, but that should be the subject of the appropriation and expenditure.

TLM
Education—School Districts—Funds belonging to board of education in city school system of which is governed by provisions of special charter cannot be expended except in accordance with provisions of special charter.

January 17, 1928.

John Callahan, State Superintendent,
Department of Public Instruction.

With your letter of December 31, 1927, you enclose copy of a letter received from S. B. Tobey, city superintendent of Wausau public schools. Mr. Tobey's letter reads in part as follows:

"* * * the state tax commission's auditor in making the statement of the financial condition of the school board, June 30, 1927, placed in the general school funds balance $169,472.07, and a bond fund balance of $881.71, a total of $170,353.78. This balance our common council believes is incorrect. They are of the opinion that the common council has at various times advanced to the school funds, approximately $100,000, which has not been, they allege, returned to them, and request the board of education to transfer from the school funds to the city funds $100,000 in repayment of this alleged loan from the city funds to the school funds.

"You will understand that the school funds and the various city funds have been drawn on indiscriminately for the payment of all city and school indebtedness, and the funds have not been kept strictly separate for many years. It is due to this fact that the misunderstanding has arisen. Our city officials are unable to identify the loans or advances to the school funds which they allege have not been returned.

"In order to ascertain, if possible, a correct balance for the school funds, inasmuch as the state auditor did not go back over the books of the city and the schools beyond the year 1925, I have taken the pains to go back to the year 1920, and add to the undisputed balance, June 30, of that year in the school funds all receipts of every description for general school purposes and for building purposes, and for purchase of sites down to and including June 30, 1927, and have also added the total expenses from June 30, 1920, to June 30, 1927, inclusive, and find the difference between these two sums is $116,690.42 as per account attached hereto. If I am correct, then the common council has advanced to the board of education the difference between $170,353.78 and $116,690.42 which would indicate sums
amounting to $53,663.36 advanced by the council to the board of education, but not repaid by the board.

"Admitting this to be true, it would seem equitable on the part of the board to return to the council the $53,663.36 even though the state auditor has assigned it to the funds of the board of education."

The letter states that the mayor and the council are urging the board of education to sign a school order for $100,000 to the city, and you desire information as to whether such transfer can legally be made.

While all special charters of cities of the second, third and fourth class were repealed by ch. 242, Laws 1921, it has been held that such repeal did not affect the situation as far as city schools are concerned.

Ch. 425, Laws 1927, created sec. 40.50, Stats. 1927, which provides that all general school statutes shall govern city schools. This section, however, does not become effective until July, 1928.

The city of Wausau, prior to 1921, operated under the provisions of a special charter. Ch. 151 P. & L. 1883, was the latest amendment to the special charter of the city of Wausau affecting schools. Sec. 20, ch. 151, provides:

"* * * All moneys raised, received, recovered or collected by means of any tax, license, penalty, fine, forfeiture, or otherwise, under the authority of this act, or which may belong to the said city, shall be paid into the city treasury, and shall not be drawn therefrom except by an order issued by order of the common council, and signed by the mayor, and countersigned or attested by the clerk, except school moneys, which shall be drawn as herein otherwise provided. * * *

Sec. 20 further provides that the city treasurer

"shall keep an accurate account of all moneys or other things coming into his hands as treasurer, and shall keep each fund separate in a book to be provided for that purpose, * * *."

Under the special charter the city council of the city of Wausau levied taxes for all purposes, including school purposes.

Sec. 41, ch. 151 provides:

"The common council of said city shall annually levy, upon the taxable property of said city, to defray the cur-
rent expenses of said city and its schools, a tax sufficient for
that purpose, * * *”

Sec. 134 of the act provides that the board of education
shall annually on or before the first day of October in each
year, submit for the consideration of the council a state-
ment of the estimate required for carrying on the schools
for the ensuing year.

Sec. 136 provides:

“It shall be the duty of the president and secretary of the
board of education to draw orders on the city treasurer, and
payable out of the school fund, for teachers’ and janitors’
wages, and other expenditures authorized by this act, and
said orders shall be paid by said treasurer out of the funds
drawn upon, and in no other way shall the school funds be
paid out by said treasurer.”

Under your statement of facts it appears that the city
treasurer has violated the provisions of sec. 20, ch. 151 for
a number of years, in that he did not keep a separate ac-
count of the various funds belonging to the city. This fact,
however, does not alter the power of the board of education.
School funds must be expended only in compliance with the
provisions of the special charter. There is no provision in
the charter, expressed or implied, which gives to the board
of education the power to transfer school funds to the city
under the conditions outlined by you in your letter submit-
ted with your request. Such funds may be expended only
in accordance with the provisions of sec. 136 of the special
charter.

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

Insurance—Insurance carried by state under provisions
of ch. 210, Stats., does not cover loss or destruction of per-
sonal property or effects of employe or officer of state.

January 17, 1928.

M. A. Freedy,
Commissioner of Insurance.

You say in the recent fire in the state capitol, the man
who operates the capitol switch board at night and who
lives in the room in which the fire occurred sustained con-
siderable loss to his personal clothing and other personal effects, on which he carried no insurance, and you ask if the protection which the state carries in the state insurance fund under the provisions of ch. 210 could be construed as extending to cover his personal property and effects. You say it is your personal conviction that it did not cover anything except property owned by the state, but you ask to be advised.

Clearly, the insurance provided for by ch. 210 is insurance by the state of property owned by the state and to cover loss sustained by the state. So it would not cover property owned by an employee or an official of the state and the officers in charge of the insurance fund would have no power to pay out any of said insurance funds to cover losses sustained by an employee or an official of the state for loss or damage to his personal property or effects.

TLM

Education—School Districts—Transportation of Pupils

—School board of district which has suspended school must pay tuition of children who attend other district schools and provide transportation to and from school.

In case board refuses to pay tuition or furnish transportation, such duty may be enforced in action of mandamus.

January 17, 1928.

E. L. KENNEDY,
District Attorney,
Rhinelander, Wisconsin.

The material facts contained in your letter of December 29, 1927, are as follows:

In 1921 the Gauthier school in the town of Pelican Lake or the town of Schoepke, also known as the Ted school, was found to be in need of considerable repair and, rather than make the repairs, the electors voted to abandon or suspend the school with the understanding that the board would transport the children attending the said school to district No. 1, in the village of Pelican Lake. The school was accordingly abandoned and transportation furnished until this year, when transportation for the children from the
said section was voted down by the electors. The school board of the town of Pelican Lake refuses to transport these children or to pay their tuition, and the children are not being sent to school.

You inquire whether the school board can be compelled to transport and pay the tuition of the children.

Subsec. (2), sec. 40.34, Stats., provides:

"The board of any district which has suspended school shall pay the tuition of all children of school age residing in the district who attend other district schools during such suspension, and shall provide transportation to and from school for all children residing more than one mile from the nearest school which they may attend, and the district shall receive the regular state and county money and state aid on account of such transportation; and one hundred fifty dollars additional state aid."

The statute clearly provides that the school board of a district which has suspended school shall pay tuition of the children who attend other district schools, and shall provide transportation to and from such schools. The statute in this respect is mandatory. If the school board refuses to pay tuition and furnish transportation it may be compelled to do so by an action of mandamus.

SOA

Courts—Jurors—Circuit court may dismiss from attendance upon it for limited and specified time juror summoned for service at term without finally discharging him from other duties; juror so excused is not entitled to per diem fixed by statute for jury service.

J. V. LEDVINA,
District Attorney,
Park Falls, Wisconsin.

In your letter of December 17, 1927, you state:

"At the trial of an arson case at our last term of court, after the twelve jurors had been chosen for this trial, the rest of the jurors, twenty-four in number, were excused on Thursday and told to report the following Monday."
You inquire whether the twenty-four jurors who were excused are entitled to pay for the days while the arson case was in progress.

Sec. 255.31, Stats., provides:

"Every grand and petit juror summoned upon any venire shall receive four dollars for each day's actual attendance upon any circuit court, county court or municipal court from either of which an appeal in such action, as may be for trial, must be taken directly to the supreme court, and four cents for each mile actually traveled in going and returning by the most usual route; but shall be paid for no day when the court is not in session unless specially ordered by the presiding judge."

It will be noted that the statute provides for the payment of four dollars to each juror for each day's actual attendance upon the court. A court may dismiss from attendance upon it for a limited and specified time any of the jurors summoned without finally discharging them from their duties; and as their compensation is actually given for actually attendance, they are not entitled, when so excused, to the per diem fixed. Jacobs v. Elliott, 104 Calif. 318.

Your question, therefore, is answered in the negative.

SOA

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**Taxation—Tax Sales**—Sale of tax certificates by county at less than face value thereof must be authorized by county board; certificates can be sold only after required publication in newspaper has been made.

D. M. Perry,

*District Attorney,*

Black River Falls, Wisconsin.

You submit a request you received from your county clerk and inquire of this department, as follows:

"Would you please advise how the tax certificates subsequent to the certificate upon which a deed has been taken can be canceled without the action of the county board."

I am of the opinion that there is no statutory authority for the cancellation or sale of tax certificates sold for less
than provided for in the statutes, without direct action of the county board.

Sec. 75.36, Stats., provides that a deed executed to the county for an unredeemed tax certificate held by the county "shall have the same force and effect as deeds executed by such clerk to individuals for lands sold for the nonpayment of taxes."

Sec. 75.14, Stats., provides that a similar deed executed to a purchaser "shall vest in the grantee an absolute estate in fee simple in such land, subject, however, to all unpaid taxes and charges which are a lien thereon and to redemption as provided in this chapter." The title which the county receives is subject to the same liens, therefore, as if the purchaser were a private individual.

Sec. 75.32, Stats., continues the land liable to taxation on which the county holds certificates of sale, for unpaid taxes. The tax certificates to which you refer, if your question is understood correctly, are therefore proper liens upon the property.

The answer, whether action of the county board is required before tax certificates can be disposed of, it would seem, is found in sec. 75.34. Unless an order to the contrary appears, county treasurers may sell and transfer tax certificates for the amount for which the land described therein was sold, together with charges thereon. Subsec. (2) provides, however, that the county board shall not at any session sell and transfer such certificates for less than the face value thereof unless the county clerk has previously, for four successive weeks, published such notice in a newspaper. No authorization for cancellation of such tax certificates or for sale below their face value appears other than the section just cited. Action by the county board is necessary and such action can only be taken after the statutory requirements have been met.

FWK
Automobiles—Bonds—Bond required of freight carrier under sec. 194.14, subsec. (1), Stats., needs cover only damage caused to pedestrian.

January 17, 1928.

RAILROAD COMMISSION.

In your letter of December 13, 1927, you inquire whether the bond to be furnished by a freight carrier, under sec. 194.14, Stats., should provide for the payment of damages to persons, to cargo, to other property, or to all three forms of damage.

Subsec. (1), sec. 194.14, Stats., provides in part, as follows:

“No auto transportation company shall operate any motor vehicle for the transportation of passengers unless there shall have been filed with and accepted by the commission a good and sufficient indemnity bond issued by some surety or indemnity company or exchange created under the laws of the state of Wisconsin or duly authorized to transact business therein, which said bond shall describe such vehicle by factory number, maker’s name, number of passengers capable of being accommodated therein at one time, and the number of the state license under which the same is operated (which said license number when changed by the issuance of a new state license shall be indicated upon said bond by the attachment of a rider thereto); said bond shall provide that the company or exchange issuing the same shall be directly liable for and shall pay all damages to persons, at least in the following amounts: Not exceeding ten thousand dollars to any one person or twenty thousand dollars for any one accident in the case of each vehicle having a seating capacity of seven passengers or less; not exceeding ten thousand dollars to any one person or forty thousand dollars for any one accident in the case of each vehicle having a seating capacity of more than seven and less than sixteen persons; not exceeding ten thousand dollars to any one person or fifty thousand dollars for any one accident in the case of each vehicle having a seating capacity of more than seven and less than twenty-five persons; and not exceeding ten thousand dollars to any one person or seventy-five thousand dollars for any one accident in the case of each vehicle having a seating capacity of twenty-five persons or more, that may be recovered against the operator of the vehicle described therein by reason of the negligent use and operation of such vehicle.”
The foregoing provisions apply only to transportation companies engaged in the business of transporting passengers. The statute further provides:

"* * * No auto transportation company shall operate any motor vehicle for the transportation of freight unless there shall have been filed with and accepted by the commission a similar bond in the sum of two thousand dollars."

There can be no question but that the bond required of passenger carriers under the foregoing statute does not include injuries to property. The statute in express terms provides:

"Said bond shall provide that the company or exchange issuing the same shall be directly liable for and shall pay all damages to persons * * * by reason of the negligent use and operation of such vehicle."

Subsec. (3), sec. 194.02, Stats. 1925, provides that the carrier issuing the bond shall be directly liable for and pay all damages "whether to persons or property" that may be recovered against the operator of the vehicle.

Ch. 395, Laws 1927, which created sec. 194.14, Stats. 1927, repealed sec. 194.02, Stats. 1925. The legislature, in repealing the latter section and enacting the former, clearly manifested an intent that the bond should cover damage only to property.

The bond required of passenger carriers covers damages to pedestrians as well as passengers. Ehlers v. Automobile Liability Co., 166 Wis. 185. In this case the court passed upon the provisions of subsec. (3), sec. 194.02, Stats. 1925, but the decision is equally applicable to subsec. (1), sec. 194.14, Stats. 1927.

The statutes requires a freight carrier to furnish a bond "similar" to that furnished by a passenger carrier. We have shown that the bond furnished by a passenger carrier does not cover damage to property. We have likewise shown that a bond furnished by a passenger carrier covers damage not only to passengers but also to pedestrians. A freight carrier, of course, does not transport passengers.

In view of the fact that the statute does not require said
bond to cover damage to property, it is the opinion of this department that the bond required of freight carriers need cover only damage caused to pedestrians.

SOA

_Fish and Game_—Applicant for license under ch. 29, Stats., who has been convicted of violating any provisions of that chapter cannot be licensed for one year after conviction; any license so issued is nullity, and licensee can be prosecuted as if no license has been issued.

Applicant who swears falsely to obtain license can be prosecuted for perjury or for unlawfully having game in his possession.

January 17, 1928.

C. E. SODERBERG,
_District Attorney_,
Rice Lake, Wisconsin.

You say a certain man in your county was convicted last June of violating the fish and game laws; that recently he made application for a trapping license, and a license was issued to him on such application; that he has since been trapping game under such license. You ask if he can be prosecuted for trapping without a license and for illegal possession of muskrat skins.

Under the provisions of sec. 29.63, subsec. (3), par. (a), Stats., a conviction for violating any of the provisions of ch. 29 revokes any license theretofore issued under that chapter, and subsec. (b) of that section provides that no license shall be issued to any person for a period of one year following a conviction of such person for violation of any provisions of that chapter. That provision absolutely disqualifies a person from being licensed under that chapter for a period of one year, so that any license issued in violation of the prohibition is absolutely void and is no protection to a prosecution for trapping without a license.

That was the effect given to the statute by this office in X Op. Atty. Gen. 64, and, as stated in that opinion, if the applicant swore falsely in his application, he could also be prosecuted for perjury, and if you found game in his possession unlawfully, he could be prosecuted for that offense also.
Physicians and Surgeons—Basic Science Law—Doctor’s license may be revoked: first, under sec. 147.20, subsec. (2), Stats.; second, under subsec. (3) of same section. Pardon does not restore license.

January 18, 1928.

Board of Medical Examiners, La Crosse, Wisconsin.

Dr. Robert E. Flynn, Secretary.

Advising as to the methods of revoking licenses to practice medicine in Wisconsin under the present laws, will state that there are two methods provided in the laws: first, under the provisions of sec. 147.20, subsec. (2), Stats., a special proceeding is provided for by filing a verified complaint with the district attorney, who must then bring a civil action in the name of the state in the circuit court to revoke the license. If on the trial a court or jury finds for the plaintiff, the judgment of the court shall revoke the license and the clerk of the court is required to certify a copy of the revocation to the board.

The second method of revoking such license is provided in subsec. (3) of that section, which says that when a licensed doctor is convicted of a crime committed in the course of his professional business, the court shall file with the board of medical examiners a certified copy of the information, verdict and judgment and the board shall then revoke the license.

Under the first proceeding the license is revoked by the judgment of the court and you get your record of that revocation by a certified copy sent you by the clerk.

In the second method, the board makes the revocation on the certified copy of the conviction from the clerk of the court.

In either procedure the license is revoked and, where it is revoked by your board on the certified copy of the conviction, that revocation is no part of the record of the circuit court proceedings, as it requires affirmative revocation by the board. So it would not be affected by a pardon, which simply kills the sentence and judgment of the court. But the revocation in such case is made by the board after
the sentence and judgment of the court and is no part of that sentence and judgment and for that reason would not be affected by the pardon.

TLM

Appropriations and Expenditures—Counties—Board of Immigration—Where county board under provisions of sec. 59.08, subsec. (10), Stats., creates board of immigration and appropriates funds to aid in promoting settlement of vacant agricultural lands in county, moneys may be used by such board in printing and distributing leaflets, booklets, etc., showing advantages of county for agricultural purposes.

January 18, 1928.

JAMES R. HILE,
District Attorney,
Superior, Wisconsin.

You ask if a county board has any authority to spend money for the printing of leaflets or booklets setting forth the advantages of the county for agricultural or resort purposes.

Your attention is called to the provisions of sec. 59.08, subsec. (10), pars. (a), (b) and (c), Stats., which gives the county board authority to create a county board of immigration and makes it the duty of such board to aid in promoting settlement of vacant agricultural lands in the county and to protect prospective settlers from unfair practices of the unscrupulous, and gives the board power to appropriate for carrying out such work a sum not exceeding five thousand dollars.

That is a very broad, general power and discretion in the creation of such a board of immigration, and when that board is created, unless its powers are restricted, it would have to determine what it would do to aid in promoting the settlement of such vacant agricultural lands. If it determined to expend part of its funds for printing of leaflets and booklets and other matters setting forth the advantages of the county for agricultural purposes as a means of aiding and promoting the settlement of the vacant agricultural
lands of the county, I think that would be within the power of the board and could not be controlled by the courts. If the county board made an appropriation for carrying out such work, then I think such county board of immigration could not only print such circulars and other printing matter, but could employ either the mails or messengers and employes to distribute them.

You then ask if such an appropriation for advertising and furthering the development of the county is a legal appropriation.

I think it is where such a board is created under that law and an appropriation is made by the county board. Under those circumstances, I think it would come within the powers delegated to the county within the decisions of our courts. That is the same principle for which moneys have been appropriated by counties in aiding county fairs and agricultural exhibits.

TLM

Navigable Waters—Public Lands—Lands uncovered by gradual recession of waters of meandered navigable lakes inure to riparian owners to next eighth line; beyond next eighth line title is in state.

January 19, 1928.

A. D. Campbell, Chief Clerk, Land Commission.

With your letter you submit tracings showing meander lines of North Lake and Lake Keesus, two meandered lakes I assume, and you inquire relative to the law governing title to land uncovered by gradual recession of the water.

Attention is directed to several lots in two or three different sections and you inquire especially with reference to the boundary line of lot 3, section 20. From the tracing it would seem that lot 3 is located in the northeast quarter (N.E.1/4) of the southeast quarter (S.E.1/4) of section 20. Part of the southern boundary of North Lake originally was the northern boundary of lot 3, but part of the southern boundary of the lake constituting part of the northern
boundary of lot 3 gradually receded beyond the 8th line running between the north half and the south half of the northeast quarter (N.E.\(\frac{1}{4}\)) of section 20; you inquire whether, under those facts, the northern boundary of lot 3 where the lake has receded, ends with the 8th line running between the north half and the south half of section 20 or extends beyond that point along the western shore of North Lake.

This department has previously ruled on a similar question, and said:

"But where there is a *gradual* recession of the waters of a meandered lake * * * the land exposed thereby becomes the property of the riparian or littoral owners of land divided according to regular subdivisions bordering on the lake *up to the next eighth line.*" (The last italics are mine). XII Op. Atty. Gen. 361, 362.

The lakes in this instance having gradually receded and exposed thereby land not included in the grants to private owners within the rule just cited, the title to this additional exposed land is in the state. Referring to Whitney v. Detroit Lumber Company, 78 Wis. 240, our supreme court said:

"* * * In that case it was held that where a lake was named as a boundary, and no lake in fact existed, the boundary must be the next eighth line." Lally v. Rossman, 82 Wis. 147, 149.

In making that rule applicable to lot 3, it is apparent that the northern boundary of that portion of lot 3 where the lake receded ends with the next eighth line. The rule just cited and applied to lot 3, section 20 is the same with respect to the other instances referred to in your letter.

FWK
Counties—Public Officers—County Board—County Highway Commissioner—Ordinance of county board of nineteen members present proposing to abolish office or position of county highway commissioner, on question of adoption of which nine members voted aye, eight members voted no, and two members did not vote, chairman of board who declared ordinance adopted being of members who voted aye, was not adopted by majority vote required by sec. 59.04, subsec. (3), Stats., and is ineffective; subsequent resolutions of board requesting state highway commission to take charge of construction and maintenance of state aided highways and placing discharge of duties imposed by law upon county highway commissioner in hands of county highway committee fail with failure of ordinance to pass and are also ineffective.

January 19, 1928.

HIGHWAY COMMISSION.

It appears from your statement and accompanying documents that a county highway commissioner of Forest county was re-elected at the annual meeting of the county board in November, 1926, for a full term of two years as provided by subsec. (2), sec. 82.03, Stats., and that his term of service under the provisions of such section therefore does not expire until the first Monday in January, 1929; that at the annual meeting of the county board in November, 1927, an ordinance and certain resolutions were successively introduced and voted upon with the purpose of (1) abolishing the office of county highway commissioner, effective upon the passage, adoption and publication of the ordinance, (2) directing the immediate publication of such ordinance, (3) requesting the state highway commission to take charge of the work of constructing and maintaining the highways built with state aid in the county, (4) placing the county highways of said county not constructed or maintained with state aid under the direction and control of the county highway committee and empowering and directing such committee to construct and maintain such county highways as ordered and authorized by the board and to employ a suitable foreman to superintend, plan, lay out and supervise the work on said county highways at a
salary not to exceed $175 per month, and (5) empowering and directing the county highway committee to take over all trucks, automobiles and machinery of the highway department of the county; that the ordinance proposing to abolish the office or position of county highway commissioner was acted upon by a vote of nine ayes, eight noes, two members of the board not voting although present, the total membership of the board being 19, and that the chairman, T. W. O'Brien, who declared the ordinance carried, was one of the voting members who voted aye; that the resolutions embodying the other measures referred to were adopted by the board subsequent to said action upon the ordinance proposing to abolish the office or position of county highway commissioner by an affirmative vote of ten or more of the members.

You request an opinion on the question of whether, under the facts as above stated, the several acts of the county board above enumerated are valid.

The answer, I think, should be in the negative.

Assuming that under the provisions of sec. 59.08, subsec. (8), Stats., which was enacted after the enactment of subsec. (1), sec. 82.03, Stats., the abolishing of the office or position of county highway commissioner before the expiration of the term of service provided for by the last cited section was within the power of the county board at the annual meeting, such power, in my opinion, was not legally exercised, for the reason that the ordinance proposing to abolish the position was not passed or adopted by a majority of the members of the board present, as required by subsec. (3), sec. 59.04, Stats., which provides as follows:

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

Only nine, including the chairman of the board, out of the nineteen members present, voted in favor of the ordinance, whereas it required the affirmative vote of at least ten members to constitute a majority in favor of the ordinance. *Strange v. Oconto Land Co.*, 136 Wis. 516, involv-

The validity of the resolutions adopted subsequent to the attempted passage or adoption of the ordinance must fail with the failure of the ordinance to pass because, unless the ordinance was legally adopted, its publication was without effect, and, there being a duly elected, qualified and acting county highway commissioner, the board was without authority to request the state highway commission to take charge of the construction and maintenance of state aided highways or to place the discharge of the duties of the county highway commissioner imposed upon him by law or change the custody and control of the county highway machinery placed in him by law (sec. 82.04, Stats.) elsewhere. The resolutions of the board subsequent to the action on the ordinance plainly had for their purposes the distribution of the duties and responsibilities imposed by law on the county highway commissioner, and were adopted on the supposition that the position of county highway commissioner had been legally abolished.

FEB

Counties—Public Officers—County Board—County Highway Committee—Chairman of county board, as well as any other member of county board, is eligible to election as member of county highway committee.

Terms of office of members of county highway committee begin upon election and qualification upon expiration of year for which any former committee was elected.

January 19, 1928.

HIGHWAY COMMISSION.

You inquire whether, in view of the amendment to sub-
sec. (1), sec. 82.05, Stats., made by ch. 26, Laws 1927, the chairman of the county board may be elected by the board as a member of the county highway committee.

The question is answered in the affirmative.

So far as material to your question, the statute now reads as follows:
"Each county board at the annual meeting shall by ballot elect a committee of not less than three or more than five persons, to serve for one year and until their successors are elected. Any vacancy occurring in the committee may be filled until next meeting by the county board by appointment made by chairman of said board. * * *"

Before the amendment of 1927, the statute in question read:

"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. * * *"

It will be seen that what the amendment did was (1) to repeal that portion of the statute which empowered the county board to instruct the chairman to appoint the committee, and (2) to empower the chairman to fill a vacancy (only) on the committee by appointment until the next meeting of the board. The additional thing done by the amendment, that of striking out the words "of which said chairman may be one" is, in my opinion, without significance in its bearing on your question, because it seems quite clear that that phrase was used in the old statute in connection with the power given the county board to instruct the chairman to appoint the committee so that there would be no doubt of the power of the chairman to appoint himself on such committee; having taken from the board the authority to instruct the chairman to appoint the committee, this provision became of no value, which, doubtless, was the reason for striking it out of the statute. The chairman of a county board is a member of the board, and it was early held in construing this statute that members of the county board, as well as other persons, are eligible to election as members of the county highway committee, and that subsec. (2), sec. 66.11, Stats., does not apply to membership on such committee. IX Op. Atty. Gen. 569. You are referred to that opinion for a statement of the reasons for so holding, to which may be added the further reason that it is eminently proper that the county board should be represented on the county highway committee.
because the statute makes such committee "the only com-
mittee representing the county in the expenditure of county
funds in constructing or maintaining, or aiding in con-
structing or maintaining any roads or bridges within the
county" which, before the enactment of the statute was a
power residing exclusively in the county board or a com-
mittee of a county board by delegation of power.

You inquire further as to when the terms of the mem-
ers of the county highway committee elected at the annual
meeting of the county board shall begin.

In an opinion to the district attorney of Marathon county
on January 27, 1923, it was held that by the plain provi-
sions of the statute, now subsec. (1), sec. 82.05, the mem-
ers of the committee take office immediately upon election
and qualification on the expiration of the year for which
any former committee was appointed, and hold for one
year and until their successors are elected and have quali-
fied. The statute, so far as the provisions referred to are
concerned, has not been changed since that opinion was
given, and it must be adhered to. XII Op. Atty. Gen. 40.

It may be, as you suggest, that it would be better if the
old committee held over until the close of the year because
of the fact that when the county board meets in annual
session the road construction and maintenance projects
of the current year are still under way and therefore the
work which the old committee has had in charge during
the year cannot be closed up at that time; on the other
hand, the legislature may have considered it a wise provi-
sion that the new committee should be appointed and take
office and become familiar with the work of the committee
before the beginning of the next year's construction and
maintenance problems come before it. At any rate, the
legislature only can determine that the beginning of the
term of members of the county highway committee shall be
the first and the ending the last of the calendar year in-
stead of the date of election by the county board, as is now
provided.

FEB
Automobiles—Common Carriers—Shipper who has entered into thirty-one contracts for transporting freight is common carrier, subject to provisions of ch. 395, Laws 1927.

January 19, 1928.

Railroad Commission.

The material facts presented in your letter of December 13, 1927, are as follows:

One C. A. operates a truck for the transportation of freight between M. and T. R. practically on a daily schedule, although at no specified time. Presumably he operates only when freight is available for transportation. In response to a demand by you that he comply with ch. 395, Laws 1927, he submitted a contract entered into between himself and thirty-one shippers of freight, located at M. The contract provides, in part, as follows:

"The said party of the first part, for the consideration hereinafter mentioned, has agreed, and does hereby covenant, promise and agree, that he will receive and discharge articles of freight and express, between the village of —, and city of —, and to the true performance of his duties as such drayman, he is to be compensated at the rate of 15 cents per hundred pounds.

"It is also understood and agreed to by both parties, that the party of the first part, shall carry such liability and other insurance that will fully compensate the parties of the second part against loss or damage to persons or property through the act or negligence of the said party of the first part. And the said party of the first part shall exhibit from time to time, or when demanded such policy or policies of insurance, unto the parties of the second part, for their approval.

"It is further understood and agreed to that the party of the first part shall receive and discharge only freight and express, for those corporations, partnerships and individuals whose name appears on this contract."

You inquire whether C. A. is a private carrier or an "auto transportation company" within the meaning of ch. 395, Laws 1927.

Ch. 395, Laws 1927, created ch. 194, Stats. 1927. Subsec. (6), sec. 194.01 provides in part, as follows:

"'Auto transportation company' means every person, firm, corporation, or association, their lessees, trustees or receivers, appointed by any court whatsoever, owning, con-
trolling, operating or managing any motor vehicle for compensation upon any public highway between fixed termini or over a regular route on the public highways of this state, and affording a means of local street or highway transportation or interurban transportation similar to that afforded by street or interurban railways by indiscriminately accepting and discharging such persons as may offer themselves for transportation, or such freight or property as may be offered for transportation along the course on which such vehicle is operated, * * *.*

Sec. 194.02, Stats., provides:

"* * * Every such auto transportation company is declared to be a common carrier, * * *.*"

It is apparent from the provisions of ch. 395, Laws 1927, that if C. A. is a common carrier, he is subject to the provisions of the act.

The distinction between a common carrier and a private carrier is very aptly pointed out by Babbitt, in his work, The Law Applied to Motor Vehicles, where he says (sec. 158):

"The distinction between such carriers [common carriers] and private carriers is that the former holds himself out to all persons who choose to employ him, as ready to carry for hire, while the latter agrees in some special case with some private individual to carry for hire. The common carrier's employment is public, and he is bound to carry the goods and persons of all who demand carriage who will comply with his reasonable terms."

In State ex rel. Public Utilities Commission v. Nelson, 65 Utah 47, P. U. R. 1926A 89 the court in commenting on common carriers, said, pp. 461–462:

"* * * All recognize that a common or public carrier is one who, by virtue of his business or calling or holding out, undertakes for compensation to transport persons or property, or both, from one place to another for all such as may choose to employ him. Running through the cases is a recognition of the dominant element of public service, serving and carrying all persons indifferently who apply for passage or for shipment of goods or freight."

There is nothing to indicate from the statement of facts that C. A. holds himself out to the public as a common car-
rrier. If, of course, he is operating bona fide under contract with shippers, he is not a common carrier.

In Michigan Public Utilities Comm. v. Duke, 266 U. S. 570, the United States supreme court held that a person who entered into a contract to transport automobile bodies from Detroit, Michigan to Toledo, Ohio, who had no other business, and who did not hold himself out as a common carrier of the public, was a private carrier and not a common carrier.

In Frost v. R. R. Comm., 271 U. S. 583, it was held that a common carrier engaged solely in the business of transporting freight under a single private contract, was not a common carrier.

In the Frost case the argument was made that unless the carrier involved in that case was held to be a common carrier, it would be possible for all carriers, by subterfuge, to evade the provisions of the law regulating automobile common carriers. The court, in discussing this contention, said, p. 599:

"The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect to common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number, to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here: and we are not to be understood as challenging the power of the state, or of the railroad commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly."

We believe that the situation you have presented is one which falls within the language used by the supreme court in the Frost case.

C. A. has entered into thirty-one contracts in order that he may make a prima facie showing that he is a private carrier and not a common carrier.

We believe that under such circumstances the court would hold that he is in fact a common carrier. The question is a serious one, and should be passed upon by the courts.

SOA
Corporations—Credit Unions—Trade Regulation—Credit union cannot apply for or receive permit to lend money pursuant to provisions of sec. 115.07, Stats.

January 19, 1928.

C. F. SCHWENKER,
Commissioner of Banking.

You ask if a credit union can apply for and receive a permit to lend money pursuant to the provisions of sec. 115.07, Stats. A credit union is a co-operative credit association organized under the provisions of ch. 186, Stats. Sec. 186.01, Stats., which defines credit unions, provides in part:

"The words 'credit union' shall mean a corporation formed under the provisions of this chapter for the purpose of promoting thrift among its members and loaning its funds to them for provident purposes. * * *"

Sec. 115.07, Stats., provides among other things for the making of loans secured by "chattel mortgage, bill of sale, pledge, receipt or other evidence of debt upon chattel goods or property, or by assignment of wages" at the ten per cent per annum maximum interest rate plus "an amount equal to seven per centum per annum of the original sum actually loaned for the time of such loan, on sums of a hundred dollars or less, nor more than four per cent per annum of the original sum actually loaned for time of such loan, on sums over one hundred dollars, disregarding part payments and the dates thereof, but not to be computed for a period exceeding one year in any event," this to be in full for all examinations, views, fees, commissions, etc.

Subsec. (3a), sec. 115.07, Stats., provides:

"Before any person, or any association, copartnership, or corporation heretofore or hereafter created, shall do business under the provisions of section 115.07 of the statutes, such person, association, copartnership, or corporation shall first obtain a permit from the commissioner of banking, who is hereby invested with the supervision of said organizations."

Under the provisions of sec. 115.07, Stats., the interest rate which may be charged by persons engaged in business under the provisions of that section ranges from 17 per cent on less than $100 and 14 per cent on more than $100 up to exorbitant rates, depending upon how payments on the prin-
Opinions or the Attorney General

cipal are made during the year. It is obvious that making loans on such basis would be in violation of the express purpose of credit unions—that is, of promoting thrift among its members. In my opinion, therefore, a credit union cannot apply for and receive a permit to lend money pursuant to the provisions of sec. 115.07, Stats.

ML

Fish and Game—Navigable Waters—All lakes and streams meandered or those that have been declared navigable by statute and those that are navigable in fact are navigable waters in this state.

Licenses for muskrat, beaver and fur animal farms may not issue covering any land submerged by navigable lake or pond but may issue covering navigable stream.

Head waters of stream may be nonnavigable while other parts of stream may be navigable.

If stream is nonnavigable and dam is legally constructed, causing greater depth of water and making stream navigable, general public does not have right to enjoy privileges afforded by navigable waters unless they acquire such right by prescription or otherwise.

If railroad commission permits one to build obstruction across navigable stream there is provision made for public to travel through or around such obstruction by commission under sec. 31.02, subsec. (2), Stats.

There is no definite size that lake must be in order to be navigable. It must be navigable in fact and each case must be decided upon facts and circumstances present.

If lake or pond is entirely surrounded by privately owned land having no outlet or inlet, is small or large, and is classified as navigable waters, no fur farm license may issue covering such lake or pond.

No person has right to place screen across nonnavigable stream which prevents free passage of fish up or down stream when such stream has been stocked by state authorities.

January 20, 1928.

Conservation Commission.

You state that a number of questions has arisen as to the definition of navigable water and other questions pertain-
ing to the issuing of muskrat, beaver, and fur animal farm licenses, and you have submitted a number of questions for an official opinion, which we will take up *seriatim*:

"1. How may we determine what is navigable water?"

Navigable water is defined by our statute in sec. 30.01, subsecs. (1), (2), and (3), which follow:

"(1) All lakes wholly or partly within this state which have been meandered and returned as navigable by the surveyors employed by the government of the United States, and all lakes which are navigable in fact, whether meandered or not meandered, are hereby declared to be navigable and public waters, and all persons shall have the same rights therein and thereto that they have in and to any other navigable or public waters.

"(2) All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States, and all rivers, streams, sloughs, bayous and marsh outlets, whether meandered or nonmeandered which are navigable in fact for any purpose whatsoever are hereby declared navigable to the extent that no dam, bridge, or other obstruction shall be made in or over the same without the permission of the legislature.

"(3) All inner harbors, turning basins, waterways, slips, and canals created by any municipality to be used by the public for purposes of navigation, and all outer harbors connecting interior navigation with lake navigation, are declared navigable waters and shall be subject to the same control and regulation that navigable rivers are subjected to as regards improvement, use and bridging."

In Olson v. Merrill, 42 Wis. 203, our court held that it is the settled law of this state that streams of such capacity to float logs to market are navigable and that it is not essential to the public easement that this capacity be continuous throughout the year, but that it is sufficient if the stream have periods of navigable capacity ordinarily recurring from year to year and continuing long enough to make it useful as a highway.

For the purpose of navigation any stream that may float logs or a skiff is navigable in fact. See Allaby v. Mauston Electric Service Co., 135 Wis. 345, 350.

It is therefore a question of fact whether a certain stream is navigable unless it is expressly so declared by statute.
law of this state and the test of navigability is whether it can be usefully used for floating logs and a skiff.

In the case of Willow River Club v. Wade, 100 Wis. 86, it was held that the Willow River in St. Croix county, an unmeandered tributary of the Mississippi, which is capable at times of high water of floating logs and small row boats, although at other times row boats cannot be taken up the stream without dragging or pushing them on the bottom in numerous shallow places, is a public, navigable stream.

In Falls Manufacturing Company v. Oconto R. I. Co., 87 Wis. 134, it was held that the Oconto River, which in its natural state has a capacity to float logs during the spring freshet, which usually lasts about six weeks, is a public, navigable waterway, although during the remainder of the year it is not particularly useful for such purposes without the aid of flooding dams.

We may therefore draw the conclusion that for the purpose of navigation any stream that may float logs or a skiff is navigable, in fact, and the term "navigability in fact" is not used by the courts in a restricted or commercial sense, but in a broad sense, which includes the capacity of navigation for recreation as well as for profit.

In the case of Bixby v. Parish, 148 Wis. 421, it was held that the test of navigability of lakes and ponds is the same as in case of streams.

It is therefore a question of fact in each individual case whether a certain stream or a certain lake or pond is navigable unless it is expressly so declared by statute law of this state and the test of navigability in each case is whether it can be usefully used for floating logs and a skiff.

Question 2. "May a fur farm license be issued covering any land which is submerged by navigable water?"

A muskrat farm may be established under sec. 29.575, and a beaver farm under sec. 29.576, and a fur animal farm under sec. 29.577, Stats. Such statutes require that the licensee must be the owner or lessee of the land which must be suitable for the breeding and propagating of the respective animals for which the farm is to be used. No person can be the owner or lessee of land submerged by navigable lakes. This is well settled in this state and needs no cita-
tion of authorities. The state is the owner and holds said land in trust for the use of the public. It must therefore be held that no part of a public lake can be a part of a muskrat, beaver, or fur animal farm.

The question whether such farms may include navigable streams and rivers is a more difficult question. The beds of all navigable streams in Wisconsin are owned by the riparian owners. If the riparian owner owns both sides of the stream he also owns the bed of the stream. If he owns only the land on one side of the stream his farm line will be the center of the stream.

The above cited statutes also provide that the license issued shall entitle the licensee named therein or his successors or assigns to the exclusive right for and during its said term to breed and propagate muskrats, beaver, or fur bearing animals thereon and to the exclusive and sole ownership of any property in said animals caught or taken therefrom. Sec. 29.575, subsec. (7); sec. 29.576, subsec. (7); sec. 29.577, subsec. (7).

There is no provision in any of these statutes exempting navigable waters from muskrat, beaver, or fur animal farms. We are therefore confronted with the question whether it was the intent of the legislature to authorize the granting of a license for a muskrat, beaver, and fur animal farm for land covered in part or in whole by navigable streams. The question is not free from difficulty. Under the definition of a navigable stream as adopted by our court it would be almost impossible to find a place suitable for a muskrat farm and fur animal farm, to say nothing of a beaver farm, disconnected from a navigable stream. A stream so petty that a saw log or a skiff cannot be floated upon its waters as described in Olson v. Merrill, supra, would not yield enough water to make the place suitable for the propagation of beavers and probably not for the propagation of other fur bearing animals.

In subsec. (6), sec. 29.575, we find the provision:

"Within thirty days after the date of the issuance of such license the licensee shall erect posts or stakes at intervals of not more than twenty rods along the boundary of the lands embraced in said license, wherever the same are
not already enclosed, and shall post and maintain upon said posts, stakes or other enclosures at intervals of not more than twenty rods, notices furnished by the conservation commission proclaiming the establishment of a muskrat farm."

It is further provided that the licensee shall pay to the conservation commission the sum of twelve cents each for such notices.

The same provision is found in subsec. (6), sec. 29.576 and subsec. (6), sec. 29.577. In subsec. (4), sec. 29.575 it is provided:

"* * * He [licensee] shall have the right to manage and control said lands and the rate thereon, to take and trap the same at any time or in any manner which he sees fit and deems to the best advantage of his business, and to sell and transport at any time said muskrats or the pelts taken from them. * * *"

The same provision is found in subsec. (4), sec. 29.576 and subsec. (4), sec. 29.577. It thus appears that it is the intent to stake off these farms and give the licensee of the farm the exclusive right to trap, catch and kill the animal or animals for which the farm is licensed. A serious question confronts us here whether the legislature has the right to bar the public from part of a navigable stream for the purpose of propagating wild animals and gives such right exclusively to a licensed individual. It is well known that the fundamental law of the land guarantees to the public the right of hunting and fishing in all navigable waters. See Ne-pee-nauk Club v. Wilson, 96 Wis. 290; Willow River Club v. Wade, 100 Wis. 86; In re Trempealeau Drain. Dist., 146 Wis. 398; Diana Shooting Club v. Hustmg, 156 Wis. 261.

After careful consideration of this question I have come to the conclusion that the legislature has the right, for the purpose of propagating wild animals, to give the exclusive right to certain persons to trap, hunt, and kill such animals in navigable waters as is provided in the statutes here in question.

I have been unable to find any authorities passing upon statutes such as we are considering here. It is, however, well settled that although the public has the right to navigate on navigable waters and exercise the right of hunting
and fishing thereon the parliament in England and the legislature in this country has the power to grant the exclusive right for fisheries in navigable waters. Thus, in 13 Am. & Eng. Encyc. of Law (2d ed.) 567–568, it is said:

“By statute in several states persons are authorized to locate oyster beds, or to have oyster grounds assigned to them, in the navigable waters of the state, and are given the exclusive privilege of planting and cultivating oysters in such beds or grounds upon their complying with the provisions of the statutes. Some of these statutes are general in their terms and apply to all citizens or inhabitants of the state and to all its navigable waters. Others apply only to certain specified waters or to a particular class of persons.”

The constitutionality of these statutes has been sustained. 13 Am. & Eng. Encyc. of Law (2d ed.) 567. See cases cited in Note 2.

In Angelo v. Railroad Commission, decided by our supreme court on January 10, involving the question of taking marl from the bottom of a navigable lake, our court said:

“McCready v. Virginia, 94 U. S. 391, 396, upheld the right of Virginia to exclude all but her citizens from the privilege of oyster fishing; and Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 86, is in point. The same doctrine was declared as to sponges found in tide waters and that Congress had no power to legislate thereon in The Abby Dodge, 223 U. S. 166, 175.”

The rules giving the public the right to fish in public waters are held to apply to shell fish as well as to other fish, but it has been held that the exclusive right to a shell fishery may be obtained by grant from the legislature. See 11 R. C. L. 1031. See also extensive note in 60 L. R. A. 481, in which the conclusion was reached that notwithstanding the denial of the power of the crown of Great Britain, there is no doubt that the people themselves can make valid grants of fisheries to private individuals. If they have not limited the power of their representatives, the latter may make them. Therefore all argument which has been adduced to overthrow the power of the crown for the purpose of limiting the power of the legislature is wasted, because the legislature possesses not only the power of the crown but of parliament also. Although the power of the crown
to grant private fisheries in tidal waters was restrained by Magna Charta, the right of parliament to do so is undoubted. *Queen v. Robertson*, 6 Can. N. S. 52. There is no ground for questioning the power of the legislature to authorize a grant to private individuals of a public fishery. *Commonwealth v. Weatherhead*, 110 Mass. 175.

Under the statute in question it must be noted that even if a muskrat, beaver, or a fur animal farm is established over lands submerged or partly submerged by a navigable stream it does not necessarily interfere with the rights of the public to navigate such streams and to fish and hunt thereon—even those parts covered by muskrat, beaver, or fur animal farms. The only limitation upon the public is to prohibit them from taking and killing the specific animal for the propagation of which the fur farm has been created.

In view of the above authorities I believe it must be held that our statute intends to authorize the establishment of these muskrat, beaver, and other fur bearing animal farms on land wholly or partly covered by navigable streams. In view of the above observation I am of the opinion that a fur farm license may not issue to cover land which is submerged by a navigable lake, but may be issued to cover land which is submerged or partly submerged by a navigable stream.

It must not be overlooked that in establishing and operating these fur farms it is not permitted to place obstructions in the navigable waters or impair the free navigation thereof under sec. 31.23, Stats.

Question 3. “Might the headwaters of a stream be considered nonnavigable, and further down stream, navigable?”

This question, I believe, can be answered in the affirmative. It is a fact that many a stream is navigable near its mouth, but nonnavigable near the source.

Question 4. “If a stream were nonnavigable, and the railroad commission permitted one to build an obstruction which would cause a larger depth of water, making the stream navigable, would the general public have a right to enjoy the privileges afforded by such navigable water, if they could gain access to it without trespassing upon any-
one's land, say by going over the obstruction or by a road running to it?"

In answering this question it is necessary to call your attention to the case of Allaby v. Mauston Electric Service Co., 135 Wis. 345, in which our court held that the test of navigability under the mill dam law is not the same as the test of navigability with reference to determining whether a stream is a public highway or waterway. If the stream is in fact nonnavigable because it is impossible to float logs or a skiff for passage on said stream, then I would answer your question in the negative. The pond created by the dam would be a private pond and remain such until the public had acquired navigable rights in it by prescription.

In Johnson v. Eimerman, 140 Wis. 327, where it was held that a pond created in a nonnavigable creek by the flowage of a dam across such creek is navigable, it must be noted that our court also held that the public had acquired the public rights by long user.

Question 5. "If a stream were navigable in the first place, and the railroad commission permitted a man to build an obstruction causing water to overflow private land, would the general public have a right to enjoy the privileges afforded by such water which would be overflowing this privately owned land?"

In the Mendota Club case, 101 Wis. 479, 493, which involved the right of fishing on waters overflowing certain lands caused by the raising of a dam at the outlet of Lake Mendota our court said:

"* * * That dam was a permanent structure, designed to be such, and has so remained for nearly half a century. There is no claim that it was an unlawful structure. Although an artificial structure, which considerably increased the depth, the extent, and breadth of the waters on the premises in question, yet the public had the right to navigate such waters after they were so increased in volume, the same as though they had always remained in that condition. Whisler v. Wilkinson, 22 Wis. 572; Volk v. Eldred, 23 Wis. 410; Weatherby v. Meiklejohn, 56 Wis. 73; Smith v. Youmans, 96 Wis. 103, and cases cited by Mr. Justice Pinney on page 110. 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.”

This rule applies here and necessitates an affirmative answer to this question.

Question 6. “If the railroad commission permits one to build an obstruction across a navigable stream, is there any provision made for the public to travel over such obstruction to get to navigable water above it?”

This question must be answered in the affirmative.

See sec. 31.02, subsec. (4). Under this provision the railroad commission, I am informed, invariably makes provision for the public to pass either around or through the dam.

Question 7. “Is there any definite size that a pond or lake must be, which is entirely surrounded by privately owned land and has no inlet or outlet before it could be considered navigable water?”

The test of navigability of lakes or ponds is the same as that of streams, that of navigability in fact. Bixby v. Parish, 128 Wis. 421.

In the case of Ne-pee-nauk Club v. Wilson, 96 Wis. 290, our court said, p. 295:

“It is well settled in this state that grants by the United States, of lands bounded by a meandered lake or other permanent body of water, convey title only to the natural shore of the body of water, while the title to the land which is under the water is in the state. Diedrich v. N. W. U. R. Co., 42 Wis. 248. And the rule is the same whether the body of water can be made practically useful for the purposes of navigation or not (Boorman v. Sunnuchs, 42 Wis. 233), irrespective of its size or depth.” (Italics, except in citations, ours.)

In Massachusetts, as early as 1647, an ordinance was passed by the colony, which fixed the line between private and public lakes or ponds arbitrarily at ten acres, and provided that ponds over ten acres were subject to public use. The surveyors that surveyed Wisconsin territory, at least some of them, were instructed to meander all lakes and deep ponds of the area of twenty-five acres and upwards. 28 W. R. C. R. 21.
Of course, the purpose of these instructions was rather to ascertain the number of acres of land subject to sale than to decide that such waters should be always considered navigable waters. The policy of the state of Wisconsin as expressed by judicial decision and legislative enactments was to the effect that any permanent body of water, regardless of size, if navigable in fact, is a navigable lake or pond. No definite line of demarcation has ever been laid down by legislative enactment nor by judicial decree in this state. It is therefore impossible to state in this opinion definitely how large a lake or pond would necessarily have to be in order to be considered navigable.

The question must be determined in each particular case, depending upon not only the size of the lake, but also its depth and its availability for public use. Even in such cases the public may acquire the right to make access to the lake by condemning the land or part of it bordering on the lake either for highway purposes or, in some cases, for parks and grounds for public buildings.

This question must therefore be answered in the negative.

Question 8. "If a body of water is entirely surrounded by privately owned land, has no outlet or inlet, is small or large, and is classed as navigable water, might we issue a fur farm license covering the entire area and would such party have a right to fur farming under his fur farm license in such navigable water, or would he have to restrict his fur farming to only such area as is not submerged by public water?"

This question must be answered in the negative. The land under the water of a navigable lake is in the state and under the provisions of the statute authorizing the creation of a fur farm, one of the conditions is that the licensee of such farm must be either the owner or the lessee of the same, and of all of it. This is impossible in case of lands submerged by a navigable lake.

As Question 9 is dependent upon an affirmative answer to Question 8, it need not be answered.

Question 10. "If a stream is nonnavigable, would a party have a right to place a screen across such stream which would prevent rats from leaving or entering his li-
censed area? This would prohibit the free passage of fish up or down the stream, and would this be lawful?"

Under sec. 29.03, Stats., the following, among others, is declared a public nuisance:

"(3) Any screen set in public waters to prevent the free passage of fish, or set in any stream which has been stocked by state authorities." (Italics ours.)

Under the above provision it is unlawful to set a screen to prevent the free passage of fish in a nonnavigable stream which has been stocked by state authorities. I know of no law which prohibits the placing of a screen in a nonnavigable stream that has not been stocked by public authorities.

JEM

Criminal Law—Second Sentences—Prisons—Probation
—Person convicted of felony second time cannot be placed on probation under sec. 57.01 nor under sec. 54.02, Stats.

January 21, 1928.

BOARD OF CONTROL.

You state that one Donald Flynn was convicted in Oconto county in 1925 of the crime of burglary and was sentenced to two years in the reformatory, but sentence was stayed and he was placed on probation; that he served his probation period and was discharged in 1927; that he is now again convicted of the crime of burglary in Brown county and is under sentence to the state reformatory for one year. You ask whether this man is eligible to be placed on probation under sec. 57.01. This question must be answered in the negative, as only such persons as have never before been convicted of a felony in this state or elsewhere are eligible for probation under this statute.

You also inquire whether, if not placed on probation this offender falls within the provision of Class 1 as defined in sec. 54.02.

This question must be answered in the negative, because, under Class 1 the person must be one convicted of a felony for the first time. This man has been previously convicted of a felony.

JEM
Fish and Game—Wholesale Fish Markets—Wholesale grocery concern that incidentally sells at wholesale salted fish in barrels does not require license to operate wholesale fish market.

Where concern has as its primary business selling of fish at wholesale it is wholesale fish market within contemplation of sec. 29.135, Stats., requiring license.

It matters not whether sales are made wholly in state or out of state.

License goes to person operating wholesale fish market; more than one market may be operated under one license.

January 21, 1928.

Conservation Commission.

You refer to sec. 29.135, Stats., which provides:

"Every person who deals in fish by operating a wholesale fish market or fish house shall secure a license from the state conservation commission. * * *" You state that several questions have arisen as to just what is considered a wholesale fish market or fish house and as to who should be required to purchase such a license.

Your first question is as follows:

"1. The first question is one of a wholesale grocery concern handling imported and locally caught fish. These fish are in barrels and preserved in brine. The concern carries no fresh fish in stock, and sells the fish preserved in brine in the original package in which they purchase them, excepting in some instances when the barrels are unpacked and packed in smaller containers. These fish, in turn, are sold in a wholesale way to their trade. Would such a concern be considered as operating a wholesale fish market or fish house, and thereby be required to purchase a wholesale fish dealer's license?"

I do not believe that it was intended by this law to require every person who deals in fish at wholesale to secure a license. If that had been the intention of the statute it would have simply provided that every person who deals in fish at wholesale shall secure a license, but this statute says "who deals in fish by operating a wholesale fish market or fish house shall secure a license." The license is required only from persons who operate a wholesale fish market or fish house.
The statute does not give a definition of the terms "wholesale fish market" or "fish house." In sec. 370.01, subsec. (1), it is provided that in the construction of the statutes the rule shall be observed:

“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 or appropriate meaning.”

The meaning to be given to these words would be the one that is given to them in common parlance. I do not believe that a wholesale grocery concern, which incidentally, in connection with its other business, sells barrels of salted fish at wholesale would be operating a wholesale fish market or fish house and I believe that the person operating it does not require a license under this statute.

Your second question is as follows:

“2. The Dormer Company of Menominee, Mich., who on their letterhead state that they are producers, packers, and shippers of lake herring in pickle, and that they have everything in lake herring and wholesale salt fish, state that at Marinette, Peshtigo Harbor and Oconto, they have parties buying herring in the round from the fishermen and that at these places the herring are taken in, dressed, and salted. They pay a local party to do this work at so much per barrel.

“(a) If, after these fish have been dressed and salted, they sell them in a wholesale way to Wisconsin retail dealers, would they be required to have a wholesale fish dealer’s license?”

I believe this question should be answered in the affirmative. This company seems to operate a business which almost exclusively deals with fish.

Part (b) of your second question reads thus:

“(b) If they sold these fish to parties outside of the state, would they be required to have a wholesale fish dealer’s license?”

I believe this question must be answered in the affirmative, as they would still be operating a wholesale fish market or fish house in the state of Wisconsin.
Question 3 is as follows:

"3. If a wholesale fish dealer's license is required, will one license be sufficient, or will they be required to have a license for each of the stations where they pack these fish?"

I believe that one license will be sufficient if the same person operates the different markets. You will note that the license does not limit a person to a certain location and no description of any place or location is necessary. It is true, the wording of the statute is in the singular number instead of the plural, but under sec. 370.01, subsec. (2), it is provided that in the construction of our statutes every word importing the singular number only may extend and be applied to several persons or things as well as to one person or thing.

Question 4:

"The Booth Company have two different establishments in Wisconsin where they purchase fish and sell them again in a wholesale way. Will one license cover two of these stations, or should they be required to purchase a license for each station that they have within the state?"

If the Booth Company represents one person or one corporation then only one license is required.

JEM

Fish and Game—Wild Life Refuges—Public Lands—
Privately owned lands in Northern Forest Park, established by ch. 434, Laws 1927, are no part of state park, but under provisions of sec. 29.56, subsecs. (1) and (2), Stats., they are made part of wild life refuge and no game can be killed therein during any part of year.

January 21, 1928.

Conservation Commission.

You say a question has arisen whether the privately owned lands within the Northern Forest Park, which is established by ch. 434 is within the purview of the wild life refuge established by ch. 469, both references being to chapters of laws of 1927.

If I understand your question correctly, I have to advise that it is not. Ch. 434, as the title indicates, establishes a
park on state owned lands in Vilas county, so that chapter only sets aside and establishes a park on lands owned by the state in Vilas county and, of course, the state could not set aside as a park lands privately owned.

Ch. 469 creates sec. 29.56 and subsections thereof and says in subsec. (1):

"The following described areas are to be known as state wild life refuges."

Pars. (a), (b), (c), (d) and (e) thereof provide that all lands, whether state or privately owned, within the limits of the state parks prescribed by the conservation commission and the other lands therein described, are to be known as state wild life refuges. Subsec. (2) provides:

"* * * No person shall at any time or in any manner hunt or trap within the boundaries of any wild life refuge nor have in his possession or under his control therein, any gun or rifle unless the same is unloaded and knocked down or enclosed within a carrying case."

You will notice that chapter makes a wild life refuge of all the properties there described whether owned by the state or not and prohibits hunting or trapping on all such lands at any time. Under the law, the title to all wild game is vested in the state and the state can prevent its being taken or killed entirely or permit it at such times and in such manner as it sees fit, and it does not need to own title to the lands in order to protect the wild game upon it. It exercises that same right or principle when it prohibits the killing of wild game during certain seasons of the year or only in certain ways. So when the legislature absolutely prohibited the killing of wild game within the limits of the wild life refuge there described, that prohibition would cover all the lands in state parks. Sec. 29.56, in subsecs. (1) and (2), expressly provides that all land, whether state or privately owned, within the limits of the state parks prescribed by the conservation commission shall be game refuges and there shall be no killing of game therein. That protects them during the entire season although the privately owned lands in the state parks are not owned by the state and can not be used as state park property.

TLM
Physicians and Surgeons—Public Health—Basic Science Law—Chiropodists—Procedure for revoking license of doctor obtained through fraudulent credentials discussed.

Duties of board of medical examiners regarding reinstatement of physician's license where governor has granted unconditional pardon of physician convicted of manslaughter discussed.

Person licensed as chiropodist must be licensed each year or license must be renewed as provided in sec. 154.04, Stats. In case it is not renewed as there provided, chiropodist must be licensed as original applicant.

Practicing without such license or renewal thereof subjects person to prosecution and punishment as provided in sec. 154.06.

January 21, 1928.

DR. ROBERT E. FLYNN, Secretary,
Board of Medical Examiners,
La Crosse, Wisconsin.

I have your letter of January 17, requesting an opinion of this office on several questions relating to the revocation of license to practice medicine. On January 18 I advised you on the question submitted to me after a hearing. I notice you now ask as to the powers of the board regarding revocations of licenses which have been obtained through fraudulent credentials.

You are advised that is one of the grounds for revocation, under the procedure by the district attorney, as provided in subsec. (2), sec. 147.20, and your board would have power to direct some member of the board to make a verified complaint required in that section and to furnish necessary information to enable the district attorney to successfully prosecute the case. Your board would then, under the provisions of subsec. (3), revoke the license upon the certified transcript of the record of the court revoking the same. While the provisions of subsec. (3) do not specifically provide or specify cases where the license has been revoked because the license had been procured through fraud or perjury, yet I think the same procedure would be had in such case. The judgment of the court revokes the license, so
that it could do no harm when that transcript is certified to the board to have the board formally revoke the license, and I think that would be the proper practice.

You then ask:

"What are our duties regarding reinstatement of a physician’s license to whom the governor has given an unconditional pardon, his conviction having been for manslaughter?"

You are advised that the provisions for restoring a revoked license are found in sec. 147.20 (4), and such proceedings must be had in the court where the license was revoked and the trial had, and must be upon written recommendation by the president of the state board of medical examiners and upon findings by the court that the applicant for restoration of license for a certificate is presently of good moral and professional character and justice demands a restoration.

You then state that there are more than one hundred chiropodists in the state and only about one-third of the number have applied for registration. You ask if it is compulsory for your board to require them to be reregistered under the provisions of ch. 302, Laws 1925, and what the penalties are in the event they do not register.

Sec. 154.01, subsec. (2), provides:

"No person shall practice chiropody for compensation, direct or indirect, or in the expectation thereof, or attempt to do so, or designate himself a registered chiropodist, or use the title ‘R. C.’ or other title or letter indicating that he is a chiropodist, or otherwise directly or indirectly represent or hold himself out as such, unless registered by the state board of medical examiners and the certificate recorded * * *.”

Sec. 154.04 provides that such certificate shall expire on February 1 of each year and shall be renewed only upon the application to the board on or before January 1.

Under that provision the license is not a license after February 1 and if he fails to apply on or before January 1, as provided in that section, he can be licensed thereafter only by making application for renewal, the same as an unlicensed person.
The person practicing after his license has transpired, and without renewal is subject to arrest and punishment under the provisions of sec. 154.06, the same as a person who had never been so licensed.

L. E. Gooding,
District Attorney,
Fond du Lac, Wisconsin.

In your request of January 16 you inquire in substance whether the county board has power to make an appropriation to a school district in which is located a county asylum together with a farm operated in connection with such asylum.

Subsec. (13), sec. 59.07, Stats. 1927, describing the general powers of the county board at a legal meeting, reads in part as follows:

"Appropriate to any school district in which a county farm or any part thereof is situated, an amount of money for school purposes equal to the amount that would be paid as school taxes upon such farm land or part thereof situated within such district if such land were privately owned."

In an opinion by this department, XII Op. Atty. Gen. 467, it was construed that this section did not make the county liable for the support of the schools, but it did give the county board the necessary authority to appropriate money for such aid.

It would seem that the former opinion of this department is a direct answer to your question. Since the law has not been changed, there is no reason for modifying the opinion. You say objection has been made to the proposed action on the part of the county board on the grounds that the
farm has been transferred and is operated in connection with the asylum.

The power of the county board to appropriate a proportionate share in the school district is not made contingent upon the farm's being operated apart from the asylum. If, as a matter of fact, the tract of land is operated as a farm by the county, subsec. (13) is applicable.

FWK

Counties—County Board—Public Printing—Newspapers
—Under sec. 59.09, subsec. (1), Stats., county board cannot pass resolution asking for bids from newspapers for publication of its ordinances.

Under subsec. (2) county board may pass resolution asking for bids from newspapers for publication of its proceedings.

January 21, 1928.

EDWARD MEYER,
District Attorney,
Manitowoc, Wisconsin.

You inquire whether or not a county board can pass a resolution asking for bids from newspapers for publication of proceedings and legal notices.

Sec. 59.09, Stats., provides for the publication of ordinances and proceedings of county boards. Subsec. (1) of this section reads as follows:

“(1) Whenever any county board passes any ordinance under the provisions of this chapter, the county clerk shall immediately cause the same to be published in some newspaper published in such county, and if there is none, then in the paper which he determines has the most general circulation therein; and such clerk shall procure and distribute copies of such paper to the several town clerks, who shall file the same in their respective offices.”

By its expressed language, the law imposes the duty specifically upon the county clerk to cause immediately the publication of ordinances passed by the county board. It would, therefore, be incompetent for the county board by a contract to divest the county clerk of this authority. See
Opinions of the Attorney General

Beal v. Supervisors of St. Croix County, 13 Wis. 500, 503; Pott v. Supervisors of Sheboygan County, 25 Wis. 506, 508. Under this subsec. (1), Stats., it is the county clerk and not the county board who has the power to select or designate the newspaper in which ordinances are to be published. Hoffman v. Chippewa County, 77. Wis. 214, 216.

Subsec. (2) provides that the county board shall, by ordinance or resolution, provide for one publication of a certified copy of all its proceedings in one or more newspapers published and having a general circulation in the county therein; that said publication is to be completed within sixty days after the adjournment of each session; and that “the cost of any such publication under this subsection shall in no case exceed the rate per folio fixed by law for the publication of legal notices.” The legislature thus qualified the maximum fee that the county board may pay, and there appears to be no reason why the county board could not follow the practice of asking for bids from newspapers for the publication of its proceedings therein, in order to secure rates more favorable.

Subsec. (3) empowers the county board to provide by resolution for the publication of its proceedings in pamphlet form by the lowest and best bidder. The county board herein is given the express authority to pass resolutions asking for bids from newspapers for publication of its proceedings in pamphlet form.

Subsec. (1), sec. 331.25, provides that the fees for publishing legal notices shall not be more than one dollar per folio for the first insertion and seventy cents per folio for each insertion after the first, when not otherwise specifically prescribed by law. The fee therein provided for is a maximum fee; and again I see no reason why the county board cannot bargain with the newspapers for the publication of its legal notices at a lower rate.

AJM
Corporations—Mortgages, Deeds, etc.—Mortgage to corporation can be satisfied as provided in sec. 235.55, Stats., by entry in margin of record thereof, acknowledging satisfaction and signed by corporation as mortgagee, and signature witnessed by register of deeds.

Edward Meyer,  
District Attorney,  
Manitowoc, Wisconsin.

You ask if it is illegal for a corporation to release a mortgage on a margin of the mortgage record and you say that has been the practice in your county for a number of years but the register of deeds has now asked what effect the statute, if there is any, would have on the mortgages that have been released in the past.

You are advised that under the provisions of sec. 235.55, Stats., “any mortgage which shall have been recorded may be wholly satisfied or satisfied to the extent of any payment thereon by an entry in the margin of the record thereof, acknowledging the whole or partial satisfaction thereof, signed by the mortgagee, his personal representative or assignee in the presence of the register of deeds or his deputy, who shall subscribe the same as a witness * * *.”

There is no exception to that method of satisfaction, and where a corporation is a mortgagee it would have the same right to satisfy its mortgagees in that way as an individual would have. Of course the marginal satisfaction would have to be signed by the mortgagee, or his personal representative or assignee so as to make it the legal signature of such corporation, the same as any other signature of the corporation so as to make it the legal act of the corporation, and that signature would be witnessed by the register of deeds as provided in the statutes.

TLM
Criminal Law—False Pretenses—Under facts stated all elements constituting crime of obtaining money by false pretenses are present and warrant may issue upon complaint duly made for commission of said offense.

Railroad Commission.

You have submitted the following statement of facts as a basis for an official opinion:

"On June 30, 1927, one A and one B called on one C. Between them they represented that A was the secretary of the president of the company, one D, and that B was a broker and that one hundred eighty (180) shares of these interests had been allotted to C and that whatever of this allotment he did not care to take, this broker was anxious to get. They alleged that the interests were selling at $27.50 elsewhere and asked C how much he would take for his. C said he would take $20.00 per share. They, of course, did not say whether or not they would take it.

"C finally told them he was not interested in taking one hundred eighty (180) shares, whereupon the broker took out his notebook and started to write something in it and said, 'All right, that is all there is to it. C doesn't want it and it is the first stock we have had a chance to get, and there is no need of talking any more.' It will be seen that they represented to C that B was a broker anxious to get this stock himself but that they were under obligations to offer it first to C. B then walked over to the pump to get a drink of water and to the car to get a smoke and tried to get A to go with him. A, however, stayed back and endeavored to induce C to buy twenty more shares at $12.50 under these circumstances. C thereupon gave a check for the amount to A and later received a certificate presumably from the company. The fact is that A is not and never has been the private secretary of D nor was B a broker who desired to get the stock nor was the stock advanced in price to $27.50. On the contrary, it may be presumed that the stock, if it had any market price among brokers, would be selling at a less price than that permitted by the permit, that is to say—$12.50. A and B were both agents of the company desirous to sell the stock and, of course, to receive their commissions.

"They also represented to C that he would have to buy that day in order to hold the allotment, etc. The fact is, of course, that there was no allotment nor was there any necessity to buy that day in order to get all the shares he wanted."
You desire to have an official opinion from this department as to whether the facts as alleged constitute grounds for the issuing of warrants for obtaining money under false pretenses under our statute. You have directed my attention to the case of Corscot v. State, 178 Wis. 661, 666. In that case the court said:

"To constitute the crime of obtaining property by false pretenses there must be a false representation or statement of a past or existing fact, made by accused or someone instigated by him, with knowledge of its falsity, with intent to deceive and defraud, and which is adapted to deceive the person to whom it is made; a reliance on such false representation or statement; an actual defrauding; and an obtaining of something of value by accused or someone in his behalf, without compensation to the person from whom it is obtained. 25 Corp. Jur. 589."

A false pretense is defined in 25 C. J. 589 as follows:

"A criminal false pretense may be defined to be the false representation of an existing fact whether by oral or written words or conduct, which is calculated to deceive, intended to deceive, and does, in fact, deceive, and by means of which one person obtains value from another without compensation."

Under the facts stated by you there was a false representation of an existing fact made with knowledge of its falsity and with intent to deceive and defraud and the misrepresentations were adapted to deceive the person to whom it was made. There was also a reliance upon such false representations and statements and there was an actual defrauding.

You are therefore advised that the above stated facts constitute grounds for the issuing of a warrant for obtaining money under false pretenses.

JEM
Minors—Child Protection—Upon commitment of child to state public school at Sparta, board of control of Wisconsin ipso facto becomes legal guardian of such child; if there was general guardian at time with property or estate in his possession belonging to said child, such money or estate must be turned over to board of control.

January 21, 1928.

HY. P. SCHMIDT,
District Attorney,
West Bend, Wisconsin.

At the request of your county judge you have submitted the following as a basis for an official opinion:

"'Under our child protection statute, the state board of control is designated as the legal guardian of children committed to the state public school. Will you kindly advise whether in the opinion of your department the state board of control becomes ipso facto the guardian of the estate of such children?"

"We have a case here in which a one year old child has been committed to the state public school at Sparta, and is now there in that institution. She has a general guardian in this county, who has about $500 in her possession as such, and the question is, whether it is proper for the guardian, assuming that she is willing to do so, to turn this money over to the state board of control. We are informed by the state board of control that this practice has been followed in some cases, but would like your opinion on the subject.'"

The state board of control is the legal guardian of all children in the state public school. Sec. 48.22, Stats. See also Guardian of Knoll, 167 Wis. 461, 465.

You will note that this guardianship of the children in the state public school is not dependent upon appointment by the county judge. Such guardianship is the consequence of a commitment by a court to the state public school. On such commitment the state board of control of Wisconsin ipso facto becomes the guardian of the estate of such children by virtue of our statute. If there was a general guardian appointed over such child and such guardian is acting at the time of the commitment of the child to the state public school, then such general guardian should turn over the money in his possession to the state
board of control and take a receipt for the same. If there are any claims against the estate in favor of the guardian for fees and otherwise, then he should apply to the county judge to have those claims adjusted and passed upon and then turn over to the legal guardian the balance of the money in his possession. I believe that the provision of our statute contemplates such action.

It cannot be said that the state board of control is simply the guardian of the person of the child committed to the state public school. The statute does not make such distinction. It uses the term "legal guardian," which covers both the guardianship of the person and the estate of the child.

JEM

Appropriations and Expenditures—Counties—County board cannot legally appropriate sum of money to agricultural committee composed of three members of county board, with instructions to use appropriation as committee deems necessary for promotion of agricultural interests.

January 21, 1928.

Harold C. Smith,
District Attorney,
Fort Atkinson, Wisconsin.

Your letter of January 17, asking if a county board can legally appropriate a sum of money to an agricultural committee composed of three members of the county board with instructions to said committee to use the appropriation as the committee deems necessary for the promotion of agricultural interests is handed to me for answer.

You say in view of sec. 59.87 and sec. 59.86, Stats., you have held that such an appropriation is illegal and you ask for an opinion of this office.

I concur in your opinion. There is no authority in the statutes referred to or any other statute that I know of that gives to a county board the power to turn over to an agricultural committee or to any other committee a sum of money to be used as the committee deems necessary for the promotion of agriculture or any other interests.
The statutes have been amended from time to time giving greater powers to county boards in the matter of expending public funds and in the statutes referred to very broad powers are given to the board for expending the county money for the purposes there specified, but that money is to be kept in the county treasury and raised by a tax levy or otherwise and is only to be paid out by the county treasurer upon orders of the county clerk, which shall have been approved by the special committee on agriculture. So if that law is valid, it does not authorize the county board to turn over to such a committee to be used as the committee deems necessary for the promotion of agriculture any sum of money.

There is no apparent reason why such a departure from the authorized procedure should be resorted to in order to carry out the provisions of the law.

TLM

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**Taxation—Tax Liens**—There is no tax lien on personal property other than that of public utilities.

January 21, 1928.

CLIVE J. STRANG,

District Attorney,

Grantsburg, Wisconsin.

You state that the sheriff of your county has an execution against some hardware stock of goods and has seized all the stock, and it is found that the taxes on this have not been paid. You inquire whether this levy comes ahead of the taxes.

An affirmative answer must be given to this question. There is no lien given on personal property by our law. A lien is given on real property and on the personal property of public utilities. See sec. 76.22, Stats., but we have no tax lien on personal property otherwise.

JEM
Public Health—Public Officers—Board of health has no power to fix prices to be charged for work done on public in school of cosmetic art.

January 23, 1928.

Board of Health.

In your letter of December 20, 1927, you state that on July 14, 1927, the state board of health adopted regulations regarding schools of cosmetic art. Regulation No. 5 reads as follows:

“A school shall not be conducted as a beauty parlor and prices for services rendered the public shall cover only cost of materials. Price list must be submitted for approval and then posted on a card in large type in the school.”

You inquire whether the state board of health has the power to fix the prices for work done on the public in schools of cosmetic art.

Sec. 159.03, Stats., provides as follows:

“The state board of health shall enforce the provisions of this chapter and shall prescribe and promulgate rules and regulations governing schools of cosmetic art and for examining and licensing of managing and itinerant cosmeticians, and shall make and enforce reasonable rules governing the sanitary and hygenic conditions surrounding the practice of cosmetic art and the conduct and operation of beauty parlors and schools of cosmetic art.”

The statute confers on the board the power to adopt and enforce reasonable rules and regulations governing the conduct and practice of cosmetic art. It is a police power statute designed to promote the public health, and any regulation adopted by the board which tends to promote the public health is valid. A rule or regulation, however, which has no relation to the public health, cannot be sustained.

In Moler v. Whisman, 243 Mo. 571, 147 S. W. 985, 40 L. R. A. (N. S.) 629, a Missouri statute prohibited students or apprentices in barber colleges from making any charge for their services while learning the barber's trade. The court in holding the statute unconstitutional, said, pp. 635-636:

“Now if students of the barber's trade be compelled to labor two years without pay and without their instructor's
receiving any remuneration for their services (as required by sec. 1187, supra), it is difficult to see why they would not thereby be deprived of the gains of their own industry, as prohibited by our organic law. If a barber college or the proprietor of a barber shop were allowed to receive pay for the labor performed by a student or apprentice, then such barber college or proprietor of a barber shop could afford to teach the barber's trade or aid the student or apprentice in learning the trade for a reasonable compensation, and the student would thereby indirectly receive some remuneration for his toil, but such is not the case under the law now in judgment.

"The practice of boys or young men apprenticing themselves to skillful mechanics, artisans, or professional men in order to qualify themselves for useful trades and professions, is almost as old as civilization itself, but the barber's law is the first regulation which has ever come to our knowledge that prohibits both the apprentice and his master from receiving any remuneration whatever for services of the apprentice, thereby compelling the apprentice to waste two years of his time while qualifying for a public barber."

The court squarely held that a statute prohibiting students or apprentices from making a charge for their services, had no relation to the protection of public health. The court on this point said, p. 636:

"The learned attorney for defendants has not assigned any reason or called our attention to any fact even remotely indicating that the public health will be promoted, protected, or safeguarded by requiring students of the barber's trade to work two years without compensation. On the contrary, the simplest application of the laws of reason and common sense demonstrates that an apprentice who receives compensation for his toil will take a deeper interest in his work, and learn more thoroughly those things which he needs to know about preventing the spread of disease, than if he be required to work without pay; hence that part of the law under consideration cannot be even said to tend to promote the public health, which is the pretended purpose for which it was enacted."

We believe that the decision in the foregoing case lays down the correct rule. An enactment, under the police power must, if valid, reasonably tend to accomplish the result intended, which, in this case, is to promote the public health.
The fixing of prices to be charged in a school of cosmetic art has no relation to and does not, in fact, promote the public health. It cannot, therefore, be sustained under the police power.

SOA

Counties—County Board—Fish and Game—Bounties—
County board has no power to give bounties for foxes and wolves under sec. 29.60, Stats.

January 23, 1928.

VAN. R. COPPERNOLL,
District Attorney,
Richland Center, Wisconsin.

You inquire whether a county board, under the provisions of sec. 29.60, Stats., is authorized on its own accord to grant a bounty on foxes, wolves and other animals mentioned in said section in addition to the bounty paid by the state for the killing of such animals.

I have carefully examined said statute and I find no provision therein which in any way could be construed in my opinion as authorizing the county board to give such additional bounties. You will note that the county board is authorized under sec. 29.61 to give bounties for the killing of crows, sharp-shinned or Cooper’s hawk, pocket gopher, streaked gopher, black, brown, gray or Norway rats, rattle snakes, ground hogs, and woodchucks, but I know of no provision in the statute which authorizes it to give bounty at the present time for foxes and wolves.

JEM
Public Health—Cemeteries—Wisconsin Statutes—Cemetery board is required under sec. 157.11, subsec. (1), Stats., to inclose grounds of cemetery with suitable fence without aid from adjoining land owners.

Sec. 157.11 (1) is special statute and takes precedence over general statute; sec. 90.03 includes same subject.

January 23, 1928.

William M. Gleiss,
District Attorney,
Sparta, Wisconsin.

You state that in your county a cemetery association platted for cemetery purposes a plat of land surrounded on three sides by farming lands owned by two farmers; that before the cemetery was platted these two farmers maintained a line fence between their farms. You direct me to sec. 157.11, subsec. (1), Stats., which provides:

"The board shall as soon as practicable inclose the grounds with a suitable fence, * * * ."

You inquire whether this statute compels the cemetery association to pay the entire cost of a fence inclosing the cemetery lands or whether under sec. 90.03, Stats., it may compel the adjoining land owners to maintain their equal share of the fence as a line fence.

I have carefully examined these statutes and I am of the opinion that the provision in sec. 157.11, subsec. (1), referred to is controlling as it is a special statute and has precedence over a general statute which is broad enough to include the provisions of the specific statute.

I am of the opinion that the cemetery board is compelled to inclose the grounds with a suitable fence without aid from the adjoining farmers.

JEM
Public Officers—County Judge—Except where value of estate of minor in guardianship proceedings does not exceed $500 judge is prohibited by sec. 253.16, Stats., from assisting guardian in making or drafting his annual accounts.

January 23, 1928.

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

At the request of your county judge you ask for a construction of sec. 253.11, Stats. It is said that numerous guardians come into the county court with their books, accounts, receipts, and vouchers for the purpose of making their annual accounts and request the judge and his assistants to aid them in transferring the accounts, debits and credits to the proper blank kept for that purpose.

You inquire whether sec. 253.16 includes and forbids the judge or his assistants to assist guardians in the manner stated in making their annual accounts.

Said sec. 253.16 provides as follows:

“No county judge or his clerk or any person employed by him in or about his office shall be allowed to draft or prepare any paper or give advice pertaining to the drafting or preparation of papers or as to who shall prepare them, relating to any matter, proceeding or action pending in or which there is good reason to believe will be brought or instituted in the county court over which such judge presides, except such as are expressly given by law. The prohibitions of this section shall apply to the drawing of wills. Any county judge who shall violate any of the provisions of this section shall be fined not less than fifty dollars nor more than five hundred dollars and be subject to impeachment.”

You are advised that in my opinion this statute applies to proceedings in guardianship matters and that the judge is not authorized to assist guardians in making their annual accounts in the manner stated by you. There is, however, an exception found in sec. 253.17. Said section contains the following:

“* * * Such judge or his clerk may also without charge, when requested and when there is no contest, draw
any necessary papers in any guardianship proceedings of minors, where the value of the property of the minor or minors in said proceedings does not exceed five hundred dollars; and also any papers necessary in any proceeding for the adoption of dependent, neglected or delinquent children, as defined in chapter 48.

In all proceedings not coming under the exceptions here expressly stated the county judge is prohibited from assisting the guardian in making his annual accounts.

JEM

Criminal Law—Cheat—False Statements—Complaint should be drawn under specific statute if such exist; otherwise offense of gross fraud or cheat at common law should be charged, specifying act constituting offense.

January 24, 1928.

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

You ask us to furnish you a form of complaint or information against a defendant who is guilty of gross fraud or cheat at common law under sec. 343.41, Stats.

You are advised this office does not draw complaints for district attorneys and of course that cannot be done without the particular facts in each case. If you will draw a complaint applying to the facts and situation you have in mind and if you are in doubt as to the sufficiency, you can send it here for approval or alteration.

A complaint under the provisions of sec. 343.41 would not be drawn for a gross fraud or cheat at common law, but would be drawn for the particular offense and based upon some one or more of the specific conditions stated in that section, and it would have to be drawn in the language of the statute or with reference to the provisions of the statute in the same way that any other complaint is drawn.

Sec. 343.31 is the general statute providing a penalty for any person who shall be convicted of a gross fraud or cheat at common law. That section would apply only to such acts as were punishable as gross frauds or cheats at com-
mon law where no specific provision of our statutes would apply to the offense; but where a specific statute covers the offense, the person must be prosecuted under such statute.

You will find a number of definitions of cheats or frauds at common law and generally they refer to cheats or frauds not amounting to felony as are affected by deceitful or illegal symbols or tokens which may affect the public at large against which common prudence could not have guarded—the fraudulent obtaining of property of another by any deceitful and illegal practice or token short of felony which affects the public. So if you have a case that cannot be prosecuted under some specific statute, it can be charged that it is a common law offense by—and then you should set out the offense constituting the gross fraud and cheat in practically the same way you would draw any other complaint.

TLM

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**Bonds—Public Officers—Malfeasance—Town Board**—Member of town board cannot be employed to survey for town; order to pay therefor is illegal and members of board are guilty of malfeasance in voting for it.

Validity of bond issue for cost of improvement based on such survey is not affected by malfeasance of members.

January 24, 1928.

**GLEN D. ROBERTS,**

*District Attorney,*

*Madison, Wisconsin.*

You ask: 1. Is it legal for a town board which is composed of three members to employ one of the three members, who is a surveyor, to do surveying for the town?

A. No, under the provisions of sec. 348.28.

2. Is an order drawn for such services illegal?

A. Yes, under the provisions of that section of the statute.

3. Are the other two members guilty of malfeasance in office when they sign an order for such services?

A. I think they are, under the provisions of sec. 348.28.
which says that any officer who shall make any contract or pledge or contract any indebtedness or liability or do any other act in his official capacity or in any public or official service not authorized by law shall be punished, etc. It seems to me that covers all of the members of the board who vote for a contract of employment and the payment for the services which are illegal.

4. Is the validity of a town bond issue in any wise affected by the fact that such board member made the surveys upon which the issue is based?

A. I do not think it is, as the illegal act is not involved in the bond issue.

TLM

Automobiles—Bridges and Highways—Law of Road—
State highway commission is not authorized to issue general special permit to public utility for transportation of poles over public highways where total length of vehicle and load exceeds limitation on length contained in subsec. (4), sec. 85.18, Stats.; local officers may issue specific permit for such purpose only under provisions and subject to conditions of par. (a), subsec. (5) of said section.

January 25, 1928.

HIGHWAY COMMISSION.

You inquire whether the state highway commission is authorized by law to issue a general special permit to operate on the public highways motor vehicles with trailers attached of an over-all length, including load, up to one hundred feet for the transportation of poles in the construction and maintenance of power transmission lines of public utilities, a request for such a permit having been made to you on behalf of The Milwaukee Electric Railway and Light Company, of Milwaukee, The Wisconsin Gas and Electric Company, of Racine and the Wisconsin–Michigan Power Company, of Appleton, all of which are public utilities operating electric transmission lines in various parts of the state. The representation is made that "it would be practically impossible to secure a permit for transportation of each pole, as frequently the poles are required in an emer-
gency where it becomes necessary by reason of storm or sleet to replace equipment immediately in order that service be not interrupted, and naturally, these emergencies cannot be foreseen," and that the legislature apparently has overlooked the necessities of utilities and telephone companies by its failure to provide some method for securing a special permit for the transportation of poles which necessarily exceed the length of vehicles and loads specified in the limitations of ch. 85, Stats.

I can find no authority in the statutes for the issuing by the state highway commission of such a special permit as has been requested.

By the provisions of subsec. (4), sec. 85.18, Stats.,

"No motor truck, tractor, trailer, semitrailer or wagon except when loaded with loose hay or straw or similar material, shall be operated on any highway or street when the over-all dimensions exceed eight feet in width, including load, or thirty-three feet in length, including load, except under a special permit."

The special permit referred to in the subsection just quoted is one of those authorized by subsecs. (5) and (6) of the same section, and they are issued, not by the state highway commission, but by the commissioner of public works of a city of the first class (Milwaukee) or the officer in charge of highways or streets, or county highway commissioner under subsec. (6), in other units of government. A general special permit for the operation of a motor vehicle, trailer or semitrailer or both, having an over-all length of not to exceed fifty feet, provided that the motor vehicle does not exceed 33 feet in length, may be issued by such officer under par. (c), subsec. (5), and a specific special permit for the operation between the hours of eight o'clock p.m. and five o'clock a.m. of trains of tractors, trailers or wagons up to one hundred feet in length over such route or routes as may be designated in the permit, may be issued by such officer under the provisions of par. (a) of said subsection. A permit issued under the latter provision, of course, only partially meets the requirements of the utility companies as outlined in the request to you for a general special permit, but this provision is the only one applicable to the case presented that I know of, and, of course, it is
only the legislature that can provide for a special permit constituting an exception to the limitation on length of vehicles and load prescribed by subsec. (4) of said section.

FEB

Appropriations and Expenditures—Constitutional Law
—Constitutionality of sec. 20.605, Stats., is doubtful.

January 26, 1928.

SOLOMON LEVITAN,
State Treasurer.

You say that question has been raised in your office as to the validity of sec. 20.605, Stats. 1927, and you ask for an official opinion concerning the validity of this section.

Sec. 20.605, added to the statutes by ch. 529, Laws 1927, provides:

"There is appropriated to the department of agriculture from the drainage fund not to exceed ten thousand dollars each year for the purpose of carrying out the provisions of section 89.75. There having been heretofore paid into the general fund from the proceeds of the swamp and overflowed land a sum of money in excess of the amount herein appropriated, the state treasurer is directed to transfer to the drainage fund from the general fund the sum of ten thousand dollars each year."

Sec. 89.75 (also added to the statutes by ch. 529, Laws 1927) provides in part:

"(1) Any drainage district, town or county may appropriate money for the purpose of erecting a dam over or across any drain or ditch constructed under chapter 88 or 89 of the statutes.

"(4) Upon the completion of said dam the commissioner of agriculture shall so certify to the secretary of state, and direct said secretary to draw his warrant on the state treasury in favor of such district, town or county for an amount equal to that which was appropriated by the district, town or county for the building of such dam."

Sec. 10, art. VIII of the state constitution provides:

"The state shall never contract any debt for works of internal improvement, or be a party in carrying on such
works; but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion. Provided, that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways. Provided, that the state may appropriate moneys for the purpose of acquiring, preserving and developing the forests of the state; but there shall not be appropriated under the authority of this section in any one year an amount to exceed two-tenths of one mill of the taxable property of the state as determined by the last preceding state assessment."

Unquestionably the building of dams is an internal improvement. The only money, if any, available for carrying on such work by the state must come from grants of land or other property especially dedicated to particular works of internal improvement. The original swamp land act of September 28, 1850, granted to the state the swamp and overflowed lands, the proceeds of such lands to be applied exclusively, as far as necessary, to the purpose of reclaiming these lands by means of levees and drains. The moneys from the sale of the swamp lands were finally appropriated for the normal schools and added to the normal school fund.

In State ex rel. Owen v. Donald, 160 Wis. 21, the referee appointed by the supreme court found:

"(a) There are no unsold swamp or indemnity lands which have been conveyed to the state that belong to the drainage fund," and

"(e) There is no indebtedness from the general fund to said drainage fund." 162 Wis. 609, 659.

Since the proceeds from the swamp and overflowed lands have all been appropriated and there are none of these funds now in the general treasury, it is clear that the effect of sec. 20.605 cannot be a transfer of funds but is in fact a direct appropriation for the use of the construction of dams. The constitutionality of this provision is exceedingly doubtful and you are advised that no funds should be paid out of
the state treasury pursuant to this section until its constitutionality has been finally established by a court of last resort.
ML

Prisons—Prisoners—Money earned by prisoner while inmate of state prison must be considered as part of his estate after his death, which occurred in said prison.

Board of Control.

You have directed me to sec. 53.15, Stats., which provides that the money and effects, except the clothes, in possession of each convict when committed to the state prison shall be preserved by the warden and restored to the convict when discharged. You state that the prisoner earns a certain amount of money while he is imprisoned and you inquire whether such money should be considered as part of his estate if such inmate dies in the prison.

This question must be answered "Yes." The money that the prisoner earns while in prison is his property and should be considered as part of his estate after his death.

JEM

Banks and Banking—Double liability can be collected from all persons mentioned or each of them if shares of bank stock are issued to "Mrs. A— H— and/or J— B— and/or H— B—"; all should agree upon vote of shares and dividends should be paid by check or draft payable to order of such persons in manner specified in shares.

In case of transfer all should join.

C. F. Schwenker, Commissioner of Banking.

You ask to be advised if a certificate of stock in a bank can be written as follows:

"Mrs. A— H— and/or J— B— and/or H— B—.

You say there is nothing in the bank law prohibiting ownership of shares of stock by more than one person, and you
say Wisconsin has adopted the uniform transfer act and in the definition under sec. 183.21 "person" is defined to include a corporation or partnership or two or more persons having a joint or common interest. But you say the questions involved in such an ownership of bank stock are more involved than in general corporations on account of the double liability on shareholders. You ask:

"In event that shares are written as indicated above, who would be required to pay the assessment in case there was one; who could vote the shares at the annual meeting; to whom would dividends be paid; who could legally transfer title, and when such certificates are issued to avoid the probation of an estate, have the other persons named in the certificate a joint and common interest in the shares during the lifetime of the original shareholder within the meaning of sec. 123.21?"

Your questions are difficult to answer with any degree of certainty because I think the expression, when used to grant rights in banking stock at least, is a very unfortunate if not a meaningless expression and the person who used it in that connection ought to be made to explain its effect.

I have asked some bank attorneys who thought it could not be done under the banking laws because of the very things you have suggested, but if stock has actually been issued in that way, I think it ought to be held that it is both a joint and several situation and that each ought to be liable for the assessment in case there was one, and the bank ought to require them to agree upon the vote of the stock either by one or by the majority. Dividends should be paid in check or draft payable to the order of the persons in the language of the ownership. To convey entire title, I think all should join or one could transfer his interest.

Your last question is not very clear. I assume that you mean: Does it create a present joint and common interest in each of the persons named? I think it does. That word "and" must be given as much meaning as the word "or" and in fact, under the opinion I have given you on the other questions, I think the word "and" is more important if not controlling as so used, so I do not think it would be safe to ignore either one of the parties in determining
Bridges and Highways—Trunk Highways—Proceedings for alteration or change of state trunk highway system may be instituted under secs. 83.08 or 84.02, Stats.

Minor changes in state trunk highway system may be made under sec. 83.08 without notice to localities concerned. "Due notice" required to be given under sec. 84.02 must be determined in connection with particular facts in each case.

Highway Commission.

In your letter of December 17, 1927, you quote the provisions of sec. 83.08, Stats., and subsec. (7), par. (f), sec. 84.02, Stats. 1925, and state, as follows:

"It seems to be inferred that section 83.08 is to be used when funds are available and set up for improvements by construction or maintenance and that section 84.02 should be used for changes in the system which do not involve immediate improvement. The inference seems also to be implied that changes of over five miles in length in any event should be instituted under section 82.04 and due notice given and a hearing held.

"The highway commission prefers to institute all proceedings under section 84.02 where there is any known or expected controversy, or when a number of land owners are to be deprived of a state trunk highway, regardless of the length of the change or whether or not it is up for immediate improvement."

You request an opinion on the following questions:

1. When should proceedings be instituted under sec. 83.08 and when under sec. 84.02?
2. Is the commission within its rights in making minor changes in the state trunk highway system without first issuing due notice to the localities concerned?
3. In the case of an improvement of a project on the state trunk highway system more than five miles in length in
volving several small or minor relocations (none of which are in themselves five miles long) and a widening of the existing highway, can a relocation order be issued by the commission without due notice being given to the localities concerned of such intent?

4. What constitutes due notice?

5. Through what medium or mediums should due notice be given?

6. How much time should elapse between such due notice and action by the commission.

1. It is impossible to give a definite answer to your first question. In *Bosshard v. Hotchkiss*, 190 Wis. 29, 31, the court said:

   "There is nothing in the statutes to prevent the same proceeding, as here, from being both one for an alteration of a highway under sec. 83.08 and one for a change in the system of highways under sec. 84.02. The two can be included in the same proceeding.

   "When we consider the fact that the present ordinary state highway is from fifty to several hundred miles long, a relocation of five or ten miles or more is not in fact the laying out of a new highway but only a change in an existing one authorized by sec. 83.08, Stats."

As the court pointed out in the foregoing decision, it makes little difference whether the commission proceeds under sec. 83.08 or sec. 84.02. Of course, if the change or relocation involves more than five miles of the state highway system, then due notice must be given in accordance with the provisions of subsec. (3) (a), sec. 84.02, Stats.

Under your statement of facts you prefer to institute all proceedings under sec. 84.02 where there is known or expected controversy. There is no objection to your proceeding in the manner outlined.

2. Your second and third questions are answered in the affirmative.

Subsec. (1), sec. 83.08 provides as follows:

   "Whenever the state highway commission shall deem it necessary for the proper construction, improvement or maintenance of any state trunk highway or prospective state highway or state highway or any bridge thereon to change or relocate the same, the commission shall so order,
and shall prepare a plat or map showing the old and new locations, and shall file a copy of such order and plat with the county clerk and the county highway committee. It shall thereupon be the duty of the county highway committee to deal by contract, if possible, with the owners of the land required for and of the premises to be affected by such change, and to make provision for such change within thirty days after the filing of said copy. The contract shall be in writing, shall name the county as grantee of the lands acquired, and shall be signed on the part of the public by the committee, and shall be filed with the county clerk and may be recorded in the office of the register of deeds. Such contract shall not be binding until approved by the state highway commission. The price of lands acquired, including any damages allowed and other expenses connected with the matter, shall be paid out of the funds available for the work, except in case of federal aid projects in which case payment shall be made as provided in section 84.04."

This section does not require notice to be given, and, in the absence of such provision, no notice is required.

The answer to these questions is limited to the precise question involved, that is, whether notice must be given for minor changes.

3. It will be convenient to answer your fourth, fifth and sixth questions together.

Subsec. (3) (a), sec. 84.02, provides as follows:

"Any necessary changes may be made in the trunk system from time to time by the commission, if it deems that the public good is best served by making such changes. Due notice shall be given to the localities concerned of the intention to make such changes or discontinuances, and if the proposed change affects more than five miles of the system, a hearing at or near the proposed change shall be held prior to making the change effective. Whenever the commission shall decide to change more than five miles of the system, such change shall not be effective until the decision of the commission shall have been referred to and approved by the county board of each county in which any part of such proposed change is situated. A copy of such decision shall be filed in the office of the clerk of each county in which a change is made or proposed."

The section to which you refer, namely, subsec. (7) (f) of sec. 84.02 was renumbered by ch. 473, Laws 1927, to be subsec. (3) (a) of sec. 84.02.

The statute expressly provides that "due notice" must be
given to the localities concerned. The term "due notice" is not defined, and there is nothing in sec. 84.02 to indicate what the legislature intended to be "due notice."

The definition of the term "due notice" as used in the Maine revised statutes, ch. 107, sec. 8, requiring due notice of a deposition taken out of the state and not under a commission, was presented to the court in Harris v. Brown, 63 Maine, 51, 53. The court held that "due notice" is that which will reasonably enable the adverse party to be present at the taking, and depends on the circumstances of each case, and must be settled by the sound discretion of the presiding judge. It was further held that the lower court did not abuse its discretion by holding good a notice served in Portland, Maine, on the 14th for the taking of a deposition in New Bedford, Massachusetts, one hundred and sixty-six miles distant, on the 24th.

In the absence of any indication by the legislature as to what constitutes due notice, it is the opinion of this department that it is such notice as will reasonably enable the localities interested to ascertain the fact the changes are proposed, and to afford to them an opportunity to object if they so desire. What will constitute "due notice" in any particular case, will depend on the circumstances of each case. Lawrence Co. v. Bowmann, 15 Fed. Cas. 8134.

SOA

Corporations—Public Utilities—Taxation—"Pin money" and "subscribers' deposits defaulted" constitute gross receipts upon which telephone license fees are computed.

Interest received on savings deposits does not constitute part of gross receipts upon which telephone license is computed.

January 30, 1928.

SOLOMON LEVITAN,
State Treasurer.

You inquire whether or not a telephone company should include the following items of income, (a) pin money, (b)
subscribers' deposits defaulted, (c) interest on savings deposits, in determining the gross receipts upon which the license fee should be paid.

"Pin money" is income in the nature of rent received for the use of its telephone poles by another telephone company. "Pin money" and also "subscribers' deposits defaulted" constitute a part of the gross receipts received in the operation of the exchange property of the telephone company and should be included in the statement on which the annual license fee should be computed.

You also inquire whether or not these items should be classed as exchange service or as toll line service receipts. In XVI Op. Atty. Gen. 349, the rule was laid down that all gross receipts should be reported as exchange service receipts except in the case where it was clearly and strictly toll line service. Under the circumstances, I believe it would be proper to report "pin money" and "subscribers' deposits defaulted" as exchange service receipts.

The interest received on savings accounts does not constitute income which should be included in the gross receipts upon which the telephone license fee is computed. In the case of State v. Northwestern Telephone Exchange, 107 Minn. 390, 120 N. W. 534, 539, the court said:

"The securities which produced dividends and interest, while the property of the telephone company, were not used in connection with its business, and the court, therefore, properly held that the income therefrom was not a part of the gross earnings of the company within the meaning of the statute."

AJM
Banks and Banking—Mutual Savings Banks—Bonds—
Real estate mortgage bonds are included in words "all other
loans" as expression is used in sec. 222.13, Stats.

Finance committee must certify to value of real estate
upon which mortgage bonds are issued.

Mutual savings banks may invest in real estate mortgage
bonds issued on property in Wisconsin and adjoining states.

January 30, 1928.

C. F. Schwenker,
Commissioner of Banking.

In your letter of recent date you ask three questions:
1. Is a real estate mortgage bond on an apartment house
included in "all other loans" as the words are used in sec.
222.13, Stats.?

2. Is it necessary for the finance committee to certify as
to the value of the real estate upon which such real estate
mortgage bonds are issued?

3. May mutual savings banks invest in such bonds?

Sec. 222.13, Stats., provides:

"Any mutual savings bank organized hereunder may em-
ploy not exceeding one-half of its deposits in the purchase
of the bonds of the United States or of the states of the
United States or of the authorized bonds of any incor-
porated city, village, town or county, or school district in
the aforesaid states of the United States or of first mort-
gage bond of any railroad company, which has paid annual
dividends of not less than four per cent regularly on its
entire capital stock for a period of at least five years next
preceding the investment, and in the consolidated mortgage
bonds of any such company issued to retire the entire
bonded debt of such company, or in farm loan bonds issued
by the federal land bank in the federal land bank district
of which the state of Wisconsin is a part in accordance with
the provisions of an act of congress approved July 17, 1916.
All other loans, except as provided in section 222.14, shall
be secured by mortgage or unencumbered real estate lying
and being in the state of Wisconsin and states immediately
adjoining the state of Wisconsin, to wit: Michigan, Illi-
nois, Iowa and Minnesota. No mutual savings bank shall
invest any part of its deposits in the stock of any corpora-
tion nor loan on, nor invest in any mortgage on real estate,
except such real estate as lies in the state of Wisconsin, and
states immediately adjoining, to wit: Michigan, Illinois,
Iowa and Minnesota. No loan shall be made upon real
estate to any amount exceeding sixty per cent of the value thereof as determined upon by not less than a majority of the members of the finance committee who shall duly certify to the value of the premises to be mortgaged, according to the best of their judgment, and such report shall be filed and preserved with the records of the corporation.”

It has been held by this department that the buying of bonds secured by real estate mortgages is a lending of money upon a real estate mortgage. I Op. Atty. Gen. 37, X Op. Atty. Gen. 425. Real estate bonds are not mentioned among those in which mutual savings banks may invest and therefore they must be included in the expression “all other loans.” Since the purchase of real estate mortgage bonds is a lending of money upon real estate security, according to the express provisions of the statute the members of the finance committee must first duly certify to the value of the premises to be mortgaged.

According to the opinion in I Op. Atty. Gen. 37, mutual savings banks were prohibited from investing in real estate mortgage bonds of a California corporation; apparently if the bonds had been issued on real estate in the state of Wisconsin and the states immediately adjoining, there would have been no objection to the purchase of the bonds. This opinion is adhered to.

ML

Building and Loan Associations—Several questions answered as to rights of building and loan associations and owners of shares of instalment stock and paid-up stock.

January 30, 1928.

C. F. SCHWENKER,
Commissioner of Banking.

In your several letters you have submitted for opinion the following questions relating to powers of building and loan associations and the rights and liabilities of share owners and I shall endeavor to answer them in one opinion:

Question 1. Can a withdrawal fee be assessed and collected against matured shares?
Answer: No. If the owner has matured the stock he has earned it and it is not a withdrawal so he cannot be penalized therefor.

Question 2. Can a withdrawal fee be assessed and collected against the withdrawal of instalment shares before maturity?
Answer: Yes, if provided in the by-laws or by contract under the provisions of sec. 215.26, Stats. That right, I think, is based upon the theory that if they are withdrawn before maturity it may injure the association because it has a right to assume that the money will not be called for before the end of the maturity period and the money is loaned out with reference to that maturity period.

Question 3. Can such fee be charged if it is provided for in a by-law?
Answer: Yes, if withdrawn as above.

Question 4. Would it be legal for such association to set up as an asset a withdrawal fee of $1.00 per share at the time the shares are sold?
Answer: No, for it might not be withdrawn and a purchaser could not be penalized for maturing his stock.

Question 5. Are withdrawal fees a recognized form of earnings or are they penalties?
Answer: I think they are in the nature of penalties as to the withdrawing shareholders but as to the association they are in part earnings, for extra services have to be performed in so maturing the stock before its maturity date.

Question 6. If withdrawal fees can be assessed on all shares, is it legal for an association to set up at the time such shares are sold an artificial account to be known as a withdrawal fee fund and credit such amount to undivided profits and at the close of the next period to distribute such anticipated revenue?
Answer: No. See answer to question No. 4.

Question 7. Is it lawful for an association at the time shares are sold to take from the purchasers a waiver of any dividends which may be earned over and above a specified per cent and can that be done to establish different rates of payment of dividends?
Answer: No. The statutes, sec. 215.24, require the equal distribution of gross earnings less the expenses and
contingent losses and I do not think that right can be changed by agreement, waiver or by-law.

TLM

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Prisons—Prison Labor—If dependents of convict have not been determined at time of his conviction as required by provisions of subsec. (6), sec. 56.08, Stats., court may during time for which convict is sentenced make such determination. After convict has begun to serve his sentence court cannot place him on probation.

January 30, 1928.

VICTOR M. STOLTS,
District Attorney,
Eau Claire, Wisconsin.

Under date of January 21 you have submitted two questions. The first one reads thus:

"1. If at the time a person is sentenced, the court fails to comply with the provisions of subsection (6) of section 56.08, of the Wisconsin statutes, can he thereafter during the execution of the sentence, make such investigation provided therein?"

Subsec. (6), sec. 56.08, Stats., contains the following:

"At the time of sentencing such convicted person the court shall take proof and determine what person or persons if any are actually dependent on such convicted person for support, and shall cause their names to be entered in the docket, and in the commitment of such convicted person. The court shall at the same time designate and enter in said docket and commitment the name of a person to whom payments shall be made for the use of such dependent person or persons, as hereinafter provided. * * *

In order to answer your question it is necessary to refer to subsec. (2) of the same section, which provides:

"At the time such sentence is imposed or at any time before its termination, the court sentencing such person may, upon consideration of his health and training, ability to perform labor of various kinds, and the ability of the sheriff to find and furnish various kinds of employment, direct the kind of labor at which such person shall be employed, and the nature of the care and treatment he shall receive during such sentence."
You state that you believe this question should be answered in the affirmative. I believe your answer is correct, although subsec. (6) says that the court shall at the time of the sentencing of a convict take proof and determine what person or persons if any are actually dependent on such convicted person for support. This is the regular and proper procedure for the court to follow. It is something it should do at that time. If, however, the court has neglected to do so, I see no reason why the court should not do so any time during the term for which the convict has been committed. It is not a part of the sentence or commitment. As the court, under subsec. (2), is empowered to control the employment of the convict during the time for which he is sentenced I think it necessarily follows that if the dependents have not been ascertained the court may ascertain that in order to carry out the powers that are given to it under subsec. (2).

Your second question is:

"2. In view of the statutes and the above mentioned opinion of the attorney general on page 532, in Volume XII, can the court, during the execution of a county jail sentence, release the defendant from the sentence and place him on probation for the unexpired term under certain conditions?"

This question in my opinion must be answered in the negative. I find no provision in the law which authorizes a change in the sentence such as is here contemplated. After the convict has begun to serve his sentence there is no power in the court to place him on probation. You will note that the power given to the court under sec. 56.08, subsecs. (2) and (3) does not in any way include the power of placing the prisoner on probation. When the convict is employed under said statute, he is in contemplation of law, still in jail. Under subsec. (3) the county jail is extended to any place within the county where the work is provided and the sheriff has custody of such prisoner.

Nothing in the opinion of the attorney general in XII Op. Atty. Gen. 532 militates against this construction.

JEM
Bridges and Highways—Trunk Highways—Under facts stated funds under control of state highway commission provided for improvement of state trunk highway system may lawfully be used in payment of state's share (as fixed by railroad commission in proceedings under sec. 195.19, Stats.) of cost of grade separation project on state trunk highway U. S. No. 41 on street center of which is boundary line between city of Appleton and town of Grand Chute, Outagamie county, improvement being within construction limits provided by sec. 1313, subsec. 1, Stats.

January 31, 1928.

HIGHWAY COMMISSION.

The following facts appear from your statement and the map, drawn to scale, accompanying your inquiry:

Wisconsin avenue is a street running east and west, part of the center line of which (involved in your question) is the boundary line between the city of Appleton (a city having a population of more than 2,500) and the town of Grand Chute, in Outagamie county, originally designated as a part of state trunk highway No. 15 and now known as U. S. No. 41; the tracks of the Chicago & North Western Railway cross said street at grade approximately 1,275 feet from the west line of said town, between it and a part of the city, projected across said street, and the distance from such crossing along said street to the east city limits line is approximately 4,250 feet; on the north side of said street, in the town of Grand Chute, between said west town line projected and said crossing there are now four houses and two other buildings (a saloon and a school) and between the said crossing and the east city limits line are thirteen houses and six other buildings (a greenhouse, two stores, a saloon and two garages); on the south side of said street, in the city of Appleton, between said west town line projected and said crossing are three houses and three other buildings (a store and two sheds), and between said crossing and the east city limits line are nine houses and three other buildings (a greenhouse and two hatcheries); in 1921 the city of Appleton petitioned the railroad commission for an order separating the grades of the street and the railroad, which petition was denied without prejudice, and
in 1925 the city again petitioned the railroad commission for such separation by the construction of a subway, and the city, the railway company and the Wisconsin Traction, Heat, Light & Power Company (which operates a street railway on said street) then joined in a request to the railroad commission to grant a delay of one year, all parties stipulating that they would undertake to effect the separation of grades within that time, and the railroad commission granted the request; on April 2, 1926, the state highway commission, by resolution, joined in the petition of the city and subjected itself to the jurisdiction of the railroad commission on condition that the state's share of the cost of the project should not be greater than one half of the public's share thereof and not more than one fourth of the entire cost; the railroad commission, acting, I assume, under the provisions of sec. 195.19, Stats., entered an order for such separation of grades and fixed the share of the cost of the project to be paid by the state at approximately $50,000; the time for instituting any action for a judicial review of the order of the railroad commission has elapsed, and no such action has been taken by any party to the proceedings; apparently, the amount of the state's share of the cost of the project so apportioned is not contested, but you inquire whether, under the opinion of the attorney general to you of October 13, 1925 (XIV Op. Atty. Gen. 477) (holding that the allowable construction limits on the state trunk highway system in cities of more than 2,500 population limited by sec. 1313, subsec. 1, Stats. 1921, remain in force, and that such construction limits automatically recede whenever the number of houses along a street or road therein forming a part of the state trunk highway system increases so that they average less than 200 feet apart in any platted block or equivalent distance), the funds under the control of the state highway commission which are required to be expended on the state trunk highway system, only, may lawfully be used in the payment of the state's share of the grade separation project in question under the order of the railroad commission.

The question is answered in the affirmative.

I think it is clear that the whole of the street in question
is even now within the construction limits referred to and is therefore a part of the state trunk highway system. The statutory test may be applied only to that part of the street which is within the city, there being no limitation as to the construction limits of that part of the street lying in the town; hence, if the houses along the south side of said street from the west city limits line to the east boundary of the separation project do not average less than 200 feet apart, the construction project is on the state trunk highway system. The map submitted shows that the houses average approximately 425 feet apart in any equivalent distance of a platted city block, and that all buildings average approximately 212 feet apart, and the map also shows that on the portion of the street east of the construction project the houses average approximately 472 feet apart and all buildings average approximately 354 feet apart. As already indicated, the north half of the street is a part of the state trunk highway system irrespective of the distance apart of the houses. Under the fact stated, it is not necessary to determine whether the term "houses" in the statute includes buildings other than dwelling houses, because the distance apart of all buildings shown on the map averages more than 200 feet; however, I may say, for your possible future guidance, that in my opinion the term "houses" in the statute means dwelling houses and does not include stores, factories, saloons, garages, sheds, or other buildings, as it must be assumed that the legislature used the term advisedly and meant to exclude all other buildings and would have used the term "buildings" if it had intended that the test should be the average distance apart of buildings of all descriptions.

Neither is it necessary to rule on your other questions of whether the situation with reference to the distance apart of the houses along the street as of the date of the filing of the petition with the railroad commission, as of the date of the order of the railroad commission, or as of the date of the beginning or completion of the work, governs the liability or power of the state to contribute to the cost of the separation project, nor on the question of what effect the fact that the order of the railroad commission has be-
come final would have, in case there had been a recession of the construction limits between any of those dates, because the situation with reference thereto has remained unchanged.

I think that the foregoing disposes of all of your questions.

FEB
Copyrights—Public Officers—Superintendent of public property has not power to purchase copyright and sell guide book of capitol.

February 1, 1928.

C. B. Ballard,
Superintendent of Public Property.

You state that you have been contemplating taking over the guide books of our state capitol, which are now owned and sold by one of the capitol guides, and to sell them from your office to the public at actual cost. You state that you are advised that these books are copyrighted and that this copyright has been purchased by the said guide.

You inquire whether the state may legally purchase these books and the copyright and sell the books in the same manner as you sell the statutes, session laws, pamphlets, maps, etc.

I have carefully examined the statutes prescribing your duties and powers. In all cases where you have been selling statutes, laws, pamphlets, maps, etc., I find that there is an express provision of the statute authorizing it. I have been unable to find any provision in the statute which expressly or impliedly gives you the power to purchase the copyright and to buy and sell a guide book for the capitol.

You are therefore advised that it is my opinion that you have no such power.

JEM

Insurance—Fire insurance company under provisions of statutes can issue coverage against loss by tornado, windstorm or cyclone, by attaching rider to standard fire insurance policy, except that under provisions of sec. 201.05, subsec. (4), Stats., damage to crops by hail, although it might be accompanied by tornado, wind or cyclone, is required to be written in separate and distinct policy from other insurance mentioned in 201.04 (1).

February 1, 1928.

M. A. Freedy,
Commissioner of Insurance.

You refer to sec. 203.01, Stats., which provides for a standard fire insurance policy and to sec. 203.06 subsecs.
(1) and (2) and to sec. 201.05, subsec. (3), and to sec. 201.04, subsecs. (1) and (12). You ask if a fire insurance company in accordance with the statutory provisions can issue coverage against loss by tornado, wind storm or cyclone by attaching a rider to the standard fire insurance policy of the state of Wisconsin.

You are advised that it can. Sec. 201.04 says that an insurance corporation may be formed "for the following purposes," and it then says:

"(The mention of several subjects or risks of insurance in any subsection indicates that any one or more or all may be included.)"

Subsec. (1) says:

"Against loss or damage to property on land, by fire, lightning, hail, tempest or explosion."

You do not use the same terms in your question but I see no reason why the subject ought not to be included in the terms used in that subsection, only I think it would be safer to describe the risks in the language of the statute. The only exception that I find in the statute is that specified in sec. 201.05 (4), which says:

"Insurance against damage by hail to crops shall be written in separate and distinct policies from other insurance mentioned in subsection (1) of section 201.04."

You will notice the word "hail" is used in sec. 201.04 (1) as one of the risks that can be insured in fire insurance companies, and the fact that that risk is required to be written in a separate policy would indicate that it could not be covered in the same policy although it is mentioned in subsec. (1), sec. 201.04.

Subsec. (2), sec. 201.05 says that no company shall be formed for the purpose of engaging in any other kind of insurance than that specified in some one of the subsections of sec. 201.04, or more kinds of insurance than are specified in a single subsection, except that a company may be formed for the purposes specified in subsections there named. The purposes then grouped are those specified in the subsections named and in a number of those subsections several different kinds of insurance are specified, with no attempt to require separate policies for any of the kinds in a subsection until it gets down to subsec. (4), which requires a separate
policy for damages by hail to crops. Subsec. (5) again groups the risks in the several subsections there specified, which would include all of the risks specified in each subsection, and for those risks the fire insurance company need not use the standard fire policy for insuring automobiles.

As you know, there have been so many changes and modifications in the several provisions classifying properties and risks for insurance that it is sometimes difficult to reconcile them as to a particular property or risk, but where specific provision is made requiring certain kinds of risks to be insured in separate policies and no such specific provision made as to other kinds of property described in the same subsection, I do not see any reason why they could not be covered by the same policy, and especially where a slip or rider is used so as to specifically cover it, for to that extent it would be covered by a specific policy as to that property. So I answer your specific question in the affirmative.

TLM

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Banks and Banking—State Banks—Lending bank which has filed general claim against bank in process of liquidation may compromise on collection of collateral it holds to secure note, without amending general claim.

C. F. SCHWENKER, Commissioner of Banking.

You say that the Farmers' State Bank of Allen in full compliance with the provisions of sec. 221.33, Stats., borrowed money from the First Wisconsin National Bank of Milwaukee, giving its note therefor, and pledging assets of the bank as collateral. The Farmers' State Bank failed, whereupon the First Wisconsin National Bank filed a general claim for the amount of the note and retained all of the collateral pledged. From time to time the First Wisconsin National Bank has endeavored to collect on its collateral and in some cases has compromised on percentages as low as ten per cent. You ask whether the lending bank, when it has filed its claim and retained possession of the collateral, may lawfully compromise on the collection of such collateral without making a proper amendment to its general claim under the note against the bank.

February 1, 1928.
In 7 C. J. 750, the rule is stated as follows:

“There is some conflict of opinion as to whether a creditor holding collateral must first seek satisfaction out of such collateral. In some jurisdictions it is held that such creditor can sell his collaterals and apply the proceeds on his debt, and if they are insufficient to satisfy it in full prove the unpaid balance on which he is entitled to a dividend like other creditors; but in other jurisdictions a secured creditor is entitled to prove his entire claim as though he had no collaterals and to take a dividend like other creditors and afterward to apply the proceeds of the collaterals to the unpaid balance of his claim, turning over the excess, if any there be, to the trustee or the receiver for the benefit of the other creditors.”

In re Meyer, 78 Wis. 615, is given as one of the cases supporting the latter rule and there is enough in that case to warrant the citation. Under this rule, of course, the lending bank has a right to realize on its collateral, using its best judgment, without making any amendment to its general claim under its note against the bank. Harrigan v. Gilchrist, 121 Wis. 127, 344–347; Corbett v. Joannes, 125 Wis. 370.

Banks and Banking—Land Mortgage Associations—Public Officers—Commissioner of banking may take charge of affairs of land mortgage association when it cannot meet its interest on bonds issued.

When banking department liquidates land mortgage association, state treasurer can turn over mortgages deposited to secure bonds only when so ordered by circuit court.

If necessary to conserve assets of land mortgage association, commissioner of banking should commence action to collect on guaranties of land mortgage association which issued the mortgaged originally.

February 1, 1928.

C. F. SCHWENKER,
Commissioner of Banking.

In your letter of January 26 you ask the following questions:

“1. When does a default occur sufficient to permit the commissioner of banking to take charge of the affairs of a
land mortgage association? Does it occur if the interest is not paid on the due date or does it require sixty days later in pursuance to the provisions of the bond contract?

"2. In the event that a land mortgage association is taken over by this department following a default and this department proceeds to liquidate, what procedure will be necessary for the release of the securities deposited with the state treasurer? Has he authority to release such mortgages to the commissioner of banking when the land mortgage association becomes insolvent or in default?

"3. Certain of the mortgages forming collateral to the bond issue of a certain land mortgage association were acquired by purchase from other companies and such notes bear the endorsement and guaranty of those companies. Will the taking possession of such land mortgage association require the immediate action of the commissioner of banking to collect on the guaranties of such other endorsing corporations?"

The laws governing the operations of land mortgage associations are contained in ch. 225, Stats. Sec. 225.14, Stats., provides that certain sections of the banking law, including secs. 220.01 to 220.14, inclusive, are applicable to land mortgage associations. Sec. 220.08, Stats., provides in part:

"(1) Whenever it shall appear to the commissioner of banking that any bank or banking corporation to which this chapter is applicable has violated its charter or any law of the state, or is conducting its business in an unsafe or unauthorized manner, or if the capital of any such bank or banking corporation is impaired, or if any such bank or banking corporation shall refuse to submit its books, papers, and concerns to the inspection of any examiner, or if any officer thereof shall refuse to be examined upon oath touching the concerns of any such bank or banking corporation, or if any such bank or banking corporation shall suspend payment of its obligations, or if from any examination or report provided for by this chapter the commissioner shall have reason to conclude that such bank or banking corporation is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue business, or if any such bank or banking corporation shall neglect or refuse to observe an order of the commissioner, specified in section 220.07 of the statutes, the commissioner may forthwith take possession of the property and business of such bank or banking corporation, and retain such possession until such bank or banking corporation shall resume business, or its affairs be finally liquidated as herein provided."
Under this section the commissioner of banking may take charge of the affairs of the land mortgage association if the commissioner concludes that the association is in an unsound or unsafe condition to transact the business for which it was organized or that it is unsafe and inexpedient for it to continue business. It is unnecessary to wait until the association actually makes a default in the payment of its obligations. The inability of the association to meet its interest on its bonds on the due date justifies the commissioner of banking in taking charge of the affairs of the association.

Sec. 225.35, Stats., provides:

"All mortgages pledged to secure the payment of the bonds issued hereunder shall be deposited and left with the state treasurer. The land mortgage association may, with the approval of the state treasurer, remove such mortgages from the custody of the state treasurer, substituting in place thereof other of its mortgages, or money or state of Wisconsin bonds or certificates of deposit, indorsed in blank, issued by state or national banks located in Wisconsin, farm mortgage bonds issued under the provisions of the federal farm loan act approved July 17, 1916, or obligations of the United States government, in an amount equal or greater than the amount unpaid upon the notes secured by the mortgages withdrawn."

This section does not authorize the state treasurer to release any of the mortgages placed in his custody without the substitution of other securities except when the bonds secured by the mortgages pledged have been paid. If the release of the securities deposited with the state treasurer is necessary for the proper liquidation of the association, the state treasurer may release them when so ordered by the circuit court.

When the commissioner of banking takes charge of a land mortgage association it becomes his duty under subsec. (3), sec. 220.08, Stats., "to collect moneys due to such bank or banking corporation, and do such other acts as are necessary to conserve its assets and business." If necessary to conserve the assets of the land mortgage association, then, the commissioner of banking should commence action to collect on the guaranties of the land mortgage association which issued the mortgages originally.

ML
Appropriations and Expenditures—Legislature—Members of legislature are entitled to constitutional travel compensation in attending sessions of legislature in cases only where such travel is actually made.

February 2, 1928.

JOHN W. EBER,
Speaker of the Assembly.

You inquire whether a member of the assembly is entitled to mileage on account of the special session of the legislature commencing January 24, 1928, under the following circumstances: the "member came to Madison from a distant point in the state in December, 1927, entered a hospital in this city on account of illness and was confined in such hospital during all the time the legislature was in session at such special session."

Sec. 21, art. IV, Wis. Const., provides, among other things:

"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 each mile he shall travel in going to and returning from the place of meeting of the legislature * * *. 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."

It will be observed, therefore, that to entitle a member of the legislature to the travel compensation provided for by the constitution, he must, of necessity, actually "travel in going to and returning from the place of the meeting of the legislature," etc.

Your communication negatives the essential basis of any claim for such compensation, in my view of the situation. Under such circumstances it is not readily perceivable how you, as presiding officer of the assembly, in conformity with the duty cast upon you by the provisions of sec. 13.04, Stats., can certify to the secretary of state that this particular member is entitled to compensation for travel, which you say was never actually accomplished by him.
The constitutional travel compensation to which members of the legislature are entitled in attending sessions of the legislature is not payable under the facts detailed by you.

HAM

**Appropriations and Expenditures—Bonds—Public Officers—State Treasurer—** Cost of additional surety company bond to be furnished to annuity board by state treasurer is properly chargeable to and payable out of appropriation to annuity board.

February 2, 1928.

**Retirement System.**

Attention R. E. Loveland, Secretary.

You advise that a dispute has arisen between your board and the state treasurer as to whether the cost of the additional bond of the state treasurer to cover the funds of your board could or should, under my opinion in XVI Op. Atty. Gen. 224, be paid out of the general funds of the state, out of the appropriation for the state treasurer's office or out of the appropriation of your department, and you ask to be advised.

You will notice my opinion referred to does not advise as to what state funds it should be paid out of or to what it should be chargeable. The only thing I advised was, that under the provisions of sec. 42.24, Stats., the cost of such a bond is to be borne by the state instead of out of the special trust funds belonging to the teachers' retirement system.

Sec. 204.20 provides that the state shall pay the cost of any official bond furnished by an officer or employe thereof and it then provides the cost of any such bond to the state shall be charged to the appropriation for the state officer, department, board, commission or other body, the officer or employe of which is required to furnish the bond.

You say under this law Mr. Levitan, as state treasurer, is made treasurer of the annuity board by legislative action. Under sec. 42.24 he is an officer of the annuity board as well as a state officer, and you think that might justify the payment of the cost of such additional bond out of the appropriation to the annuity board.
Such section says that the state treasurer shall be ex officio treasurer of the annuity board and the state retirement system and shall give an additional bond in such amount and with such corporate sureties as shall be required and approved by the annuity board.

Under these provisions of the law, when the annuity board requires the treasurer to furnish a special bond for the protection of its funds the cost of such bond is properly chargeable to and payable out of the appropriation to the annuity board.

TLM

Automobiles—Law of Road—Statute prohibits person under sixteen years from obtaining driver’s license and therefore prohibits such person from driving.*

February 3, 1928.

L. D. Smith,
District Attorney,
Waupaca, Wisconsin.

In your communication of January 12 you inquire whether a person under sixteen years of age may operate an automobile when such person is accompanied by adult who has an operator’s license.

Subsec. (1), sec. 85.08, Stats., provides in part as follows:

“No person under the age of sixteen years unless accompanied by an adult * * * shall operate any automobile * * * on any highway.”

Subsec. (1), sec. 85.33, which was enacted by the 1927 session of the legislature, provides:

(1) After January 1, 1928, no person shall operate or drive a motor vehicle upon any public highway of this state without obtaining a license for that purpose as provided in this section. No such license shall be issued to any person under sixteen years of age, or to any person who is physically or mentally incompetent to safely operate a motor vehicle upon the public highways.”

This last section, part of the so-called “driver’s license law,” was enacted by the last session of the legislature and

*This law was amended by ch. 1, Laws 1928 (Second Special Session).
is the last word upon the subject. Previous to this legislation, no one under sixteen years could legally drive an automobile without being accompanied by an adult. To legally operate an automobile at the present time, the driver must have a license. To obtain such a license one must be sixteen years of age. The rule of law is well established that where an act of the legislature covers the subject matter of an earlier act, the latter repeals the former. *City of Madison v. Southern Wisconsin Railway Company*, 156 Wis. 352, 146 N. W. 492. In this case our supreme court approvingly cited *Lewis v. Stout*, 22 Wis. 225. See also *Jones v. Broadway Roller Rink Company*, 136 Wis. 595, 118 N. W. 170.

Since a person under sixteen years of age cannot obtain a license to drive a motor vehicle and since such license is made a requisite to the legal operation of an automobile, it follows that a person under sixteen years of age cannot operate or drive a car although accompanied by an adult, even though the adult may have a driver’s license.

FWK.

*Bridges and Highways—Town Highways—Apportionment and charge to towns of expense of repairs made by county board to town line highway in due proceedings on appeal provided for by sec. 81.14, Stats., is to be made without regard to any apportionment of maintenance liability existing between towns made under provisions of sec. 80.11, and is to be made by county board in proportion to equalized value of taxable property in town as fixed by county board pursuant to secs. 70.61 and 70.63; either town must seek its own remedy against other for readjustment of such expense as between themselves based on any claimed apportionment of maintenance agreement existing between them.*

February 6, 1928.

CHARLES M. WILLIAMS,
*District Attorney,*
Whitewater, Wisconsin.

I quote your statement and question as follows:

“On June 18, 1842, highway commissioners in the towns of Whitewater and Richmond, Walworth county, divided
the town line highway between these towns for the purposes of maintenance and repair, as follows: Commencing at the east end of said road and running westward Whitewater had the first two miles, Richmond the next one mile, Whitewater the next two miles and Richmond the last one mile; the order of the commissioners was duly filed and recorded in the office of the clerk of both towns; the road was kept in repair by the respective towns pursuant to the terms of this order from 1842, to August 8, 1923; on August 8, 1923, supervisors of each town at a joint meeting entered into a new agreement, redividing this road for maintenance and repair, allotting to the town of Whitewater the east three miles and to the town of Richmond the west three miles; this agreement was filed and recorded in the office of the clerk of the town of Whitewater, but does not appear to have been filed and recorded in the office of the clerk of the town of Richmond; the town of Richmond maintained that portion of the road allotted to it by this agreement for about one year, expending about $600 thereon; but for the past three years has not kept its portion of the road in repair; the town of Whitewater has maintained that portion of the road allotted to it by this agreement and has expended about $1,600 thereon; upon advice of counsel, the town of Richmond refuses to keep that portion of the road allotted to it under this agreement, on the grounds that sec. 1273, now 80.11, was not complied with; it is a settled fact that the supervisors acted on their own motion in the matter; no application was filed and no notice given; appeal to the county board of Walworth county has been made in accordance with the provisions of section 81.14, asking that the road be repaired by the county board; the board will repair the road, but the question arises, when the expense of such repair is audited and allowed by the county board and added to the next county tax, how shall it be apportioned between the two towns,—under the order of 1842, or the agreement of 1923?"

My answer is: Under neither order or agreement, but it should be apportioned to the two towns in proportion to the equalized value of the taxable property in each town as fixed by the county board under the provisions of sec. 70.61, Stats.

While under the provisions of the territorial statutes of 1839 and the statutes of the state from 1849 to date and quite numerous decisions of the supreme court construing them, which I have examined with considerable pains but
shall not refer to in detail, some doubt exists, I am of the opinion that as between the towns the joint action of the supervisors of the two towns on August 8, 1923, apportioning the liability for the maintenance of the town line road in question, constituted a contract which the supervisors had power to make under the provisions of sec. 80.11, Stats. 1923, and the agreement having thereafter been acted upon according to its terms by both towns in the maintenance of the highway, involving the expenditure of money by each, for upwards of a year, that it is binding upon both towns despite any irregularities in the matter of the filing of the agreement in the office of the town clerk of one of the towns, until abrogated in the manner provided by law. Montgomery v. Scott, 34 Wis. 338; Seif v. Eaton, 153 Wis. 657, 661; Pella v. Larrabee, 164 Wis. 403. The original apportionment of the maintenance liability was made approximately six years before Wisconsin territory became a state. No application by anyone to change that old apportionment and no notice of proposing to change it was required; a majority of the supervisors of each town acting together had power to make the change of their own motion. State ex rel. Shawano County v. Sexton, 124 Wis. 352; Seif v. Eaton, supra.

The duty of keeping the town line highway in question in repair is upon the two towns jointly, and each of the towns is liable for any damages to person or property occurring because of the failure to perform that duty. West Bend v. Mann, 59 Wis. 69; Waupun v. Chester, 61 Wis. 401; State ex rel. Shawano v. Sexton, supra; Bloomer v. Bloomer, 128 Wis. 297; Seif v. Eaton, supra. But, as between themselves, that duty and liability may be apportioned by agreement of the two towns, acting through their supervisors, or, in case of failure to agree, by proper proceedings before the circuit judge of the county. Sec. 80.11, Stats. If not so apportioned, the liability for expense of maintenance and for want of repair is in proportion to the value of the taxable property in the towns as equalized by the county board, and in case of refusal, failure or neglect in the performance of their joint duty by either or both of the towns and an appeal to and the making of repairs by the county board under the provisions of sec. 81.14, Stats., it is this latter
basis of apportionment of the expense of such repairs that is charged to the towns, leaving the towns to settle as between themselves.

Sec. 81.14, Stats., so far as material here, provides:

"If any towns in case of a town line highway, shall refuse, fail or neglect to repair any public highway in such towns, any fifteen freeholders, whether residents or not of such towns, may appeal from such refusal, failure or neglect to the county board of the county in which such highway is situated, by notice in writing served on the chairmen of such towns. When an appeal is taken as hereinbefore provided for, the county board shall, at the next regular meeting thereafter, either by a majority of its members or by a committee of not less than three, examine such highway, and if after such examination they shall determine that it ought to be repaired, the said county board shall thereupon appropriate sufficient funds to defray the estimated cost of repairing such highway, and the chairman of such county board shall cause the said highway to be put in reasonable condition for travel, and keep an accurate account of the expense thereof, and such expense when audited and allowed by the county board shall be charged to such towns and added to the next county tax apportioned thereto and collected therewith."

In my opinion, the direction of the statute above quoted that "such expense when audited and allowed by the county board shall be charged to such towns and added to the next county tax apportioned thereto and collected therewith," means that the apportionment shall be on the same basis that other county taxes are apportioned, namely, in proportion to the value of the taxable property in each town as equalized by the county board under the provisions of secs. 70.61 and 70.63, Stats. The county board is not charged with knowledge of or with any duty with reference to any order or agreement apportioning the liability of maintenance between the towns, and I think it is clear that the apportionment made by the county board to the towns of the expense of repairing the town line highway made by the county board pursuant to due proceedings under said statute shall be made without regard to any existing order
or agreement of apportionment of maintenance liability existing between the towns. The references (omitted in the quotation) to apportionment between the towns in the statute are merely for the purpose of establishing a statutory rule as to which county board has jurisdiction of the appeal provided for where a town line highway is also on the line between two or more counties.

If, under the apportionment of expense of repairs made by the county board, the town not in default under the apportionment agreement between it and the other town is required to pay for repairs which it would not have had to make had the other town performed its part of the agreement, such town has its remedy against the latter; but certainly the legislature did not intend and has not provided that the county board shall be required, before making these repairs to the highway or before apportioning and charging to the towns the expense thereof, to decide the controversy between the towns as to whether the apportionment of maintenance liability made in 1842 or the one made, or attempted to be made, in 1923 governs the liability of the towns to reimburse the county for such expense as between themselves; indeed, such a controversy is a judicial one, and the power to decide it could not constitutionally be conferred upon the county board.

February 8, 1928.

Bridges and Highways—State Highways—Entry on land acquired by agreement with owner for highway purposes under secs. 83.07 and 83.08, Stats., may be made immediately upon consummation of contract or conveyance.

Highway Commission.
Attention C. R. Weymouth, Secretary.

In response to your inquiry you are advised that in my opinion where a right of way for a county trunk or state trunk highway over lands of private owners has been acquired by the county highway committee, dealing by contract with such owners under the provisions of sec. 83.07 or 83.08, Stats., and the consideration therefor has been paid
and such conveyance or contract has been approved and 
filed as provided by those sections, entry on such lands for 
the purposes of the acquisition may be made immediately. 
I know of no provision of law requiring thirty days’ no-
tice before such an entry can be made.

FEB

Municipal Corporations—Ordinances—Public Health—
City cannot provide by ordinance for inspection of premises 
of milk producers outside of city limits, requiring milk pro-
ducers whose premises are inspected to pay one dollar to 
the city for making such inspection.

February 10, 1928.

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

On January 16 you submitted certain ordinances enacted 
in the city of La Crosse, governing the sale of milk therein. No opinion was submitted to you because the case City of 
Milwaukee v. Childs Co., 217 N. W. 703, was pending. The 
Childs company had appealed from a fine imposed by the 
Milwaukee municipal court for violating the milk ordinance.
The supreme court held yesterday that a city may regu-
late the sale of milk within its limits; that such ordinance 
requiring milk to be sold only in original containers, capped 
and sealed, to be opened by the consumer was a proper 
police regulation.

It is further announced by the court, p. 704, that

"* * * The fact that neither the state law, nor the 
regulations of the state board of health enacted pursuant 
thereto, attempt to prescribe regulations for the sale of 
milk, cannot deprive the city of the power expressly granted 
to it."

Your ordinance would seem to be valid, except where it 
requires the inspection of the premises of milk producers 
located outside the city limits and payment of one dollar 
to the city for making such inspection.

I doubt whether this provision of the ordinance is consti-
tutional. The city can certainly determine standards to
which all milk sold within its limits shall adhere. For instance, a restriction could be placed on sales of milk other than from tuberculin tested cattle or milk that was not pasteurized. But if a Madison milk dealer was selling milk in La Crosse, the city could not come down to Madison and inspect his plant and require him to pay the fee of one dollar exacted therefor. This seems unreasonable and, although praiseworthy, it takes away property without due process.

MJD

Public Lands—Public Officers—Commissioner of Agriculture—State Fair—Commissioner of agriculture may not lease or license portions of state property so as to convey interest in land.

February 10, 1928.

W. A. Duffy,

Commissioner of Agriculture.

You have submitted a lease between the department of agriculture, lessor, and Miller and Rose, lessee, leasing for ten years portions of the state fair grounds on which lessees may erect amusement devises.

Lessees are to pay an agreed percentage of the gross receipts as compensation, and such equipment as they may place upon the grounds remains personal property. The lessor has the "option to renew this lease for a further period of ten years or take over the physical property at an appraised value, the appraisal to be made by the American Appraisal Company."

When the lease was made certain assurances were supposedly voiced by the then secretary of the board that these devices would be exempt from taxation. A tax was thereafter collected on this equipment by the town in which the property was situate and the lease was changed to allow the deduction of such taxes from the lessor's share of the gross receipts.

You inquire whether this lease is valid, particularly whether the renewal clause is binding.
The statutes do not authorize the commissioner of agriculture to execute leases upon state fair grounds in whole or in part. He may agree with exhibitors whereby the latter may erect exhibition buildings on the fair grounds, using plans approved by the state engineer and architect. The governor must approve this program and the buildings are not only to be free from taxation, but become the property of the state on an agreed date, not more than ten years from the date of the agreement. Sec. 93.06, Wis. Stats.

This so-called lease was not granted under the aforementioned statute because this is not an exhibition building built by an exhibitor, but merely allows the erection of amusement devices which are stipulated to be personal property and remain such.

No statutory authority exists, except as aforementioned, by which the commissioner of agriculture may lease. He may not convey an interest in land. This agreement in question is in all respects a lease or a license coupled with an interest which is irrevocable until it terminates according to its conditions and is binding on successors in interest. It certainly purports to convey an interest in the state fair grounds to the so-called lessees.

I believe that the commissioner of agriculture may ignore this lease, because of lack of authority of his predecessor to execute it. The commissioner may license amusement promoters, but the license may be revoked at will. Sec. 93.07, subsec. (4), requires him to exclude from the fair grounds all exhibitors and all booths, stands and other temporary places for the sale of articles which he may deem objectionable. The intent of this statute is to have amusement operators on the state fair ground only with the consent of the commissioner.

The commissioner has full responsibility for the state fair under the statute. His decisions concerning state fair matters are final. Since this agreement is invalid as a lease or as a written license, coupled with an interest, which has already been acted upon, notice of revocation should be sent to the lessees and a license granted them as agreed upon by the parties.

MJD
Criminal Law—Inquests—Public Officers—Coroner—

Where man is hit by railroad train in Illinois and is put on board train but dies in Wisconsin, person responsible for death may be prosecuted in Wisconsin under sec. 353.12, Stats.

Under provisions of sec. 366.01 district attorney of county where person dies has power to direct coroner or justice of peace to make inquest; coroner has no right to take charge of body or hold inquest or incur expense and collect same from county.

February 13, 1928.

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

You say a man was hit by a train about six miles south of the state line. He was placed in a baggage car and brought to Kenosha, where he died. The Kenosha county coroner took charge of the body and later, when it was returned to Waukegan for burial, an inquest was held there. You ask which coroner should take charge of the body. You say you find nothing in the statutes to cover the point and you thought this office might lay down a rule for those near the state line to follow.

You are advised that this office has no authority to lay down rules for public officers to follow except as they may be prescribed by law and we can then attempt to construe such laws.

Sec. 59.34, Stats., says the coroner shall take inquest of the dead when required by law.

Sec. 366.01 says:

"Whenever the district attorney shall have notice of the death of any person within his county and from the circumstances surrounding the same there is good reason to believe that murder or manslaughter has been committed, he shall forthwith order and require the coroner or some justice of the peace therein to take an inquest * * *

and sec. 366.13 provides for payment of the cost of such inquest by the county.

From these provisions of the statute it would appear that the coroner has no power to take charge of a body and hold
an inquest except where ordered to do so by the district attorney under the conditions named in the statute, and that would have to be done by the district attorney of the county where the death occurred.

Sec. 353.12 provides that if any mortal wound shall be inflicted or other violence or injury done without the limits of this state by means of which death shall ensue in any county of this state, such offense may be prosecuted and punished in the county where such death may happen.

Under that section the district attorney in the county where the death occurs has the power to direct the coroner to take charge of the body and hold an inquest to enable him to determine whether or not to prosecute under the provisions of sec. 353.12, and if he does that, the coroner can then legally take charge of the body and hold the inquest.

Whether or not an inquest would thereafter be held in Illinois or any other state under the laws of such state would not be a matter in which either you or the coroner would have any interest, but the officers of such other state might be authorized under the laws of such other state to hold an inquest to enable them to determine whether or not an offense had been committed against the laws of such state, and might hold the person to prosecute him for the violation of such laws. But, of course, your coroner would have nothing to do with that proceeding and, of course, you would have no concern in such proceedings except in so far as it might prevent your obtaining the custody of the criminal for prosecution in this state.

TLM
Automobiles—Law of Road—Public Printing—Stickers

Printed matter covered by sec. 35.34, subsec. (1), Stats., can be procured only upon requisition directed to printing board.

Printing board shall order all such printing which it (board), in exercise of sound discretion, may determine is needed.

Windshield display, after March 1, 1928, of "sticker" receipts issued by secretary of state evidencing payment of state motor license fee, does not constitute violation of sec. 85.085, subsec. (3), Stats.

February 15, 1928.

C. B. Ballard,
Superintendent of Public Property, and ex-officio member of Printing Board.

Your communication of recent date requesting an official opinion on the law governing a statement of facts made therein by you has been received. Your statement of such facts follows:

"The secretary of state has recently ordered from the Journal Company, of Milwaukee, 142,300 motor vehicle license receipts (windshield stickers), at $7.00 per thousand, incurring an obligation of $996.10. No requisition was issued from this department for this material, nor was the printing board consulted about printing these stickers.

"A requisition has been presented to me for signature, and I would like an immediate opinion as to whether or not the secretary of state had a right to order these windshield stickers without submitting the matter to the printing board under sec. 35.01 of the revised statutes of the state of Wisconsin for 1927. This seems to be job printing, and would come under this section.

"I would also like to know whether I have any legal right at this time to issue such requisitions, or whether the state treasurer has any power under the law to pay out any money for this bill. I find no authority in the law even for printing such stickers, which are to be construed as a receipt to the party who makes an application for a license to run his car under subsec. 3, sec. 85.085 of the revised statutes of Wisconsin, and such stickers would not be permissible on the windshield after March 1, 1928."

The printed matter in question, copy of which you enclosed in your letter, undoubtedly comes within the statutory
definition and classification of fourth class printing to wit: “all job printing and all printing not otherwise classified,” under the provisions of sec. 35.01, Stats. What is meant to be included in this particular class of printing is further amplified by the provisions of sec. 35.34 (1).

By sec. 35.02 (1) it is provided:

“The governor and the superintendent of public property, ex officio, and an editor of public printing, who shall be appointed by the governor, shall constitute the printing board.”

Judging from the sample enclosed in your letter, the “stickers” ordered by the secretary of state are merely a receipt issued by him evidencing the payment of state motor license fee, on the particular vehicle being operated, and to be used until such time as license plates are issued by him for use upon such vehicle.

Under the provisions of sec. 85.04 (1), Stats., the operator of a motor vehicle after March 15, “upon any highway unless the same shall have been registered or application for registration shall have been made to the secretary of state and the registration fee paid * * * may be arrested by any sheriff, * * * or other police officer” and subjected to the penalties therein provided for.

By the use of the windshield sticker receipt, needless and annoying arrests will be avoided and vexatious and expensive litigation eliminated. The use of the sticker receipt was intended to, and does, serve the citizenry of the state, including all police officers and, in the final analysis, no higher or greater duty devolves upon any public officer than to do just that. The efficient administration of the law demands nothing short of the performance of that duty by all officers of the state.

The proper procedure to have been adopted by the secretary of state, in order to procure the sticker receipts, was to have requisitioned the printing board for such printing. The matter coming in that manner to the attention of the board, it would have been the duty of the board to order such printing or such portion thereof as it (the board), in the exercise of a sound discretion, might determine was needed by the department making such requisition. That is the method prescribed by sec. 35.34 (1), Stats. It is my
opinion, however, that for the printing board to refuse to honor such requisition would be an abuse of discretion.

The last above mentioned section gives to the board the undoubted authority to override and veto the requisition of the secretary of state in calling for such printed matter, although in the judgment of the latter officer it may be necessary in an efficient administration of his office. This veto power of the printing board may be exercised by it in all instances unless it runs counter to some special legislative enactment, in which case the latter would govern. Bearing on the instant situation, I fail to find any such legislative act.

In connection with the use of this windshield sticker receipt, your attention is invited to sec. 85.085 (3), Stats., which reads as follows:

"After March 1, 1928, it shall be unlawful for any person to drive any vehicle upon a highway with any sign, poster or other nontransparent material upon the front windshield, side wings, side or rear windows of such motor vehicle other than a certificate or other papers required to be so displayed by law."

From a reading of the last above mentioned section of our statutes it will be observed that the operator of a motor vehicle upon any of our highways, between the time of payment of motor vehicle license fee and the time of issuance of license plates, must, in order to avoid arrest and annoyance, display in a conspicuous place the evidence of payment of registration fee. Undoubtedly this may best be accomplished by displaying such evidence of payment of that fee in such manner as may be prescribed by the secretary of state in the due and orderly administration of the motor vehicle law. No other intent can be read out of said statute. If, therefore, the windshield sticker receipts in question are provided by the secretary of state for windshield display, the operator of a motor vehicle upon the highway would not, in my judgment, by such display, violate the provisions of said sec. 85.085 (3).

Summing up the entire situation as detailed by you, I am constrained to hold:

1. The secretary of state exceeded his authority in giving the order here under consideration.
2. He should have proceeded by way of requisition directed to the printing board.

3. No liability against the state may be predicated upon the order in question, and payment by the state treasurer of any part of the amount involved will find no warrant or authority in the law.

4. Justification for proper requisition for such printed matter is found in sec. 85.04 (1), Stats., in the event that the secretary of state deemed the same necessary to an orderly and efficient administration of such section.

5. Under the provisions of sec. 85.085 (3), Stats., the use of the windshield stickers in question will not be unlawful after March 1, 1928, even though they be nontransparent and displayed on the windshield of a motor vehicle.

However, I gather from your communication that the printed matter in question has not only been ordered by the secretary of state but that the same has been delivered to him and is now being used in his department. Assuming that such is the fact and that the only question in which the state is now interested is the reasonableness of the charge made for filling his order, it is suggested that the officials interested in the matter take such action upon the requisition before you as will bring about a ratification of the action of the secretary of state, based upon such price per thousand as you may determine by the usual method which you would have pursued in the event that the requisition has been presented to you prior to the giving of the order by the secretary of state. By so doing, the state will be as fully served and protected in the premises as though the strictly legal course to obtain the printed matter had been originally followed. This suggestion is offered for your consideration in the event only, of course, that it is determined by the printing board that the printed matter under consideration is needed by the department making the requisition for the same.

HAM
Automobiles—Law of Road—Words and Phrases—
"Gross and culpable negligence," as used in drivers' license law, defined.

February 15, 1928.

THEODORE DAMMANN,
Secretary of State.

In reply to your request of January 30, in which you ask for an interpretation of "gross or culpable negligence" as used in par. (b), subsec. (10), sec. 85.33, Stats., I want to say that the terms "gross negligence" and "culpable negligence" have been reviewed by the courts and have been given a definite meaning.

In Stucke v. Milwaukee & Mississippi Railroad Company, 9 Wis. 202, the court, in substance, approved of the meaning of gross negligence as the want of slight diligence, or such diligence as men of less than common prudence or no prudence at all take of their own concerns.

In Rideout v. Winnebago Traction Company, 123 Wis. 297, 101 N. W. 672, the court passed upon the distinction between negligence and gross negligence. "Negligence" suggests inadvertence or want of ordinary care, whereas "gross negligence" signifies willfulness. Gross negligence involves actual or constructive intent. Omission to do something which a reasonably prudent and honest man would do, or doing something which a reasonably prudent and honest man would not do, under all the circumstances surrounding the particular case, is the definition given to "culpable negligence" by the supreme court of Missouri in State v. Pauly, 267 S. W. 799, 801. See also Estabrook v. Moulton, 111 N. E. 859, and Commonwealth v. Lyseth, (Mass.), 146 N. E. 18.

The words "gross or culpable negligence" are not new in statutory language, and should have the same interpretation in sec. 85.33, the popularly called "drivers' license law," as in other sections of the statutes and as interpreted by the courts in the past.

FWK
Appropriations and Expenditures—Public Officers—Highway Commission—Appointive members of state highway commission are entitled to five dollars per day for each day they actually attend meeting of commission or public meeting in state to discuss highway administration, construction or maintenance; but they are not entitled to per diem for days other than meeting days, whether engaged as members of commission in traveling to or from meetings or otherwise.

All members of commission are entitled to reimbursement for their necessary traveling expenses incurred in discharge of their duties, whether or not performed in attending such meetings.

February 15, 1928.

HIGHWAY COMMISSION,
Attention Mr. C. R. Weymouth.

You inquire whether a member of the highway commission who, because of distance from the capitol, is obliged to leave his place of residence on the day preceding any meeting of the commission and is unable to get back to his place of residence until the day following the conclusion of any meeting of the commission is entitled to the per diem compensation provided by law for the day required in traveling to and the day required in traveling from the meeting as well as the five dollars per day for the days he is actually in attendance at the meeting; also whether a member of the commission who performs services as such at the capitol or elsewhere on other days than the days that the commission meets or that public meetings in the state are held is entitled to compensation for such extra services.

I am of the opinion that the answers to both of your questions must be in the negative.

Sec. 20.49, subsec. (1), Stats., provides:

"* * *
but the members of the commission shall receive no compensation other than their actual and necessary traveling expense, except as herein expressly allotted. Each appointive member shall receive five dollars for each day such member shall attend a meeting of the commission, or attend and conduct or participate in any public meeting held in the state to discuss highway administration, construction or maintenance."
The express allotment is five dollars per day for each appointive member only for actual attendance on an actual meeting of the commission, or actual attendance and conduct of or participation in any public meeting held in the state to discuss highway administration, construction or maintenance. Members of the commission are clearly not entitled to compensation except as stated, and are not entitled to the per diem for services of any kind other than in attending a meeting either of the commission or a public one held in the state for the purposes enumerated, because the statute so expressly and without ambiguity limits the right to compensation that the limitation cannot be enlarged by construction. The per diem, therefore, may not be paid for days other than meeting days specified in the statute, whether the member is engaged in traveling to or from a meeting or in any other service for the commission.

You further inquire, specifically, whether an appointive member is entitled to the per diem and necessary expenses when attending at the time of duly advertised opening of bids or letting of contracts held by order of the state highway engineer by virtue of delegated authority from the commission.

What has already been said compels a negative answer as to the per diem, because such attendance is not at a meeting of the commission or at a public meeting to discuss highway administration, construction or maintenance within the meaning of the statute.

All members of the commission are entitled to reimbursement for their necessary traveling expenses incurred in the discharge of their duties, whether or not performed in attending one or the other of the two classes of meetings referred to. (Sec. 20.49 (1) quoted above and sec. 14.71 (2), Stats.)
Mothers' Pensions—Family receiving mothers' pension cannot receive in addition such aid as funeral costs of one of its members.

February 16, 1928.

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

You inquire whether it is proper to allow and pay the funeral expenses of a child whose mother is receiving a mother's pension.

Sec. 48.38, Stats., the so-called mothers' pension law, in subsec. (6) contains the following provision:

"The aid granted shall be sufficient to enable the mother, grandparents or person having the custody of such children to properly care for the children and shall not exceed fifteen dollars per month for the first child excepting in emergency cases where the aid to such first child shall be left to the discretion of the court and ten dollars per month for each additional child. Such aid shall be the only form of public assistance granted to the family excepting medical aid and no aid shall continue longer than one year without reinvestigation."

Here it is expressly provided that such mothers' pension shall be the only form of public assistance granted to the family, excepting medical aid. You will notice that there is a provision for granting additional amounts for emergency cases. Outside of that there is no authority for the public to pay the funeral expenses.

JEM

Charitable and Penal Institutions—Maternity Homes—Baby Farms—Sec. 58.04, Stats., applying to licensing of maternity homes and "baby farms," applies only to such cases as are engaged in such business and not to homes where children are occasionally kept.

February 16, 1928.

DR. C. A. HARPER,
State Health Officer.

You have directed me to the provision of sec. 58.04, subsec. (1), Stats., which reads in part:
"Every individual, firm, association, or corporation, owning, keeping, conducting or managing any institution or home for the boarding or sheltering of infant children, or so-called ‘Baby Farm,’ or any lying-in hospital, hospital ward, maternity home or other place for the reception, care and treatment of pregnant women, shall obtain an annual license * * *.”

You state that you find “that persons who are keeping or caring for a single child that frequently has been placed with such persons by parents, have objected or refused to submit themselves to inspection and apply for a license in accordance with the provisions of the statutes.”

You also state that it has been your “interpretation of the statutes that all homes which kept children in their home either with or without compensation for the same must be licensed and subject to inspection in order to secure proper safe-keeping of the interest of the child.” You also state that you have felt that this general interpretation was fundamentally essential in order to properly administer the baby boarding home act, as otherwise it would be difficult to know where to apply the provisions of the law and where not to apply them. The city attorney of Milwaukee and an assistant district attorney of Milwaukee county have advised a local health department of the city of Milwaukee that this law does not apply unless the person is engaged in the business of keeping such children and that it does not apply to persons who are keeping or caring for a single child that frequently has been placed with such person by a parent.

I am of the opinion that the interpretation given to this law by the city attorney’s office and the district attorney’s office of Milwaukee is the correct interpretation. You will note that this statute applies to individuals and corporations owning, occupying, conducting, or managing any institution or home for the boarding and sheltering of infants and children, etc. The home or institution must be operated for that purpose. It must be a business conducted for the purposes here given.

The mere keeping of a child in a home would not subject such home to the provisions of this law. That is a mere incident to a private home and is often done. If it is intended that the law shall have a broader scope than its lan-
Ralph M. Immell, 
Adjutant General.

In your letter of December 23, 1927, you raise the following questions:

1. Are the provisions of pars. (4), (5) and (6) of sec. 14.71, Stats., applicable to passenger automobiles or trucks now in the custody and control of the Wisconsin national guard?

2. Do the provisions of sec. 85.32 apply to the Wisconsin national guard?

3. You state that it has been the practice to stencil all national guard transportation "Property of the Wisconsin National Guard." Prior to the passage of the 1924 automobile registration law, the Wisconsin national guard transportation was never licensed and carried a stenciled tag in lieu of license plates, marked "Q. M. G., W. N. G."

You inquire whether this practice may be continued.

1. Subsec. (4), sec. 14.71, Stats., provides:

"Each department, board or commission, upon the written approval of the governor, may purchase necessary trucks and automobiles for its general use, of such style and make as it may determine. Such trucks and automobiles shall be purchased through the superintendent of public property, pursuant to section 33.03."

This section was created by ch. 496, Laws 1927.

Sec. 620, Stats. 1915, provides:

"The quartermaster-general shall, subject to the approval of the governor, issue to the commanding officer of each
regularly organized company, troop, battery, band and
members of the commissioned staff such arms, accoutre-
ments, uniforms, quartermaster's and ordnance stores, sup-
plies for rifle practice and such other supplies, drill regu-
lations, textbooks, blanks, and papers as may be necessary,
taking receipts and causing proper returns to be made for
the same. The quartermaster-general, subject to the ap-
proval of the governor, may contract for the purchase and
transportation of the supplies provided for in this section."

This section was by ch. 537, Laws 1917, renumbered to
be sec. 21.25, Stats., and was amended by ch. 329, Laws
1919, to read as follows:

"The quartermaster-general shall, subject to the approval
of the governor, issue to the commanding officer of each
regularly organized company, troop, battery, and sanitary
detachment, such arms, accoutrements, uniforms, quarter-
master's and ordnance stores, supplies for rifle practice and
such other supplies, drill regulations, textbooks, blanks and
papers, and stationery as may be necessary, taking receipts
and causing proper returns to be made for the same. The
quartermaster-general shall, subject to the approval of the
governor, provide by purchase or hire such common animals
and motor transport as are necessary for the proper train-
ing of any military unit at home station and field camp of
instruction and for the care and keep of such animals and
transport. The quartermaster-general, subject to the
approval of the governor, may contract for the purchase
and transportation of supplies provided for in this section."

The statute has not been amended since 1919.

There is no material conflict between the provisions of
subsec. (4), sec. 14.71 and sec. 21.25 except as to the man-
ner in which motor transport may be purchased. The con-
sent of the governor to the purchase of motor transport is
required under both sections. The legislature has not
specifically amended or repealed sec. 21.25, and unless sub-
sec. (4), sec. 14.71 amends sec. 21.25 by implication, the pro-
visions of the latter statute must govern.

Repeals and changes by implication are not favored.
Hence, if two laws conflict, and the earlier will admit of rea-
sonable construction, leaving the later one in force, such
construction will be adopted; otherwise, the later will pre-
vail. State ex rel. Hayden v. Arnold, 151 Wis. 19; State ex
rel. McManman v. Thomas, 150 Wis. 190; State ex rel.
Trustees of La Crosse Public Library v. Bentley, 163 Wis.
A repeal by implication is not favored; on the contrary, the earlier act remains in force unless the two are manifestly inconsistent with, or repugnant to each other, or unless in the later act some express notice is taken by the former plainly indicating an intention to abrogate. Attorney General ex rel. Taylor v. Brown, 1 Wis. 513.

A reasonable interpretation may be given to sec. 21.25 without in any way affecting the provisions of subsec. (4), sec. 14.71. The latter statute, in express terms, applies to "trucks" and "automobiles." The former applies to "motor transport." Clearly the term "motor transport" has a different meaning from the terms "trucks" and "automobiles." "Motor transport" might and does include automobiles and trucks, and it also includes tanks, caterpillar trucks and tractors; the term also comprehends a special type of transport used during the Great War commonly called "lorry."

Under sec. 21.25 the quartermaster-general clearly has the power to purchase transport caterpillar trucks and tractors, tanks and lorries. There is no good reason why the quartermaster-general should not have the power to purchase motor transport, consisting of automobiles and trucks. Until the legislature in clear and unambiguous language enacts a statute to the contrary, such power must be held to exist.

It should be remembered that subsec. (4), sec. 14.71 is a general statute applying to automobiles and trucks, while sec. 21.25 is a specific statute dealing with motor transport.

It is well settled that where an existing statute specifically deals with a subject and another statute is later enacted covering the same matter in a general way, the former will be held to prevail, if such result can be reached by a reasonable construction. Ward v. Smith, 166 Wis. 342.

Ch. 371, Laws 1927, published July 16, 1927, created subsec. (2), sec. 21.56, Stats., to read as follows:

"Whenever any chattel property of the state in the official custody of the quartermaster-general shall become unserviceable or unsuitable, or is no longer required for military purposes, the quartermaster-general may, upon recommendation of a board of survey and subject to the approval
of the governor, dispose of and sell at public sale any such property; such sale to be conducted and the proceeds applied as follows:

“(a) Notice of the time and place of such sale and of the property to be sold shall be given in such manner as he believes will be most likely to attract attention of probable purchasers.

“(b) At least ten days before such sale a written notice containing a brief description of the property, its location and an estimate of its value, shall be given to each principal officer of the state, including the board of control, the board of normal regents and the board of regents of the University of Wisconsin. If any such officer or institution can use any such property to advantage, he or it shall be allowed to purchase the same or any part thereof at any price deemed reasonable by the quartermaster-general.

“(c) The quartermaster-general shall make and preserve an accurate account of each sale which shall be subscribed by the vendee; and the proceeds shall, within ten days after the receipt thereof, be paid into the common school fund.”

Ch. 496, Laws 1927, published August 5, 1927, created subsec. (5), sec. 14.71, Stats., to read as follows:

“All state owned passenger automobiles or trucks now in the possession, custody or control of any department, board or commission shall, when ready to be disposed of, be placed in the custody and control of the superintendent of public property. Said superintendent shall dispose of such automobiles and trucks in such manner as he sees fit, and the proceeds from the sale or trade thereof shall be credited to the proper department, board or commission for the subsequent purchase of automotive equipment.”

It will be noted that ch. 496, Laws 1927, was enacted subsequent to ch. 371, Laws 1927.

The provisions of subsec. (5), sec. 14.71 conflict in several respects with the provisions of subsec. (2), sec. 21.56. Under the former statute the proceeds of the sales of automobiles is credited to the proper department for the subsequent purchase of automotive equipment. Under the latter statute, the proceeds of military property sales shall be paid into the school fund. The legislature in enacting subsec. (5), sec. 14.71, did not expressly or impliedly amend or repeal the provisions of subsec. (2), sec. 21.56. This is especially significant in view of the fact that both sections were created at the same session of the legislature, and in
view of the further fact that less than a month elapsed between the passage of the respective enactments. Since the legislature has not manifested an intent to repeal or amend the provisions of subsec. (2), sec. 21.56, we are of the opinion that the provisions of this section are still in full force and effect.

Subsec. (6), sec. 14.71 provides for the compensation which may be paid to an employee who uses his personal automobile in his work for the state.

There can be no question but that this section in express language applies to your department.

2. Sec. 85.32, Stats., provides:

"All automobiles, trucks and other similar motor vehicles belonging to the state of Wisconsin shall, before being driven on any public highway in this state, be numbered consecutively, and have labeled on both sides of each such automobile, truck or other similar motor vehicle in letters not less than one inch in height, the words 'State of Wisconsin,' together with the name of the department by which such automobile, truck or similar motor vehicle is used. On the rear of each such automobile, truck or similar motor vehicle there shall be labeled the initials of such department, in letters not less than three inches high. The provisions of this section shall not apply to the passenger automobile used by the governor, nor to automobiles used by prohibition deputies or conservation wardens."

The language used in this statute is broad and comprehensive. In express terms it applies to all "automobiles, trucks and other similar motor vehicles belonging to the state of Wisconsin."

It is therefore the opinion of this department that sec. 85.32, Stats., applies to the Wisconsin national guard.

3. The answer to your third question is found partly in the answer to your second question.

The provisions of sec. 85.32, Stats., must be complied with. However, there is no reason why you cannot continue the practice followed in the past of marking the trucks in the manner prescribed by you. At least so long as such practice does not interfere with a compliance of the provisions of sec. 85.32.

SOA
Opinions of the Attorney General

Automobiles—Law of Road—Criminal Law—Penalty prescribed in sec. 353.27, Stats., is applicable to provisions of sec. 85.01, subsecs. (6), (7), (8), (9), (10) and sec. 85.14.

February 16, 1928.

G. Arthur Johnson,
District Attorney,
Ashland, Wisconsin.

You state that in the preparation of an ordinance for the regulation of traffic on public highways in your county you find that under the statutes there is no penalty provided for cases in violation of the following: Sec. 85.01, subsecs. (6), (7), (8), (9), (10), and sec. 85.14. These sections provide regulations as to the use of motor vehicles and trucks on highways. See said sections.

You say that sec. 85.16 requires that all ordinances, resolutions, rules and regulations of local municipalities must be in statutory conformity with the provisions of ch. 85, Stats., and impose the same penalty for violation of the same; that in view of these provisions it appears to you that the county cannot pass an ordinance which provides penalties for the violation of the above-named section.

I believe that the penalties provided in sec. 353.27 are the ones applicable. Said section provides:

"Any person who shall be convicted of any offense the punishment of which is not prescribed by any statute of this state shall be punished only by imprisonment in the county jail not more than one year or by fine not exceeding two hundred and fifty dollars."

This statute is intended to cover a great range of offenses and no minimum penalty is prescribed, so that it is within the discretion of the trial court to vary the penalty from a nominal fine to two hundred fifty dollars, the maximum, and imprisonment from one day to one year. It has been held that this section provides a penalty for statutory as well as common law offenses, for which the punishment is not otherwise prescribed by statute, and that physicians failing to record licenses as required may be punished as prescribed in this section. II Op. Atty. Gen. 311.

It has also been held that the delivery of coal without being accompanied by the delivery ticket constitutes a crim-

In this opinion a great many authorities are cited and I would refer you to those authorities.

It has also been held by this department that an attempt to commit suicide is a misdemeanor under the statute and the common law. XI Op. Atty. Gen. 619.

Our court has never passed upon the question submitted by you and we cannot be absolutely certain as to our interpretation, but I believe that these prohibitions and positive mandates of the statute must be complied with and, unless they are, it was the intention that violators should be punished.

JEM

_School Districts—Wisconsin Statutes—Sec. 40.52, Stats., is so indefinite and unworkable that attorney general declines to attempt to advise regarding its application to varying situations of composition of school boards and terms and method and time of election of members thereof existing in several cities of state within classes specified in sec. 40.50._

February 17, 1928.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

After careful consideration of your three requests, and of several letters from city and school officers also submitted, for the construction of the provisions of secs. 40.51 and 40.52, Stats. 1927, as applied with reference to the present varying composition of school boards and the terms and methods and time of election of members thereof in the several cities of the state within the classes specified in sec. 40.50, I have come to the conclusion that the provisions of the law are so indefinite and unworkable that it is impossible to advise with any assurance of being correct as to how it can be applied to the specific conditions in the different cities presented by your requests and the letters referred to.
Sec. 40.52 as framed by the revisor of statutes and embodied in the revision bill before the 1927 legislature (sec. 87, Bill No. 13, S.), had it been enacted as drawn, would have been uniform and constitutional, definite and workable. It read as follows:

"The school affairs of the city shall be managed by a school board of six members chosen from the city at large at the regular city election for the term of three years from the first of July following. Upon the first election the two receiving the highest number of votes shall hold for three years; the two receiving the next highest for two years, and the others for one year."

The same cannot be said of the section as finally enacted, which, by virtue of amendments to the bill, was made to read as follows:

"(1) ELECTION, TERM, OATH. The school affairs of the city shall be administered by a school board chosen from the city at large at the regular city election for the term of three years from the first of July following. One-third of the members of the board (as nearly as may be) shall be elected annually. The number of members of the school board of every city shall remain as it existed in January, 1927, until and unless changed by the city. The number of members of said board may be increased by a referendum ordinance but not beyond seven. The newly created memberships shall be filled at the succeeding regular city elections, but only one such new position shall be filled in any year, to the end that the terms of one-third of the members (as nearly as may be) shall expire each year. The members of the school board are city officials and shall be nominated and elected in the manner that other city officials are nominated and elected; and they shall take and file the official oath."

The school and city officers in the several cities of the state can make just as good a guess as to how to apply the law as can the attorney general, and they will have to solve the problem of its application to the particular situation existing in any given city as best they can, trusting that the next legislature will clarify the statute and remove any doubt as to its constitutionality; or, perhaps, ignore the enactment as unworkable.

For the reasons indicated, I must decline to make any
further suggestions with reference to the election and terms of school board members, and I am returning to you here-with the documents which you submitted.

FEB

Courts—Subpoenas—Public Officers—State Treasurer—
Public Records—State treasurer is required to comply with direction in subpoena duces tecum and produce in court original records and documents therein described, for inspection of court and parties to suit.

Production by witness of photostatic or certified copies is not compliance with such requirement. Such copies, after production of original in court for inspection, may be substituted for latter upon leave granted by court, which will undoubtedly be given upon request of witness.

February 17, 1928.

S. A. Schindler,

Assistant State Treasurer.

You say:

"The state treasurer was subpoenaed to appear in Crandon on February 20th and to bring with him the original checks that are required in the case. The checks of the state treasurer are combined checks and warrants, and are the only authority the state treasurer has for paying the money, and they are a part of the permanent records of this office. Can these records be removed from the office upon the order of the court? Will the state treasurer be within his rights in insisting that photostatic copies take the place of the original checks? Years ago part of the permanent records of this office were taken into the courts, and they never have been returned."

Since the state treasurer has been subpoenaed to appear in a court at Crandon, Wisconsin and to bring with him certain original records in his possession. I assume that the subpoena was issued by a court of record.

By sec. 256.01 it is provided:

"The several courts of record of this state shall have power:

"(1) to issue process of subpoena, requiring the attendance of any witness, residing or being in any part of this state, to testify in any matter or case pending or triable in such courts."
Subpoenas are also authorized to be issued under the provisions of sec. 325.01, (1), Stats., which reads as follows:

“(1) By any judge or clerk of a court or court commissioner or justice of the peace, or police justice within the territory in which such officer or the court of which he is such officer has jurisdiction, to require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee or other person authorized to take testimony in the state.”

The form of the ordinary subpoena, which directs merely the personal attendance of a witness in court, is provided for in sec. 325.02 (1), Stats., and subsec. (2) of such section prescribes:

“(2) For a subpoena duces tecum, the following or its equivalent may be added to the foregoing form (immediately before the attestation clause): and you are further required to bring with you the following papers and documents (describing them as accurately as possible).”

It will be observed, therefore, that the subpoena served on the state treasurer is neither more nor less than the ordinary subpoena plus a direction therein that the individual subpoenaed bring with him and produce certain records or documents in his possession. This latter direction makes the process what is known and provided for in sec. 325.02 (2) above quoted, to wit: “subpoena duces tecum,” a species, nevertheless, of “subpoena.”

Directing your attention again to the provisions of secs. 256.01 and 325.02 (1) and (2), you will observe that a subpoena, whether in the form of an ordinary or in the form of a duces tecum, whichever the case may be, requires the attendance in court of a certain witness or that such witness, in addition to such attendance, produce in court such lawful instruments of evidence as may be in said subpoena described.

Failure to comply with the directions in either form of subpoena subjects the offender to punishment as for contempt of court and compliance with the directions in such subpoena may be enforced by attachment issued by the court against the offending person, directing that he be brought
before the court for contempt, and also to testify. A disobedient witness is also liable to an aggrieved party for all damages occasioned by failure to comply with the subpoena in the event that his disobedience in that respect is without any reasonable excuse. Such is the punishment visited upon a disobedient witness by the provisions of sec. 325.11, Stats.

I have made a diligent search of the authorities and of our statutes on the subject matter here under consideration, for the purpose of ascertaining whether or not the state treasurer is under any circumstances not bound to comply with the directions contained in a subpoena duces tecum as respects the public records in his office, but fail to discover any such dispensation extended to him that would permit him to set at naught or ignore such a command of a court of competent jurisdiction.

I do not believe, therefore, that the state treasurer would be within his legal rights in insisting that even photostatic copies be produced in court instead of the original records or documents described in the subpoena. I can see many reasons why a personal view of the originals may be necessary to the litigants or to the court instead of any substitute therefor. In this connection, I may say that I do not recall a single instance in my experience in courts where photostatic or certified copies of public records or documents were not permitted to be substituted for the originals, after the latter had been in court, and request made to the court that photostatic or certified copies thereof might be substituted for such originals.

This does not, however, tend in any wise to modify the general rule that every witness compelled by proper subpoena to produce books or papers in his possession or under his control, to be inspected by parties to an action in court, or by the court itself, to be used as evidence on the trial, is required to comply with such direction.

In the case of United States v. Burr, 25 Fed. Cas. No. 14,692d, it was held that a subpoena duces tecum might issue to the president of the United States, directing him to bring any paper of which the party praying it had a right to avail himself as evidence, where it did not affirmatively appear that the paper contained any matter which it would be imprudent to disclose.
And in the case of United States v. Smith, 27 Fed. Cas. No. 16,342, 3 Wheeler, Cr. Cas. 100, it was held that members of the president's cabinet might be compelled to answer a subpoena duces tecum in a federal court.

Likewise the judiciary has been held not to be exempt from the power of a court to compel an appearance before it, when they are necessary witnesses. It was so held in the case of United States v. Caldwell, 1 L. ed. 404, where it was held that judges of a county court were not excused from obeying a subpoena duces tecum, on the ground that the judges of the state supreme court were holding nisi prius court in the county and that the occasion seemed to require respectful attention to them on the part of the county judges.

It appears to me quite likely that the state treasurer must be bound by the same rules of law that govern our national executive, his cabinet, and the judiciary, in the respect inquired about, at least.

I think that the foregoing sufficiently covers the situation detailed by you so that you may be advised of your rights and duties in the premises.

HAM

Automobiles—Law of Road—Reflective signals approved under subsec. (3a), sec. 85.13, Stats., are not authorized to be used as substitute for required clearance lamps as required by subsec. (3b), sec. 85.13.

February 17, 1928.

F. M. Wilcox, Chairman,
Industrial Commission.

In your letter of February 9 you inquire whether types of reflective signals as approved by your commission under authority of sec. 85.13, subsec. (3a), Stats., may be used in lieu of clearance lamps, on trucks, tractors, etc., as required by subsec. (3b), sec. 85.13.

Subsec. (3a), sec. 85.13 reads as follows:

"Types of reflective signals as approved by the industrial commission under subsection (3) of this section may be carried in lieu of a tail light or in addition thereto on all trucks, tractors, trailers or semitrailers which are electric-
ally equipped. These signals shall be applied in lieu of a tail light on all trucks, tractors, trailers and semitrailers which are not electrically equipped when such vehicles are being driven upon or occupy any public highway in this state."

Subsec. (3b) of the same section, reads as follows:

"Every motor vehicle other than any road roller, road machinery or farm tractor having a width at any part in excess of eighty inches shall carry two clearance lamps on the left side of such vehicle, one located at the front and displaying a yellow light visible under normal atmospheric conditions for a distance of five hundred feet in front of the vehicle, and the other located at the rear of the vehicle and displaying a yellow (or red) light, visible under all like conditions from a distance of five hundred feet to the rear of the vehicle."

In an opinion to C. R. Weymouth, secretary of the highway commission, February 20, 1928; XVII Op. Atty. Gen. 150, this department held that approved reflective signals cannot be substituted for the required red light at the top on the rear end of a projecting load, as required by par. (b), subsec. (5), sec. 85.18. In that opinion this department said:

"It will be noted that the latter statutory provision [85.13 (3a)] is for reflective signals 'in lieu of a tail light,' on trucks, tractors, etc., which are not electrically equipped. The first statutory provision [85.18 (5) (b)] above cited specifically provides that such red light 'shall be in addition to any other light required to be carried by vehicles,' namely, in addition to a tail light, head lights, and any required clearance lights. That a tail light is not contemplated in par. (b), subsec. (5), sec. 85.18 is apparent, further, from the position which this additional light is to have, namely, at the 'rear end of the upper side of such projecting load.'"

Likewise, in this instance, it is submitted a tail light is not contemplated in par. (3b), sec. 85.13. Par. (3a) specifically authorizes the approved reflective signals in lieu of or in addition to a tail light only. Since approved reflective signals are not authorized for other lights than tail lights, it follows that there is no authority for substituting a reflective signal for a clearance lamp, which clearance lamp is not a tail light as contemplated in subsec. (3a).

February 20, 1928.

LLOYD D. SMITH,
District Attorney,
Waupaca, Wisconsin.

You inquire whether a justice of the peace may issue a search warrant not only to search a place or premises definitely described but also the person owning and in charge of such place.

This question was passed upon by our supreme court in the case of State v. Kriegbaum, 215 N. W. 896, on November 8, 1927. In that case the liquor in question was seized while a search of the person of the defendant was in progress under a search warrant issued by a justice of the peace which expressly directed that a search be made of the person of the defendant while on the premises described in the warrant. The court said, p. 897:

"We express no opinion as to the power of a court of general jurisdiction to issue a warrant to search the person. We are concerned only with the question of whether the person of the individual described in the warrant can be searched under a search warrant issued by a justice of the peace, who can exercise only the judicial power conferred upon justices of the peace by the statutes when fairly interpreted. De Laval Separator Co. v. Hofberger, 161 Wis. 344, 346, 154 N. W. 387."

The court said that ch. 363, Stats., contains the only legislative enactment which grants any express power to a justice of the peace to issue a warrant to search for liquor alleged to be illegally held or possessed, and that it does not grant authority to issue a warrant for the search of the person; that it only grants authority to search a particular house or place where the property or thing sought is alleged to be concealed. The court further said, p. 897:

"* * * The Legislature having granted no power to a justice of the peace to issue a warrant for the search of a person, the conclusion follows that the liquor in question was received in evidence in violation of article 1, sec. 11, of the Constitution of Wisconsin, * * *"
Your question on the authority of this case must be answered in the negative. I would, however, on suggestion of the court that this decision does not cover the issuing of a search warrant for the search of a person by a court of general jurisdiction, recommend that, in all cases where it is intended to issue a search warrant to search a person as well as the place, the same be issued by the circuit court.

JEM

Criminal Law—Neglect of Duty—Indigent, Insane, etc. Public Officers—City officials whose duty it is to properly relieve and take care of indigent persons may be prosecuted under sec. 348.29, Stats., if they refuse or wilfully neglect to perform such duty.

February 20, 1928.

O. A. STOLEN,
Humane Agent.

You state that a city of the fourth class in one of the counties of this state that has no county home has contracted with a private person for the care and maintenance of two old poor and indigent persons; that the city pays to such person the sum of $12.50 per month for each such poor person; that the humane officer of the county writes:

"I found two indigent persons both aged and feeble it was dinner time, at first they were afraid to talk to me. They afterwards told me that they were not getting enough to eat and were afraid to complain of their treatment. I saw the meal as it was cooking. It was not fit to eat and there was not enough of it Their quarters and persons were very filthy their landlady is a very dirty housekeeper and they all live in filth and squalor. Mrs. I was told, obtained most of the food for herself and these people from the garbage cans of the city. Many of the residents of have complained. The situation is deplorable, and these people are compelled to live in squalor and filth, half fed."

You further state that the city authorities refuse to act; that you have made a personal investigation and found the reports of the humane agent to be true, and the officers charged with the care of the poor refuse to sign a petition
for sending these people to a county home as provided in sec. 49.07, Stats.

You ask, assuming that these poor people in question are not being properly relieved and taken care of as required by law, if the city can be compelled to do so and who the proper person is to make complaint and institute the proceedings.

I know of no civil action that could be brought which would give a practical solution of the question confronting you. Sec. 49.01 provides:

"Every town, village and city shall relieve and support all poor and indigent persons lawfully settled therein whenever they shall stand in need thereof, except as hereinafter provided. The town board, village trustees, or common council, respectively, in each town, village, or city shall have the oversight and care of all such poor persons and indigents so long as they remain public charges; and shall see that they are properly relieved and taken care of in the manner required in this chapter."

Here it is made the duty of the common council to see that the poor persons in their charge are properly relieved and taken care of in the manner required in that chapter. Assuming that the description of the condition under which these people are maintained is correct as reported by you, then these officers are neglecting their duty as they are not giving proper relief and care to these indigent people.

Sec. 348.29 provides:

"Any person mentioned in section 348.28 [this includes officers of a city] who shall refuse or wilfully neglect to perform any duty in his office required by law shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars."

It is unthinkable that any official in the state charged with the solemn duty of giving proper care to old, indigent people should permit them to be kept in such squalor and filth as you describe. No jury, in my estimation, would be found that would acquit such officers when the evidence shows such facts to exist.

You are therefore advised that criminal prosecution may be brought against the city officials who are charged with
the duty of giving relief to the poor and that such complaint may be made by any person who is conversant with the facts. It may be made by the humane officer of the county or by yourself, acting as state humane agent.

JEM

Public Health—Dentistry—License to practice dentistry which has been revoked may be restored by order of court, as provided in sec. 147.20, subsec. (4), Stats.

February 20, 1928.

W. W. Taggett, D. D., Secretary-Treasurer,
Board of Dental Examiners,
Mellen, Wisconsin.

You request an opinion on the power of the Wisconsin state board of dental examiners to reinstate a dentist whose license has been revoked, due to crime involving moral turpitude. You say that one A of Racine had his medical license revoked but has since been reinstated in medicine; that he was also licensed as a dentist and has applied to your board to be reinstated as a dentist, and you inquire as to the power of the board to do so.

Sec. 152.06, Stats., provides for the revocation of a dentist's license by the board upon conviction of a crime involving moral turpitude, when the record of conviction, or a copy certified by the clerk or judge of the court has been given to such board.

Subsec. (3), said section reads in part as follows:

"Subsections (2), (3) and (4) of section 147.20 shall apply, the board of dental examiners taking the place of the board of medical examiners, and employing an unlicensed person being an additional ground for action, * * *.*"

It is only necessary to quote the provisions of subsec. (4), sec. 147.20 here, which reads as follows:

"When a license or certificate is revoked no license or certificate shall be granted thereafter to such person. Any license or certificate heretofore or hereafter revoked may be restored by subsequent order of the trial court, but only after a first revocation, upon notice to the district attorney who prosecuted, or, in the event of his disability, his suc-
cessor in office, upon written recommendation by the president of the state board of medical examiners, and upon findings by the court that the applicant for restoration of license or certificate is presently of good moral and professional character and that justice demands the restoration."

Under the above provision of statute, the board of dental examiners has the same power as the board of medical examiners under the said provisions of subsec. (4).

You will note that the restoration of the license must be by order of the trial court. In the case of the restoration of a license to practice medicine as well as the restoration to practice dentistry, the same rule of law applies.

I believe that this answers your question fully.

JEM

Automobiles—Law of Road—Reflective signals approved under subsec. (3a), sec. 85.13, Stats., are not authorized to be used as substitute for required red light at top on rear end of projecting load as required by par. (b), subsec. (5), sec. 85.18.

February 20, 1928.

C. R. WEYMOUTH, Secretary,
Highway Commission.

In your letter dated January 27, you inquire as follows:

"May types of reflective signals as approved by the industrial commission under the authority granted it in sec. 85.13, (3a), be used to comply with sec. 85.18 (5) (b)?"

Par. (b), subsec. (5), sec. 85.18, Stats., reads as follows:

"No motor truck, tractor or trailer with any load or part of a load projecting more than four feet beyond the rear end of the body or carrying part of such vehicle shall be operated on any highway during the period from one-half hour after sunset of any day to one-half hour before sunrise of the next succeeding day, unless there shall be a red light firmly attached to the rear end of the upper side of such projecting load or part of a load. Such red light shall be in addition to any other light required to be carried by vehicles."

Subsec. (3a), sec. 85.13 reads as follows:

"Types of reflective signals as approved by the industrial commission under subsection (3) of this section may be carried in lieu of a tail light or in addition thereto on all trucks,
tractors, trailers and semitrailers which are electrically equipped. These signals shall be applied in lieu of a tail light on all trucks, tractors, trailers and semitrailers which are not electrically equipped when such vehicles are being driven upon or occupy any public highway in this state."

It will be noted that the latter statutory provision is for reflective signals "in lieu of a tail light" on trucks, tractors, etc., which are not electrically equipped. The first statutory provision above cited specifically provides that such red light "shall be in addition to any other light required to be carried by vehicles," namely, in addition to a tail light, head lights, and any required clearance lights. That a tail light is not contemplated in par. (b), subsec. (5), sec. 85.18 is apparent, further, from the position which this additional light is to have, namely, at the "rear end of the upper side of such projecting load."

The conclusion reached, therefore, is that approved reflective signals cannot be substituted for the required additional red light, the approved reflective signals being authorized only in lieu of, or in addition to, a tail light.

FWK

School Districts—Procedure for purpose of altering common school district should be brought under sec. 40.30, Stats.

February 21, 1928.

Edward Meyer,
District Attorney,
Manitowoc, Wisconsin.

You have submitted the following:

"A is a resident of B school district. B school district consists of a combined grade and high school. A lives about three and one-half miles from this school. A is desirous of being placed in C school district, from which he is located about two miles. The adjoining farms belong to school district C."

You ask to be advised of the procedure necessary, citing the section number of the statutes of 1927. The procedure must be brought under sec. 40.30, 1927 Stats. This section gives all the procedural steps necessary. I refer you to the same.

JEM
Elections—Registration—Voter who has not previously registered may register in March primary where such primary is held and in April primary and election where no previous primary has been held.

February 24, 1928.

Theodore Dammann,
Secretary of State.

In your letter of February 14 you inquire whether a presidential preference primary, if called on April 3, is a "first primary" within the meaning of sec. 6.17, subsec. (1), Stats., and, if not, whether in those cities where no regular city primary is held on March 13, the "first primary" is in September unless a special primary intervenes.

Subsec. (1), sec. 6.17, on registration, provides in part as follows:

"The clerk of the municipality shall receive applications for registration at his office during regular office hours throughout the year, and at such other places and at such times as he may deem advisable, except that registration for any election or primary shall be closed at the close of office hours on Tuesday next preceding the election or primary. At the first primary election conducted after the taking effect of sections 6.15 to 6.18, any qualified voter shall be permitted to register at the polls on the day of election and vote at such election. * * *.*"

The provision above cited is part of ch. 208, sec. 3, laws of 1927, certified on June 9, 1927, and provides that the act shall take effect on September 1, 1927. No general, special primary has intervened since the law took effect, and the question therefore arises: What election or primary election was meant when the legislature said "first primary election?"

In view of the fact that in some cities a primary is held on March 13, while in other cities this primary is not necessary, the first primary in the remaining cities or towns above five thousand, where the law is applicable, will be the presidential preference primary on April 3d. The presidential preference primary is a primary, within the language of ch. 208, and should be available for registration purposes where cities have not had a primary in March.

Should this department give a different interpretation,
the effect would be that the first primary for registration purposes, unless a special primary intervened, for many cities would not be held until fall. It does not seem reasonable that the legislature intended that for some cities registration at an election should be made in the spring and for others in the fall. Furthermore, the privilege of exercising the right of suffrage has always been made as easy as possible, consistent with reasonable safeguards. This is good public policy and should be encouraged. If granting the privilege of registration at the first primary is an incentive for obtaining an expression from a greater number of electors, setting up a prohibitive obstacle would have the opposite effect and neither would it be sound public policy.

FWK

Public Health—Pharmacy—Board of pharmacy is required to issue pharmacy permit if application is made therefor and law is otherwise complied with.

February 24, 1928.

G. V. KRADWELL, President,
Board of Pharmacy,
Racine, Wisconsin.

In your letter of February 15 you state that your board is refusing to issue a pharmacy permit to a pharmacist to operate a drug store in a small city for the reason that your inspector has informed you that this pharmacist, who is regularly registered, attends to other business and permits his drug store to be conducted by hired help who are not registered. You inquire whether under sec. 151.02, subsec. (9), Stats., you have the power to withhold the issuance of a pharmacy permit until the board is satisfied that the pharmacy is being operated lawfully at all times.

Under said subsec. (9), sec. 151.02 it is provided that no pharmacy shall be kept open for the transaction of business until it has been registered with and a permit therefore has been issued by the state board of pharmacy. It contains the following provision:

"* * * Every pharmacy and store conducted under the supervision of a registered pharmacist shall be annually
registered on the first day of June with the state board of pharmacy, on application forms provided for that purpose by the board, on request, and the board shall thereupon issue a suitable certificate of registration which shall be conspicuously displayed in the respective place of business. * * * " (Italics ours.)

The statute also provides:
"* * * Applications for registration as a pharmacy or drug store shall include information regarding the names of all pharmacists, assistant pharmacists and registered apprentices who are employed therein. Only places in charge of a registered pharmacist may use the title 'pharmacy,' 'pharmacist,' 'apothecary' or 'drug store,' and each must be under the separate management of a registered pharmacist, who shall not engage to manage or supervise more than one such place, but nothing contained in this section shall prevent a person from owning and conducting more than one pharmacy; provided, each be under the separate supervision of a registered pharmacist. * * *"

Then the statute provides for an annual registration fee to be paid and then further provides:
"* * * Any person failing to register his place of business as herein required, failing to have in charge of each pharmacy a registered pharmacist, who does not manage or supervise more than one pharmacy, or who otherwise fails to comply with the provisions of this section, shall, upon conviction, be fined the sum of not more than fifty dollars for each separate offense."

You will note that the application shall state "the names of all pharmacists, assistant pharmacists and registered apprentices who are employed therein." If the application of this person in question contains the information that he will be employed in said pharmacy and asks to be registered and for a permit, I am of the opinion that it is the duty of your board to issue such permit.

You will note that the language is that "the board shall thereupon issue," etc. This language has a mandatory significance and you are required to register the pharmacy and issue the permit. If the applicant violates the law in operating such pharmacy the statute contains the penalties which may be enforced. Only through the application of those penalties may the law be enforced. You have no power to withhold the permit.

JEM
Indigent, Insane, etc.—Minors—Expense of keeping insane person under provisions of sec. 46.10, Stats., by either state or county is to be determined by facts as to his legal residence at time of commitment, county being liable if he is legal resident of county, state being liable if he is not.

Fact that patient was minor and his parent lived in county and then moved to Canada and afterwards brought minor to Wisconsin, where he stayed with relative in county of his former residence and there became insane, are all circumstances to be considered with other facts in determining legal residence.

Determination as to proper charge against county or state on each year's expense is final as to that bill unless appealed and changed as provided in sec. 46.10.

February 25, 1928.

BOARD OF CONTROL.

Attention Mr. A. W. Bayley, Secretary.

I have your papers submitted in the matter of the application of Douglas county to have the cost of keeping one E— N—, an insane minor, charged to the state on the theory that he is a resident of Canada and not of Douglas county. Among the papers is the petition of the district attorney of Douglas county setting up certain facts and giving his conclusions thereon that such insane minor was a resident of Canada and not of Douglas county, and therefore the conclusion that the cost of maintenance should be paid by the state. I notice the district attorney is asking to have all of the costs since the time of the commitment that have been charged to Douglas county repaid to the county by the state, upon the theory that the first determination was wrong as to the residence of the insane minor.

You are advised that the question of a man's residence within the meaning of that law is a question of fact to be determined upon the evidence in each case and the board is the determining tribunal in the first instance, subject to an appeal and review in court, but that determination, either by the board or by the court on appeal, would be final as to that bill under consideration. As to subsequent bills and charges it would be final until, on a subsequent objection, a different determination was made either by the board or by the court on appeal, based on the evidence in that case, and
that determination would apply as to that bill and charge and to subsequent bills and charges unless or until on a subsequent application and showing a different determination was made. Such subsequent determination would continue until changed by a subsequent application and hearing. I think under the provisions of sec. 46.10, Stats., each charge and the determination thereon is final in the same sense that a judgment of court if final unless appealed from. So I do not think any of the charges in this petition can be considered or changed by the board except the last charge which comes up for an original hearing and determination under the statute, and you will have to determine that on investigation and proofs in the same way as you did in the first place.

I would suggest that you have the matter investigated and have affidavits or other proofs bearing upon the matter obtained as to the facts so that they can be used on the hearing before the board.

This is an application for a hearing under the provisions of subsec. (4), sec. 46.10, and when you have obtained the necessary affidavits and proofs, notice should be given of the time and place of hearing as provided in that section, and your determination will then be subject to appeal under the provisions of subsec. (5), so that it is desirable that affidavits and proofs as to the facts be made a part of the record in the proceeding before your board, as I think the hearing on appeal is a review of the evidence taken before the board. As heretofore stated, the question of residence is a question of fact and your only interest and duty is to determine the proper facts based on the evidence in each case, and your duty to the state is no greater than your duty to the county in determining the proper charge.

TLM
Public Health—Quarantine—Christian Science healer is not physician or clergyman within meaning of sec. 143.05, subsec. (3), Stats., so as to authorize him to visit quarantined place without written permit of health officer under rule of previous opinions.

February 25, 1928.

BOARD OF HEALTH.

You quote part of sec. 143.05, subsec. (3), Stats., which prescribes the form of placard to be posted upon quarantined houses and which says:

"'All persons, except the health officer or his representative, attending physicians and nurses and clergymen, are forbidden to enter or leave these premises without a special written permit from the health officer, and all persons are forbidden to remove, obscure or mutilate this card or to interfere in any way with this quarantine without written orders from said health officer, under penalty of fine or imprisonment.'"

You ask if a Christian Science reader may be classified as a clergyman under the provisions of the statute.

You say it is generally understood that when a clergyman enters a quarantined home he does so for the purpose of performing religious rites and for this purpose only, while a Christian Science reader is supposed to enter the home for the purpose of healing, therefore not in the capacity of a clergyman performing what is usually expected of such people under these conditions,—the last religious rites; furthermore, that it is one of the established teachings of the Christian Science church that absent healing is one of the common practices. You also say it has been scientifically proved that a healthy individual coming in contact with an individual afflicted with a communicable disease may become a carrier of this disease although he may not be afflicted with the disease himself. For these reasons you say the quarantine provides the possible minimum contact of healthy individuals with the sick, for the public protection.

Without going into the questions again or giving my personal opinion on the questions submitted, I refer you to the opinions of this office in V Op. Atty. Gen. 642 and VII
Bridges and Highways—County line road placed on county systems of prospective state highways by contemporaneous action of county boards of counties may be taken off such system by one county by sole action of its county board. No question of county liability for maintenance is involved.

February 28, 1928.

L. W. BRUEMMER,
District Attorney,
Kewaunee, Wisconsin.

Referring to my letter of January 11 (not published) declining, in the absence of further information, to advise as to whether where the counties of Kewaunee and Door had jointly placed a county line road on the county trunk highway system Door county might thereafter, by sole action of its county board, take such road off the county trunk system, you submit a copy of the petition to and the resolution of the Door county board adopted November 22, 1923, and also a copy of the resolution of said board adopted November 17, 1927.

I have examined the documents submitted. The resolution of November 22, 1923, does not purport to place the road in question on the county trunk highway system, but only to make it a part of the county system of prospective state highways "with the understanding that the construction to be made on said system be done by the different counties as formerly divided, by the towns where the construction is to be made on the county line." (Italics mine.) The resolution of November 17, 1927, provides that the road in question "is hereby removed and taken off from the county system of prospective state highways."

A road placed on the county system of prospective state highways does not become a state highway nor a county highway so as to impose maintenance liability on the county unless and until it has been accepted by the state highway commission as a state highway or has been adopted as a
state highway or a part of the county trunk highway system by the county board with the approval of the state highway commission; until such a road actually becomes a county or state highway by such acceptance, or adoption, the liability for maintenance remains where it always was, with the towns. VI Op. Atty. Gen. 313, 677.

The condition imposed by the county board of Door county in placing the road on the prospective system was in accordance with the law. There is nothing before me which tends to show that the road in question has ever become either a county highway or a state highway, and the question of the power of Door county by sole action to take it off the county trunk system does not arise. The power to take the road off the county system of prospective state highways, which the resolution of November 17, 1927 does, is undoubted.

The assumption in both of your letters that the road in question had been made a part of the county trunk highway system by joint action of the two county boards appears to have been erroneous, due, doubtless, to the acts of the two counties in maintaining the highway in question under a failure to appreciate the difference between a road which is merely on the county system of prospective state highways and a road which has actually become a state or county highway.

Insurance—Domestic mutual hail and cyclone insurance company organized under secs. 1966–2 to 1966–12, Stats. 1898, which were thereafter repealed, provisions being continued as by-law adopted by company, is required to comply with secs. 203.12 and 201.18, Stats., and set up unearned premium reserve, as insurance companies are required to comply with all reasonable police regulations.

February 28, 1928.

M. A. Freedy,
Commissioner of Insurance.

You say a domestic mutual hail and cyclone insurance company was organized in 1900 under what was then secs. 1966–2 to 1966–12, Stats. 1898, which was thereafter re-
pealed and the provisions of that section were continued as a by-law adopted by this company; that the company has since operated under the provisions of the statute.

You say in the operation of the company a gross advance premium has always been collected of an amount which was supposed to be sufficient to meet the expenses and losses during the year and that was set up as an unearned premium reserve for that purpose in accordance with law and no other assessments have ever been made or collected, and you ask:

1. Whether or not the company is required to comply with sec. 203.12, Stats.;
2. Whether or not the company is required to comply with sec. 201.18 and set up an unearned premium reserve.

You enclose a brief by Herman L. Ekern as attorney for the company, in which it is claimed that the company is not required to comply with these statutes because of the facts stated and the reserve provision in its by-laws.

You also enclose a brief by you claiming the company is required to comply with those sections of the statute. You also enclose copy of the form of policy used by the company and you ask to be advised on the questions.

We must begin with the general proposition that a law can always be changed, amended or repealed except where it becomes a contract, and with the other general principle that a corporation is not a "person born or naturalized" within the provisions of sec. 1, Amendment XIV, United States Const., and for that reason it is subject to reasonable police powers of the state to be exercised for the protection of its citizens, and that is particularly true as to an insurance corporation and its business. Rose v. Kimberly & Clark Co., 89 Wis. 545; N. Y. Life Ins. Co. v. State, 192 Wis. 404.

I notice it is claimed here that because this company was organized under the provisions of secs. 1966—2 to 1966—12 which were in force in 1900, and which, although subsequently repealed, were continued in force as a by-law of the company, the provisions of secs. 203.12 and 201.18, Stats., would not apply to this company now. But the present statute makes no such exceptions and the company took its existence and all it has under and subject to the laws made
Opinions of the Attorney General 161

and to be made by the state. So I think your only question here is: Are secs. 203.12 and 201.18 lawful police regulations of insurance business, and do they apply to this company?

A very significant circumstance here is the admission and argument in the company's brief:

"In view of the fact that this company has not heretofore maintained necessary assets to provide for pro rata reinsurance reserves calculated on the advance payments and is only gradually building up its assets to a change to a full reserve plan, it would be impracticable and unjust to require any pro rata premium on cancellation and the requirement of payments on cancellation other than strictly pursuant to its by-laws then in force would be unjust and a discrimination against other policyholders."

Whether this change in the statute was impracticable or unjust as applied to this company or to any other company under the conditions existing, was a question for the legislature to determine when it enacted these changes in the laws. I do not see how we can now read anything into sec. 203.12 that was not written there. Where that section covers the particular situation it is final, and as to any other situation, if it does not so fully cover it, then the provisions of sec. 201.18 authorize the commissioner to act as there provided subject to review in a court proceeding, as provided in that section. But I do not think that sec. 203.49 would change the effect of those sections because it says:

"The provisions of this act shall not apply to town mutual companies nor to domestic mutual cyclone insurance companies operating on the assessment plan,"

because it is claimed that this company never has operated on the assessment plan.

You say that during the history of this company it has been the practice of the company to pay the unearned part of the premium to the policyholder when his policy was canceled since cancellations were usually caused by the members' moving out of the territory, but now you say a competing company has been formed in the locality and about 300 policies were canceled evidently for the purpose of joining that company. You say a return premium was paid on the first few policies canceled, which you think indicates
that the company recognized its liability to return the unearned premium on such canceled policies. You say later the company refused to pay the return premiums on such cancellations, and you think because his company has so recognized and operated under the provisions of sec. 203.12, that it cannot now claim that that section does not apply to it.

I see no reason why his company is not subject to the present laws and to any general changes applicable thereto. These are all changes made under the police powers of the state for the protection of the citizens of the state. Police powers cannot be contracted away nor can one legislature prevent a subsequent legislature from exercising its rights to pass reasonable police regulations based on changed conditions or on its judgment as to the necessary or reasonable exercise of its duty to pass reasonable and proper regulatory laws for the proper protection of the rights of citizens of the state.

TLM
Insurance—Insurance commissioner is justified in refusing to approve of clause added to standard form of policy that modifies provisions and conditions of standard policy otherwise than is authorized by conditions specified in numbers 1 to 9 in sec. 203.06, Stats.

March 3, 1928.

M. A. Freedy,
Commissioner of Insurance.

In your letter of February 7 you state that the Terminal Elevator Grain Merchants Association has submitted the following clause which they desire incorporated in all fire insurance policies covering elevator buildings and their contents, including grain stored therein:

"In consideration of the rate at which this policy is written, this company hereby waives all rights which it may have or acquire through payment of loss or damage under this policy to recover the amount paid for such loss or damage from any railroad and/or railway company or companies. Anything inconsistent herewith in the policy notwithstanding."

You say the company asks the approval of your department to that clause being added and you ask if it is within the scope of your authority to waive the conditions in the policy as to such clause, and if so, whether it is discriminatory as against other insurance which may have warehouse property along the railroad right of way.

Sec. 203.06, subsec. (1), Stats., says that no insurance company shall issue any fire insurance policy on property in this state other than such as shall conform in all particulars as to provisions, agreements, and conditions with the printed form as filed with the commissioner and no other or different provision, agreement, condition or clause shall in any manner be made a part of such contract or be endorsed thereon or delivered therewith except the several specific things there named.

The only thing that has given me any trouble in passing upon your question is the provision in the policy itself or the conditions on the back thereof in lines 72 to 88, which provides for certain conditions or provisions that might be added in writing to the form of the policy, but you will no-
tice by the language there used, the conditions that could be so added by provisions in writing must not be inconsistent with or a waiver of any of the conditions or provisions of the policy. So I think such authorized changes must be confined to the changes or character of changes enumerated and authorized in sec. 203.06 and numbered as (1) to (9), inclusive. If not, I see no object in having the standard form of policy and the specific provision against any changes or alterations thereof.

The change proposed to be added to the standard policy by the Terminal Elevator Grain Merchants Association is not of the kind or character described in any of the exceptions which are authorized in sec. 203.06. So I would agree with you that you have no authority to authorize such a clause to be added to the provisions of the standard policy.

Of course, under the specific provisions of the statute, if it was not authorized to be added to the standard policy its addition thereto would not change the liability of the company under the language of the statutes but it might be used in many cases to bluff the insured out of collecting a loss that would be covered by the policy requirements.

I think you are justified in your interpretation of the law.

TLM

Public Officers—County Board—Highway Commission—
Town Chairman—Appointive member of state highway commission vacates his office as such member by acceptance while holding it of office of town chairman and member of county board.

March 3, 1928.

HONORABLE FRED R. ZIMMERMAN,
Governor.

I quote your statement and inquiry as follows:

"On January 26, 1925, Ex-senator George Staudenmayer of Columbia county was appointed a member of the Wisconsin state highway commission.

"On April 5, 1927, he was elected chairman of the town of Caledonia, Columbia county. As chairman of the town
of Caledonia, he is a member of the county board of Columbia county.

"I would like your opinion on the following questions:

"(1) Are these two offices incompatible?

"(2) Did the office of Ex-senator Staudenmayer on the highway commission become vacant upon his election to, and his acceptance, qualification, assumption and performance of the duties of chairman of the town of Caledonia, in Columbia county, and thereby became a member of the county board of said county?

"(3) If the election to and qualification of said Ex-senator Staudenmayer as a member of the county board of said county automatically created a vacancy on the highway commission, may I now make an appointment to fill the unexpired portion of Mr. Staudenmayer's term as a member of the highway commission, without the necessity for taking any other action in the matter?"

Assuming that Mr. Staudenmayer duly qualified for and accepted and entered upon the performance of his duties as chairman of the town and member of the county board, my opinion is that all three questions must be answered in the affirmative.

That the two offices are incompatible seems clear from a mere reading of the following sections (among others) of the statutes: 83.01, 83.06 (2), 84.03 (9), 84.07 (2), (4), 84.09 (1), 87.03, 87.04. Under these provisions the state highway commission is required to pass upon and approve or disapprove acts of the county board in changing or altering the county system of prospective state highways and in establishing and subsequent changing or altering of the county trunk highway system; to hear and decide upon applications by the county board for the allotment of state aid in the construction and maintenance of highways and bridges; to hear and decide upon applications of the county board for compulsory orders affecting other counties and municipalities for the construction of highways and bridges and to apportion the cost of such construction between the county and other counties and municipalities; to enforce the provisions of the laws requiring counties to maintain state highways, with power to withhold state aid if the county board does not provide for their proper maintenance, etc., etc. All these powers and duties of the commission,
and others that might be mentioned, make the office of member of the state highway commission incompatible with that of member of a county board.

It is the settled law of this state that one who, while occupying one office, accepts another incompatible with the first, ipso facto vacates the first office and that his title thereto is thereby terminated without any other act or proceeding. *State ex rel. Stark v. Hines,—Wis.—*, 215 N. W. 447; *Wonewoc v. Industrial Commission*, 178 Wis. 656; *State ex rel. Johnson v. Nye*, 148 Wis. 659; *State v. Jones*, 130 Wis. 572; *State ex rel. Wheeler v. Nobles*, 109 Wis. 202; *State ex rel. Knox v. Hadley*, 7 Wis. 700.

An appointed member of the state highway commission holds office until his successor is qualified. Sec. 82.01, sub-sec. (1), Stats., but his successor may be appointed at any time after a vacancy occurs, and this applies to a vacancy caused by the acceptance of an incompatible office. See the cases above cited.

FEB

**Constitutional Law—Legislature**—Joint resolution of legislature does not have force of law.

Joint Resolution No. 13, first special session 1928, does not carry necessary authorization for board of control to grant easement to city of Waukesha.

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

With your communication of February 15 you enclose Joint Resolution No. 13 of the special session of 1928. This joint resolution reads as follows:

"WHEREAS, The city of Waukesha is reconstructing its present sewage system and contemplates the erection of a sewage disposal plant, and

"WHEREAS, It is absolutely necessary that the city acquire an easement from the state for the purpose of laying a new trunk line sewer across lands owned by the state, and used by the Wisconsin industrial school for boys at Waukesha, Wisconsin. Therefore, be it

March 7, 1928.
Resolved by the assembly, the senate concurring, That the state board of control be authorized to grant an easement to the city of Waukesha in a strip of land fifteen feet wide extending from Walton avenue west to the new proposed septic tank on such terms and conditions as may be agreed upon by the state board of control, and the authorities of the city of Waukesha, Wisconsin."

Assuming that the board of control does not have authority to grant such an easement to the city of Waukesha, and that legislative authority is necessary, this department is of the opinion that such Joint Resolution No. 13 does not carry the necessary authorization.

Our constitution does not provide for joint resolutions, nor prescribe a method for their passage. Laws are not passed in the form of resolutions but in the form of bills.

Art. IV, sec. 17 of the constitution provides:

"The style of the laws of the state shall be 'The people of the state of Wisconsin, represented in senate and assembly, do enact as follows;' and no law shall be enacted except by bill."

Art. V, sec. 10, provides in part:

"Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections * * * ."

It also provides the necessary method for a bill to become a law despite the executive veto.

The syllabus to a Montana case reads as follows:

"Const. art. 5, sec. 19, provides that no law shall be passed except by bill. Section 20 prescribes the form of enacting clause. Held, that such provisions were mandatory, prohibitory, and exclusive. Hence a joint resolution of both Houses of the Legislature, signed by the Governor, addressed to the game warden, providing that he appoint the widow of a prior game warden who lost his life in the service as additional deputy game warden, was void." State v. Cunningham, 103 Pac. 497, 39 Mont. 197, 18 Ann. Cas. 705.

In a West Virginia case the syllabus reads:

"The legislature cannot give a matter the force and effect of law, by the passage of a joint resolution in relation
thereto, when such matter is properly the subject of enactment. Such action being in contravention to the 1st section of article IV of the constitution providing that the style of the acts of the legislature shall be 'Be it enacted by the legislature of West Virginia.'” Boyers v. Crane, 1 W. Va. 176.

The same constitutional provisions have been previously construed by this department. For a good discussion see IV Op. Atty. Gen. 1076. Also VIII Op. Atty. Gen. 663.

Fish and Game—Wolves—Although bounty is given for killing of wolf in this state, still person who shoots wolf with gun without hunting license may be prosecuted for hunting without license.

March 7, 1928.

JAMES R. HILE,

District Attorney,

Superior, Wisconsin.

You state that a resident of your county heard of some wolves in a certain neighborhood and went out with his gun and shot the wolf and made claim for a bounty; that the game warden made complaint to your office and asked that a warrant be issued for his arrest for hunting without a license. You ask to be advised as to whether this law contemplates that he should be prosecuted.

Sec. 29.09, subsec. (1), Stats., provides:

“Except as expressly provided, no person shall hunt with a gun any wild animal, or trap or fish any game or game fish unless a license therefor has been duly issued to him which shall be carried on his person at the time and shall be exhibited to the state conservation commission or its deputies on demand. * * *”

There is no exception to this statute for one who shoots a wolf with a gun and receives a bounty for it under sec. 29.60.

In an official opinion this department held that residents of this state without hunting or trapping licenses may dig out and capture foxes. XVI Op. Atty. Gen. 407. A bounty
is given for the killing of foxes under sec. 29.60, as well as for the killing of wolves. You will note that a license is required for the hunting with a gun of any wild animal. In that case the fox was dug out and captured and therefore did not come within the provisions of the statute. Under the facts submitted by you, however, the person who killed the wolf did so with a gun and he had no license. The statute requires him to have a license if he kills a wolf in the manner he did.

I believe the person who shot the wolf with a gun has violated the statute. You will note that sec. 29.01, subsec. (5), provides:

"'Hunt' or 'hunting' includes shooting, shooting at, pursuing, taking, catching, or killing of any wild animal or animals."

A contrary ruling would make it more difficult to enforce our game laws, because it might be difficult to prove whether the hunter is hunting for wild animals to which a bounty has been attached or whether he is hunting for other wild animals. This will not be necessary, for if he is hunting for any wild animals, although he has none in his possession, it will not make any difference whether he was hunting for animals for which a bounty is offered or whether he is hunting for other wild animals. He will be violating the law if he is hunting with a gun.

You are therefore advised that your question must be answered to the effect that the person who shot the wolf without having a hunting license, although he received a bounty for it, may be prosecuted for hunting without a license.

JEM
170 OPINIONS OF THE ATTORNEY GENERAL.

Appropriations and Expenditures—Legislature— Appropriation under sec. 20.01, subsec. (9), Stats., is available for service mentioned therein after close of either special or regular session of legislature.

C. E. Shaffer, Chief Clerk, Assembly.

You request to be advised as to whether or not the appropriation under sec. 20.01, subsec. (9), Stats., is available for a special session as well as for a regular session.

Sec. 20.01 (9) reads as follows:

“To clerks detailed for service after the close of the session, as provided in subsection (6) of section 13.14, not exceeding five dollars per day each, and not exceeding an aggregate of two hundred and twenty-five dollars for the assembly and seventy-five dollars for the senate.”

Sec. 13.14 (6) reads as follows:

“The chief clerk of each house may detail clerks after the close of the session for mailing, indexing, proof reading, completing the bulletin and for such other work as he may direct.”

The above quoted sections of our statutes govern in the situation inquired about. I do not believe that a well founded doubt might be read out of those sections as to the meaning intended in their enactment. The service for which compensation is provided is as necessary at the close of a special session as at the close of a regular session, save and except that the likelihood is that at the close of a special session the quantum of service may not be as great as at the close of a regular session. In all other respects the necessity for the service mentioned in the statute may be just as great.

It will be noted that in both of the quoted sections reference is made to “service after the close of the session.” The words “the session” can have reference only to that particular session, either special or regular, which has just come to a close, and you are therefore advised that the appropriation afforded by sec. 20.01 (9) is available either with reference to the close of a special session or a regular session of the legislature.

HAM
Appropriations and Expenditures—Legislature—Second special session of legislature convened on March 6, 1928, under call has authority to fix amount of appropriation necessary to relieve emergency.

It does not have authority to consider appropriation not emergency appropriation as ordered in call.

It may consider money available in funds, if such funds exist, over which statutes control. (Teachers' retirement fund distinguished.)

Legislature has authority to raise necessary money by revenue bill required for appropriation.

March 7, 1928.

C. E. Shaffer, Chief Clerk,
Assembly.

You enclose Resolution No. 7, A., passed by the assembly on this date, asking this department to render opinions on the following questions:

"1. Whether the legislature has power to increase or decrease the board of control appropriation to an amount larger or smaller, as the case may be, than the $750,000 specified by the governor.

"2. Whether the legislature is restricted to acting on a general emergency appropriation as such or may provide a regular appropriation for the fiscal year for a given specified purpose.

"3. Whether money could be diverted to the board of control by this legislature from a fund already in existence, for instance, the teachers' retirement fund, as requested in Resolution No. 7, A., by Mr. Polewczynski.

"4. Whether the legislature has power to provide for raising the revenue for any board of control appropriation at this special session by means of an altogether new surtax measure or a bill increasing income tax rates."

In the proclamation issued by the governor on February 28, convening the legislature into special session on March 6, one of the purposes of the call was to appropriate $750,000 to the state board of control as an emergency appropriation.

Sec. 11, art. IV, state constitution, reads as follows:

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

The purpose in this instance is to make an emergency appropriation to the state board of control. In *State ex rel. Owen v. Donald*, 160 Wis. 21, 124, the court said:

"It is a maxim of the law that the power to appropriate is coextensive with the power to tax and so has fundamental and inherent limitations."

Stating this in other words, if the legislature does not have power to tax (for the purpose or amount under consideration), it has no power to appropriate.

In the syllabus to this case, on page 26, par. 38, written by Justice Marshall, is found this statement:

"The power to appropriate money out of the state treasury is limited by the power of taxation to create a fund to appropriate from."

The legislature is asked to make an appropriation from state monies for an emergency. To accomplish this purpose it is necessary to consider what money the state has, or, in other words, what the financial condition of the state is, together with a consideration of the amount that will relieve the emergency. The framers of the constitution undoubtedly had this in mind, when drafting sec. 4, art. V. They provided that the governor, "shall communicate to the legislature, at every session, the condition of the state * * * ."

The previous opinions on similar questions rendered by this department are found in XI Op. Atty. Gen. 249, rendered in 1922, and XV Op. Atty. Gen. 163, rendered in 1926. The following is taken from *In re Governor's Proclamation*, 35 Pac. 530, 19 Colo. 333, 335–337, which is quoted in XI Op. Atty. Gen. 249, 251:

"* * * The proclamation under consideration is somewhat extraordinary for its minuteness of detail. Hence the task of construing and applying the constitutional provision to the terms of the proclamation is attended with some difficulty.

"If we construe the language of section 9 [11] with the view to sustain the largest measure of executive control
over legislative power, we reach a certain conclusion; if we construe the language with the view to protect legislative power against undue executive control, we reach a conclusion quite different.

"In a free representative government, like ours—a government of distributed and balanced powers—the equality of the different departments of the government, and the supremacy of each department in its appropriate sphere, are cardinal principles, and must be maintained except in those instances where the constitution expressly authorizes a departure from them. Thus, a conservative construction of section 9 [11] is required. In this matter, truth lies between the extremes, and the middle of the road is the path of safety.

"The governor is required to state in his proclamation the purpose for which the legislature is to assemble in special session; and it is provided that at such session no business shall be transacted other than that specially named in the proclamation. The governor is thus invested with extraordinary powers; he alone is to determine when there is an extraordinary occasion for convening the legislature; and he alone is to designate the business which the legislature is to transact when thus convened. Thus far, there can be no question as to the meaning of section 9 [11]. But must we go further, and hold that the governor may prescribe the particular way and manner in which the business he has designated shall be transacted in all its details? If the session be called for legislative purposes, may the governor draft the bills, append them to his proclamation, and require the legislature to pass them as prepared by himself, or not legislate at all? * * * It is manifest that such a construction would be to destroy legislative independence and convert members of the two houses into mere instruments to register and ratify the executive will—that is, to do the bidding of the governor, or not act at all.

"It is true, section 9 [11] requires that the business to be transacted at the special session shall be specially named; but it does not require that such business shall be definitely and particularly prescribed in all its details by executive proclamation. Legislative judgment and discretion as to the transaction of the business specially named are certainly not inhibited at special sessions. The legislature cannot go beyond the limits of the business specially named in the proclamation, nor can it legislate upon business not named in the proclamation; but within the limits of such business it may act freely, in whole or in part, or not at all, as may be deemed expedient, according to its own judgment. The legislature must do this much, or the right of legislating by
the representatives of a free people at a special session is destroyed, and all our ideas of such right are rendered obsolete. Baldvin v. State, 21 Tex. App. 593 [591], 3 S. W. 109; Jones v. Theall, 3 Nev. 233; City of St. Louis v. Withaus, 16 Mo. App. 247, affirmed by supreme court, 90 Mo. 646; State v. Shores, (W. Va.) 7 S. E. 413; Wells v. Mo. Pac. Ry. Co., (Mo. Sup.) 19 S. W. 530.”

The above is in accord with a review of a series of cases dealing with special sessions and the calls issued therefor, found in State v. Woollen, 161 S. W. 1006, which I merely refer to due to an anxiety to have this opinion before your honorable body at the earliest moment.

I desire to quote from State v. Clancy (Mont.), 77 Pac. 312, 314:

"* * * The Governor may submit the subjects with reference to which legislation is desired, but the lawmaking body then has absolute power to construct such laws respecting those subjects as it shall see fit (unless restrained by constitutional inhibition) or to disregard the subjects altogether and not enact any measures respecting them. The Governor has the same authority at a special session of the Legislature that he has at a regular session to recommend any particular measures which he may deem expedient; but such recommendation does not measure or limit the legislative authority. That authority is only limited by the scope of the subjects submitted for consideration, and any recommendation respecting a particular measure would not be binding upon the legislative assembly.

"In order to determine whether a particular measure is germane to the subjects stated in the Governor's proclamation, it is incumbent upon us to examine the proclamation as a whole (Chicago, B. & Q. R. R. Co. v. Wolfe, 61 Neb. 502, 86 N. W. 441) giving to the language used its ordinary meaning. * * * To say that because, in his proclamation, the Governor specified 'general legislation by which the bias and prejudice of district judges be made a disqualification of such judges to try any case,' etc., no law enacted in pursuance thereof would be valid which did not expressly declare bias and prejudice a disqualification, would be to lodge in the governor greater power than was ever contemplated by the constitutional provision under consideration. He cannot in advance tie the hands of the legislature. He cannot submit the draft of a proposed bill, and direct the Legislature to enact it, or no measure at all; but any enactment which will meet the ends sought to be accomplished in his call must be deemed to be embraced
within the limits of the subjects submitted for consider-
ation. That a liberal rule for the interpretation of these proclamations has been generally applied, to the end that the legislation enacted in pursuance thereof be operative, is apparent from the adjudicated cases."

"* * * The call or proclamation should be reason-
ably construed so as to bring the act within its meaning if possible. Where a general object is described, the legis-
lature is free to determine in what manner such object shall be carried into effect. In determining whether a given act is germane to the objects stated, the entire proclamation should be considered." 36 Cyc. 945.

Applying the foregoing principles to the questions sub-
mitted by you, it is necessary to keep in mind that one of the governor's purposes in calling this special session was the existence of an emergency, with respect to the state board of control and the institutions under their jurisdiction, and the necessity of an appropriation to meet this emergency.

First: It is the opinion of this department, therefore, that an appropriation bill carrying an amount that, in the judgment of the legislature, will relieve the emergency, is within the jurisdiction of the legislature, whether such an appropriation be larger or smaller than the suggested $750,000.

Second: A regular appropriation involving questions other than those necessarily arising out of the present emergency, (for which the legislature was convened), not being ordered under the call, is not such legislation as may be considered by this special session.

Third: Your third and fourth questions involve a con-
sideration of the question—whether the legislature, con-
venced in special session, can, under the call, consider the state funds available and necessary for the appropriation, and consider the methods of raising revenue for the appro-
priations to be made.

It is the opinion of this department, applying the prin-
ciples above indicated, that the legislature may, and neces-
sarily must, take into consideration the funds available for the appropriation, and methods for making available the necessary funds.

To this end, in answer to your third question, the legis-
lature may consider funds already in existence, and in an-
swer to your fourth question, may consider revenue meas-
ures that will provide such funds, whether such revenue
measures shall be in the nature of a surtax, and income
tax, or a mill tax law. Relative to our answer to your
third question, it is desired to point out, however, that the
teachers' retirement fund mentioned in that question is not
such a fund as is contemplated in our reply to that ques-
tion. The teachers' retirement trust fund has certain trust
fund characteristics and is not a free fund from which the
state can appropriate as from the general fund.

In view of the fact that the legislature is waiting for this
opinion, it is respectfully submitted in the above form
without a further detailed analysis of the law involved.
FKW

Abandonment—Marriage—Divorce—Father is liable for
support of his minor child after divorce where jurisdiction
in divorce case was obtained by publication and custody of
child was given to mother, and no provision was made for
support of child by father for reason that court could not
do so in case where jurisdiction has been obtained by publi-
cation; if he neglects to support child he may be prosecuted
under sec. 351.30, Stats.

March 9, 1928.

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

In your communication of February 29 you state that in
1924 one Mrs. C. was granted a divorce from C; that C. was
at that time in the state of Michigan, and that service of
summons was had by publication; that the judgment pro-
vided for an absolute divorce and for custody of their infant
child to the plaintiff, his wife, who was at that time and still
is a resident of your county; that the judgment was silent
as to any payment on the part of the husband, either for
alimony for the wife or for support of the infant child, and
that you assume that the reason for no orders being entered
requiring C. to pay a certain amount towards the support
of the child was that C. was outside of the jurisdiction of
the court and no personal service was had.

You inquire whether C. can be prosecuted against crim-
inally under sec. 351.30, Stats., assuming that he has failed
to support the said infant child and that the other facts in
the case fall within the said section. You refer me to
V Op. Atty. Gen. 119, and Watke v. State, 166 Wis. 41, and
other authorities, and you then say that it appears to you
that the present case is somewhat different from that re-
ferred to in the opinions of the attorney general and the de-
cisions for the reason that this decree was obtained by pub-
lication and manifestly no order can be entered, requiring
the husband to support the infant.

I have already informed you by telephone that in our
opinion your position is well taken, and that we believe that
your question should be answered in the affirmative. You
desire a written opinion. It was held by a former attorney
general, V Op. Atty. Gen. 119, to which you have referred
me, that a divorced husband not required by the decree of
divorce to support his minor children who were committed
to the care of the divorced wife, cannot be convicted of
abandonment of such minor children. In that case, how-
ever, the custody of the children was given to the divorced
wife and certain property was assigned to her, and the hus-
band was required to pay to her the sum of $5.00 per week
as and for a permanent alimony. There was nothing in the
papers to show that any application had ever been made for
the modification of this decree with reference to the care,
custody, maintenance or education of the minor children
and there was nothing to show that any demand had ever
been made upon the accused since the decree of divorce to
contribute to the support of said minor children. We came
to the conclusion in that case that no prosecution could be
had.

This case is somewhat different. Here no order was
made requiring C. to contribute to the support of the child
and no presumption can be indulged in that there was an
adjudication that he should not be required to support the
child and that the divorced wife should be required to sup-
port it, for the court was powerless in that case to make
any disposition of this question as the service was not a personal service, but one by publication.

Said sec. 351.30 provides, so far as is here pertinent:

"* * * or any person who shall, without lawful excuse, desert or wilfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate minor child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime, and, on conviction thereof, shall be punished * * *"

In the Watke case, judgment of the divorce was entered and the custody of the children given to the wife and alimony for the support of the wife and children of $20 per month. The court said, pp. 46-47:

"* * * It is asserted that this judgment of divorce was such a modification of the defendant’s legal obligation to support his minor children as to free him from the penalties prescribed by sec. [351.30] Stats. This claim cannot be sustained. The terms of the divorce judgment do not modify the defendant’s legal obligation to support his children, but expressly provide that he shall do so by paying to his former wife the amount awarded. This case is entirely different from the case of People ex rel. Comm’rs v. Cullen, 153 N. Y. 629, 47 N. E. 894, where the husband had by decree of the court been entirely absolved from the legal obligation to support his wife. The fact that the children’s custody was awarded to the mother by the divorce judgment does not operate to modify this obligation, nor is any court having jurisdiction to enforce the penalties provided by sec. [351.30] Stats., deprived of the power to enforce them against the defendant by the divorce proceedings in the circuit court. We discover no such conflict between the jurisdiction of the two courts as is claimed by the defendant in exerting their powers to administer the laws governing the domestic relations involved in the divorce proceedings and the legal obligations involved in this action. The duties of the defendant can be enforced separately by the different courts having jurisdiction thereof and he be fully protected in all his legal rights. People v. Schlott, 162 Cal. 347, 122 Pac. 846; In re McMullen, 19 Cal. App. 481, 126 Pac. 368; Spade v. State, 44 Ind. App. 529, 89 N. E. 604."

In Campbell v. Campbell, 37 Wis. 206, 210, our court said:
"* * * As a general rule of our law, divorce does not discharge the husband from the duty of supporting the wife and their infant children. * * *"

In *Thomas v. Thomas*, 41 Wis. 229, 233, it was said:

"* * * The primary duty to support both mother and child remains with the defendant, notwithstanding the divorce. * * *"

In *Zilley v. Dunwiddie*, 98 Wis. 428, 432–433, the court said:

"* * * When the marriage is dissolved by divorce, the duty of parents to maintain their children remains as before, for children are not parties to the divorce suit and do not lose any rights thereby. Hence the father's duty to maintain them after the divorce, where there is no decree of the court relating thereto, especially if their custody is not taken from him, remains as before. * * * The claimant owed the husband no duty as wife, and her duty to support the child continued, as before, secondary, and his primary. * * * It is generally laid down that the liability of the husband to a divorced wife, in respect to the support of the children, is the same as to any other third person, except as provided in the decree. If the court makes no order either for custody or support of children of the marriage, the divorce leaves the father's liability as at common law, and the mere divorce does not terminate his liability. * * * The father is under legal obligation to provide for the support of his children, even if they remain with their mother after her divorce, and, as against the public and the children, he cannot escape the duty." Citing *Courtright v. Courtnght*, 40 Mich. 633.

In *Spencer v. Spencer* (Minn.), 105 N. W. 483, it was held:

"The legal obligation of a father for the support of his minor children is not impaired by a decree of divorce at the suit of his wife for his misconduct, which gives the custody of the children to her, but is silent as to their support. * * *" (Syllabus.)

While none of these authorities cover a case exactly such as you present, still they all recognize the duty of the father to support his own child after divorce, as well as before divorce, and when we have a case as the one before us, where the court could not enter a decree passing upon the amount.
of support that the father should give to the child, and it being his duty to meet his natural obligations to his child, and if he neglects to do so under the circumstances required in sec. 351.30 he may, in my opinion, be prosecuted.

JEM

Criminal Law—False Pretenses—Crime of obtaining money or property under false pretenses is not complete where there was no defrauding, as where stock is sold for price that it is actually worth.

March 9, 1928.

RAILROAD COMMISSION.

In your recent letter you refer to the opinion of this department of January 21, 1928, XVII Op. Atty. Gen. 73, in which it was held that under the facts in the case the parties involved were guilty of obtaining property under false pretenses. You state in your letter that the district attorney of Walworth county, who has investigated the facts, maintains that if the stock was worth $12.50, and that it is admitted by Mr. Stewart that that was the sum that he paid for the stock, the accused did not obtain something of value without compensation to Mr. Stewart.

The former opinion was predicated on the assumption and the belief that the stock was not worth the amount paid for it by Mr. Stewart and that the accused had, through false representation, induced him to pay $12.50 for it, although it was not worth that much. If it is assumed or shown that the stock is worth as much as Mr. Stewart paid for it, then all the elements of the crime of obtaining property under false pretenses are not present. He was not defrauded in the sense in which this crime contemplates and requires, as was said in Corscot v. State, 178 Wis. 661, 666, that one of the elements of the crime is an actual defrauding and an obtaining of something of value by accused or someone in his behalf without compensation to the person from whom it is obtained, citing 25 C. J. 589.

In 25 C. J. 608–609 it is provided:

"While the statutes do not in express language require that the person from whom the property is obtained should
be defrauded thereby, but only that it is obtained with intent to defraud him, nevertheless, it is held as a general rule that the crime is not committed unless the prosecutor is in fact defrauded. Hence, as a rule, the crime is not committed if the prosecutor gets out of the transaction just what he bargained for. * * *

This is the rule laid down by the overwhelming weight of authority. See Notes 3 and 4 of the above authority. Also see Clawson v. State, 129 Wis. 650.

JEM

Appropriations and Expenditures—Legislature—Bill No. 8, S., second special session, 1928, providing for transfer of funds, is not legislation within call to appropriate funds.

March 9, 1928.

C. E. Shaffer, Chief Clerk, Assembly.

You enclose Resolution No. 9, A., passed by the assembly on this date, asking this department to render an opinion on the constitutionality of Bill No. 8, S. Bill No. 8, S., in substance, transfers unexpended appropriation balances made by previous sessions of the legislature to the state board of control, to be spent for emergency needs.

The proclamation by the governor for the convening of the legislature in special session on March 6, included only the following subjects of legislation:

“(1) To appropriate the sum of seven hundred fifty thousand dollars ($750,000) to the state board of control as an emergency appropriation.

“(2) To amend section 85.33 of the statutes to make possible the granting of drivers' licenses to persons between fourteen (14) and sixteen (16) years of age to operate motor vehicles upon the public highways in the day time.”

The call is for an appropriation of funds to the state board of control; a transfer of funds already appropriated is not an appropriation, therefore is not within the call. It follows that, in our opinion, the proposed legislation would be unconstitutional.

JWR
Public Officers—County Judge—Legislature has power to change salary of county judge during his term of office.

March 12, 1928.

Howard D. Blanding,
District Attorney,
St. Croix Falls, Wisconsin.

I have your letter of January 27, in which you question the correctness of an opinion recently given you by this department concerning the power of the legislature to change the salary of a county judge during his term of office.


The opinion given you, December 15, 1927, therefore, is reversed.

SOA

Courts—Adoption—There is grave doubt whether Iowa Children's Home Society, organized at Des Moines, has power to give its consent for adoption of child in court in Wisconsin.

March 12, 1928.

Board of Control.

You have submitted statement of facts to this department contained in a letter to you by Judge Agnew of the county court of Waukesha county, concerning the consent for adoption of a minor child. I quote from said letter:

"The child in question was born out of wedlock. The mother, by stipulation, gave it to the Iowa Children's Home Society, at Des Moines. This organization then turned the child over to the adopting parents, Olingers. The Olingers then moved to the state of Wisconsin and have lived here for years. The Iowa Children's Home Society has consented that the Olingers adopt this child here in this state and un-
under the laws of this state. The question is: Has the Iowa Children's Home Society any authority to act in this state? Secondly, can any such institution give consent as here requested without special authority given it by legislative act?"

Sec. 322.02, Stats., provides that no adoption of a child shall be made without the written consent of the living parents of such child unless the court shall find that one of the parents has abandoned the child or gone to parts unknown, when such consent may be given by the parent, if any, having the care of the child, etc. In subsec. (2) of said section it is provided:

"In case of a child not born in lawful wedlock such consent may be given by the mother, if she is living and has not abandoned such child; provided, that unless the living parent or parents of a minor consent to such adoption or shall have abandoned such child it shall be the duty of the court having jurisdiction of the proceedings, upon the filing of any petition for adoption, by order to appoint a time and place for hearing such petition and cause notice of such time and place to be given to such parent or parents, by personal service of said notice on such parent or parents at least ten days before the hearing or, if to the satisfaction of the court personal service cannot be obtained, by publication thereof in a newspaper in the county at least three weeks successively prior to said hearing, and when notice is duly given as herein provided the parent of any minor shall be bound by the order of adoption as fully as though he had consented thereto."

This procedure being strictly statutory I doubt very much whether the Iowa Children's Home Society has any right to give consent as here requested without authority given it by legislative act. You do not state whether this society is a corporation or not. Assuming that it is a corporation, it might have some rights to act in this state without being licensed as a corporation organized for a benevolent or charitable purpose, but I do not believe that it is safe to rely upon its consent for the adoption of the child, because there is serious doubt as to whether such consent is sufficient under our statute.

JEM
Taxation—Forest Crop Lands—Delinquent tax lands owned by counties may be entered under forest crop law, as provided in ch. 77, Stats.

Where land is so entered county and state must pay to local government unit tax provided in sec. 77.05, Stats.

March 12, 1928.

Conservation Commission.

In your letter of February 25 you state that the question has been raised as to whether delinquent tax lands owned by counties might be entered under the forest crop law.

You inquire if, if the answer is in the affirmative, it follows that the ten cents per acre to the local government unit shall be paid by the county and the state as in the case of private ownership.

Subsec. (1), sec. 77.02, Stats., provides that the "owner" of any tract of land of not less than one hundred sixty acres, may file with the conservation commission a petition stating that he believes the lands described are more useful for growing timber and other growing forest crops than for any other purpose, and that he intends to practice forestry thereon.

Subsec. (2), sec. 77.02, provides that upon the filing of the petition a hearing shall be held before the conservation commission.

Subsec. (3), sec. 77.02, provides that if the commission "finds that the facts give reasonable assurance that a stand of merchantable timber will be developed on such lands within a reasonable time," an order shall be entered granting the request of the petitioner.

The counties, under your statement of facts, are owners of tracts of land. The statute does not restrict the definition of "owner" in any respect. In view of the plainly expressed intent of the act, which as stated in sec. 77.01 is to encourage a policy of preserving from destruction or premature cutting the remaining forest crop in this state, the statute includes counties which own lands.

In case counties determined to avail themselves of the privileges offered in ch. 77, the tax of ten cents per acre provided in sec. 77.05 must be paid by the county and the state the same as if the lands were privately owned. The
object of the legislature in providing for the tax was to insure the payment of a tax revenue to the local taxing unit. Sec. 77.01.

SOA

Appropriations and Expenditures—Forest Crop Lands— Appropriation to state treasurer for forest crop lands made under sec. 20.05, subsec. (7), Stats., is cumulative and unexpended amount is available for future use.

Said appropriation does not include expenses of publication of notices, traveling expenses of commissioners and others to attend hearings and compensation and expenses of cruisers in examining lands offered for admittance under forest crop law; appropriations for these are made to conservation commission under sec. 20.20.

March 12, 1928.

Conservation Commission.

You have asked two questions in regard to the appropriation made under sec. 20.05, subsec. (7), Stats. First, is this appropriation limited to the amount expended, or is it cumulative and is the unexpended amount available for future use?

Said sec. 20.05, so far as material here, provides:

"There is appropriated from the general fund to the state treasurer:

"* * *

“(7) On July 1, 1927, thirty thousand dollars; on July 1, 1928, forty thousand dollars; on July 1, 1929, fifty thousand dollars; on July 1, 1930, sixty thousand dollars; on July 1, 1931, seventy thousand dollars; on July 1, 1932, eighty thousand dollars; on July 1, 1933, ninety thousand dollars; on July 1, 1934, and annually thereafter one hundred thousand dollars to carry out the provisions of chapter 77.”

Appropriation statutes are construed according to the rules laid down in sec. 20.77. In subsec. (3) we find the following:

"* * * Any appropriation in the following or substantially similar language: ‘There is appropriated on July 1, * * * dollars to (department, board or com-
mission), for (purpose or object),' shall be available until used unless specifically repealed; but no appropriation for operation shall be used for permanent property and improvements. Moneys appropriated for operation may be used for ordinary repairs and maintenance, except replacements."

This language is decisive of the question before us. The wording of said subsec. (7) above quoted is in substantially the same language and I am therefore constrained to answer your first question to the effect that this appropriation is cumulative and the unexpended amount is available for future use.

Your second question is: Does this appropriation cover all expenditures under the forest crop law, such as the expense of publication of notices, traveling expenses of commissioners and others to attend the hearings, and the compensation and expenses of cruisers in examining the lands offered for admittance under the forest crop law?

You will note that the appropriation for forest crop lands in sec. 20.05, subsec. (7) above quoted is an appropriation to the state treasurer and not to the state conservation commission and it is for the purpose of carrying out the provisions of ch. 77. After forest crop lands have been designated under the provisions of ch. 77 the provisions of sec. 77.05 are applicable, which read thus:

"Any owner shall be liable for and pay to the town treasurer on or before February twentieth of each year the sum of ten cents per acre on each such description hereinafter called the 'acreage share,' and on or before the twenty-fifth day of February of each year the state treasurer shall pay to each town treasurer the sum of ten cents on each acre so certified to him on which the owner has so paid said acreage share, and also on acreage share previously returned delinquent and subsequently paid; provided, that if the total amount of payments so authorized in any one year shall exceed the appropriation for that year made in subsection (7) of section 20.05 then such payment of ten cents per acre shall be proportionately reduced. If such acreage share be not paid by the twentieth day of February to the town treasurer it shall be subject to a two per cent penalty, plus one per cent per month until paid, and if such land remain delinquent beyond the period of three years shall become the property of the state."
Here the state treasurer is ordered to pay to the town treasurer the sum of ten cents on each acre so designated but if the total amount of payments so authorized in one year exceed the appropriation made under subsec. (7), sec. 20.05, then the payment of ten cents per acre must be proportionately reduced. It is very evident here that the appropriation to the state treasurer made under sec. 20.05, subsec. (7), is to provide the funds to pay to the town treasurer the ten cents per acre or proportionate amount per acre if reduced as provided in said sec. 77.05.

Your second question must therefore be answered to the effect that the expense of publication of notices, traveling expenses of commissioners and others to attend the hearings and the compensation and expenses of cruisers in examining the lands offered for admittance under the forest crop law are not covered by the appropriation made to the state treasurer under sec. 20.05, subsec. (7). The appropriation for these items is made to the conservation commission under sec. 20.20.

JEM

Agriculture—Agricultural Societies—Fair association is entitled to state aid based on total net premiums paid, regardless of source from which funds were secured.

W. A. Duffy,

Commissioner of Agriculture.

You direct my attention to sec. 20.61, subsec. (11), par. (a), Stats., which appropriates:

“To each county, and any such organized agricultural society, association, or board in the state, eighty per cent of the first five thousand dollars actually paid in net premiums and fifty per cent of all net premiums paid in excess of five thousand dollars * * *.”

You state that you find that some of the fairs receive donations from breeders’ associations and individuals toward the payment of certain premiums. For example, at the La Crosse Interstate Fair in 1927 an announcement is made at the head of several classes like the following:
"The ——— Breeders' Association, will give a donation to the La Crosse Inter-State Fair Association of a sum not to exceed one-fifth of the premiums paid out in the ———-class. Said donation can be used for any purpose in accordance with resolution adopted by the Board of Directors of the La Crosse Inter-State Fair Association."

You also state that in the books of other fairs there occasionally appears the statement that "the ——— Association offers one-third of the premium money in this class." You inquire whether these donations of a part of the premiums paid out should be deducted from the total premiums paid in order to find "net premiums," the basis upon which state aid is to be allowed or whether fair associations are entitled to state aid based on total premiums paid regardless of where such funds may be secured or who may be offering the premium.

The last sentence in said sec. 20.61, subsec. (11), par. (a), provides:

"* * * No fair, association, or board shall receive state aid unless its premium list, entry fees, and charges shall have been submitted to the commissioner of agriculture on or before May 1, and approved by him in writing, both as to premiums offered, amounts to be paid, entry fees to be charged, and all other charges for exhibiting."

The commissioner has great powers in view of this last quoted provision of the law in preventing any undue advantage to be gained by the donation of premiums described in your letter as stated herein before. I believe that when the statute uses the words "net premiums" it means premiums that are actually paid, and that are considered as premiums only. The statute does not make any restrictions as to the source from which the fair associations receive the money for which premiums are paid. If it should be deemed advisable to eliminate all premiums, or such a per cent of them as have been donated, it would be an easy matter to say so in the statute. Until the statute makes that clear and more definite I believe that the fair associations are entitled to state aid based on total premiums paid, regardless of the source from which such funds may be secured.

JEM
Insurance—Life Insurance—Insurance company which lost negotiable note can recover on note.

Lost note secured by mortgage is loan under sec. 206.34, subsec. (3), Stats.

March 12, 1928.

M. A. Freedy,
Commissioner of Insurance.

You state that a domestic insurance company loaning assets on notes and mortgages has lost a note given it by a mortgagor. The note was a negotiable instrument and the maker has filed a carbon copy of the note with an affidavit verifying its correctness as to form, dates, etc. Affidavits have also been made by all persons and committees that the note has not been endorsed and you ask whether the insurance company can recover against the maker of the note if the note cannot be produced at the time of the trial, also whether this transaction can be regarded as a loan secured by a mortgage within the meaning of sec. 206.34, subsec. (1), par. (c), Stats.

The note, although negotiable, was not endorsed by the payee and therefore subsequent holders are not holders in due course. If the note appears in the hands of third persons who claim by endorsement the endorsement being a forgery the maker can avail himself of all defenses against such holders.

The note is only an evidence of the debt and its loss does not cancel the debt. The insurance company can sue thereupon, putting up a bond to protect the maker.

Since the debt is not extinguished by mere loss of the instrument the note and mortgage may properly be regarded as a loan within the meaning of sec. 206.34, Stats.

MJD
Automobiles—Law of Road—Sec. 85.08, Stats., does not create any precise speed limits; it defines prima facie lawful speeds in certain situations.

Legality of higher speeds depends upon all facts and circumstances in each particular case.

March 12, 1928.

L. E. Gooding,
District Attorney,
Fond du Lac, Wisconsin.

You inquire whether sec. 85.08, Wis. Stats., fixes a maximum automobile speed limit of forty miles an hour.

Sec. 85.08, subsec. (2), pars. (a) and (b), Stats., provides in part:

“No person shall operate a motor vehicle recklessly or at a rate of speed greater than is reasonable and proper with due regard to the width, surface, traffic and use of the highways and the rules of the road, or so as to endanger the property, life or limb of any person.

“(b) Subject to the provisions of paragraph (a) of this section, and except in those instances where a lower speed is specified in this section, it shall be prima facie lawful for the driver of a vehicle to drive the same at a speed not exceeding the following, but in any case when such speed would be unsafe it shall not be lawful.”

It should be noted that sec. 85.08, Stats., 1925, after enumerating certain conditions where a lower speed is specified, provides in part that no person shall operate a motor vehicle “on any public highway at a speed exceeding thirty miles an hour.” This section prohibited absolutely and made unlawful the operation of an automobile on any public highway at a speed exceeding thirty miles an hour.

The 1927 legislature then enacted ch. 217, Laws 1927, which amended sec. 85.08, Stats. 1925, relating to automobile speed limit, by changing almost entirely the phraseology employed in the 1925 statutes. The 1927 act creates no precise speed limit but provides that “it shall be prima facie lawful for the driver of a vehicle to drive the same at a speed not exceeding the following,” etc.

Subsec. (2), par. (a), sec. 85.08, Stats., is in the nature of a general prohibition upon the operation of automobiles and provides:
"No person shall operate a motor vehicle recklessly or at a rate of speed greater than is reasonable and proper with due regard to the width, surface, traffic and use of the highways and rules of the road, so as to endanger the property, life or limb of any person."

Subsec. (2), par. (b), sec. 85.08, Stats., is in the nature of an interpretation of the general prohibition contained in subsec. (2) (a), sec. 85.08. It does not create precise speed limits but merely raises a presumption that certain rates of speed under certain specified conditions are lawful. This, of course, may be rebutted by showing that the rate of speed was not reasonable and proper in each particular case or that such speed was unsafe, in which case it would be unlawful.

Thus, the legislature by the 1927 act removed speed limits under certain specified conditions and the act as amended and changed provides that a certain rate of speed under certain conditions "shall be prima facie lawful." Thus, it is conceivable that, under certain conditions, a lower speed than that specified in paragraphs 1 to 7, inclusive, of sec. 85.08, subsec. (2) (b), Stats., might be unlawful. But, if the driver of an automobile does not, under the conditions specified in sec. 85.08, exceed the speeds specified therein, the presumption is that such speed is lawful. This may, of course, be rebutted by showing that under all the circumstances of the case such a speed was not reasonable and proper or was unsafe and, hence, unlawful.

If, however, the driver of an automobile exceeds the rates of speed under the conditions specified in sec. 85.08, there would be no presumption of legality in the driver's favor but the question would be one of fact whether such speed was or was not lawful. Hence, under the conditions specified in subsec. (2) (b) 7, of sec. 85.08, Stats., it might be lawful to drive an automobile at a speed exceeding forty miles an hour upon a public highway in a case where such speed was reasonable and proper and not unsafe with due regard to the width, surface, traffic and use of the highway.

It is, therefore, the opinion of this department that sec. 85.08, Stats., does not create precise speed limits; it merely defines prima facie lawful speeds in certain situations. The
legality of higher speeds depends upon all the facts and circumstances in each particular case.

HHN

Public Officers—Board of Education—Malfeasance—
Member of board of education who is stockholder in paving corporation doing paving for city in which stockholder lives does not violate sec. 348.28, Stats.

Bridges and Highways—Counties—County may condemn land for construction of county trunk highway.

March 12, 1928.

FRANK B. KEEFE,
District Attorney,
Oshkosh, Wisconsin.

You state that a minority stockholder in a corporation engaged in general paving and construction work in the city of Oshkosh which accepted paving contracts from the city is a member of the school board of education and you ask whether such stockholder and board member is guilty of malfeasance because the corporation is doing paving work as aforementioned.

This status is compatible. If he were a minority stockholder in a corporation engaged in building a school he might be guilty of malfeasance, although occasionally officials who have performed work on buildings over which they, as officers, would have control have been held free from guilt under sec. 348.28, Stats. Because the paving corporation has no connection with school activities he is therefore not violating sec. 348.28, Stats.

You also state that Winnebago county proposes to construct a county trunk highway with hard surface pavement between Oshkosh and Neenah during the coming summer and that certain land is necessary for relocations. You ask whether the county may condemn such land.

County trunk highways are prospective state highways and the county may condemn under either ch. 32 or ch. 83, Stats.

MJD
Counties—Loans from Trust Funds—County has no power to repay loan made to school district, nor to guarantee payment of such loan.

March 12, 1928.

Harold W. Krueger,
District Attorney,
Crandon, Wisconsin.

The material facts presented in your letter of March 2, are as follows:

At the present time an effort is being made to establish a federal forest which would include a large portion of Forest county. A letter has been addressed to a member of the county board of supervisors of Forest county, written by the commissioners of public lands, in which it is stated that several of the school districts located in the proposed reforestation area are indebted to the state trust funds and that the officers of these school districts have indicated that it will be impossible for the school districts to pay off the loans to the trust funds if the lands in the proposed reforestation area are taken from the tax rolls. The commissioners of public lands in their letter inquire whether the county will pay or guarantee the payment of the loans which were made to the various school districts.

You state that the county board of supervisors has requested an opinion as to whether the county can legally pay or guarantee the payment of such loans.

You state further that you have searched the statutes and failed to find any provision which authorizes the county to pay or guarantee the payment of such loans and that you have so advised the county board. You inquire whether your advice was correct.

I have made a careful study of the statutes and fail to find any provision authorizing the county to pay such loans or to guarantee the payment thereof.

In view of the fact that counties have only such powers as are granted, it is the opinion of this department that no such power exists.

SOA
Corporations—Criminal Law—Fraudulent Advertising—
Firm located in Chicago which advertises in Wisconsin publications may be prosecuted for violation of sec. 343.413, Stats., provided service can be had on officer or agent of company in Wisconsin.

Publisher is not responsible for fraudulent matter contained in advertisement unless he has knowledge of unlawful or untruthful nature of such advertisement.

March 12, 1928.

Emil Pladsen,
State Treasury Agent.

The material facts presented in your letter of February 11 are as follows:
A firm located in Chicago advertises a proprietary medicine in Wisconsin publications. In such advertisements you find statements which you consider misleading. You inquire whether your department may institute action against such firm for violation of sec. 343.413, Stats.

You inquire whether the publisher of a newspaper may be held responsible for fraudulent matter contained in advertisements published in such newspaper and paid for at regular advertising rates.

1. In order to institute a criminal proceeding under the provisions of sec. 343.413 against the Chicago firm, it is necessary to obtain service on an officer or agent of the corporation in this state. If such service may be obtained, your office may institute proceedings under the provisions of the statutes. No such proceedings, however, can be instituted unless such service can be had.

2. A publisher of a newspaper “does not violate the statute unless he has knowledge of the unlawful or untruthful nature of the advertisement.” VII Op. Atty. Gen. 298, 299.

It is suggested that you notify the publisher that the statements contained in the advertisements are misleading, and if the publisher fails to discontinue the publication of such advertisements, an action may be instituted against him.

SOA
Public Officers—Special Deputy Commissioner of Banking—Passes and Franks—Special deputy appointed by commissioner of banking in liquidation of bank is subject to provisions of sec. 348.311, Stats.

March 12, 1928.

C. F. SCHWENKER,
Commissioner of Banking.

In your letter of March 2 you inquire whether an attorney appointed by you to represent your department as a special deputy in the liquidation of a bank is subject to the provisions of sec. 348.311, Stats. You state that such special deputy is local attorney for a railroad, and, as such, has been issued a pass.

Sec. 348.311 applies to the incumbent of any office or position under the constitution or laws, of the state of Wisconsin. It is clear that a person who is appointed special deputy is an incumbent of a position within the meaning of the statute.

SOA

Courts—Court Commissioner—Intoxicating Liquors—Search Warrants—Court commissioner probably has power to issue search warrant to search person; question is not entirely free from doubt.

March 12, 1928.

LLOYD D. SMITH,
District Attorney,
Waupaca, Wisconsin.

On February 20, 1928, XVII Op. Atty. Gen. 146, you received an opinion from this department that a justice of the peace cannot issue a search warrant to search a person and it was suggested that such warrant be issued by the circuit court. You now inquire whether such warrant could be issued to search the person of a suspected one while, first, a county judge who is also by virtue of his office a court commissioner of the circuit court, and, second, by a court commissioner appointed by the circuit judge.

In the case of State v. Kriegbaum, 215 N. W. 896, our supreme court held, as my former opinion indicated, that
a justice of the peace did not have the power to issue a search warrant to search a person. In that opinion the court said:

"We express no opinion as to the power of a court of general jurisdiction to issue a warrant to search the person."

The office of court commissioner is an arm of the circuit court and the circuit court is a court of general jurisdiction. The statute expressly provides that the court commissioner has the same powers that the judge at chambers of the circuit court has and such judge at chambers has the power to issue search warrants and warrants for arrest. I can see that quite an argument may be made that court commissioners have not the power to issue search warrants.

In the Kriegbaum case the court was concerned only with the question of whether a justice of the peace could issue such a search warrant. No reference was made to court commissioners whatever. I do not believe that the court intended to limit the office of a search warrant only to the circuit court sitting as a court. You will note that the court in said opinion noted that the prohibition of unreasonable searches and seizures in the constitution had never been held to prevent the search of the person of one who is under arrest under a valid warrant, charging him with the commission of an offense against the law, citing Thornton v. The State, 117 Wis. 338. This question has been raised in a case in Iowa county, where the search was made under a search warrant issued by a court commissioner and it is believed that the matter will be taken to the supreme court and a decision on the question obtained as soon as possible. Until such decision is rendered I think it should be assumed by the prosecuting attorneys of this state that court commissioners have the right to issue search warrants, but the question is not free from doubt until the supreme court has passed definitely upon that proposition.

JEM
Real Estate—Plats and maps thereof must be drawn on scale of not less than one hundred feet to one inch.

Plats of land within second, third and fourth class cities must be filed within sixty days after approval. In villages and towns and lands within three miles of second, third and fourth class cities filing must be had within thirty days after approval.

March 13, 1928.

Glenn D. Roberts,  
District Attorney,  
Madison, Wisconsin.

You ask whether maps showing plats and which shall be filed with the register of deeds must be drawn on a scale of not less than one hundred feet to one inch as a condition of acceptance for filing.

Sec. 236.02, Stats., provides that such maps must be drawn on a scale of not less than one hundred feet to one inch. This section is mandatory and designates one hundred feet as the minimum.

You inquire whether maps may be drawn on other than good muslin backed paper. Although it may be difficult to make blue prints on such paper the statute requires that all maps must be drawn on sheets of good muslin backed paper. The statute being clear, its requirements cannot be waived.

You further inquire within what time plats for maps must be recorded with the register of deeds. Sec. 236.05, subsec. (1), provides that if the map shall be approved, presumably by the common council or the village board, it must be recorded within thirty days. Subsec. (2) however, states that any maps must be offered for record on or before sixty days after the date of resolution. Maps for plats of property within cities of the second, third, and fourth class must be filed within sixty days after approval. In villages and towns also on lands within three miles of the limits of second, third and fourth class cities and villages the plat must be filed within thirty days after approval by the town board. We refer you to secs. 236.05, 236.07, 236.08 and 236.09, Stats.

Your opinion given to the register of deeds was very helpful and eliminated extensive research. It was greatly appreciated.

MJD
Public Officers—County Board—Grain and Warehouse Commissioner—Offices of grain and warehouse commissioner and member of county board are not incompatible so that acceptance of one vacates other, but under provisions of sec. 126.55, Stats., if performance of duties of member of county board prevents member of warehouse commission from devoting his entire time to duties of that office, he may be removed in proper proceeding for that purpose.

March 16, 1928.

John A. Barton, Member,
Grain and Warehouse Commission,
Superior, Wisconsin.

You say a year ago when you were appointed a member of the Wisconsin grain and warehouse commission you were also a member of the county board and you say you then consulted an attorney and were advised that the two offices are not incompatible. You say you are again up for election for member of the county board and you ask if in view of the recent ruling in the matter of Staudenmayer and Bretting, XVII Op. Atty. Gen. 164, the advice of your attorney was right or wrong.

You are advised that the opinion in the case referred to was based upon the fact that the two offices were incompatible, that is, the duties of the two offices conflicted, and under that rule the acceptance of the last office vacates the first. That general rule has been passed upon by this department in a number of cases, but I do not see anything in the office of county board member and member of the grain and warehouse commission that would make the offices incompatible so that the rule of the acceptance of the later office vacating the first office would not apply. However, your attention is called to the provisions of sec. 126.55, Stats., which says:

"The three members of the grain and warehouse commission, provided for in sections 126.01 to 126.55, inclusive, shall each give his entire time to the performance of the duties of his position, and shall not engage in any other active business.* * *"

I do not see how you could perform the duties of member of the county board without devoting a part of your time to
the performance of the duties of that office, and while that would not vacate the office of grain and warehouse commissioner under the rule of incompatibility, it might subject you to a proceeding for removal from the office of grain and warehouse commissioner on a charge that you were not giving your entire time to the performance of the duties of that office as required by that section of the statutes.

TLM

Taxation—Trade Regulation—Warehouses—Corporation may be organized to maintain "commercial storage warehouse."

"Merchandise" as used in sec. 70.13, subsec. (7), Stats., includes automobiles.

To be "not subject to taxation" under statute, merchandise must be in storage in original package in commercial warehouse on May 1.

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

In your letter of February 27 you refer to subsec. (7), sec. 70.13, Stats., which provides:

"Merchandise placed in storage in the original package in a commercial storage warehouse shall while so in storage be considered in transit and not subject to taxation."

You submit several questions:

Q. 1. May three or more adult residents of this state organize a corporation for the purpose of maintaining a commercial storage warehouse and conduct it without license or bond?

A. 1. The business of maintaining a commercial storage warehouse is undoubtedly a lawful one, and a corporation may be organized under the general corporation law for that purpose. So far as the state is concerned the business may be conducted without bond or license, except where the character of the merchandise stored is such that some special law applies, as in the case of articles within

March 16, 1928.
the scope of the cold storage licensing law contained in chapter 111, Stats. In other words, there appears to be no state law requiring the licensing or bonding of commercial storage warehouses as such, or warehouses generally.

Q. 2. Does “merchandise,” as used in the foregoing, include automobiles?

A. 2. This is answered in the affirmative. Words are to be construed according to the common and approved usage of the language, unless such construction would be inconsistent with the manifest intent of the legislature. Sec. 370.01 subsec. (1), Stats. In Wynne v. City of Eastman, 31 S. E. 737, 738, 105 Ga. 614, which you cite, it was held that carriages, wagons “and other vehicles” are embraced within the ordinary meaning of the term “merchandise.” See also XVI Op. Atty. Gen. 322.

Q. 3. Can such corporation receive automobiles from manufacturers outside of the state and outside of the assessment district within the state for storage before the first of May for delivery after the first of May?

Q. 4. Would such automobiles be considered merchandise and in transit and not subject to taxation?

A. 3, 4. A categorical answer cannot be given to these questions.

Personal property is assessed as of the first day of May in each year, with certain exceptions not here pertinent. Sec. 70.06, Stats. Under the last cited statute a coal company, for instance, can be assessed only on the amount of coal on hand on May 1. Pennsylvania Coal Co. v. Forth, 63 Wis. 77, 23 N. W. 105. Personal property, including merchandise, which includes automobiles located within the state on May 1, is, if subject to taxation, assessable as of May 1 in some assessment districts in the state. The statute above quoted, however, expressly provides that merchandise placed in storage, in the original package in a commercial storage warehouse “while so in storage” shall not be subject to taxation. The question to be determined in each case, therefore, is whether the merchandise was in storage in the original package in a commercial storage warehouse on May 1, the assessment date.

From what has been said, it is seen that it is possible for
situations to exist which would call for an affirmative answer to the questions you propound.

For a general discussion of the scope of the statute see XVI Op. Atty. Gen. 322. Your attention is also directed to a letter of instructions sent to assessors by the tax commission in May, 1927.

FCS

Taxation—Delinquent Taxes—County treasurer is required to credit city treasurer with sums returned by latter as delinquent city taxes of unpaid instalments of special assessments for local public improvements under provisions of secs. 62.21 and 74.19, Stats.; but special assessment certificates issued to contractors are not to be so credited. Issuing of special improvement bonds in anticipation of collection of such special assessments under sec. 62.21 (2), Stats., does not change rule.

March 21, 1928.

EUGENE WENGERT,
District Attorney,
Milwaukee, Wisconsin.

You inquire whether the county treasurer is required to credit the city treasurer on the latter’s forthcoming return of delinquent taxes with the amount of unpaid instalments of special assessments for local public improvements, except sprinkling and oiling of streets, levied against real estate in the city under the provisions of sec. 62.21, subsec. (1), Stats., which may be returned delinquent.

In my opinion, the answer should be in the affirmative.

Subsec. (1), sec. 62.21, Stats. authorizes the city council to provide that such special assessments may be paid in not more than ten annual instalments, with interest on deferred instalments, and for the entering of the instalments of principal and interest on the tax roll for the current and succeeding years, and that the same “shall be treated in all respects as any other city tax,” and that “(d) If any instalment so entered in the tax roll shall not be paid to the city treasurer with the other taxes it shall be returned to the county as delinquent and accepted and collected by the
county in the same manner as delinquent general taxes on real estate." These provisions, and particularly the last one quoted created by ch. 406, laws of 1927, clearly, I think, restore the rule of Sheboygan County v. City of Sheboygan, 54 Wis. 415 (see also State ex rel. City Construction Co. v. Kotecki, 156 Wis. 278; XI Op. Atty. Gen. 923, 924) and make sec. 74.19 [old sec. 1114] Stats., applicable to such unpaid instalments of special assessments. Sec. 74.19, Stats., provides that on the filing of the return of delinquent taxes with the county treasurer by the city treasurer, to which is annexed the affidavit of the city treasurer that the sums therein returned as unpaid taxes have not been paid and that he has not upon diligent inquiry been able to discover any goods, or chattels, belonging to the persons charged with such unpaid taxes whereon he could levy the same, "he shall thereupon be credited by the county treasurer with the amount of taxes so returned as unpaid," and "all taxes so returned as delinquent shall belong to the county and be collected, with interest and charges thereon, for its use."


Subsec. (2), sec. 62.21, Stats., provides for the issuing, at the discretion of the council, of special improvement bonds payable only out of special assessments provided for by subsec. (1) and in anticipation of the collection of such special assessments. These provisions for the issuing of bonds are independent of subsec. (1), and the city may or may not take advantage of the power to issue special improvement bonds in anticipation of the collection of the special assessments; it may, if it chooses, issue general liability bonds for such purpose under the provision of paragraph (1), subsec. (2), sec. 67.04, Stats.
Automobiles—Law of Road—Order of industrial commission requiring sticker to be affixed to windshield to indicate legality of lighting equipment is not in violation of subsec. (3), sec. 85.085, Stats.

March 22, 1928.

A. J. Altmeyer, Secretary,
Industrial Commission.

In your letter of March 9 you ask to be advised whether an order of the industrial commission requiring a sticker to be affixed to the windshield of a motor vehicle indicating that the lighting equipment is in compliance with law, would be contrary to sec. 85.085, subsec. (3), Stats.

Sec. 85.085, subsec. (3), Stats., provides:

"After March 1, 1928, it shall be unlawful for any person to drive any vehicle upon a highway with any sign, poster or other nontransparent material upon the front windshield, side wings, side or rear windows of such motor vehicle other than a certificate or other papers required to be so displayed by law."

Subsec. (3), sec. 85.13, Stats., provides:

"Subject to the minimum requirements provided in subsection (2) of this section, it shall be the duty of the industrial commission, and it shall have power, jurisdiction and authority, to investigate, ascertain, determine and fix such reasonable standards of lighting equipment for automobiles, motor cycles and other similar motor vehicles, and for the adjustment and use of such equipment, as to make the use of the highways by such vehicles safe for all the public, and to issue general or special orders prohibiting the use of any highway by such motor vehicle contrary to such standards of safety. Such investigations, standards and orders, and any action, proceeding or suit to set aside, vacate or amend any such order of said commission, or enjoin the enforcement thereof, shall be made pursuant to the proceeding in sections 101.01 to 101.28, inclusive; and every order of the said commission shall have the same force and effect as the orders issued pursuant to said sections 101.01 to 101.28, inclusive; and the penalties shall be such as are imposed for a violation of section 85.10."

Orders issued pursuant to secs. 101.01 to 101.28, inclusive, are "valid and in force, and prima facie reasonable and lawful until they are found otherwise in an action
brought for that purpose, pursuant to the provisions of section 101.27 of the statutes, or until altered or revoked by the commission." Sec. 101.13.

The orders of the commission in carrying out the provisions of sec. 85.13, if made in the manner prescribed by secs. 101.01 to 101.28, inclusive, have the same effect as legislative enactments. When the commission requires a sticker to be affixed to the windshield to indicate that the lighting equipment is in compliance with the law, the sticker may properly be said to be one required to be displayed by law and is therefore not in violation of subsec. (3), sec. 85.085. The commission may therefore issue the order requiring the use of such stickers.

ML

**Fish and Game—Wild Life Refuges**—Conservation commission in establishing wild life refuge under sec. 23.09, subsec. (7), par. (b), Stats., must investigate and have public hearing before establishing same. It may make orders to prohibit hunting and fishing on such refuges under sec. 23.09 (7) (a). Violation of said orders is punishable by provisions of sec. 23.09 (11).

March 23, 1928.

**Conservation Commission.**

You have directed me to sec. 29.57, Stats., which provides for the establishment of wild life refuges when the owner or owners of land make the proper application to the conservation commission and to subsec. (4) of said section which provides that no person whatever shall hunt or trap within the boundaries of any wild life refuge.

You also direct me to secs. 29.56 and 29.565 which provide for the establishment of such refuges for wild life and that no hunting or trapping shall be permitted on the area of such wild life refuges. Your question, however, refers to the provision of sec. 23.09, where under subsec. (7), par. (b), it is provided that the commission shall have power:

"To designate such localities as it shall find to be reasonably necessary to secure perpetuation of any species of game or bird, and the maintenance of an adequate supply
thereof, as game or bird refuges for the purpose of providing safe retreats in which game or birds may rest and replenish adjacent hunting grounds.”

In par. (a), subsec. (7) of said section it is provided that the commission shall have power:

“To close seasons in cases of urgent emergency on any species of game or fish in any specified locality or localities, when it shall find after investigation and public hearing, that such action is reasonably necessary to secure the perpetuation of any species of game or fish, and the maintenance of an adequate supply thereof. * * *”

You further state:

“If the conservation commission were to designate any such localities as a game or bird refuge, what steps would be necessary to determine that it is reasonably necessary to establish such a game refuge to secure perpetuation of any species of game or bird?”

The statute simply says that the commission may do this “after investigation and public hearing.” You will note in sec. 29.57 that if application is made to the commission for the establishment of a wild life refuge by the owner the statute provides:

“The commission may thereupon employ such means as it may deem wise to inform itself regarding the premises; and if, upon inspection, investigation, hearing or otherwise, it shall appear to the satisfaction of the commission that the establishment of said lands as a wild life refuge will promote the conservation of one or more useful species or varieties native within this state, it may by order designate and establish the said lands as a wild life refuge.”

The commission should inspect, investigate, have a public hearing and in any other way it may inform itself as to the advisability of establishing a wild life refuge and then it may make orders to close the season thereof and prohibit the hunting and trapping or killing of wild life on said refuge.

I think subsec. (3), sec. 29.57 would be a wise rule to adopt as to the publication of the orders made by the commission concerning the establishment of a wild life refuge under sec. 23.09. Said subsec. (3) provides:

“No such order shall be effective until at least thirty days after the date of its issue; nor unless the commission
shall have caused notice thereof to be given by its publica-
tion, once in each week for three successive weeks next pre-
ceding the date of its effect, in at least one newspaper pub-
lished in the county embracing the said lands. Thereupon
the said lands shall be a wild life refuge, and shall so re-
main for a period of not less than five years, from and after
the date of effect stated in said order.”

You also inquire whether, after so designating such a
locality, it would be a violation to hunt or trap thereon. It
would be if your commission makes orders to that effect.
You further inquire if the answer is “Yes,” what section
covers this violation. Subsec. (11), sec. 23.09, which pro-
vides:

“Any person violating any rule or regulation of the state
conservation commission shall be punished by a fine of not
less than twenty-five dollars nor more than one hundred dol-
lars, or by imprisonment in the county jail for not exceed-
ing six months, or by both such fine and imprisonment.”

You inquire whether there is any other section in the law
which would give the conservation commission authority to
establish a wild life refuge other than as provided in sec.
29.57. There are none except those contained in sec. 29.565
and sec. 23.09, subsec. (7) (a) and (b) as above quoted.
JEM

Banks and Banking—Taxation—When bank tax has been
levied upon stock of state bank prior to change in method of
assessment provided by ch. 396, Laws 1927, paid by bank
under protest and afterward compromised for percentage
of tax without adjudication as to its validity, proportionate
amount of loss on such settlement need not be paid back to
city by state, county or other subdivision.

March 23, 1928.

Jerome V. Ledvina,
District Attorney,
Park Falls, Wisconsin.

You state that the city treasurer of the city of Phillips
has filed a claim with the county treasurer for a refund of
$783.77 pursuant to subsec. (2), sec. 74.73, Stats., that be-
ing the money which the city refunded to the state bank of Phillips and the First National Bank of Phillips for taxes which these banks paid during the years 1923 to 1926, inclusive, and you say that money was refunded by the city to the banks pursuant to the decision of the United States supreme court in the Hartford Bank case and the city treasurer is now asking for a refund from the county treasurer for the county's and state's share of such taxes so paid.

You state that the city of Phillips has never paid to the county more than its share of the county and state tax and you think if a refund is made now the city will in effect not be paying its share of the apportionment of the state and county taxes, and because of such fact, you say you would like to know what position the state will take on the question of refunds of the part of the taxes received.

You are advised that under the plan of levying and collecting taxes for the state, county and city, there is not a specific levy of a certain percentage for state and a certain percentage for county and a certain percentage for city and the theory of the law does not contemplate that the state is to receive its proportionate amount from each tax levied on the different kinds of property. The city makes the assessment and levies the tax and is required to remit to the state through the county the amount due the state from the first moneys collected and not a percentage out of each tax paid. If the city levies a tax on property that is not assessable or too large a tax and it is contested and cut down, the city may be short of raising the necessary funds to meet all of its levies, but in levying for the next year it would levy an amount sufficient to cover whatever expenses or obligations it would have to meet based on the condition of the funds in the treasury.

As you suggest, the city compromised the tax so it cannot be determined what amount would have been cut from the tax if it had been tried out. So I think the amount voluntarily discounted by the city of any particular tax is the loss of the city and in the next levy it would have to levy whatever would be necessary to meet the obligations of the city for the next year, and the amount might be larger because of the compromise of the previous bank tax.

You refer to the provisions of sec. 74.73, which provides
a special rule for the distribution of the loss where a tax has been adjudged unlawful and set aside, but you say, as you understand it, this tax was not declared or found unlawful or unconstitutional, and I think you are right, and for that reason that special rule would not apply. That section seems to be based upon the theory that the state, the county and the city or other municipality was entitled to its proportionate amount of tax levied on each particular piece of property, which, of course, is not true under the general provisions for distributing the taxes collected among the state and the several subdivisions thereof. So that provision should not be extended beyond the particular situation described, and as you say, because this tax was not adjudged unlawful it would not come within the provisions of that section.

TLM

Indigent, Insane, etc.—Wife's legal settlement follows that of her husband; it requires year of residence of her husband in town for her to acquire legal settlement therein.

EDWARD MEYER,
District Attorney,
Manitowoc, Wisconsin.

You have submitted the following:

“A and B, a married couple, have a residence in X. B, the wife, goes to Y in January, 1927 and her husband follows her in July of 1927. A seeks aid from Y. Has he acquired a legal settlement in Y, or is his legal settlement still in X?”

In sec. 49.02, Stats., you will find the following provision:

“Legal settlements may be acquired in any town, village, or city so as to oblige such municipality to relieve and support the persons acquiring the same in case they are poor and stand in need of relief, as follows:

“(1) A married woman shall always follow and have the settlement of her husband if he have any within the state; otherwise her own at the time of marriage, and if she then had any settlement it shall not be lost or suspended by
the marriage; and in case the wife shall be removed to the place of her settlement and the husband shall want relief he shall receive it in the place where his wife shall have her settlement.

"* * * (4) Every person of full age who shall have resided in any town, village or city in this state one whole year shall thereby gain a settlement therein; 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."

Under your statement of facts it seems that the husband did not become a resident in Y until July, 1927. He has not yet resided in Y long enough to acquire a legal settlement and he still retains his legal settlement in X. In giving this answer, I assume that the facts in the case will not permit of the construction that the husband was residing with his wife in Y from January, 1927.

JEM

Civil Service—Public Officers—Deputy state treasury agent is subject to provisions of civil service law and tenure of position or office does not automatically expire with termination of incumbency of state treasury agent making appointment.

March 24, 1928.

A. E. Garey, Secretary and Chief Examiner,
Civil Service Commission.

In your letter of March 20, after calling my attention to an opinion of this department addressed to Honorable Michael Laffey, the then state treasury agent, dated December 12, 1916 (V Op. Atty. Gen. 890), in which it was erroneously assumed that deputy treasury agents were not subject to the state civil service law, you propound the following questions, viz:

1. Are deputy treasury agents subject to the provisions of the civil service law?
2. If deputy treasury agents are employed subject to the provisions of the civil service law, do their tenure of position or office automatically expire with the termination of the incumbency of the state treasury agent?
Careful examination and consideration of our statutes having to do with the department of the state treasury agent and his appointees, does not disclose language that either expressly or by implication exempts such appointees from the provisions of the civil service law. In fact the very contrary appears from the language quoted below. Nor do the state civil service statutes contain any provision which might be construed as exempting said appointees from the operation of secs. 16.01 to 16.30, Stats., inclusive.

I think the provisions of sec. 14.71, subsec. (1), Stats., constitutes a conclusive solution to your first question and that it must be answered in the affirmative. That section, so far as here material, reads:

"Except as expressly provided by law, * * * the state treasury agent, * * * is authorized to appoint such deputies, assistants, * * * or other employes as shall be necessary, * * * and to designate the titles, prescribe the duties, and fix the compensation of such subordinates, but these powers shall be exercised subject to the state civil service law, unless the position filled by any such subordinate has been expressly exempted from the operation of chapter 16 * * *.""

With your first question answered in the affirmative, it follows that the tenure of the position or office of deputies appointed by the state treasury agent does not automatically expire with the incumbency of the officer making the appointment.

In so far as the above cited opinion (V Op. Atty. Gen. 890) is in conflict with the foregoing, it may be considered as overruled.

In connection with what is said above, your attention is particularly invited to the provisions of sec. 16.30, Stats., which may reasonably be relied upon as a quite cogent reason for expecting co-operation from the appointing officer. It reads:

"(1) All officers of this state shall conform to, comply with and aid in all proper ways in carrying into effect the provisions of sections 16.01 to 16.30, inclusive, and the rules and regulations prescribed thereunder.

"(2) No appointing officer shall, select or appoint any person for appointment, employment, promotion or reinstatement, except in accordance with the provisions of sec-
(3) Any person employed or appointed contrary to the provisions of sections 16.01 to 16.30, inclusive, or of the rules and regulations established thereunder, shall be paid by the officer or officers so employing or appointing, or attempting to employ or appoint him, the compensation agreed upon for any service performed under such appointment or employment, or attempted appointment or employment, or in case no compensation is agreed upon, the actual value of such services and any expenses incurred in connection therewith, and shall have a cause of action against such officer or officers or any of them, for such sum and for the costs of the action. No public officer shall be reimbursed by the state for any sums so paid or recovered in any such action.”

HAM

School Districts—Secs. 40.50 to 40.60, Stats., provide plan or system of school administration for each city of fourth class whose territory constitutes entire school district and each city of second and third classes to end that city schools shall be as nearly uniform as practicable; territory in district outside city at time when that plan became effective was by sec. 40.51 attached to city for school purposes.

Electors residing in district outside city may vote on all school matters submitted to and voted on by city electors and may exercise such right at city polling place nearest to their respective residences without being registered.

Sec. 40.50 was modified by sec. 40.51 as to school districts including territory outside city.

March 28, 1928.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

Referring to my opinion of November 14, 1927, XVI Op. Atty. Gen. 733, you state: that the answer to question 4 of that request leads to some confusion and differences of opinion; that it appears that this opinion leads to the conclusion that secs. 40.51 and 40.52, Stats., may be made to apply to a city constituting a part only of a joint school dis-
212 Opinions of the Attorney General

trict; that there are something like one hundred and twenty-three fourth class cities in the state of Wisconsin; that of this number probably between twenty-five and thirty comprise all the territory belonging to the city school district, in other words, the boundaries of between twenty-five and thirty cities of the fourth class are identical with the boundaries of the city school district. Counting these cities out there are nearly one hundred cities of the fourth class in which the boundaries of the city and the boundaries of the school district of which the city is a part are not identical, owing to the fact that more or less of the territory belonging to the district lies beyond and outside the city limits.

You state that sec. 40.50 seems to clearly indicate that the purpose of this statute was to provide a plan of school administration for each city of the fourth class whose territory constitutes an entire school district and each city of the second and third class; that no exception is made as to whether cities of the second and third class comprise within their boundaries all of the territory of the city school district; that it occurs, however, that there are but three cities of the third class and none of the second class in which outlying territory belongs to the city school district.

You further state that the question placed before this department for consideration appears to have rested especially upon the city of Reedsburg, a city of the fourth class and part of the joint school district, a considerable portion of the school district territory lying outside of the city limits.

You refer to the answer to question 2 which is given on page 2 of the above referred to opinion and you say it seems to indicate that it is evidently the answer that results in confusion, notwithstanding it appears at variance with the lines emphasized above as found in sec. 40.50.

It is true that sec. 40.50 starts out with quite a specific provision:

"Sections 40.50 to 40.60 provide a plan or system of school administration for each city of the fourth class whose territory constitutes an entire school district, * * *"

But sec. 40.51 (1) specifically provides:
"Each city, affected by this plan, is a single and separate school district; and any territory outside of the city which is joined with city territory in the formation of a school district, when this plan becomes effective, is hereby attached to the city for school purposes."

That seems to very clearly extend the provisions of sec. 40.50 to cities of the classes named, for at the time of the adoption of that law territory outside the city constituted a part of the school district in such cities, for it specifically says that such outside territory "is hereby attached to the city for school purposes," and that, being in the nature of a specific provision, would control the general provision in sec. 40.50 in so far as it was inconsistent with it.

This construction is strengthened by the provisions of subsec. (2), sec. 40.51, which provides:

"The electors residing in such attached territory shall have the right to vote on all school matters which are submitted to or are voted on by the city electors, and may exercise such right at the city polling places nearest to their respective residences, without being required to register."

While that provision does not specify in detail how the separate vote and record of such separate vote should be kept, yet it is very clear that the intention was that the electors residing in that part of the district outside of the city should have the right to vote at the regular polling places in the city on the school questions only. So some plan would have to be devised for permitting such vote on school questions and keeping it separate from the votes on other matters in the city. The number of cities in the state of the classes named that have attached to their school district territory lying outside of the city limits would not be material in determining the meaning or the proper construction to be given to the specific provisions of the statute.

In answer to an inquiry from the clerk of school district in the city of Reedsburg, which includes territory outside of the city, I have just advised that that district comes within the provisions of sec. 40.50 and sec. 40.51 and the subsequent sections constituting that city school plan, and that city, including the territory lying outside of the city which constituted a part of the school district of the city at the time of the adoption of that plan was attached to the city for
school purposes in accordance with the provisions of sec. 40.51, and that the electors outside of the city but in the district have the right to vote on all school matters which are submitted to or voted on by the city electors and can exercise such right at the city polling places nearest their respective residences as provided in subsec. (2) of that section.

TLM

Banks and Banking—Trust Company Banks—Trust agreements cannot be substituted for securities deposited by trust company banks with state treasurer under sec. 223.02, Stats.

March 28, 1928.

C. F. SCHWENKER,

Banking Department.

With your letter of March 17 you submit a prospectus of a certain trust company dealing with their trust agreements which they propose to substitute for the security mentioned under sec. 223.02, Stats. You ask whether this may legally be done.

Sec. 223.02, Stats., provides in part:

"Before any such corporation [trust company bank] shall commence business it shall deposit with the state treasurer not less than fifty per centum of the amount of its capital stock, provided, however, that no such corporation shall be required to deposit more than one hundred thousand dollars, such deposit to be in cash, bonds, or mortgages, or notes and mortgages on unencumbered real estate within this state worth double the amount secured thereby, or federal or joint stock farm loan bonds issued under the provisions of the federal farm loan act approved July 17, 1916, or public stocks or bonds of the United States, or of any state of the United States that has not defaulted on its principal or interest within ten years immediately preceding the date of such deposit, or of any county, town, village, or city in this state, and upon all which bonds and other securities there shall have been no default in the payment of interest or principal for a longer period than thirty days; * * * ."

The material portion of the trust agreement is as follows:
"The ___________ Trust Company has this day received One Thousand & No/100 Dollars from

JOHN DOE

in trust as follows:

1. To invest and re-invest the principal fund in lawful trust fund securities and to collect the income from such investments.

2. To pay from said income to

JOHN DOE

at the office of the Trustee, 5% annually on the principal invested in Semi-annual installments of Twenty Five & No/100 Dollars, each, until the termination of the trust, the Trustee to retain annually the excess income over 5% of the fund for services and expenses as Trustee.

3. Either subscribing party or assigns, personal representatives or successors, may terminate the trust at any time after one year from date upon six months' notice by registered mail at the respective addresses shown hereon. Upon the termination of the trust the securities and uninvested and unpaid trust moneys shall be turned over to

JOHN DOE

his assigns, personal representatives or successors, provided that the Trustee shall have the option to their purchase and have assigned to it any or all such securities on payment of the cost price and any then accrued and unpaid interest thereon at 5%.

In your letter you say that you deny the right of the company to substitute the trust agreements for the securities mentioned in sec. 223.02, but that the company is very insistent that it has such right. That such trust agreements may not be substituted seems too obvious for discussion. They certainly are not cash, bonds or mortgages. They are exactly what they purport to be—trust agreements issued by a trust company and they are not listed in sec. 223.02, Stats., among the securities which may be deposited with the state treasurer.

ML
Education—Vocational Education—Sec. 41.15, subsec. (6), Stats., provides that local board of vocational education shall have power, among other things, to employ teachers in such schools subject to approval of state board of vocational education.

Action taken at special meeting of board tendering desire to re-engage teachers to school board of city is not contract of employment within meaning of sec. 41.15.

March 30, 1928.

Board of Vocational Education.

With your letter of March 17 you enclose a communication from L. H. Dressendorfer, director of vocational schools at Marshfield, Wisconsin, asking for an official opinion on two questions, which questions grow out of the following situation as stated in his letter:

"It has been customary for the vocational school board to meet on the last Friday of each month. This past month the meeting was not held on the last Friday but was called on the following Friday because the secretary of the board found it necessary to be out of the city. Notices of the meeting were written February 21 and were put in the mail on the 22nd of February. The meeting was to be on Monday Feb. 27, 1928. All of the members were notified in writing and all except Supt. Newlun received their notices. He did not receive his personally but his office girl did. Mr. Newlun left on the night of the 22nd for Boston. Before Mr. Newlun left for Boston he wrote a letter requesting that the board have no meetings during his absence out of the city. This letter was sent to Mr. Stauber who is neither president or secretary. Mr. Stauber made mention of Mr. Newlun's letter to Mr. Colvin but nothing was said about it until the meeting was opened. At this meeting all were present except Mr. Newlun. Mr. Stauber mentioned Mr. Newlun's letter and the attitude of the board was that four was more than a quorum and that they would meet and transact the business of the board.

"The minutes of this meeting are as follows: Feb. 27, 1928, 7:15 P. M. Office of the Director—Willard D. School. All members were present except Mr. Newlun. The minutes of the previous meeting were read and approved. The following bills were read—(bills listed). A motion was made by Mr. Normington that the bills read be allowed and paid. Mr. Stauber seconded this motion. The motion was carried. A motion was made by Mr. Colvin that a com-
munication be tendered the school board of District No. 1, City of Marshfield that we desire to reengage the services of Mr. Dressendorfer as director and Miss Anderegg and Mr. Ferrando as teachers for another year; as we feel that their services have been satisfactory to the vocational school board. The salaries to be adjusted jointly by the two boards. This motion was seconded by Mr. Stauber. The president of the board had the roll called and the vote was as follows: Normington—yes. Colvin—yes. Stauber—yes. Blum—yes. Newlun—absent. Motion declared carried.

You say when Mr. Newlun returned and was advised of the meeting and the action taken, he questioned the legality of the meeting because of his request and, furthermore, because the law does not mention that the vocational school board shall have regular meetings and can meet only on a call. You say Mr. Normington notified your director to call the meeting on the 27th and he called it in the manner stated. You say that the city attorney holds that the meeting was legal and you ask for the opinion of this department.

You are advised that the law does not fix the dates of meetings of the board nor specify the manner of calling meetings but leaves that to be determined by the local boards, and that should be done by a rule or by-law adopted by the board, which I assume is not the case here. You say it has been the custom of the board to meet once a month on the last Friday of the month but because of the absence of the secretary that meeting was not held and this meeting was called for the next Friday, and that notice of the meeting was mailed to each member, and all except Mr. Newlun received the notice but that he was out of the city and the notice was received at his office. You say he had requested that no meeting be called in his absence. Of course that would not prevent the other members from calling and holding a meeting if properly called. You say this meeting was properly called and you say the city attorney holds that it was.

It is difficult for us to hold as a matter of law that it was properly called in the absence of any rule of the board prescribing the manner of calling and noticing or sending notices of the meeting. If that had been done on other occa-
sions and acquiesced in by the board, that might be regarded as a rule to be followed in other cases.

Assuming, without holding, that the meeting was properly called, I do not see how we can say that the action taken by the board would be a legal employment of the teachers. The minutes say that the proceeding taken was:

"A motion was made by Mr. Colvin that a communication be tendered the school board of District No. 1, City of Marshfield, that we desire to re-engage the services of Mr. Dressendorfer as director and Miss Anderegg and Mr. Ferrando as teachers for another year * * * the salaries to be adjusted jointly by the two boards. This motion was seconded * * *," and on roll call was declared carried.

I think that comes far short of being an employment of the persons named for the year. It merely authorized the communication to be tendered to the school board of the city, expressing the desire of the board to re-engage the teachers for another year.

Sec. 41.15, subsec. (6), Stats., provides:

"The teachers in such schools shall be employed and their qualifications determined by the local board of vocational education, subject to the approval of the state board of vocational education; and subject to such approval, such local board may employ such other technical advisors and experts as may be necessary for the proper execution of its duties and fix their compensation."

Certainly this mere expression of the wish of the members of the local board that the board expressed would not be an employment of the persons named even if the state board of vocational education had affirmatively approved of such action, which seems to be necessary under the provisions of sec. 41.15 (6). This motion seems to have been directed to the local school board of District No. 1 of the city of Marshfield and, as I have stated, appears to be a mere expression of the wish of the local board. So assuming the meeting to have been regular, I do not think the action taken would be an employment of the teachers named without some subsequent action of the board consummating that expressed wish, and the approval of the state board, as provided by sec. 41.15 (6).
Bridges and Highways—County board cannot be compelled to grant aid to town for improvement of highway within town unless such highway is portion of system of prospective state highways, nor, if it is part of such system, unless town has received donations or voted tax equal to amount of aid petitioned for.

March 30, 1928.

Paul B. Conley,
District Attorney,
Darlington, Wisconsin.

At the last annual meeting of the county board of your county a petition was presented by the town board of the town of Darlington asking the county board to appropriate the sum of $500 to meet a contemplated tax of a like amount by the town for the improvement of a certain highway in the town described in the petition; such highway is not a part of the county system of prospective state highways, nor is it on the county trunk or state highway systems; the county board denied the petition; you have given your opinion that the county board is not bound to grant county aid for the improvement of the specified highway, and you ask whether you are correct in that opinion.

I concur in your opinion, first, because the road in question is not a portion of the system of prospective state highways, and, second, because at the time of the filing of the petition no tax had been voted by the electors of the town for the improvement. Conditions precedent to coercing a county board to grant county aid for the improvement of highways in a town under sec. 83.14, Stats., are (1) the highway must be a portion of the system of prospective state highways, and (2) the town must have received cash donations or voted a tax equal in amount to the amount the county is asked to appropriate; and both conditions must be complied with, otherwise, it is wholly within the discretion of the county board to grant or to deny aid. X Op. Atty. Gen. 1134.

FEB
Indians—Taxation—Personal property of Indian citizen, whether such property is situated or said citizen resides on Indian reservation, or elsewhere, within this state, is subject to taxation to same extent that personal property of other citizens and residents of state is subject to taxation.

March 30, 1928.

TAX COMMISSION.

You have submitted to the attorney general for an opinion the question of the jurisdiction of the state, and its subdivisions, to levy and collect personal property taxes on the personal property of Indian citizens of the United States and of this state residing on Indian reservations within this state where such property is located, raised in a letter of March 8, 1928, to the governor by certain chiefs and headmen of the La Pointe band of Chippewa Indians living in the village of Odanah, on the Bad River Indian reservation, and referred by the governor to the tax commission under date of March 22.

It is my opinion that the personal property of Indian citizens, whether such property is situated and such citizens are residing on Indian reservations, or elsewhere, within this state, is subject to taxation to the same extent that the personal property of other citizens and residents of the state is subject to taxation.

Lands allotted to Indians and conveyed through trusts or restrictive patents cannot be taxed by the state during the trust or restrictive period, nor can cattle, horses, and other personal property of like character, furnished by the United States to Indian allottees to enable them to maintain themselves while the land is held in trust by the United States be taxed by the state. United States v. Rickert, 188 U. S. 432. But after the removal of restrictions on alienation of the lands, or after the allottees become citizens, their lands and personalty become subject to state taxation in the same manner and to the same extent as other lands and personal property located in the state belonging to other citizens, unless it has been specifically or by clear implication exempted or reserved from taxation. Goudy v. Meath, 203 U. S. 146; United States v. Bd. of Commissioners of McIntosh Co., 271 Fed. 747; United States v.

Under the law of this state only the property of Indians who are not citizens (except lands held by them by purchase) is exempt from taxation. Sec. 70.11, subsec. (7), Stats. McGeehan v. Ashland Co., 192 Wis. 177.

Neither sec. (2), art. VI, United States constitution, nor the act of congress of June 2, 1924 (43 Stats. at Large 253) enacting that “all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States,” and “the granting of such citizenship shall not in any manner * * * affect the right of any Indian to tribal or other property,” cited by the chiefs and headmen in their letter to the governor, support the claim from exemption from personal property taxation as to Indian citizens. An Indian, having become a citizen of the United States, becomes thereby a citizen of the state within the territorial limits of which he resides. State v. Morrin, 136 Wis. 552. He thereby becomes subject to the laws of the state, including the laws relating to taxation, the same as any other citizen, except probably as to lands allotted or patented to him by the United States with restrictions on the power of alienation during the period of such restrictions.

FEB

Education—Blind and Deaf—Granting of pensions to blind and to blind and deaf persons is mandatory under conditions and qualifications specified in sec. 47.08, Stats., but amount thereof is within discretion of county board within limitations prescribed by said section.

To be entitled to aid as blind person under sec. 47.08, Stats., person must be deprived of all useful vision of eye, but it is not essential that he be totally blind.

March 31, 1928.

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

In your letter of March 20 you submit the following questions:
(1) "What is the proper construction of section 47.08 (1) and (2) (b), statutes?

(2) "If a blind person has an income of $479, is he entitled to a pension of $301, making a total of $780, or is he entitled to only one dollar?

(3) "If a person is only partially blind, able to do some little work, and able to move about, would he be entitled to a pension?"

You then state that your county clerk recently received a letter from Mr. John De Fouw, president of the Badger State Association of the Blind, enclosing him a copy of opinion of this office addressed to the state board of control, dated February 7, 1924 (XIII Op. Atty. Gen. 65). Mr. De Fouw's letter you set forth verbatim. Among other things, he says:

"Many counties seem to have the idea that the amount of pension to be given to the blind individual is optional with the county board. This, however, is a wrong idea, as the law states very plainly that the amount of pension to be given to any blind individual shall be the difference between $780 and the amount he earns in a year although the amount paid shall not exceed $360.

"Please note that the old pension law which set the maximum earning of a blind individual at $420 was changed last year in so far that it raised the maximum earning from $420 to $780 a year. or in other words any blind individual earning less than $780 a year is entitled to enough pension to make his income for the year $780, although this amount cannot exceed $360." (Italics ours.)

Some excuse for the italicized portions of Mr. De Fouw's letter may be traceable to the holding of the previous opinion of this department cited above, which opinion, in so far as the same conflicts with what is said below, is hereby overruled.

Pensions to the blind of this state were first created by ch. 283, laws of 1907 (sec. 572i, Stats.). That act authorized annual county aid of $100, in the discretion of the county board, to certain blind persons. The granting or withholding of such aid was thereby wholly within the discretion of the county board, but, when granted, the amount thereof was definite and certain, to wit: "One hundred dollars per annum, payable quarterly." So far as here material that section reads:
“Any male person over the age of twenty-one years, * * * who is declared to be blind * * * may, in the discretion of the county board, receive from the county in which such person or persons are resident, a benefit of one hundred dollars per annum, payable quarterly.”

By ch. 378, Laws 1917, said sec. 572i, Stats. was amended in several particulars, none of which are pertinent to the questions under consideration, save and except that by such amendment it was provided that such aid might be increased by “such additional aid as the county board may determine.”

It will be noted at this point that the definite and specific amount of aid prescribed by the statute remained unchanged, with the added authorization that such aid might be increased by such additional aid as the county board might, in the exercise of its discretion, determine. The language used in this amendment is quite compelling, that it was the intention of the legislature that no discretion of the county board should be exercised in respect to the amount of aid, except when aid in excess of the definite and certain amount specified by the statute was deemed by the county board to be needed by the applicant.

By ch. 81, sec. 11, Laws 1919, sec. 572i, Stats. 1917, was renumbered to be sec. 47.08, and by ch. 563, Laws 1919, said renumbered sec. 47.08 was again amended, but in particulars not here material.

A further amendment to said sec. 47.08 was made by ch. 579, secs. 1 and 2, Laws 1921. It will be observed that the entire scheme of providing aid to the blind was changed by making the granting of aid mandatory but allowing the amount thereof to be wholly within the discretion of the county board. So far as here material that section was by such amendment made to read: Said applicant “shall receive from the county * * * a benefit of not to exceed one hundred and fifty dollars per annum if blind. * * *.”

Out of the legislative phrase “said applicant shall receive from the county a benefit” there can be spelled no discretion on the part of the county board for none is left to it. The legislature thereby made its mandate upon the county board in words as emphatic and certain as might well be imagined or used. However, when we reach that portion of the act having to do with the amount of the benefit, we find the
phrase "a benefit of not to exceed one hundred and fifty dollars," which falls far short of saying that the amount of the benefit "shall be" or "equal" or "amount to" or "be in the sum of" one hundred and fifty dollars. "Not to exceed" a certain specified sum cannot be construed as meaning, in any or all events, a sum mentioned as the maximum that might be granted.

By ch. 355, Laws 1923, said sec. 47.08 and other specified sections of our statutes relating to aid to the blind, was repealed and other new sections were added to the statutes, among which is sec. 47.08, was divided into nine subsections.

The pertinent portion of subsec. (1) of said sec. 47.08 by such act, reads:

"Any * * * person * * * who is declared to be blind * * * shall receive from the county * * * an annual pension * * *. Such pension shall be an amount which when added to any amount received as an income from other sources not to exceed four hundred and eighty dollars if blind, and seven hundred and twenty dollars if both blind and deaf. In no event, however, shall any pension exceed three hundred and sixty dollars if blind and four hundred and eighty dollars if both blind and deaf."

And par. (b), subsec. (2) of said sec. 47.08 provides:

"His annual income, exclusive of any amount received under the provisions of this section, must be less than four hundred and eighty dollars, if blind, and seven hundred and twenty dollars if both blind and deaf."

Although subsec. (1), sec. 47.08 was amended by ch. 95, Laws 1927, and none of the amendments thereby made are material to the questions here involved, the same is set out verbatim so that a clearer understanding of its provisions may be had in its final phraseology. It reads:

"Subsection (1) of section 47.08 of the statutes is amended to read: (47.08) (1) 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 payable quarterly. Such pension shall be an amount which, when added to any amount received as an income from other
sources, *shall not* *exceed* *seven hundred and eighty dollars*. In no event, however, shall any pension exceed three hundred and sixty dollars, if the person receiving the pension is blind and four hundred and eighty dollars if both blind and deaf."

It will be observed from the foregoing that our present so-called blind pension law makes it mandatory upon county boards to *grant* pensions to the blind. The *amount* of such pensions are, however, to be determined by the county board, with due regard to the conditions in each individual case. The purpose of the law is to grant aid to the needy blind. In this the county board is vested with full discretion, save and except that in no case shall the pension, "when added to any amount received as an income from other sources" by the applicant "exceed seven hundred and eighty dollars," and provided further that "in no event however *shall any pension exceed three hundred and sixty dollars if the person receiving the pension is blind, and four hundred and eighty dollars if both blind and deaf," and provided still further by subsec. (2), par. (b), that:

"His annual income, exclusive of any amount received under the provisions of this section, must be less than four hundred and eighty dollars if blind, and seven hundred and twenty dollars if both blind and deaf."

Answering your second question, you are advised that because the blind person therein mentioned has an income of only four hundred and seventy-nine dollars it is mandatory that the county board, in acting on his application, grant him a pension which, when added to his income, *shall not exceed* seven hundred and eighty dollars, the *amount* thereof to be fixed by the county board. He is not entitled as a matter of *right* to an amount which, when added to his income shall "be" or "equal" or "amount to" the sum of seven hundred and eighty dollars. As a matter of right he is entitled only to such amount as the county board may determine, such amount so fixed, when added to his income, "shall not exceed seven hundred and eighty dollars." In this connection it will be observed that the legislature has attempted no voice in the *amount* of pension to be granted to the needy blind, except to place a maximum limitation upon the generosity of county boards.
Your third question has heretofore been passed upon by this department, in an opinion dated January 12, 1917, addressed to the district attorney at Wausau and may be found in VI Op. Atty. Gen. 39, wherein it was held that to be entitled to aid as a blind person under sec. 572i, Stats. 1915 (now sec 47.08), a person must be deprived of all useful vision of the eye, but it is not essential that he be totally blind. What is there said is now reaffirmed and adopted as a full and complete answer to this question propounded by you.

HAM
Insurance—Public Officers—Deputy Oil Inspectors—Malfeasance—Deputy oil inspector is not denied right to engage in other business activities, save and except those specified in sec. 168.11, Stats.

April 2, 1928.

FRANK KERSTEN, Supervisor,
Inspectors of Illuminating Oils.

Reference inquiry propounded to you by Carl R. Thye, cashier of Bank of Dresser Junction, under date of March 26, as to whether or not deputy oil inspectors may, while holding such office or position, engage in soliciting or selling insurance, you are advised as follows:

In denying oil inspectors the privilege or right to engage in other remunerative activities during their terms of office, sec. 168.11, Stats., confines itself to trafficking, "directly or indirectly, in any oil used for illuminating or heating purposes or to be interested in any manner whatever in the manufacture, refining or sale of such oil * * * ."

Violation of said section subjects the offender to immediate removal from office and a fine of not less than one hundred dollars nor more than five hundred dollars, provided, however, that such provision in regard to dealing in oil shall not apply to deputies whose inspections, during the term of one year, shall not exceed fifteen hundred barrels.

Other than the foregoing quoted statutory prohibition upon oil inspectors engaging in business outside of their official duties, there are none that diligent search discloses, and so long as other business activities that they may see fit to engage in do not detract from a faithful performance of their duties to the state, no reason is observable for denying them that right.

HAM
Automobiles—Taxation—Motor Vehicle Fuel Tax—Every dealer in gasoline is required to report to state treasurer all sales of gasoline in state and pay license tax thereon; for failure to do so he is subject to penalties prescribed.

State treasurer must enforce collection thereof.

Question of right of seller to refund or power or duty of treasurer to repay any part of license tax under provisions of law should be passed upon in each case when claim is presented, based upon showing made.

April 2, 1928.

Solomon Levitan,
State Treasurer.

You have submitted several questions as to the construction and constitutionality of certain provisions of ch. 78, Stats., imposing a license tax upon motor vehicle gasoline in this state, and you also enclose a letter from Geo. D. White, of the Valvoline Oil Co., Chicago, Illinois, which advises you:

"Our competitors in Beloit are collecting no gasoline tax inside the city limits and we followed suit. Inasmuch as we collect no tax we don't see why we should remit any to the state. This is the attitude we are going to take, though your state legislature by its recent amendment would seem to expect that we pay the state and then ask for a refund. We figure that since no tax is collected there is none to remit. What do you think about it?"

We understand this letter from Mr. White refers to his competitors in what is called South Beloit, which is located in the state of Illinois, and of course, you have nothing to do with the enforcement of the laws of Illinois by Illinois officials. Our law very clearly requires you to collect the usual tax from all persons selling gasoline in this state. Mr. White is selling gasoline in this state and of course, comes squarely within the provisions of the law requiring him to report and to pay the license tax the same as any other person selling in this state, and he seems to understand that law and that requirement. If he fails to make the report and payment in the manner provided by law, he is subject to the penalties therein provided, and it is your duty to enforce collection of both the license tax and the penalty.

As to his right to collect any part of the amount of tax
and your duty or power to refund it, that is a question that you are not now confronted with and you will be advised on that on each claim when it is presented, so we can pass upon the particular situation in each case, to enable you to perform your duty under the law.

TLM

Appropriations and Expenditures—Optometry—Board of Examiners in Optometry—Wisconsin board of examiners in optometry has no authority to use accumulated funds in state treasury for purposes of enforcing optometry law.

April 2, 1928.

T. O. F. Randolph, Secretary,
Board of Examiners in Optometry,
Burlington, Wisconsin.

You inquire of this department “whether the secretary of the optometry board may use the funds now in the state treasury that have accrued from the annual renewal license fees, for expense and per diem, in an effort to enforce the present optometry law.”

Ch. 153, Stats., on optometry, contains the power and authority of the Wisconsin board of examiners in optometry. Authority for its activities will have to be found in that chapter.

A careful reading of the sections in the above chapter fails to disclose authority necessary for your board to engage in a program of law enforcement. I might add that you will therefore have to rely upon the regularly constituted officials for prosecution of violations of the optometry law. Sec. 153.07, Stats., in part, specifically states that the district attorney shall prosecute.

You are therefore advised that your board may not use accumulated funds in the state treasury for purposes of enforcing the optometry law.

FWK
Automobiles—Law of Road—Out-of-state student coming here merely for purpose of attending school and retaining residence of his own or with his parents in foreign state, having definite and present intention of returning to his residence out of state, is nonresident as term is used in sec. 85.33, subsec. (8), Stats.

April 3, 1928.

B. W. Huiskamp,
Assistant District Attorney,
Madison, Wisconsin.

You inquire of this office whether “a student of the university of Wisconsin who lives here nine months or more of the year” is a nonresident within the meaning of sec. 85.33, subsec. (8), Stats., dealing with the exemption of nonresidents from obtaining operators’ licenses for motor vehicles.

Sec. 85.33 is the drivers’ license section placed upon the statutes by the legislature of 1927. Subsec. (8) thereof reads as follows:

“The provisions of this section shall not prevent any nonresident operating a motor vehicle upon the public highways of this state, unless he be convicted of any offense for which any license may be revoked, when such persons shall thereafter be subject to and required to comply with all the provisions of this section.”

In substance you inquire whether out-of-state students at the university qualify as nonresidents or whether they should be required to procure operators’ licenses.

The term “nonresident” has previously been construed by this department as used in this same chapter and pertaining to the requirement of a nonresident to license motor vehicles driven in this state. The opinion is found in V Op. Atty. Gen. 635–636, and is in part as follows:

“It is true, of course, that the question of residence is largely a matter of intention accompanied by actual habitation in the state. One who comes into this state and establishes here a place of abode, with the present intention of remaining here indefinitely or without a present intention of going elsewhere, becomes a resident. One, however, who comes here with the intention of remaining temporarily only for some temporary purpose and with the intention of
returning to the state from which he comes, does not become a resident of this state but remains a resident of the state from which he comes and to which he intends to return.

"Of course the mere statement of a person is not conclusive as to his intention. This may be gathered as well from his acts, the nature of the business in which he is engaged and other facts and circumstances. While no particular lapse of time is necessary for a person coming here in this manner to acquire residence, sometimes the length of time which he has been here is a circumstance bearing upon the question of intention."

As the term “nonresident” is used in the fish and game law, the following interpretation was given and is found in VI Op. Atty. Gen. 440, 441:

“This statute speaks of nonresident males. A nonresident is one who has his residence in some other place than the state of Wisconsin. This statute does not speak of state citizenship nor of electors of this state. An elector is required to have a residence in this state for one year before he becomes a real elector or a person who is permitted to vote. A resident is one who has his residence in this state. That is established as soon as a party leaves another residence outside of this state and moves into this state and establishes his home here, with the intention of staying here permanently. It does not require any length of time before a residence is established; it may be established simultaneously with the establishment of a location in the state."

Dealing with the question of residence as a qualification for voting, our supreme court, in a number of decisions growing out of the question whether or not students attending the university might vote in Madison, found it necessary to group such students into classes:

“Attendance at an institution of learning for the sole purpose of acquiring an education is not of itself sufficient to establish the student’s residence and entitle him to vote at that place. In such case much weight must be given to the fact that the student still depends upon his family for a home or for means of support; and a student who registers as coming from the place where his parents reside and to which he returns during vacations and who is dependent in part at least upon that home for his support is not entitled to vote at the location of the school. Seibold v. Wahl, 164 Wis. 82, 159 N. W. 546.” Wis. Anno., sec. 6.51.
The court found another class of students represented by the type:

"* * * An entirely self-supporting student came from a distant state where his parents resided, but who had been emancipated from them and had voted elsewhere than at their home, registered as a resident of Madison and fixed his habitation there with no present intention of removing therefrom and on the contrary with the intention, whenever he is absent, of returning thereto. Asbahr v. Wahl, 164 Wis. 89, 159 N. W. 549." Wis. Anno., sec. 6.51.

Still a third class:

"A student came to Madison to attend the university law school. He registered from another place in the state where his parents lived and where he spent his last vacation. He had taught school several years in another city away from his parents' home and had voted there. His expenses were paid partly by his own earnings and partly by borrowing from his father whom he was obligated to repay. Held, entitled to vote in Madison and that his attendance at a Chicago law school for a part of a year did not break the continuity of his residence in Madison. Gross v. Wahl, 164 Wis. 91, 159 N. W. 549." Wis. Anno., sec. 6.51.

The fourth class dealt with strictly out-of-state students:

"A student who came to Madison solely to attend the state university, registering from a foreign state, where his parents reside and where he spends a part of his vacations, and whose expenses are partially paid by his father, is not a resident of Madison, within the meaning of this section, and hence not entitled to vote there. Wadsworth v. Wahl, 164 Wis. 93, 159 N. W. 550." Wis. Anno., sec. 6.51.

It will be seen that what applies to one student may not apply to another. Consistently with previous opinions, it would seem that an out-of-state student coming here merely for the purpose of attending school, and retaining a residence of his own or with his parents in a foreign state, having a definite and present intention of returning to his residence out-of-state, is a nonresident as that term is used in this statute.

FWK
Corporations—Co-operative Associations—Not more than ten per cent of common stock of co-operative association may be recalled during period intervening between any two regular stockholders' meetings; such right is not cumulative.

April 3, 1928.

J. H. Vint,
Commissioner of Markets.

In your letter of March 24 you refer to sec. 185.081, Wis. Stats., providing, among other things, that a co-operative association may reserve to its board of directors the right to recall for value the stock of any stockholder, "subject to the limitation that not more than ten per cent of the common stock may be recalled by the board of directors during the period intervening between any two regular stockholders' meetings * * *"

You ask whether the right to recall the common stock, under the quoted limitation, is cumulative. For example, if the board of directors does not recall any of the common stock during the period intervening between the first two regular stockholders' meetings, has it the right to recall twenty per cent of the common stock during the next intervening period, and so on?

Unless such construction would be inconsistent with the manifest intention of the legislature, all words and phrases contained in the statutes are to be construed and understood according to the common and approved usage of the language. Sec. 370.01, subsec. (1), Wis. Stats. This provision does not prevent the court from enlarging or restricting the commonly accepted meaning of a particular word or words where that becomes necessary to give effect to a plainly declared legislative purpose, but the court will not extend a statute by construction where there is no express legislative intention to guide it. Estate of Spooner, 172 Wis. 174. When the words of an act are in clear and precise terms, and its meaning is evident and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning the words naturally present, or going elsewhere in search of conjecture in order to restrict or extend the act. Brightman v. Kirner, 22 Wis. 54.
The language of the statute here under consideration is in clear and concise terms. Not more than ten per cent of the common stock of a co-operative association may be recalled during a designated period, clearly and concisely described as the period intervening between any two regular stockholders' meetings. The natural meaning of the period thus described is self-evident, and it is equally self-evident that during any such period the ten per cent limitation applies. The period intervening between the first and second regular stockholders' meetings, or the period intervening between the second and third regular stockholders' meetings, or the period intervening between the nineteenth and twentieth regular stockholders' meetings—each is a period to which the ten per cent limitation applies according to the natural meaning of the provision. To adopt the "cumulative" construction suggested by your question would do violence to the language of the statute, would be to hold that the statute means something different from what it says. No reason is perceived for such a strained interpretation.

Your question is therefore answered in the negative.

FCS

Mortgages, Deeds, etc.—Public Officers—Notary—Acknowledgment of deed before notary public of another state does not need to have added date of expiration of commission of notary.

April 5, 1928.

G. ARTHUR JOHNSON,
District Attorney,
Ashland, Wisconsin.

In your letter of March 27 you say you have advised the register of deeds of your county that according to secs. 137.01 and 235.24, Stats., it is not necessary when a deed is acknowledged in another state that the date of the expiration of the notary public's commission be stated, and you say the register of deeds and some attorneys do not agree with your opinion and you ask for the opinion of the attorney general.
I agree with your opinion. Sec. 137.01, subsec. (4), says:

“All certificates of acknowledgments of deeds and other conveyances, or any written instrument required or authorized by law to be acknowledged before any notary public within the state of Wisconsin, shall be attested by clear impression of the official seal of said officer, and in addition thereto shall be written or stamped the day, month and year, when the commission of said notary public will expire.”

That last clause, requiring the expiration of the commission of the notary to be added, was not in the law formerly and is now required only because of that express provision, but you will notice it is required only where the acknowledgment is taken before any notary public within the state of Wisconsin. Sec. 235.24 has no similar provision where the acknowledgment is taken before a notary public of another state as provided in sec. 235.23, if the acknowledgment is taken according to the laws of that state.

TLM

Civil Service—Rule XI, sec. 3, of civil service commission, made under provisions of 16.22, Stats., cannot apply to appointment of deputy game wardens, oil inspectors, and deputy treasury agents; persons so appointed cannot recover their salaries from state but persons appointing them are liable therefor.

April 6, 1928.

A. E. Garey, Secretary and Chief Examiner,
Civil Service Commission.

You ask if there is any authority in the state civil service law for par. 3 of rule XI of the rules of the civil service commission and, if not, whether the rule is void.

That rule provides:

“In certifying from the eligible list for deputy game warden, oil inspectors and deputy treasury agents, where the service is confined to a locality, the secretary of the commission shall upon request of the appointing officer, give preference in certification in their order of eligibility to the person or persons residing in the district in which the service is required.”
You are advised that I find no authority in the law for such a rule for appointing the officers named. That rule seems to be based upon the special provision in sec. 16.22 for filling vacancies in labor classes. That provision has no reference to positions like those mentioned here, coming under the provisions of sec. 16.18 of the competitive class, which must be made in accordance with the provisions of that section. The law authorizes the commission to make rules but that would be to aid in carrying out the provisions of the statutes and not to violate the provisions of the statute. It is my opinion there is no authority for making this rule applicable to the competitive class of positions as specified, and for that reason it would be void, although under the provisions of sec. 16.30, subsec. (3), provision is made that if any person is appointed contrary to the provisions of secs. 16.01 to 16.30 or of the rules and regulations established thereunder he shall be paid by the officer or officers so employing or appointing or attempting to employ or appoint the compensation agreed upon for any service performed under such employment or appointment. That evidently was intended to prevent the person so attempting to be employed or appointed from recovering the salary for services rendered from the state and to make the person so unlawfully appointing the person liable for his compensation while he was permitted to work under such pretended appointment or employment, but, the employment being unauthorized, he should and could be dismissed at any time by the person appointing so as to prevent personal liability for the salary or wages of the person so wrongfully appointed.

TLM
Public Officers—County Board—County Highway Committee—Inspector of County Highway Work—Member of county board cannot be employed as inspector of county highway work; member of county highway committee who is member of county board comes within that rule.

April 11, 1928.

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

You request an opinion of this department on the following questions:

1. Whether a member of the county board can be appointed as an inspector by the county highway committee and the county highway commissioner in construction work done for the county.

2. Whether a member of a county highway committee can be appointed as an inspector by the county highway committee and the county highway commissioner, the member of the highway committee being a member of the county board. You have cited opinions of this office in X Op. Atty. Gen. 416, XII Op. Atty. Gen. 141, 193, XV Op. Atty. Gen. 454, also sec. 348.28 and sec. 66.11, subsec. (2), Stats. You say you are of the opinion, first, that no member of a county board has the right to be an inspector and no member of a county highway committee has a right to become an inspector because the county board directly or indirectly is responsible for the remuneration for such a member of the board and you think as to question number 2, that could not be done because a member of the county highway committee is responsible for fixing the salary through the county highway commission, or in other words, the county highway commissioner is under the immediate direction of the county highway committee and it is your opinion that no member of the county highway committee can serve as inspector for road work done for the county.

Under the opinions of this department in X Op. Atty. Gen. 416 and XII Op. Atty. Gen. 353, I agree with you that a member of the county board is ineligible to be employed or appointed as an inspector for such county highway road work. Those opinions hold that a member of a county
board is ineligible as a patrolman on a county highway and for the same reason I think he could not be employed or appointed as an inspector on such work, and the fact that he was a member of the highway committee would not change the rule.

Sec. 66.11 (2) specifically provides that no member of a county board shall, during the term for which he is elected, be eligible for any office or position which, during said term has been created, or the selection to which is vested in said board. Under the opinions of this office referred to, the appointment, selection or employment of such inspector is in the county board and must be exercised either by the county board directly or indirectly by some committee or officer authorized or instructed to make such employment, so that it would come squarely within the provisions of sec. 66.11 (2), prohibiting any member of the county board from appointment or employment in a position "the selection to which is vested in such board." I think the reasons for that rule apply to this situation because if the member of the county board which fixes the number of such inspectors and the compensation to be paid for such services could hold such position, he would be interested in both an increased number of inspectors and increased compensation to be paid therefor, for he would be fixing his own compensation. This I think is contrary not only to the spirit of the law but to the letter of the law and its expressed prohibitions.

TLM

Public Officers—County highway committee may construct machine shed by day labor under its supervision without advertising for bids or letting contract.

April 11, 1928.

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

The material facts contained in your letter of March 30 are as follows:

The county board of your county has authorized the county highway committee to erect a machine shed at a cost not to exceed $10,000. The committee desires to pur-
chase necessary materials and to have the work done by day labor under its supervision. You inquire whether the building may be constructed in accordance with the plan of the county highway committee, or whether it is necessary to advertise for bids and let a contract for the construction work.

Subsec. (6), sec. 82.06, Stats., confers on the county board the power to delegate the construction of buildings to the county highway committee. There is no statutory provision requiring the county board to advertise for bids for the construction of county buildings. Neither is there any provision requiring the county highway committee to advertise for bids. In my opinion, therefore, the county highway committee may proceed with the construction of the building by day labor under its supervision.

SOA

Insurance—Company when it issues insurance policies for term of years is required to collect and have on hand premiums for full term of policy contract in conformity with provisions of 201.14, subsec. (3), Stats.

April 11, 1928.

M. A. FREEDY,
Commissioner of Insurance.

I am handed your findings and authority issued on the hearing of the complaint of Fred R. Scobie, agent of the Fidelity–Phenix Insurance Company of New York against the Minnesota Farmers Mutual Insurance Company of Minneapolis, Minnesota and its agent, H. L. Cornelison, also the brief of the attorneys for the Minnesota Farmers Mutual Insurance Company, claiming that the order of the commissioner requiring the company to collect and have on hand premiums for the full term of policies issued for a period of years is unauthorized. I have also the opinion of the attorney general in XVI Op. Atty. Gen. 596, in which he confirms your order by answering your questions by "yes" and "no" on the questions submitted. I have also the brief of the attorneys for the insurance company criticising
your order and the opinion of the attorney general. I am asked to make further report on the premises.

I fully agree with your findings and order and with the opinion of this office referred to and as your findings and order state the reasons for your determination, I see no reason why the answers in the opinion of this office by "yes" and "no" to each question does not give the company all the information needed to carry out the provisions of your order, and the theory of and reasons for your order and determination have evidently not been misunderstood by the company as appears from the arguments in the brief of counsel submitted, which has to do with the construction of sec. 201.14 and especially of subsec. (3) of that section as construed by the insurance commissioner, requiring the company to collect and have on hand premiums for the full period of the policies issued for more than one year. Counsel for the company claim that provision applies only to the policies issued to enable the company to commence business. I cannot agree with that theory of the law.

I think the provisions of that subsection must be construed with reference to the reason for and the purpose of the provision requiring premiums to be collected and on hand for the full policy period, whether for one year or more than one year, because the reason for the payment is to furnish the financial responsibility for the protection of the policyholders. Certainly a mere promise in an application for the policy that the insured would each year pay the annual premium for the full term of the policy would, in many cases, be no financial responsibility to the company because the insured would in many cases be financially irresponsible and no collection could be enforced against him. The company would not only have on hand the premium for such greater period, but could never collect it from the irresponsible members, so it would not be an asset at all, and that would work a fraud upon other policyholders who might be induced to join the company upon the theory that the company had on hand premiums equal to the policy contracts of the company.

I see no reason for changing the findings and order of the commissioner and do not think it should be done under
the specific provisions of the statute, which were made for
the protection of all of the policyholders in the company.

One of the objects of a long term insurance contract
policy is to enable the company to give to the insured a re-
duced premium because the full premium is paid in advance,
which enables the company to earn an income on such ad-
vanced premiums. I think the advance premiums should
be for the term of the policy contract. So you are advised
not to change your former order.

TLM

C. J. KREMER,

Dairy and Food Commissioner.

You request this department to advise you, (1) whether
you "may lawfully withhold renewal of license to operate
a cheese factory if applicant has a record of making unlaw-
ful products in such factory and if it does not appear that
factory during life of the license so renewed is intended to
be and is used to make lawful cheese only."

You also inquire, (2) whether you are authorized by
subsec. (1), of sec. 98.06, Stats., to prescribe as part of the
rules and regulations under which a cheese factory license
is issued, "that it must appear that lawful products are to
be made therein and that manufacturing unlawful cheese
will be cause for voiding or refusing to renew license."

Our answer to both of your questions is in the affirma-
tive. Subsec. (1), sec. 98.06 authorizes you to grant a li-
cense to operate a cheese factory, where license shall be
granted according to your rules and regulations. Such
rules and regulations are restricted to be reasonable. Sub-
sec. (9) authorizes you to "suspend or revoke" such license
if licensee fails to comply with one of the rules or regula-
tions. Sec. 98.02 makes it the duty of the dairy and food
commissioner to enforce the laws regarding production,
manufacture and sale of cheese having an illegal moisture content. Clearly, your proposed rule is a reasonable one and may be incorporated in your rules and regulations. Having prescribed it, you have specific authority “to suspend or revoke any license if the licensee fails to comply” with such rule or regulation.

FWK

Automobiles—Constitutional Law—Taxation—Motor Vehicle Fuel Tax—Sec. 78.095, Stats., is attempt to authorize refund of gasoline license taxes paid by dealers in towns, villages and cities any portion of whose territory abuts on boundary line of adjoining state, under conditions and in manner there specified.

It is unconstitutional and void as denying equal protection of laws and does not authorize state officers to refund any portion of such fees.

April 11, 1928.

Solomon Levitan,
State Treasurer.

Under date of April 2, XVII Op. Atty. Gen. 228, I advised you that under the provisions of ch. 78, Stats., it is your duty to collect a license tax from all dealers in gasoline as required by that law. I did not advise upon the constitutionality of sec. 78.095 in that opinion because the right to a refund of the license tax paid under the provisions of that section would not justify a dealer in a city whose territory abuts on the boundary line of the state in refusing to pay the tax upon the theory that he would be entitled to recover back if paid and for that reason he would not have to pay the tax because I thought that question should not be passed upon until the license tax had been paid and the application made for a refund. You now advise that the license taxes have been paid and applications have been made for a refund under the provisions of sec. 78.095 by dealers whose territory abuts on the boundary line of an adjoining state, so you are now entitled to an opinion as to your duty under the provisions of that law.

You are advised that it is the opinion of this office that
Opinions of the Attorney General 243

sec. 78.095 is unconstitutional and void and would be no protection to you in refunding the license taxes paid in the cities, towns or villages described in that section. We think by that law the state has denied to persons within its jurisdiction the equal protection of the laws within the prohibitions amendment XIV of the United States constitution. A dealer in a city near the state line but not abutting upon the boundary, would bear the same relation to the dealers in an adjoining state and if he was located in a city on a principal through highway, he might be injured more by the competition in the adjoining state than the dealer in a small city whose territory abutted upon the state line. So the persons so located would not receive the equal protection of the law within the constitutional requirements, and for that reason that section is unconstitutional and void. But we do not think that affects the constitutionality or the validity of the other provisions of the law, which clearly require the license tax to be paid by all dealers and the right of a state to impose a gasoline license tax for the maintenance of its highways is now recognized and held to be valid and constitutional by the United States courts and most of the state courts. We will not at this time attempt any review of the court decisions on the right of a state to impose a license tax on the sale of gasoline in the state, but refer you to an article published in No. 6, Vol. XXVI, Bulletin of the University of Kansas, March 15, 1925. The article is prepared by Edmund P. Learned and is an extended review and brief of the decisions on both sides of the question, and, I think, justifies our gasoline tax law, except this refund provision.

TLM
Public Officers—County Board—Assistant Fireman—
Subsec. (2), sec. 66.11, Stats., does not prohibit selection of A. for position created by county board while A. is member but during previous term, selection of whom is not made by county board.

April 11, 1928.

Lewis W. Powell,
District Attorney,
Kenosha, Wisconsin.

You state that in January, 1925 the Kenosha county board created the position of assistant fireman, part of whose duties was to take care of the lawn for the court house, and whose appointment is not made by the county board but by the county agent. Mr. A. was a member of the county board when the job of assistant fireman was created; he has been a member of the board ever since, having been several times re-elected. You inquire whether, in view of subsec. (2), sec. 66.11, Stats., Mr. A. may resign from the county board and thereafter accept the appointment of assistant fireman. The question is not raised whether both positions may be held. This opinion is, therefore, limited to a consideration of Mr. A.’s first resigning from the county board and then accepting the job.

Subsec. (2), sec. 66.11 reads in full as follows:

“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.”

Two considerations must be kept in mind: First, Mr. A. may not take the office during his term as member of the county board in which term the position was created. The term in which the office was created has, however, expired and Mr. A. is now serving his second or third term since then. Sufficient time has elapsed to remove this disqualification.

The second consideration is that A. may not take the position if the appointment or selection is made by the county board. You state the selection is not made by the county
board but by the county agent. The method of selection, therefore, does not constitute a disqualification.

It follows, on the basis of facts presented by you, there is no legal objection to Mr. A.'s resigning from the county board and accepting the position of assistant fireman.

FWK

Charitable and Penal Institutions—Public Officers—Board of control has no power to make order to stop courts from making commitments to state public school at Sparta because of epidemic of scarlet fever in said institution.

April 12, 1928.

BOARD OF CONTROL OF WISCONSIN.

You require under date of March 1 whether this board has a legal right to order further commitments to the state public school at Sparta because of the following conditions:

1. The institution is without further facilities for providing proper care for children committed to that institution. The rated bed capacity of the institution is 357 and on January 31 there were 450 children being cared for at the institution.

2. There is at present a rather widespread epidemic of measles and further there is what appears to be the beginning of an epidemic of scarlet fever, as five cases have been discovered already and it is anticipated that more cases will come.

I know of no statutory authority which gives you authority to make such orders. In the absence of any authority the courts of this state who have power to commit children to that institution may do so and you have no power to stop them. Of course, the institution may be quarantined by the health department and then no person can enter into the building after such quarantining, even though he has been committed to such institution. Whatever remedy you may have to meet such emergencies, it is not by making an order to stop commitments to such institutions.

JEM
Taxation—Tax Sales—Erroneous description of land delinquent in taxes in published redemption notices does not affect groundwork of tax within meaning of sec. 75.22, Stats.; county is under no legal liability to refund payments made for tax certificates and for tax deed containing same description as in redemption notices.

April 12, 1928.

Edward Meyer,
District Attorney,
Manitowoc, Wisconsin.

The material facts presented in your letter of April 2 are as follows:

The county treasurer of your county sold to one N certain tax certificates on three tracts of land in your county. Upon application the county clerk gave to N tax deeds. Subsequently it was discovered that the county treasurer had inserted erroneous descriptions of two of the parcels of land in the redemption notices published by him. The tax deeds contained the same description as the redemption notices. The county clerk has inquired of you whether it is possible to remedy the situation. You state that in your opinion subsec. (2), sec. 75.14, Stats., authorizes the county treasurer to correct the descriptions, to readvertise and to sell the tracts of land. You inquire whether the county treasurer is legally bound to refund to N the amount paid on the tax certificates.

Your question is answered in the negative. Sec. 75.22, Stats., provides that if after sale or conveyance of any land sold for nonpayment of taxes and within the time prescribed it shall be discovered that the sale or certificates issued thereon was invalid, the county board shall make an order, directing that the money paid for such certificate on the sale shall be refunded to the purchaser. The statute, however, provides:

"* * * 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."
Sec. 75.22 was created by ch. 215, Laws 1897. Prior to 1897 counties were made liable for all mistakes in the issuance of tax deeds. IV Op. Atty. Gen. 1007.

The enactment of ch. 215, Laws 1897, was designed to protect the counties against all mistakes "not affecting the groundwork of the tax." Hence, the sole question here involved is whether the mistake of your county treasurer was such as to affect the groundwork of the tax.

In IV Op. Atty. Gen. 1007, 1010, it was held that sec. 75.22 authorizes the counties to refund only in those cases where there is some defect in the assessment of a tax; that is, that the phrase "groundwork of the tax" means nothing more then defects in the assessment. See V Op. Atty. Gen. 715; X Op. Atty. Gen. 354.

In the case presented by you there was no defect in the assessment of the tax. It follows, therefore, that under sec. 75.22, the county is under no liability to refund to N the amount paid for the tax certificate.

SOA

Bridges and Highways—Town Highways—Where county trunk highway originally located on irregular town highway is straightened by county by relocation, and portions of old highway not included in relocation are abandoned, town board has power to vacate or discontinue such old portions of road.

John A. Thiel,  
District Attorney,  
Mayville, Wisconsin.

You state that in 1922 county trunk G from Beaver Dam to Lowell was located by the county board of Dodge county upon a town highway as indicated upon an accompanying diagram; the road was very irregular, having many turns, and in 1923 it was relocated by the county so as to extend approximately in a straight line from the old termini; during 1923 and 1924, while the relocated road was being permanently improved, the county did not patrol the parts of the old road to be abandoned except by the use of a road
scraper to keep it fit for travel while the new road was being built; portions of this old road which are no longer a part of the county trunk highway have been vacated by the town board, on the ground that such portions are unnecessary to be kept open as a highway and the discontinuing of the same does not deprive the owners of land of access to the public highway; claim has been made that the vacation or discontinuing of such portions of the old road is invalid because of the provision contained in sec. 80.02, Stats.:

“No town board shall discontinue any part of a state road, nor alter or discontinue any highway laid out by the county board, or any highway that shall have been improved by the county board with county funds, * * *.”

You ask whether the discontinuance of the portions of the old road not now a part of the county trunk highway was within the powers of the town board.

The answer, I think, is in the affirmative.

When the relocation was made by the county and the relocated county trunk highway opened for travel, there was an abandonment of those portions of the old road which are not a part of the relocated highway, and that in itself would take such old portions out of the prohibition of the statutes referred to even if the county had previously improved such portions; moreover, under your statement of facts, the county had never improved portions of the old road in question within the meaning of the statutes, as the mere patrolling of the old road to make it fit for travel during the time that the new road was being prepared for improvement and being improved was not an improvement of the old road. *State ex rel. Schroeder v. Behnke, 166 Wis. 65; X Op. Atty. Gen. 763.*

FEB

Public Health—Plumbing—Changes in state plumbing code by amending Rule No. 1 and creating and adding Rules 12, 13, 14 are authorized by statute.

April 13, 1928.

Board of Health.
You state that your board, in pursuance to subsec. (3), sec. 145.03, Stats., adopted rules governing the examina-
tion and licensing of master and journeyman plumbers, which are known as rules 1 to 11 inclusive of the state plumbing code. You state that it is contended by master and journeyman plumbers, the apprenticeship department of the industrial commission, and state and local vocational schools that the present rules governing the examination and licensing of plumbers are inadequate to meet the present-day needs and vocational school requirements, and therefore have requested that they be amended by modifying Rule 1 by striking out the word "helper" wherever it appears and inserting the word "apprentice" in lieu thereof and by adding Rules 12, 13, and 14. The proposed changes are as follows:

"Rule 1, is amended by striking out the word 'helper' wherever it appears and inserting in lieu thereof 'apprentice,' and by adding at the end of the first paragraph the following:

"The term apprentice as used in this rule denotes also plumbers’ helpers and learners actually engaged in learning the plumbing trade in conformity with the law and regulations governing. It is understood that the three-year apprenticeship means actually working at the trade of plumbing and in a manner so as to acquire sufficient knowledge of the theory and practice of plumbing and skill to pass an examination and to be useful to the employer and public.

"Rule 12. Registration of Apprentices. On and after ______ 1928, to establish a record of his beginning an apprenticeship every plumbing apprentice, indentured apprentice or learner who contemplates filing application for plumber's license shall within 30 days after beginning of such apprenticeship register with the state board of health on a blank furnished by said board, setting forth the date on which such apprenticeship was begun, age, by whom employed, and such other information as the board may require, and which registration shall constitute a record of his apprenticeship and of his right to file application for examination and license, subject to the provisions of the application and sworn statement required in application for license. All such apprentices and learners in training before ______ 1928, shall so register within 30 days after said date.

"Rule 13. Governing Apprentices and Learners. During his apprenticeship the plumber's apprentice shall receive instruction and experience in all branches of plumbing, including the preparing of material for installation as
is necessary to develop a practical and skilled mechanic, versed in the theory and practice of plumbing.

"In cities where public vocational schools giving a course in plumbing are established, or where plumbing instruction is otherwise available, the applicant for license shall, if opportunity for such instruction exists, attend school for a period of not less than 400 hours. Where vocational schools are not available the learner should take a course in plumbing with a correspondence school certified by the board.

"To enable him to qualify at the end of his apprenticeship as a skilled mechanic in the art of plumbing, the apprentice shall in addition to experience and instruction received during the apprenticeship, be given opportunity to assist in and to install plumbing materials as his skill will permit under the supervision of a journeyman or master plumber.

"In all cities where public vocational schools are established, giving a course in plumbing instruction, apprentices indentured by the Industrial Commission shall as a condition for filing application for license attend such school for the period prescribed in the indenture contract.

"School attendance must be vouched for by the plumbing instructor of said schools.

"Rule 14. Revocation of License for Violation of Indenture. A journeyman plumber's license issued to an indentured apprentice shall, until his contract of indenture has been completed, be subject to revocation upon recommendation to the industrial commission and upon due notice and hearing by the board or the state health officer, for wilful violation of the contract or termination of said contract without approval by the Industrial Commission. The license shall bear evidence to this effect until contract has been completed."

You inquire whether you have the authority to adopt these regulations. I have carefully considered these changes in the rule and believe they are reasonable and authorized by sec. 145.03, subsec. (3).

JEM
Opinions of the Attorney General

Civil Service—Public Officers—Veterinarian in United States Department of Agriculture—Veterinarian employed in U. S. department of agriculture cannot be employed by state unless he has qualified under civil service law of state.

April 13, 1928.

W. A. Duffy, Commissioner,
Department of Agriculture.

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

Dr. Healy, who is in charge of the local office of the bureau of animal industry of the U. S. department of agriculture, reports that operation funds for his office are practically exhausted, and, for that reason, it is necessary for the federal government to transfer, temporarily, two veterinarians from Wisconsin territory to some other state. These two veterinarians are at present testing cattle for bovine tuberculosis in Wisconsin, under supervision of the federal government. Sufficient funds to carry the two veterinarians will probably again be available on July 1, 1928, but if they are transferred to some other state, they may not be transferred back to this state. You desire to place these two men on the state pay roll from March 1 to July 1, at $200 per month, the federal government to pay their expenses during this period. The veterinarians to whom you refer have not qualified under the civil service law of the state of Wisconsin.

You inquire: (1) whether the state may employ the two veterinarians; (2) whether it is necessary for the veterinarians to qualify under the civil service law in order to be employed in this state; and (3) what procedure may be following in order to place the veterinarians on the state pay roll.

Sec. 94.11, Stats., authorizes the live stock sanitary board of the state of Wisconsin to co-operate with the federal government to combat dangerous diseases among domestic animals in this state. This section, however, does not authorize the employment of veterinarians who have not qualified under the civil service law.

Subsec. (1), sec. 16.20, Stats., provides for the emergency appointment of employes where there are no quali-
Opinions of the Attorney General

252

Agriculture—Agricultural Associations—Sec. 20.61, subsec. (11), par. (b), Stats., does not prohibit payments to two fairs held in one county provided there is no duplication of premiums.

April 13, 1928.

W. A. Duffy, Commissioner,
Department of Agriculture.

The material facts presented in your letter of April 3 are as follows:

The Chippewa Valley District Fair at Durand contemplates holding two fairs, one in August, and the other in September. Premiums will be offered on live stock only at the first fair and at the second fair premiums will be offered for various farm products, needlework, etc. There will be no duplications of premiums at the two fairs, and the state aid will be claimed on premiums paid at both fairs.

You inquire whether the payment of premiums at both fairs is prohibited by the provisions of sec. 20.61, subsec. (11), par. (b), Stats.

Subsec. (11) (b), sec. 20.61 so far as material here, provides.

"After July 1, 1925, state aid shall be paid to only such counties as conduct fairs, and to but one society, board, or
association in any county which does not conduct a fair, * * *.”

There is no provision expressed or implied in the foregoing statute which would prohibit the payment of state aid for premiums at the two fairs held at Durand, provided there is no duplication of such premiums.

SOA

Bridges and Highways—Counties—Conveyance of property to county for highway purposes construed.

April 13, 1928.

HIGHWAY COMMISSION.

The material facts presented in your letter of March 12 are as follows:

In 1926 Polk county, acting under the direction and supervision of the highway commission, acquired certain lands by conveyance for the improvement of the alignment and vision at the intersection of State Trunk Highway No. 35 and U. S. Highway No. 8. Copies of the conveyances are attached to your letter.

You state that the improvement has been completed and that a triangular strip of land, marked in yellow on the blue print attached to your letter, is proposed to be used by a private party as the site of a filling station. You state that you intended this strip of land to be conveyed to the county for the improvement. You inquire who is the owner of the strip of land.

The triangular strip of land to which you have referred appears on the blue print to be located in the S1/2 of the SE1/4 of the SE1/4 of sec. 30, township 34 N. of Range 18. The conveyance executed by the Bank of Dresser Junction and the Bank of St. Croix Falls conveys the triangular strip to Polk county.

It is therefore the opinion of this department that Polk county is the owner of the triangular strip in question.

SOA
 Counties—County Board—Public Officers—Sheriff—Resolution adopted by board during term of sheriff attempting to change compensation for sheriff for meals and to make allowance for use of car is entirely void unless it is determined that change for meals would have been made without other change.

April 13, 1928.

HAROLD W. KRUEGER,
District Attorney,
Crandon, Wisconsin.

In your letter of March 30 you advise that your county board on November 16, 1911, adopted a resolution fixing the salary of county officers, including the salary of the sheriff at $2500 per annum in lieu of all fees, per diem and compensation, except for keeping and maintaining prisoners in the county jail, and also fixed the salary of undersheriff and two deputies, and the board and maintenance of prisoners was fixed at actual cost not exceeding the sum of $3.50 per week, and also to receive his actual expenses in conveying prisoners to the state prison or other institutions, such salary and items of compensation to cover and include livery hire within the county and all other expenses of every kind or nature incurred by the sheriff, undersheriff or his deputy in making arrests.

In November, 1915 a resolution was adopted providing that commencing January, 1917 such salary was reduced to $2000 per annum subject to all the other provisions of that resolution. You say that resolution has never been changed, but on June 8, 1927, the county board, contrary to your advice, adopted a resolution that from and after that date the sheriff of said county should receive the sum of 30¢ per meal for all prisoners committed to the county jail of said county, and it was further resolved that a car allowance of $500 for the year 1927 and per annum thereafter be granted to the sheriff of Forest county.

You say after the last resolution was passed you advised the county clerk that that resolution was invalid because an attempt to increase the salary of the sheriff during the term of his office. You ask for the opinion of this department as to whether or not your opinion and advice was correct.
This office fully agrees with your opinion and advice to the county officers. We have advised on a number of occasions that as to the general rule, public officers take their offices cum onere and must perform all of the duties of the office for the salary fixed. That general rule is enacted into the statutes as to county officers under sec. 59.15, which requires the county board at its annual meeting to fix the salary of each county officer. It then provides that the salary so fixed shall not be increased or diminished during the officer’s term and shall be in lieu of all fees, per diem and compensation for services rendered except those specified in that section. You will notice that in par. (a), subsec. (1), sec. 59.15 authority is expressly given to the board to change the compensation to the sheriff for keeping and maintaining prisoners in the county jail, and if this resolution had stopped with that change it would seem to come squarely within the express provision of that section, but this resolution also grants an allowance of $500 per annum for a car allowance, which I think is clearly void. So the question is: Can you advise that the part of the resolution changing the price for meals is valid and that part changing the compensation for car allowance is void?

The rule of our supreme court in such cases as stated in the case of Gilbert—Arnold Land Company v. City of Superior, et al., 91 Wis. 353, 357, and cases there cited, is:

"* * * If the void part of the act is the compensation for or the inducement to the valid portion, so that, looking at the whole act, it is reasonably clear that the legislative body would not have enacted the valid portion alone, then the whole act will be held inoperative and void."

You say that the board would have passed this resolution changing the fee for meals if the other change had not been in the resolution. In view of the rule making members of the board personally liable for any illegal expenditure, I would not want to take the responsibility of saying that could be done without a decision of the court directing the payment.

You then ask if, under the situation disclosed, the sheriff is entitled to fees obtained by him for the service of civil process or they should be turned into the county treasury.
That question is very clearly answered by the express provisions of subsecs. (7) and (8) of the section, which require him to collect the fees appertaining to the office and to keep an accurate account of all such fees collected by him and to pay the same over to the county treasurer. That is as plain as I can state it. The salary takes the place of the fee and when he gets his salary he must turn over the fee.

TLM

Municipal Corporations — Ordinances — Peddlers — City may by ordinance prohibit peddling within its limits.

City enacting ordinance prohibiting peddling may refuse to grant city license to peddler who has state license.

TREASURY AGENT.

You have submitted a copy of the ordinance recently enacted in Sheboygan, prohibiting the sale at retail from any wagon, cart, truck or other moveable vehicle of any fresh, smoked, or salted meats or sausages in Sheboygan, and you inquire whether the city of Sheboygan may enact such ordinance, prohibiting peddling, and further whether the city may refuse a license to a peddler who has a state license.

Peddlers are required under ch. 129, Stats., to have state licenses issued by your department. Sec. 129.07 provides that a city may further license. This indicates that the legislature intended that the city might regulate the sale of meats and in the exercise of its police powers it may prohibit such sale. Consequently the ordinance is valid.

This ordinance may be either for revenue or policing purposes. If enacted merely for revenue the city cannot deny a license to an applicant who has already received a state license. If the ordinance was passed to regulate under the police powers the city has a discretion and may deny the license to the applicant aforementioned.

MJD
Opinions of the Attorney General

Indigent, Insane, etc.—Residence—Feeble-minded person who has not mental powers sufficient to enable him to understand and conduct business matters and care for money and property and whose condition borders on actual insanity is incompetent to acquire new residence.

April 14, 1928.

Board of Control.

In your communication of March 28 you state that one A was adjudicated feeble-minded in the probate court of Goodhue county, Minnesota, on January 28, 1928, and in accordance with our comity agreement with that state they are requesting that we authorize his return to the state of Wisconsin as a nonresident of their state. You say that the facts in the case appear to be as follows:

"The said A, 41 years of age, lived with his mother in the town of West Sweden, Polk county, Wisconsin, up to the time of her death in June 1925. After his mother's death A was taken to Kenyon, Minnesota, to live with his brother and where he has since lived.

"When the mother of this person died A came into an estate and at that time a petition was made to the county court of Polk county for the appointment of a guardian and in the order of appointment of this guardian the county court of Polk county found that 'Said John P. Peterson is mentally incompetent to have the charge and management of his property for the reason; that the said John P. Peterson is forty-one years of age; that his mind has never been fully developed; that his mental powers are not sufficient to enable him to understand and conduct business matters or care for money and property; and that his mental condition borders upon actual insanity.'"

You also state that the said A has never been adjudicated mentally incompetent by a court in this state and you inquire:

"Would the guardianship proceedings in which it was found that this person was mentally incompetent to have charge and manage his property be sufficient to bar him from gaining a legal settlement in the state of Minnesota?"

As I understand the law, a person non compos mentis has not the ability to acquire a new residence, as he cannot form the intent necessary to acquire a new residence. Not all persons that are mentally incompetent to have charge
and manage their property are non compos mentis or insane and it does not necessarily follow that because a person is under guardianship he is therefore a non compos mentis. The question for you to determine is: Was this person actually feeble-minded so that he cannot acquire a new residence? This is a question of fact which our court has not passed upon, but the Minnesota court seems to have passed upon it. If it is true that he is feeble-minded it is probably also true that he has been feeble-minded ever since his birth, and that he was in such condition while he resided in the state of Wisconsin.

It would seem from all the circumstances and facts submitted that this person is mentally incompetent to change his residence to Minnesota under the facts submitted by you.

JEM

Counties—County Board—Public Officers—County Board Chairman—Sheriff—Hiring of deputies by sheriff on recommendation of chairman of county board to guard desperate prisoners in county jail for which county jail is not considered adequate does not create valid claim against county where chairman was not authorized by county board to make such recommendations. County board may, however, ratify actions of chairman and then pay claims of deputies.

April 14, 1928.

Farnham A. Clark,  
District Attorney,  
Menomonie, Wisconsin.

You state in your recent communication that about a month ago the sheriff captured and arrested two persons who were later charged and sentenced for bank robbing with a gun; that at the time of the capture of the prisoners the sheriff deemed the jail wholly inadequate to hold the prisoners for trial; that prior to that time and within the last two years there have been two escapes from your jail due to the inadequacy of the jail; that the sheriff consulted with the chairman of the county board concerning this matter and the chairman recommended to the sheriff that he hire extra deputies to watch the jail; that this was done and
the bills for services for such special deputies total nearly $900. You state that the question arises, first, whether the claims of the deputies so hired by the sheriff constitute legal claims against the county, and, second, whether the county can legally pay these claims by special action of the county board or otherwise. You also state that at the annual session of the county board, November 9, 1915, the board passed a resolution providing that the sheriff's salary should be $1800 per year and that such salary should be in full payment for all work done in behalf of the county as such sheriff, excepting for board and maintenance of prisoners; that there is no provision made by the board subsequent to the one just referred to so that your sheriff is on a salary basis and is not entitled to fees and the board has made no provision for the assistance of the sheriff as far as you have been able to learn.

Sec. 59.15, subsec. (1), Stats., provides:

"The county board at its annual meeting shall fix the annual salary for each county officer, * * * to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer's term, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions: * * *"

The enumerations then made are not here pertinent.

Subsec. (3) of the above section, 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."

In sec. 59.21, after providing for the appointment of deputy sheriff, one for each city and village therein having one thousand or more inhabitants, it is provided in subsec. (2) that the sheriff is authorized to appoint as many other deputies as he may deem proper. From these provisions of the statute it is evident that the county board has the power at any time to increase the number of deputies of your sheriff in your county and fix the compensation of such
deputies. But the county board had not acted at the time these deputies were appointed by the sheriff. There was no compensation therefore fixed for deputies appointed by the sheriff. It follows that the claim for compensation for such services does not constitute a legal claim against the county in the sense that the deputies may legally enforce the payment thereof.

In answering your second question it is necessary to consider a few propositions of law and fact. The reasonableness of the amount of the claim has not been questioned, so it can be assumed that the amount is reasonable. It must also be conceded that the deputies should be paid for the services rendered if it may legally be done. In other words, they have what we may consider a moral claim against the county. From the facts submitted by you it appears that they, the sheriff, and also the chairman of the county board, acted in good faith and in the interest of the public in preventing the escape of desperate prisoners. The chairman was not authorized by the county board to advise the sheriff to hire the extra deputies, but the county board has the power not only to authorize the sheriff to appoint deputies and fix their compensation, but also to pass a resolution instructing their chairmen to act for the county board when such board is not in session to confer with the sheriff and to authorize the sheriff to hire deputies in cases where the nature of the prisoner is such that the jail will be wholly inadequate to hold the prisoner. Such power may be delegated by the county board to its chairman. It is a delegation of an administrative function which county boards, city councils, and other legislative bodies have the power to delegate. But your county board had not taken any such action and no such powers were delegated to the chairman of the county board. The chairman of the county board acted without authority in recommending to the sheriff the hiring of the deputies. We are here confronted with the question whether the county board may ratify the action of the chairman and thus legalize his acts.

After careful consideration I believe that the county board has such power to ratify as to give validity to the act of another. The act of ratification implies that the person or body ratifying has at the time power to do the
act ratified. Ratification is the confirmation of a previous act done either by the party himself or by another. It is the confirmation of a voidable act. 23 Am. & Eng. Encyc. Law, 2d ed., 889.

Not only may natural persons ratify the acts of another, but municipal corporations may ratify unauthorized acts and contracts of its agents which are within the scope of its corporate powers, and such ratification is equivalent to previous authority. Koch v. City of Milwaukee, 89 Wis. 220, Kneeland v. Gilman, 24 Wis. 39.

From the above observations I think we may legitimately draw the conclusion that your county board may ratify the acts of its chairman in recommending to the sheriff the hiring of these deputies and pay their compensation. While the county board cannot be compelled to pay these claims to the deputy it has the power to do so by ratifying the action of its chairman and then providing for the payment of the claims.

JEM

Legislature — Assemblyman — Public Officers — County Board—Offices of member of county board and member of assembly are compatible.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

In a recent telephone conversation you stated that the Hon. M. J. Mersch, member of the assembly from your county, was elected as supervisor in one of the wards of Stevens Point, whereby he becomes a member of the county board. You inquire whether the two offices, member of the county board and member of the assembly, are incompatible.

This department has ruled that the office of member of the legislature and town chairman may be held by the same person at the same time; that the said offices are compatible. X Op. Atty. Gen. 305. This has been the ruling of this department for a long period of time, which you will
note by reading said opinion, which refers to former opinions of this department. The duties of a chairman of the town as member of the county board are identical with the duties of a supervisor of a city.

You are therefore advised that your question must be answered in the negative. Even if it were held that the two offices are incompatible, then it would follow that the acceptance of the last office, which is incompatible with the first, would vacate the first office and the last office could be held. This requires no citation of authority.

JEM

School Districts—Transportation of Pupils—If school district board does not provide transportation to school children residing in common school district more than two miles from schoolhouse, parents may enter into contract to transport children or compel school board to furnish such transportation.

April 16, 1928.

Frederick C. Aebischer,
District Attorney,
Chilton, Wisconsin.

You ask for an interpretation of certain parts of sec. 40.34, Stats., dealing with the general subject of school transportation. Your letter in part follows:

"First: If the school district meeting does not authorize the board to transport, to and from school, all children residing more than two miles from the schoolhouse, is the board compelled to furnish transportation other than offering to enter into contract with the parents to transport?

"Second: If the parents refuse to transport at the given rate, and the district meeting refuses to furnish transportation, what is to be done?

"Third: If the board could be compelled, without a vote of the district, to transport children residing more than two miles from the schoolhouse, why do we have sec. 40.70, subsec. (b)?"

Referring to both your first and second questions, your attention is called to an opinion rendered by Circuit Judge Emery W. Crosby, of Clark county, on December 7, 1927,
in *Leo Hein v. Mrs. Adolph Luther et al.* The judge had under consideration an alternative writ of mandamus in which the plaintiff requested that the defendant school board be compelled to transport the plaintiff's children in accordance with the provisions of sec. 40.34, Stats. The judge found that the language, while ambiguous, was clear that it was compulsory for the school district to furnish transportation. If the school district failed to provide transportation, the parents might provide it, or, if the parents refused to provide it, as the judge said:

"* * * They may also bring their action to require the school board to perform its official duties, * * * *.*"

The school district could not place a burden upon the parents, the judge said, which the school board was unwilling should be borne by the school district. In accordance with the construction placed by our supreme court upon a transportation statute, in *Andrews v. School District*, 183 Wis. 255, the judge held this was a beneficent statute and one requiring a liberal construction. Accordingly, the judge issued a peremptory writ of mandamus.

If the school district meeting does not authorize transportation, the school board refuses to transport, and the parents do not choose to accept a contract for such transportation, the school board may be mandamused to furnish such transportation.

A previous opinion of this department found in XVI Op. Atty. Gen. 801, must, therefore, be modified to the extent with which it differs with the opinion of the circuit judge, and the opinion of the circuit court will have to prevail until modified by some higher authority.

Relative to your third question: it is pointed out that par. (b), subsec. (1), sec. 40.70 was, in substance, in the statutes of 1925. When chapter 425, Laws 1927, which attempted to rewrite the entire school law, was adopted, the necessary change in what is now subsec. (1), sec. 40.70 was not made to make this latter section harmonize with some new legislation found in what is now sec. 40.34. This seems a reasonable explanation for the apparent conflict in those two sections.

FWK
Mothers’ Pensions—Residence—Fact of residence (not legal settlement or merely physical presence) of mother and children in county determines right to aid, under sec. 48.33, Stats.

April 16, 1928.

HAROLD C. SMITH,
District Attorney,
Fort Atkinson, Wisconsin.

You transmit a letter from the county judge containing a statement of facts on the basis of which you request an official opinion from this department. The letter states that a mother and her four children, whose husband and father has been sentenced to five or six months in the house of correction at Milwaukee, have been living for the last five years in that portion of Watertown located in Jefferson county, except for six weeks prior to October 14, 1927, when they lived at No. 312 N. Monroe St. in the city of Watertown, which portion of the city is in Dodge county. The judge questions whether, under those facts, aid for dependent children under sec. 48.33, Stats., may be granted by the judge of Jefferson county.

Before discussing the question of residence, this department wishes to call your attention to that provision of sub-sec. (5), sec. 48.33 which, among other things, provides:

"* * * the period of aid must be likely to continue longer than one year."

It is a question of fact for the judge to determine. Such continued period of aid, for over a year, may grow out of the husband's sentence, or it may not. This question is discussed in XIV Op. Atty. Gen. 426.

To be eligible for aid, "the mother * * * 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." Subsec. (5), sec. 48.33. In other words, the mother must have had legal residence in Jefferson county for one year to be eligible for aid if other statutory requirements are met. In construing the requirement of residence this department has held that a temporary absence from a county is without legal effect on aid. VI Op. Atty. Gen. 767. Neither should
Opinions of the Attorney General 265

legal residence be confused with legal settlement. The family might have moved from Jefferson county into Dodge county and lost legal residence in Jefferson county, but not legal settlement. It is conceivable that neither might have been lost. If the family moved to Dodge county only temporarily with the intention of returning to Jefferson county, then the legal settlement and the legal residence undoubtedly would remain in Jefferson county, and if otherwise eligible aid could be granted to the mother in Jefferson county. Where the residence is, is a question of fact. If it has been in Jefferson county for the last year, despite the six weeks' absence, Jefferson county may grant aid. Otherwise not. It is certain the family for the last year have been residents of either Jefferson or of Dodge county. Whether continuously in Jefferson county is a question of fact. This must be determined by the judge to whom the application is made. "The attorney general cannot presume to determine such fact in response to a request for an opinion." XII Op. Atty. Gen. 385; XIII Op. Atty. Gen. 439; XVI Op. Atty. Gen. 254.

FWK

Optometry—It is unlawful for optometrist to use word "doctor" or "specialist" in connection with his business.

VICTOR M. STOLTS,
District Attorney,
Eau Claire, Wisconsin.

You state that complaint has been filed at your office to the effect that certain optometrists are appending to their name and advertising by cards on windows and in newspapers, including slides at motion picture houses, the words "eye specialist," "eyesight specialist" and even "doctor."

You state that it is clear that they cannot use the word "doctor" as they have no right to practice medicine, but you inquire whether they may use the words "eye specialist" or "eyesight specialist" without violating any statute.

Sec. 147.14, subsec. (3), Stats., reads thus:

"No person not possessing a license to practice medicine and surgery, osteopathy, or osteopathy and surgery, under
section 147.17, shall use or assume the title 'doctor' or append to his name the words or letters 'doctor,' 'Dr.' 'specialist,' 'M. D.,' 'D. O.' or any other title, letters or designation which represents or may tend to represent him as a doctor in any branch of treating the sick."

You will note that it is unlawful to use the word "specialist." The fact that they use in connection with it the word "eye" or the words "eyesight" does not take them out of the purview of this statute.

I am of the opinion that they are violating this statute and may be prosecuted.

JEM

Contracts—Fish and Game—Conservation commission does not have power to enter into contract for term of years with fisherman to remove rough fish unless he binds himself to remove snags, stumps and stones as part of consideration.

April 17, 1928.

L. B. Nagler,
Conservation Director.

You submit a contract between the conservation commission and W. E. Wiedner dated May 25, 1927, and ask if it is a valid contract and binding upon the present conservation commission?

I am strongly in favor of holding contracts valid which have been in existence for some time, as this one has, if consonant with correct legal principles.

Sec. 29.62, subsec. (1), Stats., provides as far as material here:

"The state conservation commission is authorized to take rough fish by means of seines only, or cause the same to be so taken, from any of the inland waters of this state other than those specified in subsection (2), * * *. In waters requiring the removal of snags, stumps, stones or other obstructions the conservation commission is authorized to contract for a term of years with fishermen who will remove and clean up such lake and river bottoms to permit the seining of rough fish."

The last part of this subsection bars the making of a contract for a term of years with fishermen unless for the purpose of cleaning up such lake and river bottoms.
The contract submitted is for a term of five years and right on its face, in the third paragraph, it contravenes the statute in giving W. E. Wiedner the contract because "he has removed snags, stumps, stones and other obstructions."

It is as clear as a bell that the only grounds for giving a contract for a term of years is because the fisherman will, as a condition of the contract, remove snags, stumps and stones. This contract does not do this and hence is invalid and not binding on the conservation commission.

JWR

Education—Blind—Mothers' Pensions—Under sec. 48.33, subsec. (6), Stats., it is illegal for one person to receive both mothers' pension and blind pension.

April 18, 1928.

BOARD OF CONTROL.

Superintendent J. T. Hooper of the Wisconsin school for the blind has raised a question which you present to this department. The facts of the case are stated as follows by Mr. Hooper:

"Mrs. A of Lincoln county is drawing a pension for the blind at the rate of $30 a month—$360, or a year's maximum. Up until January 15, 1928, she was drawing a mothers' pension at the rate of $20 a month. At that time the mothers' pension was discontinued by order of the county judge on the ground that one person could not legally draw both pensions. She has practically no income. She has two children, one aged nine years and one aged eleven years. Her gross income including both pensions was well under the $780 limit mentioned in the pension law.

"As there are several similar cases in the state, we would like the opinion of the attorney general as to whether or not it is legal for a mother under these conditions to draw both the mothers' pension and the pension for the blind."

Aid for dependent children, sometimes called a mothers' pension, is provided for in sec. 48.33, Stats. The blind pension is covered by sec. 47.08. In order to answer your question it is only necessary to quote from subsec. (6), sec. 48.33, which provides, relative to said aid to dependent children, as follows:
Such aid shall be the only form of public assistance granted to the family excepting medical aid and no aid shall continue longer than one year without reinvestigation."

This provision is decisive of the question before us. Undoubtedly the county court was controlled in its decision in the case. The language is clear and explicit and there is no room for construction. You are therefore advised that it is not legal for a person to receive a blind pension and also a mothers' pension at the same time.

JEM

Mothers' Pensions—Illegitimate children while in custody of mother are entitled to aid under mothers' pension law. Fact that mother has two illegitimate children does not necessarily make her unfit person for their care and custody.

April 18, 1928.

FULTON COLLIPP,
District Attorney,
Friendship, Wisconsin.

In your letter of March 31 you submit the following statement of facts:

"A is an unmarried woman and has two children, one three years of age and the other six years of age. No proceedings have ever been asked for or have been held at any time to enforce support by the supposed father. The alleged father of both children is no longer a resident of this state. Under sec. 48.33, subsec. (5) of our statutes should a mother's pension be granted A under the following clauses thereof viz.: 'the mother must be without a husband . . . the mother . . . must be a fit and proper person to have the custody and care' . . . It is conceded that outside of the above questions other factors would be such as to make A applicable to receive said pension."

Subsec. (5), sec. 573f, Stats. 1915 (renumbered sec. 48.33, Stats.), contains the following phrase:

"The mother must be a widow."

This department ruled in an opinion rendered January 6, 1915, V Op. Atty. Gen., 13, that illegitimate children, while
in the custody of their mother, were not entitled to aid under the mothers' pension law. Ch. 251, Laws 1919, changed such phrase to read: "* * * the mother must be without a husband." This change in the language of the statute indicates the intention of the legislature to include illegitimate children within the scope of the statute. The primary purpose of the mothers' pension law is the welfare of the children, and there is no apparent reason why this class of children should not be entitled to the aid and beneficence of the state as well as legitimate children.

As pointed out in your communication, the statute further provides that the mother "must be a fit and proper person to have the custody and care." In an opinion dated October 26, 1916, V Op. Atty. Gen. 787, it was held that the fact that an illegitimate child was a member of the household did not disqualify such family, otherwise entitled to the aid under the law, from receiving aid. The judge has wide discretion in the matter of determining who is a "fit and proper person" and should decide each case upon its own particular facts and merits. In the instant case, I would say, the fact that a mother has had two illegitimate children does not necessarily make her an unfit person to have the custody and care.

AJM

Criminal Law—Fish and Game—Beaver—It is necessary for state to prove that beaver have been unlawfully killed when skins are not tagged, in view of provisions of sec. 29.59, subsec. (5), par. (b), and sec. 29.41, Stats.

Francis J. Golden,
District Attorney,
Merrill, Wisconsin.

You state that the game wardens of Lincoln county have arrested one A of Spirit Falls, Lincoln county, Wisconsin, for having in his possession a beaver skin, such beaver skin not having attached to the same the tag as provided in sec. 29.59, subsec. (5), par. (b), Stats. Said par. (b) contains the following:

April 18, 1928.
"* * * No skin of any beaver or otter taken, caught or killed under said license shall be delivered, transported or shipped or had in possession unless it has attached thereto a distinctive tag to be prescribed and furnished by the commission. * * * Such tags shall be attached to some part of the head skin of the beaver or otter immediately after the skin has been removed from the carcass, and shall remain attached thereto until the skin is made into a fur garment. * * *"

Sec. 29.41, to which you refer me, provides:

"The skin of any fur-bearing animal lawfully killed, when separated from the rest of the carcass is not subject to the provisions of this chapter; but no person shall have in his possession or under his control the skin of any fisher, marten, mink, or muskrat showing that the same has been shot or speared, nor the green skin of any fur-bearing animal from the fifth day after the beginning of the close season for such animal until the ending thereof."

You state that considering the above quoted sections of the statute it would seem that sec. 29.41 withdraws from the whole chapter the above quoted provision of sec. 29.59, subsec. (5) (b) and completely nullifies it, making it necessary to prove on the part of the state in prosecutions under such sections that the beaver in question was illegally killed; that you have no evidence as to where A obtained possession of the beaver skin or how the beaver was killed, or when it was killed. You merely have evidence showing that the beaver skin was found in his possession and did not have the tag attached to it.

You inquire whether the state must prove that the beaver was illegally killed or whether A is charged with the duty of proving that the beaver from which the skin was taken was legally killed.

I assume, although you do not so state, that the beaver skins in question are not green skins. Otherwise they would come within the prohibition of sec. 29.41.

I see no escape from the conclusion that it is incumbent upon the state to prove that the beaver was illegally killed. Otherwise there is no offense committed under this statute. A defendant is not required in a criminal prosecution to produce the evidence to convict him. It is for the state to prove by legal evidence the guilt of the defendant beyond a
reasonable doubt, and the defendant may stand mute and even refuse to testify in his behalf and no inference can be drawn as to his guilt because of his silence.

JEM

Appropriations and Expenditures—Wisconsin agricultural experiment association has power to purchase motor truck in carrying out purposes of association under 20.61, subsec. (1), Stats.

April 18, 1928.

PROF. R. A. MOORE, Secretary,
Wisconsin Experiment Association,
Madison, Wisconsin.

Under date of April 12 you have requested an opinion as to the right of the Wisconsin Experiment Association to purchase a light truck under the provisions of sec. 20.61, subsec. (1), Stats. You state that this truck will be used in transporting seeds, fertilizers, and other materials in connection with the breeding, production, distribution, and experimentation of pure bred seeds, the inspection of fields for registry as requested by members of the association and any other necessary operation which may arise in connection with the advancement of the agricultural interests of the state; that due to the expansion of the activities of the association you feel it is necessary to own your own truck to replace the one already worn out, which was used jointly with the department of agriculture. This old truck was purchased in 1916 in conjunction with the experiment association and the department of agronomy and used for general purposes of the two organizations concerned.

Under sec. 20.61 there is an appropriation made from the general fund “annually, beginning July 1, 1913, five thousand dollars to the Wisconsin agricultural experiment association, for securing and testing new and improved varieties of seeds, plants, and fertilizers, studying the best methods of cultivation and feeding crops, and in general advancing the agricultural interests of the state. * * *”
The Wisconsin agricultural experiment association is not a department of state, so that it does not come under the provisions of sec. 14.71. The appropriation here made is one for a public purpose and is similar to those made to other societies or associations enumerated in said sec. 20.61. The purpose of the appropriation as given is broad in its terms. It is for “securing and testing new and improved varieties of seeds, plants, and fertilizers, studying the best methods of cultivation and feeding crops, and in general advancing the agricultural interests of the state.”

It is very evident that the use of an automobile truck such as you contemplate buying may be of great service and possibly indispensable in carrying out the intent of this statute.

I am of the opinion that you have the power to purchase such automobile for the purposes stated.

JEM

Bridges and Highways—Town Highways—City should pay county treasurer its special benefit assessment for state trunk highway bridge not later than settlement day.

If bonds are sold for portion or all of such assessment, such money must be promptly deposited with county treasurer.

April 18, 1928.

E. J. Morrison,
District Attorney,
Portage, Wisconsin.

You ask for an opinion on what, in substance, is the following set of facts:

Subsequent to a special session of the county board, in May, 1927, according to the provisions of sec. 87.04, an assessment was certified to the clerk of the city of Portage for an amount representing that city's special benefit growing out of the construction of a bridge on a state trunk highway. This special benefit assessment was 40% of the county’s share of the cost of construction of the bridge in
accordance with sec. 87.04, Stats. You indicate further that the city of Portage raised all but $25,200 of its assessment but that the remaining $25,200 has not been remitted to the county treasurer. This $25,200 it seems has not been provided for but the city is planning to float bonds to raise that amount. You say, “it is conceded that there is no present need for this sum of $25,200,” and “the city has purposely deferred issuing bonds to avoid the interest, since it is evident the money is not needed at this time.” You say the county treasurer does not know how to handle the city’s tax roll, especially since the county treasurer’s tax roll shows this $25,200 as an outstanding obligation. You ask for, what seems to be, advice as to how the county treasurer shall proceed.

Subsec. (5), sec. 87.04 reads as follows:

“All assessments against municipalities under this section shall be certified to the clerks thereof within five days of the adjournment of the county board. It shall then be the duty of the municipality through its board or council to provide the amount so assessed either by a direct tax, or by the issue and sale of its serial bonds, which shall bear interest at a rate not exceeding six per cent and run not more than twenty years. Such bonds shall be issued directly by the board or council and divided as to denominations and due dates as may be determined by such board or council. Money so obtained shall be promptly deposited with the county treasurer to the credit of the bridge project.”

Sec. 70.68 fixes March 22 as the day of settlement between the local treasurer and the county treasurer. The city’s (Portage’s) 40% of the county’s share of the cost of the bridge was included in the tax roll. As early as May the city was notified that this amount would be included in the city’s tax roll. The day of settlement, by statute, is March 22. The city of Portage on that day settled for its taxes except for the $25,200. I can find no provision in the statutes extending the time for settlement in a case such as we have under consideration. Subsec. (7), sec. 84.03, dealing with another phase of special assessments by counties, provides that assessments shall be collected and paid into the county treasury as other county taxes are collected and paid. It would seem that were the only reasonable
method of payment to be adopted for the sort of special assessment under consideration. This conclusion is further emphasized by that provision of subsec. (5) which specifies that when the city chooses to raise the money by a bond issue, "money so obtained shall be promptly deposited with the county treasurer." Even before settlement day would money from the sale of bonds have to be paid into the county treasury. In the light of these statutory provisions it does not follow that simply because no last day is mentioned for the sale of bonds, the municipality may choose its own convenience and thereby withhold money from the county treasury beyond the day of settlement.

While your letter would seem to indicate there is no misunderstanding between the city and county authorities, the effect of withholding the $25,200 may be the same as a refusal. The state highway commission looks to the county and not to the municipality. To protect itself the county should have the money so that it may be available when necessary. The $25,200, not having been raised in taxes, should be made available by the sale of bonds immediately. In case of a refusal, this department has held that the city may be compelled by mandamus to make provision for its share. XII Op. Atty. Gen. 128. See also XI Op. Atty. Gen. 841.

FWK

Insurance—Fraternal Benefit Societies—Subsec. (4), sec. 208.01, Stats., makes exception of fraternal benefit societies enumerated in pars. (a) to (e) unless law expressly refers to that subsection; but subsec. (5) makes exception to that rule as to societies and orders mentioned in that subsection and requires them to comply with all requirements of law relating to fraternal benefit societies.

April 19, 1928.

M. A. Freedy,
Commissioner of Insurance.

You submit the following question and statement:

"We have operating in Wisconsin, several mutual benefit societies which are organized under the provisions of subsec. (4) (e), sec. 208.01, Wis. Stats. Some of these socie-
ties have over 500 members, and issue certificates to their members. The question now arises as to whether or not societies operating under the provisions of the above subsection must also comply with the provisions of subsec. (5), sec. 208.01 in order to be exempt from the laws applicable to 'fraternal benefit societies.' A previous ruling by your office (X Op. Atty. Gen. 616) has held that the provisions contained in subsec. 208.01 (4) (e) to the effect that 'Unless express reference is made to this subsection, no law now in force or hereby or hereafter enacted shall include or apply to' such societies is invalid. We wish to inquire whether or not this ruling is in accord with your opinion."

You are advised that we fully agree with most of the things said in that former opinion and we fully agree with the statement that one legislature cannot pass a law to prevent or that would prevent a subsequent legislature from amending or modifying it. But you will notice that subsec. (4) is making a special rule or exception to the general rule in the particular cases mentioned in pars. (a) to (e) and then subsec. (5) makes an exception as to any such order or society which "(1) has more than five hundred members, (2) and provides for death or disability benefits; (b) and any such lodge, order or society which issues to any person a certificate providing for the payment of benefits; shall not be exempt by the provisions of this section, but shall comply with all the requirements of the law relating to fraternal benefit societies."

I think that subsection makes an exception to the exceptions, so that when any of the societies mentioned comes within the classes specified in subsec. (5), it would have to "comply with all the requirements of the law relating to fraternal benefit societies." You say some of these societies have a membership of more than 500 and issue certificates providing for the payment of benefits, so I think they would be taken out of the exceptions of subsec. (4) and come within the provisions of subsec. (5) and would be required to comply with all the requirements of the law relating to fraternal benefit societies.

You speak of the articles of some of these associations not expressly referring to this subsection and not stating that they were organized under this subsection, but I do not think that is important in determining the character of the
society. You will notice subsec. (4) does not require that the articles of association shall refer to this subsection, but that provision says "unless express reference is made to this subsection, no law" etc., but subsec. (5) is a part of that law and it is referring to the provisions of that subsection although it does not name it and is making a special rule for the particular class of associations or societies there named, and I think you must give it that effect.

TLM

Appropriations and Expenditures—Taxation—University—Change of time of payment of income taxes into state treasury from second Monday of March to 20th of July does not prevent crediting to university fund income (and normal school and common school fund incomes) of amount of mill tax levies provided by sec. 20.39, subsec. (2), par. (b), sec. 20.36, subsec. (4), par. (b), and sec. 20.25, Stats., where amount of mill taxes actually levied has been reduced by estimated amount of state's share of income taxes under authority of sec. 20.255, Stats.

April 19, 1928.

REGENTS OF THE UNIVERSITY OF WISCONSIN.

Attention J. D. Phillips, Business Manager.

Through the business manager of the university you have submitted the following question:

"Under existing statutes, can the amount of the ¾ mill tax be paid into the university fund income early in March, as usual?"

The answer, I think, is in the affirmative.

The applicable statutes are the following:

"20.39 Basic appropriations for the university.

"(1) UNIVERSITY FUND. * * *

"(2) UNIVERSITY FUND INCOME. The university fund income is constituted of the following increments:

"(a) Interest and revenues. Interest derived from the university fund and from unpaid balances of purchase money on sales of university land; and all other revenues derived from the university lands.

"(b) Mill tax. An annual state tax of three-eighths of one mill for each dollar of the assessed valuation of the
property of the state as determined by the tax commission pursuant to section 70.57, which is hereby levied and shall be collected and paid into said fund annually.

"* * *

Sec. 70.57, Stats., provides for the valuation of the property of the state by the tax commission annually; sec. 70.58 authorizes the application of any part of the surplus in the treasury to reduce the state tax levy in each year and provides for the apportionment of the balance among the several counties as directed in sec. 70.59.

"20.255 Distribution of income tax. Out of the state's share of the proceeds of the income tax there shall first be set aside an amount sufficient to meet the appropriations made by subsections (1) and (4) of section 20.09 and an amount equal to the appropriations made in paragraph (a) of subsection (2) of section 20.05, subsection (2) of section 20.26, and section 20.27. The remainder shall be applied, as far as it will reach, toward the remission of the taxes on property for the support of the university, the normal schools and the common schools, in the order named, and shall be used for no other purpose."

Under the provisions of sec. 71.10 (4) income taxes collectible in 1928 and subsequent years become due and payable on June 1st, and delinquent if not paid on or before July 1st. In former years the income tax was due and payable at the same time as property taxes. The mill tax levied by sec. 20.39 (2) (b) is required to be paid into the state treasury on or before the second Monday in March, and the state's share of the income tax is required to be paid to the state treasurer on or before July 20th. Sec. 74.26 (1).

It appears that all of the mill taxes levied by sec. 20.39 (2) (b) for the university fund income, and by sec. 20.36 (4) (b) for the normal school fund income, and approximately 35% of the mill taxes levied for the common school fund income by sec. 20.25, for the year 1927 have been remitted under the authority of sec. 20.255, supra, because of the estimated amount of income taxes to be paid into the state treasury in the current year. (See XVI Op. Atty. Gen. 782, 173.)

The secretary of state keeps separate accounts of the revenues and funds of the state and of all appropriation
The interest earned on state moneys in state depositaries is required to be apportioned quarterly or oftener and added to the several funds. Sec. 14.49, Stats.

Par. (a), subsec. (6), sec. 20.39 provides:

"After the beginning of each fiscal year and before the collection in such year of the state tax levied by paragraph (b) of subsection (2), the secretary of state may, if in his judgment the condition of the general fund warrants it, with the approval of the governor, transfer from the general fund to the university fund income, such sum or sums as may be necessary to meet current expenses of the university; but immediately upon the collection of such state tax in each year an amount equal to the sum or sums so advanced shall be transferred from the university fund income to the general fund."

And there is a similar provision with reference to the normal school fund income. Subsec. (6), sec. 20.36. These provisions are express authority for the transfer from the general fund to the university and normal school fund incomes under the conditions therein stated; and it seems to me that when the state tax levy, including the university and normal and common school mill taxes, is reduced by reason or because of the estimated returns from the income taxes pursuant to sec. 20.255 (or by reason of there being a surplus in the state treasury pursuant to sec. 70.58) the amounts of the mill taxes levied may, if the state of the general fund permits, be placed to the credit of the university fund income (and of the normal school and common school fund incomes) at the same date as in past years, even though the collection of the income taxes on the basis of which the actual mill tax levy has been reduced, is postponed until July. The income taxes when paid into the state treasury in July will, of course, go into the general fund. To hold that the university, normal and school funds are not entitled to credit for the amount of the mill tax levies at the time when, except for the remission in anticipation of the amount of the income taxes, they would be paid into the state treasury, would deprive the university, normal school and common school funds of their proper apportionment of the interest on state moneys in state depositaries, and would force the university and normal schools
to resort to emergency transfers under sec. 20.39 (6) (a) supra after a time when the statutes contemplate that the mill tax levy shall be available.

FEB

Physicians and Surgeons—Basic Science Law—Student who had matriculated at time of enactment of ch. 306, Laws 1901, in medical college of this state that offered courses required by statute, was eligible to be admitted to practice without examination on part of board of medical examiners.

April 20, 1928.

ROBERT E. FLYNN, M. D., Secretary,
Board of Medical Examiners,
La Crosse, Wisconsin.

You indicate that a man presented himself to the state board of medical examiners for examination, in 1901, and failed to pass the examination; that he has, however, practiced medicine since that time, without having applied to the board of medical examiners for a license. You say the man in question “graduated” in 1901. You inquire:

“1. When was the board of medical examiners first created and what were the requirements for a man to practice medicine and surgery?

“2. Was it possible for any physician in 1901 to obtain a license by presentation of a diploma, and a recommendation of several reputable physicians who might qualify or vouch for this man’s reputation?”

I find that ch. 264, laws of 1897, approved April 19, and published April 20, 1897 (the act providing that it shall take effect upon passage and publication), created what was then known as a board of medical examiners. That act provided that every person beginning the practice of medicine or surgery after July 1, 1897, should be required to have a license, which license should be issued after an examination or upon presentation of a diploma issued by a satisfactory college. A registration bill was passed in 1899, providing that all practicing physicians should be registered within a certain period of time. I presume you are not interested in the details of that bill.
Ch. 306, laws of 1901, approved May 6, and published May 8, taking effect upon passage and publication, amended the laws of 1897 with respect to qualifications for practicing medicine and surgery in Wisconsin. Sec. 1, of ch. 306, provided in part, as follows:

"SECTION 1. Section 1435b of the statutes of 1898 is hereby amended so as to read as follows: Section 1435b. All persons commencing the practice of medicine or surgery in any of their branches, shall apply to said board at the time and place designated by the board or at any regular meeting for license so to do, and shall submit to an examination in the various branches of medicine and surgery and present to said board a diploma from a reputable medical college that requires at least four courses of not less than six months each before graduation; no two of said courses to be taken within any one twelve months, and that shall after the year 1901 require for admission thereto an elementary education equivalent to that necessary for entry to the junior class of an accredited high school of this state, including one year's course in Latin, and for graduation from said medical college at least four courses of not less than seven months each; no two of said courses to be taken within any one twelve months, provided however, that any student who is now matriculated in any medical college of this state which requires four courses of six months each as a prerequisite of graduation, no two courses to be taken within one twelve month, shall on presentation of his diploma from such medical college and on payment of the fees specified in this act, be admitted to practice without further examination by such state board of medical examiners."

You will note from the foregoing quotation that if the doctor to whom you have reference was matriculated as a student in a medical college having the required courses at the time ch. 306, laws of 1901 was adopted, he could be admitted to practice without further examination by the state board of medical examiners.

FWK
Automobiles—Law of Road—Counties—Ordinances—

County board has no power to enact ordinance regulating operation of automobiles on public highways in county and imposing for its violation fine and imprisonment in county jail; it is limited by statute to prescribe only forfeiture for violation of such ordinance, which must not conflict with sec. 85.16, subsec. (1), Stats.

April 20, 1928.

G. ARTHUR JOHNSON,
District Attorney,
Ashland, Wisconsin.

You refer me to sec. 59.06, subsec. (11), Stats., and sec. 85.16 and you say:

"Taking into consideration these two sections of the statutes, would the county board have the power to enact an ordinance as follows?

"'Any person who shall operate, ride or drive any automobile, motor cycle, or other similar motor vehicle upon or along any public highway of this state while intoxicated shall be punished by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.'"

In other words, has the county board authority to provide a fine or imprisonment for the violation of any of its ordinances or is it limited to a penalty or forfeiture?

Sec. 59.06, subsec. (11), provides as follows:

"Enact ordinances or by-laws regulating traffic of all kinds on any highway, except street or interurban railways, in the county which is maintained at the expense of the county and state, or either thereof; declare and impose forfeitures, and enforce the same against any person for any violation of such ordinances or by-laws; provide fully the manner in which forfeitures shall be collected; and provide for the policing of such highways and to provide for what purposes all forfeitures collected shall be used."

Sec. 85.16, subsec. (1), reads thus:

"No city, village, town, county, park board or other local authority shall have power to enact, pass, enforce or maintain any ordinance, resolution, rule or regulation, requiring local registration or other requirements or in any manner excluding or prohibiting any automobile, motor cycle or similar motor vehicle, whose owner has complied with the
provisions of this chapter, from the free use of all public highways, driveways and parkways; but the provisions thereof shall not apply to corporations organized pursuant to chapter 55 of the laws of 1899, and shall not prohibit any city, village, county, town, park board or other local authority from passing any ordinance, resolution, rule or regulation in strict conformity with the provisions of this chapter and imposing the same penalty for a violation of any of its provisions."

You will note that the provision of the above-quoted sec. 85.16 confers upon county boards no power to enact any ordinance. It is rather a limitation than a grant of power. If county boards have not been given the power to enact ordinances regulating the traffic of motor vehicles on any of their highways by some other statute, then it cannot be said that they have such powers, for it is apparent that such power is not granted by the provisions of this statute.

Sec. 59.06, subsec. (11) does grant power to the county boards to regulate by ordinance and by-laws the traffic on highways maintained at the expense of the county and state or either of them, but they are only empowered to impose a forfeiture for its violation. There is no power in any of the statutes quoted nor in any statute of which I am aware which grants to a county board the power to enact an ordinance and provide imprisonment in the county jail for its enforcement.

Counties receive their powers from the state. They are at most but local organizations, which, for purposes of civil administration, are invested with a few functions characteristic of corporate existence. They are purely auxiliaries of the state, owing their creation to statute and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. Frederick v. Douglas Co., 96 Wis. 411. See also, Richland Co. v. Richland Center, 59 Wis. 591; Rock Co. v. Edgerton, 90 Wis. 288.

In Kuder v. State, 172 Wis. 141, our court held that an action brought on behalf of a county to recover a sum of money as a forfeiture for the violation of a county ordinance fixing the maximum speed of automobiles on county or state highways is a civil action; and a judgment in such action, which is in form and effect one which could properly
be entered only in a criminal proceeding, is prejudicial and erroneous, and was reversed. In that case the court questioned whether a judgment against a defendant in such a civil action may, in the absence at least of a provision to that effect in the ordinance, itself provide for imprisonment in the county jail in default of payment of the adjudged penalty under sec. 288.09, Stats. But as the question was not before them they did not pass upon it.

I find no provision of the statute which expressly or impliedly authorizes the enactment of the ordinance above quoted. In the absence of such a statute and in view of the above authorities, I am constrained to hold that the county board has no power to enact such an ordinance. Under sec. 59.06, subsec. (11), the county board has the power to enact ordinances and by-laws regulating traffic on certain highways in the county, but is limited to imposing a forfeiture for its violation. Such ordinance must not conflict with sec. 85.16, subsec. (1).

JEM

Labor—Minors—Town board has no jurisdiction under sec. 49.05, Stats., to bind out minor under sixteen years of age.

April 21, 1928.

Board of Control.

You advise that a town board has placed a boy thirteen years of age for farm work at twenty-five dollars a month, the money to be paid to the town board by the farmer; that the town board acted under sec. 49.05, Stats., that the boy's father had deserted the family; that the mother has four children, is penniless and that the boy's wages are divided in the following manner: $5.00 to the boy, $10.00 to his mother in cash, and $10.00 in supplies. You ask if sec. 49.05 applies to children under sixteen years of age or, in other words, whether a town board may indenture children who are under sixteen years of age.

Sec. 49.05 authorizes the authorities having charge of the poor of any municipality to bind a minor who is not a neglected, dependent, or delinquent child as defined in sec.
48.01 and is likely to become a municipal charge, as an apprentice to some responsible householder of the county by written indenture similar to that provided in ch. 106. While sec. 49.05 does not limit the ages of such minors, sec. 106.01 clearly limits it to minors sixteen years of age or over.

It is ridiculous for a town board to bind out a thirteen-year-old boy. If this were proper the child labor laws would be nullified in all such instances. I believe the child labor laws control, and particularly when accompanied by sec. 106.01, Stats. The town board therefore is clearly acting illegally in this instance.

MJD

Automobiles—Law of Road—Criminal Law—Sec. 85.14, Stats., requiring street cars to stop and drivers of any vehicles to pass to right side of curb upon approach of any fire apparatus responding to fire alarm is command which, if violated, constitutes offense punishable under sec. 353.27.

April 21, 1928.

R. M. SCHLABACH,

Assistant District Attorney,

La Crosse, Wisconsin.

You inquire whether a violation of sec. 85.14, Stats., is an offense which may be punished under sec. 353.27.

Sec. 85.14 provides as follows:

"The motorman of any street car shall immediately stop his car upon the approach of any fire apparatus responding to a fire alarm call, and shall keep the car stationary until it has passed; and the driver of any vehicle shall immediately drive his vehicle as near as possible to the right-hand curb and keep said vehicle stationary until such apparatus has passed."

Sec. 353.27 reads thus:

"Any person who shall be convicted of any offense the punishment of which is not prescribed by any statute of this state shall be punished only by imprisonment in the county jail not more than one year or by fine not exceeding two hundred and fifty dollars."
"An offense" is defined in Bouvier's Law Dictionary:

"The doing that which a penal law forbids to be done, or omitting to do what it commands."

Sec. 85.14 enjoins the doing of certain acts. It is a command given by clear and unequivocal language. This department has held that a physician failing to record licenses as required by statute may be punished as prescribed in sec. 353.27. II Op. Atty. Gen. 311. We have also held that the delivery of coal without being accompanied by delivery tickets as required by statute constitutes a criminal offense punishable under the same statute. II Op. Atty. Gen. 853.

It has also been held that an attempt to commit suicide is a misdemeanor under the laws of this state and is punishable under this section. XI Op. Atty. Gen. 619.

In 1 Bishop's Criminal Law, 9th ed., sec. 237 says:

"It is obvious that to prohibit a thing by statute is to bring it within the jurisdiction of the courts. When therefore a statute forbids a thing affecting the public, but is silent as to any penalty, the doing of it is indictable at the common law."

I am of the opinion that sec. 85.14 contains a command, which, if violated, is an offense within the purview of sec. 353.27. There is no specific penalty prescribed for the violation of said sec. 85.14. Therefore the penalties prescribed in said sec. 353.27 are applicable.

JEM
Contracts—Public Officers—Commissioner of Agriculture—State Fair—Commissioner of agriculture has power to enter into contracts in some instances for term of years longer than his term of office.

Miller & Rose leases for operating attractions on state fairgrounds are valid.

Renewal clause in Miller & Rose contracts is binding.

Department of agriculture should insist upon payment for concessions under original contract, and not accept tax receipts as part payment as provided by attempted modification of contract until ordered so to do by court of competent jurisdiction.

April 26, 1928.

W. A. Duffy,

Commissioner of Agriculture.

In your letter of April 16 you ask various questions in regard to the Miller & Rose contracts with the department of agriculture for the operation of various amusement devices in the state fair park. This department has previously expressed its opinion on some of the questions presented (see opinions dated June 24, 1927, XVI Op. Atty. Gen. 446, and February 10, 1928, XVII Op. Atty. Gen. 120); but additional information has been presented and the entire matter has been the subject of an extended office conference. What is here said must, therefore, be considered as a conference opinion and as overruling prior conflicting opinions.

You ask whether the commissioner of agriculture has power to enter into contracts for a term longer than his term of office. The general rule, subject to numerous exceptions which need not be here considered, is that a contract extending beyond the term of office is ordinarily valid. In Hurley Water Co. v. Vaughn, 115 Wis. 470, a contract running thirty years for a supply of water was upheld. See notes in 16 L. R. A. 257, 29 L. R. A. (N. S.) 652, L. R. A. 1915E 581.

You ask if the Miller & Rose leases are valid. It is unnecessary to determine whether the commissioner of agriculture had the power to make the leases in the first instance; nor is it necessary to determine whether the so-called leases are anything more than contracts or licenses.
It is sufficient to state that the legislative history indicates the intention of placing exceedingly broad powers of control in the commissioner of agriculture. Sec. 1458a, Stats. 1913, provided that the state board of agriculture should have control of all state fairs and state fairgrounds. This section was repealed by ch. 413, laws of 1915, which abolished the state board of agriculture and created the department of agriculture and provided that it should be the duty of the department "to control all state fairs and state fairgrounds," and conferred and imposed upon the department "all duties, liabilities, authority, powers and privileges imposed or conferred by law upon the state board of agriculture." In 1923 this chapter was revised and the department was placed under the control of the commissioner of agriculture and a provision for the transfer of duties was retained in sec. 93.19. Subsec. (1), sec. 93.06, which concerns the function of the state fair advisory board, provides in part:

"* * * The decision of the commissioner of agriculture upon all matters connected with the said state fair shall be final."

In 1921 subsec. (2) was added to sec. 93.06 providing for agreements "with exhibitors for the erection by them of exhibition buildings." This provision refers merely to exhibition buildings and neither limits nor expands the general powers of the commissioner of agriculture in regard to the control of the state fair.

The very fact that the Miller & Rose series of contracts were made and at the time of making were approved—at least as to form—by the attorney general, considered together with the fact that other contracts of the same general nature have been made, seems sufficient to give a practical construction to the powers conferred upon the commissioner of agriculture in the control of the state fairgrounds.

In Wright v. Forrestal, 65 Wis. 341, 348–349, the court said:

"The construction given to a statute by the body of men or officers who are directed to act upon it is always entitled to weight, and their construction should not be overridden by the courts, unless it be contrary to the clearly expressed meaning of the law."
The legislature could, of course, have expressly authorized the making of the contracts and by ratification could have given validity to unauthorized contracts.

In *Shipman v. The State*, 42 Wis. 377, 390, the court said:

"* * * If, with full knowledge of all the facts and of the terms of the contract, the legislature recognized and acted upon it, making appropriations for completing the hospital building upon its assumed validity, a ratification would surely be presumed."

In 1925 the following sentence was added to subsec. (1), sec. 129.14:

"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."

Some of the Miller & Rose contracts provide that the department of agriculture is to obtain any licenses which may be required by the town, village, city or county or state for the operation of the attractions. It seems clear that the sentence last quoted was inserted in the statutes because of the provision in the Miller & Rose contracts and constitutes a legislative recognition of the validity of the contracts.

In 1927 a bill was before the legislature (No. 681, A.) to exempt the Miller & Rose property from taxation. This bill, which was defeated, contained a specific authorization for leases on the state fairgrounds and a specific ratification of the existing contracts. By this bill the attention of the legislature was specifically directed to the assumption of the authority by the commissioner of agriculture to make the contracts in question; and the defeat of the bill, without any other legislation negativing the commissioner's authority, leads to the conclusion that the legislature decided that ratification was unnecessary. In 1927 the legislature also made an annual appropriation of $5,000 "for the operation of the state fair park on account of concessions, exhibitions and entertainments held other than during state fair week." (Sec. 20.60, subsec. (6), par. (k).) The Miller & Rose attractions are required to operate "during all profitable portions of the year." The legislature in making this appropriation in all likelihood took cognizance of the existence of the Miller & Rose contracts.
The state receives an income of approximately $45,000 a year from the operation of the Miller & Rose attractions, and it is fair to assume that the legislature must have given consideration to this income in determining the state fair park finances and appropriations. This income was made possible only through the investment of almost a quarter of a million dollars in the state fairgrounds by Miller & Rose in fulfillment of their contracts. The state has accepted the benefits of these contracts, and fairness requires that any doubt be resolved in favor of their validity.

In view, therefore, of the probability that the commissioner of agriculture had the power to make the contracts; the fact that other similar contracts were made, indicating a practical construction of the powers of the commissioner of agriculture in regard to the state fairgrounds; the fact that the contracts were given recognition in legislative enactments; the fact that large sums were expended in reliance upon the contracts; the fact that the contracts may be given validity as licenses rather than leases;—in view of all these facts it is the opinion of this department that the Miller & Rose contracts are now binding obligations.

You ask whether the renewal clause in the Miller & Rose contracts is valid. The Miller & Rose contracts are for a period of ten years with the provision that at the end of the ten-year period the department of agriculture shall have the option of renewing the lease for a further period of ten years or taking over the physical property at an appraised value. There is no obligation placed upon the state to buy the property; the state is merely given the option of buying the property or extending the lease for a ten-year period. The practical effect of this may be to make the leases operate for twenty years instead of ten, but it is entirely unlikely that a twenty-year lease would be held such an abuse of the commissioner's discretion that it would be void. It is within the scope of authority of the commissioner of agriculture to arrange for entertainments at the state fair (Morrison v. Fisher, 160 Wis. 621); and it is a matter of common knowledge that amusements which require the expenditure of great sums for the construction work cannot be procured without long term contracts. It is our opinion, therefore, that the renewal clause is valid.
You ask whether the department of agriculture has a legal right to accept for the state tax receipts in lieu of money paid for concessions up to the amount of the taxes on the property of Miller & Rose. The payment by tax receipts is based upon an attempted modification of the contracts in 1927 in which it was recited that it was the understanding of the parties that no taxes had been assessed against the personal property in the state fairgrounds, that none would be assessed in the future and that there was an understanding that the department of agriculture would pay the taxes if levied. Whether Miller & Rose could have gone into equity for the reformation of their contracts is exceedingly doubtful. The basis of their claim for reformation would necessarily be based on the alleged oral agreement on the part of the department of agriculture to pay the taxes if levied. In Brosnihan v. Brosnihan, 180 Wis. 360, 366, the principle declared in 34 Cyc. 922 was followed:

“When there is no fraud or mistake in the preparation of an instrument, and it appears that the parties signing understood its language and purport, it cannot be reformed on the faith of a contemporaneous oral promise which was not kept.”

Under the contract as originally executed the state was entitled to certain percentages of gross receipts regardless of any personal property taxes paid by Miller & Rose, and the attempted modification has the effect of depriving the state of some money to which it is legally entitled. Possibly the commissioner of agriculture, under his broad powers in regard to state fairs, had the right to make the modification, but the question is not free from doubt. That doubt must be resolved in favor of the state, and therefore you are advised not to accept the tax receipts in lieu of money until ordered so to do by a court of competent jurisdiction.

ML
Municipal Corporations—Town Meetings—Public Officers—Poor Commissioner—Town Clerk—Town officer acting in more than one official capacity and receiving annual salary for each violates sec. 60.60, Stats.

Town officer compensated on per diem basis by statute may not be placed on annual salary basis by annual town meeting.

April 26, 1928.

ARTHUR M. SELLS,
District Attorney,
Florence, Wisconsin.

In your letter dated April 17 you state that the town clerk of the town of Florence, elected this spring, receives a salary of $500 per year; that the town board at its first meeting appointed such town clerk poor commissioner at a salary of $75 per year. You inquire whether the acceptance by the town clerk of his salary as town clerk and his salary as poor commissioner constitutes a violation of sec. 60.60, Stats., which reads in part as follows:

"* * * No town officer shall be entitled to pay for acting in more than one official capacity or office at the same time."

Assuming that it is legal for the town to engage a town clerk on an annual basis, and assuming that it is legal for the town board to engage a poor commissioner on the same basis, it is manifest that, such having been done, a situation exists where a town officer is acting in more than one official capacity at the same time and receiving pay therefor. The above quoted section of the statute specifically prohibits this.

The above opinion assumes that it is legal to pay a town officer on an annual basis. Your attention is called to an opinion rendered by this department found in Vol. XI Op. Atty. Gen. 326, construing sec. 60.60, Stats., to mean that a town meeting may change the statutory per diem pay of town officers but may not provide compensation in the form of a fixed salary. Should the town clerk and the poor commissioner receive their remuneration on a per diem basis, it is conceivable that the officer might one day be rendering services as town clerk and another day as poor commis-
sioner, and therefore not acting in more than one official capacity at the same time.

FWK

Bridges and Highways—Signs—Circular tube without advertising erected along highway does not constitute advertising sign and is not violation of sec. 86.19, Stats.

Whether such tube is obstruction or injures highway and therefore illegal under other sections is question of fact.

April 26, 1928.

C. R. Weymouth, Secretary,
Highway Commission.

You inquire whether, in view of the opinion of this department in XVI Op. Atty. Gen. 814, holding the erection along a highway of a circular tube carrying the name of a newspaper to be an advertising sign in violation of sec. 86.19, Stats., such circular tube would be contrary to sec. 86.19 providing no printing or advertising matter appeared on such tube.

Sec. 86.19 regulates advertising signs on highways. Since, by your statement of fact, the proposed circular tube will carry no advertising, it constitutes no advertising sign and is necessarily not in conflict with sec. 86.19. The attention of the commission, however, should be called to secs. 86.01, and 86.02, Stats., which provide for the removal of an obstruction in a highway, and for damages for an injury to a highway. Whether the proposed circular tube is an obstruction in the highway or injures the highway, is a question of fact to be determined by the commission. In Jennings v. Johomott, 149 Wis. 660, 663, our supreme court said:

"* * * Any object unlawfully placed within the limits of a highway is an obstruction if it impedes or seriously inconveniences public travel or renders it dangerous, and it is not at all necessary that such object should stop travel in order to be an obstruction."

In another case the court held that a post, although set three feet from the traveled track of a highway and al-
though set between two large stones already in the highway, constituted an obstruction. *Neale v. State*, 138 Wis. 484. See also *Pauer v. Albrecht et al.*, 72 Wis., 416, and *Hubbell v. Goodrich*, 37 Wis. 84.

FWK

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**Elections—Newspapers**—Under 6.22 (4) weekly paper is entitled to receive 1.00 per square for publication of election notices regardless of number of publications; while daily newspaper may receive $1.00 per square for first publication and 70 cents per square for each subsequent publication.

April 27, 1928.

**HERMAN C. RUNGE,**

*District Attorney*,

Sheboygan, Wisconsin.

In your letter of April 16 you request an interpretation of subsec. (4), sec. 6.22, Stats. You suggest that there are only two possible interpretations which may be placed upon this section: One being that a weekly paper should be paid $1.00 per square regardless of the number of insertions, and the other that a weekly must be paid $1.00 per square for each insertion of the notice.

Subsec. (4), sec. 6.22, Stats., provides as follows:

"The compensation to be paid for all publications pursuant to sections 6.21 and 6.22 shall be one dollar per square for weekly papers, and one dollar per square for the first publication, and seventy cents per square for each subsequent publication in daily papers; provided, that in counties containing more than two hundred thousand population the compensation for publishing all said notices shall be at the commercial rates prevailing from time to time for such publications of said insertions of notices."

The history of this section clearly shows that the compensation of $1.00 per square for weekly papers represents the total amount which may be paid to the weekly regardless of the number of insertions.
Sec. 37, R. S. 1898, provides in part as follows:

"* * * The compensation to be paid for all publications of such notice shall be the amounts hereinafter specified, and no more: For a general election, in weekly newspapers one hundred and twenty dollars, and in daily newspapers two hundred and forty dollars; for a judicial election, in weekly newspapers twenty-five dollars, and in daily newspapers fifty dollars; for a municipal election, in weekly newspapers thirty-five dollars, and in daily newspapers seventy dollars, which shall cover all insertions required to be made; provided, that in cities of the first class the compensation for publication of said notice shall be at the rate of one dollar per square for the first insertion and seventy-five cents per square for each subsequent insertion. The word square as used in this section shall be construed to mean a space one inch in length of the column of the newspaper in which any such notice is published; but any fraction of a square shall be paid for as a full square."

The foregoing section has been amended several times. Subsec. 4, sec. 37, Stats. 1913, provides:

"The compensation to be paid for all publications of such notices shall be sixty cents per square for weekly papers, and one dollar per square for the first publication, and thirty-five cents per square for each subsequent publication in daily papers, but in cities of the third and fourth classes the total shall in no case exceed the sum hereinafter specified, to wit: For a general election in weekly newspapers one hundred dollars, and in daily papers two hundred dollars; for a judicial election in weekly newspapers twenty-five dollars and in daily newspapers fifty dollars; for a municipal election in weekly newspapers fifty dollars; in daily newspapers one hundred dollars, which in each case shall cover all insertions required to be made; provided, that in cities of the first class and in counties containing more than two hundred thousand population the compensation for publishing all said notices shall be at the rate of one dollar per square for the first insertion, and seventy-five cents per square for the subsequent insertions. But nothing herein shall be so construed to require the publication of a separate notice to women voters at any election."

It appears clear from the provisions of the foregoing sections that the legislature intended the compensation to be paid to a daily paper to be greater than that paid to a weekly paper. It likewise appears clear that the present statutes provide for the payment of $1.00 per square to
weekly papers, which amount is in full for all publications. Daily papers, on the other hand, are entitled to receive $1.00 per square for the first publication and 70 cents per square for each subsequent publication.

SOA
Public Officers—Mayor—School District Treasurer—

After July 1, 1928, mayor cannot hold office of school district treasurer.

May 1, 1928.

JOHN CALLAHAN,
State Superintendent of Public Instruction.

You ask if the offices of mayor of a city and treasurer of a school district of which the city is a part only are incompatible.

This office has given a great many opinions on the question of the compatibility or incompatibility of public offices and the general principles governing the question are well established, based upon the question of whether the discharge of the duties of one office will conflict with the discharge of the duties of the other office, and in some cases where the statute expressly provides that the same person cannot hold the two offices, but the specific offices named have not been involved in any of the opinions of the department so far as I find. I assume the situation you have described, if it exists anywhere in the state today, must be because of some specific provisions of a special city charter which has not been changed or some special law which will go out of existence the first of July, next, when the statutes providing a general city school plan, secs. 40.50 et seq., Stats., go into effect.

As you will notice in sec. 40.52, subsec. (3), the city treasurer is also treasurer of the school board under that plan. So, under that plan, the mayor of the city can not be the treasurer of the school district because the city treasurer is ex officio the treasurer of the school district. Under the provisions of sec. 40.51 (1) each city affected by this plan is a single and separate school district and any territory outside of the city which is joined with city territory in the formation of a school district when this plan becomes effective is thereby attached to the city for school purposes. So, under that provision, a part of the district being in the city, the city treasurer becomes treasurer of the school district and that part of the district outside of the city is attached to the city for school purposes. You see your question is largely a moot question, for these express provisions of the statute settle the question on the first day of July.
For the two months remaining under a situation such as you have described, if there are any existing, I would say, let him serve, as I do not now see any serious incompatibility in the two offices. He does not come within any of the express provisions of sec. 62.09 (2).

TLM

Public Health—Beauty Parlors—Under provisions of sec. 159.12, Stats., husband can legally work in beauty parlor of which his wife is legal owner and licensed operator.

May 1, 1928.

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

You submit the following question:
Can an apprentice legally work in a beauty parlor of which his wife is the legal owner and can she, under such an arrangement, legally operate same?
You say it is your opinion that in view of the woman's individual rights, ownership would be in no way affected by having her husband there employed, and you feel that the husband can legally be employed therein as an apprentice.
You do not use the same terms as used in sec. 159.12, Stats., but I do not see that the situation you have described is prohibited by that section, if the wife is a licensed manager and is the owner of the beauty parlor. I find nothing in the law to prevent the wife from employing her husband to work as an apprentice in her own shop if she is a licensed operator.
TLM
Insurance—Sums accruing to commissioner of insurance by reason of failure of towns, cities and villages to comply with sec. 101.29 and sec. 201.59, Stats., may be used for conducting investigations as provided in sec. 200.19, Stats.

May 1, 1928.

M. A. Freedy,

Commissioner of Insurance.

The material facts presented in your letter of April 26 are as follows:

The statutes provide that companies conducting the business of fire insurance shall pay to the state, through the commissioner of insurance, 2% of all premiums received or agreed to be paid, for insurance effected or promised to be effected against loss or injury by fire in villages, cities and towns containing an unincorporated village, which maintain a regularly organized fire department. Villages, cities and towns are entitled to receive the amount thus paid, provided they comply with the requirements of the statutes. In the past, certain villages, cities and towns have not complied with the statutory requirements, and the amounts to which such villages, towns and cities would otherwise have been entitled have been withheld. You inquire whether such sums as have been withheld may be used by you for conducting investigations required by sec. 200.19, Stats.

The payment by insurance companies of fire department dues is governed by the provisions of sec. 200.17, Stats. This section provides that the commissioner of insurance shall prepare annually and forward to each company transacting the business of fire insurance in this state a list of cities, villages and towns maintaining a regularly organized fire department as provided in sec. 201.59, Stats. It is further provided that each company effecting insurance against loss or damage by fire shall on or before the first day of March in each year, file with the commissioner of insurance a statement showing the amount of premiums upon which fire department dues are payable to cities, villages and towns, and shall likewise on or before the first day of March in each year, pay to the state, through the commissioner of insurance, the total amount of such fire
department dues. The statute also provides that the commissioner of insurance shall certify to the secretary of state the respective amounts of fire department dues, payable to villages, cities and towns, and after the statements have been audited by the secretary of state, they shall be paid by the state treasurer to the respective cities, villages and towns entitled thereto.

It will be noted that the statute expressly directs the commissioner of insurance to compile the list of villages, cities and towns “entitled to fire department dues under section 201.59.” Subsec. (2), sec. 200.17.

Sec. 201.59 provides that any city, village or town containing an unincorporated village, having or maintaining a regularly organized fire department, shall be entitled to 2% upon the amount of all premiums which, during the year, have been received or agreed to be paid to any company for insurance effected or agreed to be effected by such company against loss or injury by fire, in such city or village, and within a radius of one mile from the location of any fire department in any town containing an unincorporated village. This section sets forth certain requirements to be complied with by such cities, villages and towns in order to be entitled to be paid their proportionate share of fire department dues.

No city, village or town shall be entitled to receive fire department dues unless it shall have the equipment and be organized as provided in subsec. (2), sec. 201.59, Stats. A further important limitation on the right to receive the fire department dues is contained in subsec. (4), sec. 201.59, Stats., which provides in part as follows:

“No city, village or town shall be paid any fire department dues for any year unless the industrial commission shall have certified to the commissioner of insurance that the requirements of section 200.19 have been complied with as to such city, village or town, and any fire department dues paid into the state treasury for any city, village or town not entitled to receive the same may be expended by the industrial commission for making the necessary inspections within any such city, village or town.”

Under the foregoing provision no city, village or town is entitled to receive fire department dues unless and until the industrial commission certifies to the commissioner of in-
urance that the provisions of sec. 200.19 have been com-
plied with. Sec. 200.19 refers solely to the investigating
and reporting of fires by chiefs of fire departments, presi-
dents of village boards, and town clerks. This section con-
tains no provision, either expressed or implied, imposing
on the industrial commission the duty to certify to the com-
missioner of insurance that its provisions have been com-
plied with. Since the industrial commission is under no
such duty, sec. 201.59, if interpreted literally, would pre-
clude all cities, villages and towns from receiving the fire
department dues. The legislature clearly did not intend
any such result. The statute, therefore, is ambiguous and
open to construction.

Reference to sec. 200.19 in sec. 201.59 arose by reason
of several amendments to previous statutes. Sec. 201.59
originally appeared in the statutes as sec. 1926. Ch. 465,
laws of 1913, amended sec. 1926, Stats. 1911. Subsec. 4
thereof, as amended, reads in part as follows:

"No city, village or town shall be paid any fire depart-
ment dues for any year unless the state fire marshal shall
have certified to the commissioner of insurance that the re-
quirements of section 1946i have been complied with as to
such city, village or town, * * * ."

The foregoing section refers to sec. 1946i, which now ap-
1946i by adding thereto subsec. 4. Subsec. 4 contained
practically the same provisions as are now found in sec.
101.29, except that the inspection provided in the latter
section was under the former section, as amended, imposed
on the state fire marshal, instead of the industrial commis-
sion. Ch. 501, laws of 1917, repealed subsec. 4, of sec.
1946i, and created sec. 2394—71 which was subsequently
renumbered and now appears as sec. 101.29.

Sec. 101.29, Stats., provides that the chief of the fire de-
partment in every city, village or town is constituted a
deputy of the industrial commission. Such chief is re-
quired by himself, or by officers or members of the depart-
ment designated by him, to inspect all buildings, premises
and thoroughfares for the purpose of ascertaining and
caus ing to be corrected any conditions liable to cause fire.
It is provided that such inspections shall be made at least
once every six months in all territory served by the fire
department, and not less than once every three months in
such territory as the common council shall have designated
or shall thereafter designate as within the fire limits or as
a congested district subject to conflagration. Subsec. (5)
of sec. 101.29 provides that written reports of such inspec-
tion shall be made and kept on file in the office of the chief
of the fire department in the manner and form prescribed
by the industrial commission. Subsec. (6) of sec. 101.29
provides as follows:

"Such inspection shall be subject to the supervision and
direction of the industrial commission, which shall, upon
examination, certify to the commissioner of insurance after
the expiration of each calendar year each such city, village
or town where the inspections for such year have been
made, and records thereof have been made and kept on file
as required by law."

In view of the history of the sections here involved, there
can be no question but that the legislature intended all
towns, cities and villages to receive fire department dues
where the industrial commission certified to the commis-
sioner of insurance that the provisions of sec. 101.29 had
been complied with. It is likewise clear that it was the in-
tent of the legislature that cities, villages and towns which
did not comply with the provisions of sec. 101.29 would not
be entitled to receive fire department dues. The fact that
sec. 201.59 now refers to sec. 200.19 instead of sec. 101.29,
clearly resulted through an oversight on the part of the leg-
islature at the time subsec. 4, sec. 1946; was repealed and
sec. 2394—71 was created.

The sums to which you refer were derived by reason of
the failure of cities, villages and towns to conduct the in-
spections required by sec. 101.29, Stats. Hence, the respec-
tive cities, villages and towns were not entitled to fire de-
partment dues under subsec. (4), sec. 201.59, Stats. Sub-
sec. (5), sec. 20.55 appropriates to the commissioner of in-
surance "annually, such sums as may accrue to the commis-
sioner of insurance as ex officio state fire marshal, on ac-
count of dues to fire departments, under subsection (4) of
section 201.59, to be expended by him for making investi-
gations as provided in said subsection and section 200.19."
This provision clearly appropriates to the commissioner of
insurance as *ex officio* state fire marshal all sums accrued by reason of the failure of towns, cities or villages to comply with the provisions of subsec. (4), sec. 201.59. In accordance with the plain terms of the statutes, such sums may be used for conducting investigations as provided in sec. 200.19, Stats.

SOA

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**Workmen's Compensation**—Industrial commission has jurisdiction to modify order allowing death benefit to widow of one killed in industrial employment with separate specified amount allowed to her for maintenance of minor child, when child is committed to industrial school for girls.

May 2, 1928.

**Board of Control.**

I have your letter of March 13, in which you enclose a letter submitted by the industrial commission and from which it appears that an award was made by the industrial commission to Mrs. Lilli Knoke, on the death of her husband, in a proceeding for compensation under the workmen's compensation act against Hopfensperger Brothers, and as a part of that award $186.66 was awarded to her for the support and maintenance of Lillian Knoke, a minor child under eighteen years of age, and to be paid to the said widow as her mother for her maintenance, payments to be made monthly, and that some part of it has not yet been paid. You say the girl has since been committed to the industrial school for girls and you ask if these payments should be held at the industrial school for girls or whether the payments should be directed to the state and county in proportion to their cost for the care of this girl at such school.

I find from the records in the industrial commission office in the case of *Knoke v. Hopfensperger Brothers* that the award was as follows:

"That the weekly benefit to which each dependent child is entitled is $1.82, the equivalent of $7.39 per month, and that it is to the best interest of the children that such benefit be paid in monthly installments to the widow until ordered otherwise by the commission."
Under this situation you submit two questions:

1. Has the board of control jurisdiction to make any order diverting the payments prescribed by the commission in its award? Answer: No.

2. Should payments be directed to state or county in proportion to their cost in caring for the child? Answer: That is a question solely within the jurisdiction of the industrial commission under the provisions of sec. 102.09, subsec. (4m), par. (h), Stats., which provides that the commission may make the award as may be found best calculated to conserve the interest of the child.

The order of the commission directs the payments to be made to the mother to enable her to properly keep the child, but since she has been relieved of that burden by her delinquency in properly caring for the child, that situation should be presented to the commission by your board and the commission would then have power under the provisions of sec. 102.09 (4m) (h) to make such further order as the commission may find best calculated to conserve the interest of the child.

TLM

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Civil Service—Deputy Oil Inspector—Abolishing oil inspection district to which deputy oil inspector has been assigned does not automatically discharge him from service.

When district is abolished and inspector discharged according to law he may be reinstated in any vacant or newly created district within year.

May 2, 1928.

Civil Service Commission.

I have your letter of April 12, in which you submit the following situation and questions:

"I have received in today's mail a communication under date of April 5 from the Honorable F. L. Kersten, state oil inspector, the first paragraph of which reads as follows: "You are hereby advised that pursuant to the authority in me vested by the provisions of sec. 168.03 statutes, subject to the approval of the governor, I have abolished inspection District Number 32, to take effect April 14, 1928, for the inspection of oils, etc., by adding the territory comprising the same to District No. 31."
“In today’s mail I received also a letter under date of April 11 from the state oil inspector notifying this commission ‘that a new oil inspection district has been created and will be known and designated as district No. 5-A, comprising all of Door and Kewaunee counties. I am appointing for this position as deputy oil inspector John W. Haegele, who heads the certified list you furnished this office.’

“Under date of April 6 [XVII Op. Atty. Gen. 235], the attorney general rendered an opinion to this commission to the effect that the provision of paragraph 3 of rule XI of the civil service commission is void. The rule provided that, ‘In certifying from the eligible list for deputy game warden, oil inspectors and deputy treasury agents, where the service is confined to a locality, the secretary of the commission shall upon request of the appointing officer, give preference in certification in their order of eligibility to the person or persons residing in the district in which the service is required.’ Appointments of deputy oil inspectors have heretofore generally been made under the provisions of this rule. In other words, this commission has certified for appointment the three highest names of candidates residing within a given district regardless of their order of preference with reference to other candidates on the eligible list. As the result of the opinion of the attorney general referred to above, this old rule is now void and this commission will in the future make certification of eligibles for appointment to the position of deputy oil inspector in the manner prescribed in section 16.18 of the statutes which provides that the commission shall certify from the register of eligibles ‘the three names at the head thereof.’

“State oil inspectors have heretofore, and the present inspector has in abolishing district number 32, assumed that by such act the incumbent is automatically discharged from the service although removal has not been made in accordance with the provisions of section 16.25 of the statutes. This section was not intended to and does not prevent departmental and institutional heads from dropping from the pay roll the names of persons whose services are no longer required by reason of the discontinuance of the necessity for the grade or class of employment rendered by them. There are many employments in the state service that are by reason of their nature seasonal. Candidates are informed when accepting such service that the employment is for an uncertain period and not for the year round. There are other types of employment that are for temporary periods only. Candidates are told when accepting this kind of service that it does not provide permanent em-
ployment. There is also provision in the statutes governing emergency employment which cannot last for a period longer than ten days. The statutes also in subsection 2 of section 16.18 provide that all types of employment governing permanent positions shall be made for probationary periods. Apparently it was the intention of the makers of the law that after employment had become permanent, that is, after the probationary period had been covered, discharges or removals could be made only in accordance with the provisions of section 16.25, unless there should be a bona fide discontinuance of the need of the grade or class of service rendered.

"By the abolition of district number 32 and the placing of the inspectonal duties thereof upon the deputy inspector now employed in section 31, the need of the services of the incumbent of the first named district may be dispensed with in that particular locality. However, since appointments to these districts are to be made now not from eligible lists within the different districts but from one state wide list, and since at the time of or subsequent to the abolition of district number, district number 5-A in another portion of the state is created, should not the incumbent of the old district be transferred to the new? The grade or class of employment is relatively the same in all districts.

"QUESTIONS:

1. May deputy oil inspectors be discharged from the service automatically by abolition of the districts in which they are assigned?

2. If Mrs. Magdalena McCabe, the incumbent of district number 32, has not been discharged by reason of the abolition of the district in which she has been serving, is she entitled to be assigned to duty in the first district that becomes vacant or that may subsequently be created?"

Your first question is answered in the negative, that is to say, they cannot be discharged from the service automatically. They can, however, be removed for reasons of economy.

Sec. 16.24, subsec. (3), Stats., provides in part as follows:

"Any person who has held a position by appointment under the civil service rules and who has been separated from the service without any delinquency or misconduct on his part but owing to reasons of economy or otherwise, may be reinstated within one year, and in the case of legislative employees within two years, from the date of such separa-
tion to the same or similar position in the same depart-
ment; * * *.”

Sec. 16.25, Stats., provides:

“No subordinate or employe in the competitive class, non-
competitive class, or the labor class, who shall have been
appointed under the provisions of sections 16.01 to 16.30,
inclusive, or the rules made pursuant thereto, shall be re-
moved, suspended for more than fifteen days, discharged,
or reduced in pay or position, except for just cause, which
shall not be religious or political. In all cases of removal
the appointing officer shall, at the time of such action, fur-
nish to the subordinate his reasons for the same and allow
him a reasonable time in which to make an explanation.
The reasons for removal and the answer thereto shall be
filed in writing with the commission.”

Hence, the person is not legally removed until the reason
is filed according to the provision last cited.

Answering your second question:

“If Mrs. Magdalena McCabe, the incumbent of district
number 32, has not been discharged by reason of the aboli-
tion of the district in which she has been serving, is she en-
titled to be assigned to duty in the first district that be-
comes vacant or that may subsequently be created?”

The gist of your question seems to be, if she were not
discharged according to provision of law governing re-
movals, is she entitled to be assigned to duty in a vacant or
a newly created district?

In view of the first answer, this need not be answered
except by way of explanation, for the reason that unless
charges were preferred against her she could not be re-
moved in any other manner except as above indicated, and
if the reasons given for her discharge and filed with the
commission were the abolition of the district which con-
notes economy, then she can be reinstated in any vacant or
newly created district within a year. That is to say, her
name with two others, if there are two in her same statu-
tory position in the same department, should be certified
to the appointing officer as per sec. 16.24 (3) quoted above
and the “Law, Rules and Regulations” of the civil service
commission which provide as follows:
“RULE XII

“Promotional List

“a. Vacancies in positions in the competitive class shall be filled, so far as practicable, by promotion from among persons holding positions in the lower grade in the department, office or institution in which the vacancy exists, under rules and regulations made and enforced by the commission,”

and

“RULE XIII

“Reinstatement Lists

“a. Any person who has held a position by appointment under the civil service rules and who has been separated from the service without any delinquency or misconduct on his part but owing to reasons of economy or otherwise, may be reinstated within one year, and in the case of legislative employees within two years, from the date of such separation to the same or similar position in the same department; provided, that for the original entrance to the position proposed to be filled by such reinstatement there is not required in the opinion of the commission examination involving essential tests or qualifications different from or higher than those involved in the examination for the original entrance to the position formerly held by the person proposed to be reinstated.”

JWR

Oil Inspection—Sec. 168.05, Stats., and subsections thereof impose penalty against both selling and using gasoline and other petroleum products that have not been properly examined or tested and stamped, sealed and marked as provided in that section.

May 2, 1928.

F. L. Kersten, State Supervisor,
Inspectors of Illuminating Oils.

You say there is a difference of opinion among your deputy oil inspectors as to the proper construction of sec. 168.05, Stats., as to whether it applies to gasoline coming into the state from manufacturers who are using it in their
manufacturing plants and are not selling it for consumption on our roads, and you ask for a ruling on the law.

I can see a reason for a difference of opinion. That section starts out with the broad general provision that all such oils, whether manufactured within the state or not, shall be inspected before being offered for sale or sold for consumption or used for illuminating or heating purposes within this state, but it then goes on to say that for the purposes of secs. 168.03 to 168.14, all gasoline, benzine, naptha, or other like products of petroleum under whatever name called, used for illuminating, heating or power purposes shall be deemed to be subject to the same inspection and control as provided for in those sections for illuminating oil, except that the inspectors are not required to test it other than to ascertain its gravity, and it shall be unlawful for any person, dealer or vendor to sell or offer for sale any such petroleum products for any of such purposes that have not been so inspected or approved.

You will notice the first provision says, "before being offered for sale or sold," the next one says, "used for illuminating, heating or power purposes," and the last one says, "sell or offer for sale * * * for any of such purposes," and it then provides that it shall be the duty of the supervisor or his deputies to inspect all such petroleum products under whatever name called, whether manufactured within this state or not, and stamp the gravity test over his official signature and on the barrel, cask or package before being sold or offered for sale within this state. The test there is, "before being sold or offered for sale within this state," and that applies to all of the oils for any of the uses previously named, except, where the oils are sold or delivered for illuminating, heating or power purposes in bulk or tank wagons instead of being stamped or branded, they may have printed or stenciled on each tank wagon sale ticket covering deliveries the statement provided for in that section.

Subsec. (3) then fixes the fine and penalty to be imposed against any person who shall sell or offer for sale or for use or in any manner dispose of or attempt to dispose of any such oils for illuminating, heating or power purposes which shall not have been examined and tested, or who shall know-
Opinions of the Attorney General

ingly use or furnish for use for any of such purposes any oil, gasoline, benzine, naptha or other like products of petroleum which shall not have been properly examined or tested and stamped, sealed, or marked as provided in those sections.

It will be noticed that subsection provides a penalty not only for any person who shall sell or offer for sale or for use, but it also includes any person who shall knowingly use or furnish for use any such oils which shall not have been properly examined or tested and stamped, sealed, or marked as provided in those sections.

Considering all of the provisions together, I think it clearly imposes a penalty against both selling and using any such oils without having been examined, inspected and stamped as provided therein, although different language is used in some of the prohibitions. But the fine imposed by subsec. (3) clearly applies to both selling and using. I think the state has the right to protect a man from taking chances of using uninspected oils even though he may be willing to take such chances, because in doing so he may expose others as well as himself to danger by using uninspected and untested oils. In fact, it is not difficult to see where the use of such oils in manufacturing plants might expose many more to the dangers of explosion or accident than the use of such oils on highways or for transportation, and that is evidently the purpose of the law.

TLM

Fish and Game—Public Officers—Conservation commission has authority to furnish game wardens for American Legion forest preserve and game refuge.

May 2, 1928.

L. B. Nagler,
Conservation Director,
Conservation Commission.

Subsec. (1), sec. 29.565, Stats., describes what is known as the "American Legion Forest Preserve and Game Refuge." You inquire "whether the conservation commission has a right to employ a game warden for that area and pay his salary" out of the regular appropriation or
"whether the law intends that such supervision must be done at the expense of the American Legion."

Subsec. (1) reads in part as follows:

"All state owned land in sections * * * shall be known as the 'American Legion Forest Preserve and Game Refuge,' and shall be under the control and jurisdiction of the state conservation commission. No hunting or trapping shall be allowed on said premises. The commission is authorized to enter into arrangements with the Wisconsin department of the American Legion whereby said department will assume the care, development and protection of said preserve and refuge as a part of its activities."

It will be noted that the conservation commission has authority to enter into arrangements with the Legion under which arrangements the Legion "will assume the care * * * and protection," of the preserve. Such arrangements are not mandatory, however. The statute specifically says that the preserve "shall be under the control and jurisdiction of the state conservation commission" and that "no hunting or trapping shall be allowed on said premises." Unless arrangements have been made for satisfactory protection, the commission has authority, and it is the duty of the commission, to furnish such protection, which shall be borne by the commission's appropriation for such purposes.

FWK

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Fish and Game—Use of buffalo nets and frame nets may be licensed in Mississippi river north of La Crosse, and south of La Crosse such nets of certain sizes with certain sized meshes may be used in running waters of Mississippi for catching rough fish only throughout entire year.

May 4, 1928.

L. B. Nagler,
Conservation Director.

You inquire:

"Does section 29.34 (1) of the statute prohibit the use of buffalo nets and frame nets in the Mississippi river north of La Crosse, or may the language therein contained be
construed to permit the use of these nets throughout the Mississippi river, with such exceptions as are stated in said section?"

Said sec. 29.34, subsec. (1), Stats., reads thus:

"Net licenses which shall authorize the use of nets, as limited herein, during the period of time extending from the fifteenth day of June to the next succeeding fifteenth day of April, except that buffalo nets having meshes not smaller than five inches, stretched measure, in the pots; and frame nets whose frame at the entrance is not more than three feet by six feet and whose meshes are not smaller than five inches, stretched measure, to be used for taking rough fish only, may be used in the running waters of the Mississippi river south of La Crosse at all times of the year for taking, catching, or killing fish in the waters of the Mississippi river, Lake Pepin and Lake St. Croix, and the lakes, bays, bayous and sloughs tributary thereto and connected therewith, except the Chippewa river, Beef slough, and all tributaries and inland lakes, bays, bayous and sloughs in Pepin and Buffalo counties, shall be issued subject to the provisions of section 29.09 by the state conservation commission to any resident of the state duly applying therefor." (Italics ours.)

Your first question must be answered "No" and the second question "Yes." By reading the section and omitting the exception (italicized) it is apparent that the section refers to the licensing of all kinds of nets, including buffalo nets and frame nets in the waters described therein and the exceptions take out of the operation of the statute the licensing of Buffalo nets and frame nets with meshes of certain sizes. Such buffalo nets and frame nets may be used for taking rough fish only in the running waters of the Mississippi river south of La Crosse at all times of the year.

JEM
Public Officers—Real Estate—Real estate brokers' board may promulgate rule requiring real estate brokers who purchase real estate under land contract and sell same to third persons on instalment, to deposit with board agreement with sufficient surety or other satisfactory assurance of financial ability of broker assuring ultimate purchasers that they will be protected in event of broker's default.

Failure or refusal to comply with such rule may be proper and legal basis or cause for revocation of brokers' license.

May 4, 1928.

Real Estate Brokers' Board.

You state that numerous real estate brokers in Wisconsin purchase parcels of land under land contract for resale in smaller parcels on time payment plans; that you find the ultimate purchasers are not always adequately protected in that they have no assurance that the broker from whom they purchase will perform his part of the agreement with the vendor and assure them that they will receive conveyances in the form of warranty deeds.

You cite an instance such as the following:

A, the owner of real property, sells on land contract to B, a broker. The contract provides that B may have releases by the owners to his purchase if he pays up proportionately on the contract. B, the broker, either through salesmen or his own efforts sells small parcels of this land to a large number of wage earners, who make very small payments down and smaller payments per week or month. Upon completion of their payments they receive a deed, supposedly from the owner. In the event that the broker wishes to default the ultimate purchasers are without protection because the vendor or grantor can foreclose his land contract with the broker and deprive them of their rights under the broker's contract unless they contribute jointly to pay up the broker's contract with the grantor. You ask what steps you may take to assure these purchasers protection in such cases.

Ch. 136, Stats., confers upon the board power to issue real estate brokers' licenses to such applicants as they find trustworthy and competent. The board itself has jurisdiction to inquire into the applicant's character, past achieve-
ments, and financial standing to ascertain his trustworthiness and competency. Having such power, the board can set up certain standards, particularly in such cases as you mention, where fraud is most likely to enter, whereby a broker shall be required to protect his purchasers either by having an agreement with the grantor for their benefit by which the grantor agrees to accept their payments to the real estate broker at full value on the broker’s contract with the grantor or by requiring that the broker deposit a surety bond in a sum equal to the obligations of his purchaser, or such other security as the board deems advisable. A broker who would not comply with such an order of the board would not be trustworthy, although he might be competent.

I might add that in State ex rel. Durham Tropical Land Corporation v. Wisconsin Real Estate Brokers’ Board, 192 Wis. 396, the supreme court held the board had jurisdiction to inquire into the financial status of the broker and might look into his trustworthiness and competency in a like manner. If your broker will not file the agreement with his vendor whereby the land contract purchasers will be protected on the security or surety bond herein mentioned he becomes disqualified under that decision.

My conclusion is that the board has adequate power to require such an agreement, surety bond, or security in the foregoing instances and in all situations where the broker who holds merely a land contract is attempting to sell interests in land on a basis purely speculative, because he is not the owner of the property and has merely a temporary possessory right, so long as he continues payments.

MJD
Public Officers—Sheriff—Deputy Sheriff—Undersheriff—Sheriff on salary is not entitled to be reimbursed for actual and necessary expenses incurred in taking person to charitable or penal institution in state who has been duly committed thereto.

Sheriff, undersheriff or deputy sheriff is not entitled to any expenses for performance of his duties either within or without county, except that sheriff may receive compensation for acting as agent of state in extradition matters.

Other county officers, except county judge, are not entitled to extra compensation unless it is expressly so provided by statute.

May 8, 1928.

John B. Chase,
District Attorney,
Oconto, Wisconsin.

You state that at the regular annual meeting of the board of supervisors of your county, held in November, 1925, a motion was duly made, seconded and carried fixing the salaries of the different county officers, to be elected in November, 1926, as follows:

Clerk of the circuit court 1,500
County treasurer 1,500
County clerk 1,800
Register of deeds 1,500
Sheriff 5,000
District attorney 1,000
Undersheriff 1,000
Deputy sheriffs (3) 100 each

You inquire, first, whether or not any of these officers are entitled to any fees for the performance of the duties of their office; second, whether the sheriff, undersheriff, or deputy sheriffs are entitled to their actual and necessary expenses in taking any person to any of the charitable or penal institutions of this state who have been duly committed thereto; third, whether such sheriff, undersheriff or deputies are entitled to any expenses for the performance of their duties either within or without the county.

The second and third questions are answered in an official opinion of this department which you will find in X Op.
Atty. Gen. 592. It was there held that a sheriff receiving a salary must pay his own expenses in taking persons to state institutions pursuant to court commitments, and that such sheriff on a salary basis must pay his own expenses both within and without the county when same are incurred while acting as sheriff. Such sheriff must collect fees for civil work and pay said fees to county without any deduction for personal expenses. The only exception which was noted is when the sheriff is acting as agent appointed by the governor in requisition matters. Then he is entitled, according to two previous opinions cited in this opinion, to extra pay.

Your first question is rather comprehensive and as you seem to be more interested in the sheriff, I shall answer the first question in a general way.

Under sec. 59.15, subsec. (1), Stats., it is provided:

"The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer's term, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions:

"(a) Compensation to the sheriff for keeping and maintaining prisoners in the county jail;
"(b) Reimbursement to the district attorney of the amount of his expenses actually and necessarily incurred in briefing and arguing criminal cases before the supreme court, as required by subsection (7) of section 59.47, and in traveling within and without his county in the performance of his official duties;
"(d) Compensation received by the clerk of the circuit court for work done for the United States government or for congress."

It may be well to direct you also to the provision in subsec. (5) of said section, which provides:

"The county board may at any time change the compensation of any county officer from fees collected and retained by him to a salary, and may fix the annual salary of such
officer. However, if such change is made after election or appointment of the officer, the board and such officer shall stipulate in writing the amount of compensation which shall be received and accepted annually by such officer for the remainder of his term as equivalent to the fees or fees and salary to which he was theretofore entitled. The county board of any county wherein such change has been made may at any time change the compensation of any such officer from a salary to fees collected or to part salary and part fees collected; but no change of compensation shall be made during the term for which any such officer was elected or appointed except as provided in this subsection.”

Your first question, therefore, is answered to the effect that none of the county officers enumerated by you are entitled to extra fees for the performance of any duty of their offices except as expressly provided for by statute.

JEM

Fish and Game—Bounties—Sec. 29.61, Stats., requiring counties, towns, cities and villages to provide for bounties for certain animals is mandatory.

It applies to counties as well as to other local municipalities.

Towns, cities or villages cannot be reimbursed by county unless county board has acted either voluntarily or under mandate of court.

May 8, 1928.

D. M. Perry,
District Attorney,
Black River Falls, Wisconsin.

You direct me to the provisions of sec. 29.61, Stats., known as the bounty law, which provides in subsec. (1) that:

“The governing body of any county, town, city or village shall direct that every person who shall kill” certain specified animals shall be entitled to a reward. Subsec. (4) provides in effect that “whenever any county has authorized the reward provided for” in subsec. (1) the town, city or village shall be paid back the money so spent. You state that the county board of your county failed to authorize
the reward provided for in subsec. (1) and you inquire, first:

"Is the statute mandatory on the municipality, to pay a bounty as provided?"

This question must be answered in the affirmative. You will note that the word "shall" is used instead of "may." This has a mandatory meaning and should be given its natural and ordinary meaning, but we are strengthened in our conclusion by the fact that formerly the word "may" was found in this statute and it was changed to "shall" by ch. 452, laws of 1927.

Your second question is:

"Does this include the county?"

This must also be answered in the affirmative, for the county is specifically named in said subsec. (1).

Your third question reads:

"Can the town, city or village, recover the amount paid for bounty under subsection 4, from the county where it has not been authorized?"

This question must be answered in the negative, for the statute expressly says:

"Whenever any county has authorized the reward provided for in this section" then the towns, cities and villages may recover the same from the county. This is specific and must be taken to mean just what it says. I believe the county board could be mandamused to act in the matter, but as long as it has not acted either voluntarily or under the mandate of a court the local municipalities cannot be reimbursed.

JEM
Elections—Public Officers—Election officer may not act as such at election in which he is candidate.

One who violates sec. 6.32, subsec. (1), Stats., can be punished under sec. 348.24 for willful violation of provisions of law.

May 8, 1928.

C. E. SODERBERG,
District Attorney,
Rice Lake, Wisconsin.

In your letter of April 24 you cite sec. 6.32, subsec. (1), Stats., which provides that none of the election officers required for polling places shall be a candidate to be voted for at such election. You say that provision was violated at one of the elections in your county this spring; that dissatisfied electors are asking you whether such violation was a punishable offense or whether it prevented qualification for the office to which he was elected by a candidate who acted as inspector at such election. You state that you find no section of the statute covering the question or any opinion of the attorney general, and you ask for the opinion of the attorney general on this subject.

Sec. 6.32 (1) prohibits an inspector or any election officer from being a candidate, or vice versa, but there is no penalty in that section or forfeiture of the office, but I think it would be punishable under the provisions of sec. 348.24, Stats., which, among other things, fixes a penalty for willful violation of any provision of the law by election officers.

TLM

Physicians and Surgeons—Chiropractors—Person who performs operation called electrocoagulation of tonsils whereby diseased tonsils are shrunken and destroyed by use of electric current transmitted by electric needle performs surgical operation within provisions of sec. 147.14, subsec. (1), Stats. Such person must be licensed as surgeon.

May 8, 1928.

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

You ask for an opinion as to whether one would need a license or certificate of registration from the state board of
medical examiners, under sec. 147.14, Stats., where the practitioner holds a basic science certificate and chiropractic diploma and also a license in chiropractic, also a diploma in electrotherapy and physiotherapy, and uses a certain electrical treatment which is known as electrocoagulation of tonsils, which is a process whereby diseased tonsils are shrunk and destroyed by use of an electric current transmitted to the tonsil by means of an electric needle inserted into the tonsil for a period of from one-half to two seconds.

You state that you do not believe that a chiropractor under his license as such would be allowed to use this method of treatment.

I fully agree with you that a chiropractor could not use this treatment as a physiotherapist.

Sec. 147.14, subsec. (1), Stats., provides that 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. Sec. 147.23 makes a special rule for persons practicing chiropractic, but I do not think a chiropractic treatment would cover such a treatment as you describe, for I think that would clearly come under the head of a surgical operation or treatment, and whether the particular operation is very dangerous or involves difficult surgical skill and knowledge or not would not be controlling or even important in some cases, for it might be serious in many cases if not properly done. I do not think we can undertake to say how serious or dangerous a surgical operation would have to be in order to come within the prohibition of sec. 147.14. I do not think you should hesitate to prosecute a person for performing a surgical operation of the character described unless he be a licensed surgeon as provided by that law. The fact that he would call such an operation by some other name would not change the character of the operation or the necessity for a license in order to perform it.

TLM
Appropriations and Expenditures—Counties—County Board—Under sec. 59.02, subsec. (2), Stats., resolutions carrying money appropriations are valid if adopted same day as presented by majority vote with quorum present at lawful special meeting of county board even though rules of county board require such resolutions to be laid over one day before final action be taken thereon.

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

In your recent letter you submit the following facts:

Four resolutions in writing carrying money appropriations for road work were presented in lawful special session of the county board as follows: one resolution on April 18, two resolutions on April 19, and one resolution on April 26. These resolutions were duly referred to the county state road and bridge committee, which committee, on April 20, reported in writing on these resolutions, recommending that they be deferred until the fall meeting of the county board in November, 1928. The same day, April 20, it was moved and seconded that this report be adopted, and, on roll call the motion was lost. It was then moved by a supervisor who was not a member of the county state road and bridge committee that these four resolutions be adopted. On roll call the motion was carried. You state that Rule 6 of the code of rules adopted by the board of supervisors of Wood county provides as follows:

"All resolutions carrying money appropriations, except such resolutions as may be introduced by the committees, shall be laid over one day before final action be taken thereon."

You inquire as to whether these resolutions have been legally adopted by the county board.

Assuming that a quorum was present at the session of April 20 and assuming that these resolutions were adopted by a majority vote, I am of the opinion that these resolutions were lawfully adopted by the county board and hence are valid.

Subsec. (2), sec. 59.02, Stats., provides:
"Ordinances and resolutions may be adopted by any county board by a majority vote when a quorum is present, or by such larger vote as may be required by law in special cases; also in the special manner provided for cities by section 10.43, which section is applicable to counties."

Subsec. (3), sec. 59.04 provides:

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

The above quoted sections provide that at any lawful meeting, when a quorum is present, ordinances and resolutions may be adopted by a majority vote. It is clear that this means at any time. The county board has no power to adopt a rule of its own in conflict with these provisions, and, therefore, has no power to enforce a rule which would require resolutions carrying money appropriations to be laid over for a day before final action be taken thereon. See XII Op. Atty. Gen. 24.

HHN

Public Officers—Constable—Deputy Prohibition Commissioner—Offices of constable and deputy prohibition commissioner are compatible.

May 10, 1928.

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

You submit the following question: whether the offices of constable and deputy prohibition commissioner are incompatible. Sec. 165.02, Stats., prescribes the duties of the prohibition commissioner and his deputies. The duties of constables are enumerated in sec. 60.54, Stats. Incompatibility does not depend upon the incidents of the office, as upon the physical inability to be engaged in the duties of the two offices at the same time, but on the character and relation of the offices, where the functions of the two are inherently inconsistent and repugnant. 13 L. R. A. 670, note. I find no conflict in the duties of the office of con-
stable and deputy prohibition commissioner which would render them incompatible. There is no statutory prohibition preventing one person from holding the two offices.

AJM

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*Municipal Corporations—School Districts*—Funds raised by board of education of city for erection of high school building are under direction and supervision of and shall be expended by school board; common council cannot use such funds for general city purposes.

May 12, 1928.

**John Callahan, State Superintendent,**
*Department of Public Instruction.*

You state that in a certain city the board of education in 1925 adopted a resolution that, in addition to the regular maintenance tax levy, an appropriation of eight mills on the dollar of the assessed valuation of the real and personal property for the year 1926 be levied for a sinking fund for the purpose of erecting a new high school building in accordance with sec. 62.12, subsec. (4), Stats., and further resolved that the moneys so raised, together with the accumulations thereof, be invested by the common council of the city upon the joint advice of the cashiers of the three banks of the city, temporarily and until the same is required for the erection of such high school building, in accordance with the provisions of sec. 66.04, subsec. (7).

And in compliance with such resolution, the common council passed a resolution that in addition to the regular maintenance tax levy an appropriation of eight mills on the dollar of the assessed valuation of the real and personal property for the year 1927 be levied for a sinking fund for the purpose of erecting a new high school building in accordance with sec. 62.12 (4), Stats., and resolved further that the money so raised together with the accumulations thereof, be invested in the same manner as covered by the resolution adopted by the board of education in September, 1925.

You say similar resolutions have been adopted each year since, and you say this money is now invested in securities
as the resolutions call for, and you ask if there is any way by which the common council may use this money, and if so, under what circumstances. You say you are of the opinion that this money cannot be taken over by the city government under any circumstances and you would like an opinion of the attorney general as to whether or not that can be done.

Sec. 40.52 provides that the school affairs of cities shall be administered by the school board and sec. 40.54 provides that all moneys appropriated for school purposes shall be under the direction and shall be expended by the school board. Your question is answered in the negative, because such funds are under the control and supervision of the school board and not the city council. I do not think the board could relieve itself of that responsibility by resolution.

TLM

Elections—Public Officers—Town Clerk—Election Officer—Town clerk is not criminally liable for violation of sec. 11.67, Stats., if form of ballot is enclosed with application form sent to elector for voting by mail.

No criminal law is violated by election officer assisting elector in marking his ballot without making record on ballot of such fact.

May 12, 1928.

J. R. HILE,
District Attorney,
Superior, Wisconsin.

You state that a town clerk, in response to a letter from a party in Washington asking for blanks to enable him to vote, mailed an application blank and also a blank ballot and ballot envelope at the same time and they were all returned to the clerk at the same time; that the envelope containing the ballot and papers with other envelopes sent out in a similar manner were turned over to the election officials as mail ballots but were rejected because they showed the application for ballots and the ballots were all made out and mailed at the same time. You ask if the clerk is liable to prosecution under sec. 11.67 or any other
law for sending the ballots at the same time he sent the applications for ballots.

I find nothing in that law that prohibits the clerk from doing that, so I do not see how he is guilty of a crime for doing what he is not prohibited from doing. The procedure is irregular and not in accordance with the express provisions of the statutes and you say the ballots were rejected, but I do not think that irregularity subjects the clerk to criminal prosecution under the provisions of that statute.

You then say the law provides that assistance may be given a voter by two of the inspectors and they shall indicate on the ballot that assistance has been given, and you ask who, if any one, is liable criminally in case assistance is given by one inspector and no record made of it on the ballot.

I do not think any criminal action would lie on the facts stated. Sec. 6.22, subsec. (1), par. (a), Stats., says a ballot clerk may inform the voter as to the proper manner of marking a ballot but he must not advise or indicate in any manner whom to vote for. Then under the provisions of par. (g) a voter who declares to the presiding officer that he is unable to read or that by reason of physical disability he is unable to mark his ballot can have assistance of two election officers in marking his ballot, to be chosen by the voter, or if he is totally blind, he may be assisted by any person chosen by him from among the legal voters of the county.

It does not appear from your statement under which provision this assistance was given. Under the first provision the assistance may be given by one of the ballot clerks informing the elector of the proper manner of marking the ballot and under the latter provision the elector can have the assistance of two election officers in marking his ballot. That seems to be permissive as to the number; he can have two if he desires, but he does the choosing, so he might claim the right to choose but one instead of two and he might object to having two and, as he does the choosing, I do not see how the board could force two upon the elector contrary to his wish or request. I do not think there is any criminal law violated in either case.

TLM
Counties—County Board Proceedings—Newspapers—

County board need not advertise for bids to publish its proceedings, but whether it does or not board can let contract to paper which it considers best, based on price and circulation.

May 12, 1928.

Frank B. Keeffe,
District Attorney,
Oshkosh, Wisconsin.

You refer to sec. 59.09, subsec. (2), Stats., which provides that the county board shall by ordinance or resolution provide for one publication of a certified copy of all its proceedings had at any meeting, regular or special, in one or more newspapers published and having a general circulation therein, said publication to be within sixty days after the adjournment of each session.

You say you have one paper with a circulation exceeding 13,000 copies and another with a circulation of several hundred copies, and you ask if it is to be construed as a newspaper of general circulation so as to be a competent paper for publishing the proceedings of the county board.

You also ask if it is necessary to submit the question for competitive bids and whether, if bids were called for and the paper with the small circulation was the lowest, the board could award the contract to the paper having the larger circulation.

You are advised it could. Under the provisions of sec. 59.09 it is not necessary to advertise for bids for publishing the proceedings of the board, but, if that was done, the board could then let the contract on what it considered the best bid based on the services to be rendered.

The number of subscribers to a newspaper would not determine its qualification as a newspaper having a general circulation in the county, for that relates to the general character of the circulation rather than to the character of the newspaper.

The board might have the proceedings printed in more than one paper, and the prices might be different, based on the circulation, if so desired.

TLM
Agriculture—Civil Service—County agricultural representative is within unclassified service of civil service.

May 14, 1928.

A. E. Garey, Secretary and Chief Examiner,  
Civil Service Commission.

You inquire whether appointment of a county agricultural representative according to subsec. (6), sec. 59.87, Stats., is within the classified service of the civil service. With your request is a statement from the Milwaukee county civil service commission, indicating the duties of the agricultural representative of that county are primarily of a teaching nature. You also enclose a copy of a letter from the assistant director of agricultural extension, outlining the duties of the county agricultural representatives and giving his opinion that they are instructors.

Subsec. (6), sec. 59.87 provides for the appointment of the county agricultural agent by the university board of regents. Some of his duties are outlined in subsec. (2), which are enumerated as follows:

"(a) Advise and consult with individuals in reference to farming methods.  
(b) Aid in the development and improvement of agriculture and country life conditions.  
(c) Offer courses of instruction to young people and adults.  
(d) Aid in the formation of co-operative enterprises.  
(e) Promote better business methods among farmers.  
(f) Give such assistance as possible in the development of agricultural teaching in the schools of the county.  
(g) Do other work designed to promote the agricultural or rural development of the county.  
(h) Keep in touch with all agencies in the state and elsewhere that will enable him to utilize the most improved knowledge in the furtherance of his work.

"* * *"
Other subsections provide that the county training school board may arrange with the board of regents for the use of such county agent to further agricultural education in the county training school; also for co-operation between the county superintendent of schools and the county agent, for the furtherance of this work throughout the county.

These men have been ranked as instructors in the university and accordingly have been compelled to comply with the teachers’ retirement act. The facts would indicate that the rank of instructor given by the university is in accordance with the duties of the position.

Par. (d), subsec. (2), sec. 16.07 provides that instructors in the university shall be in the unclassified service of the civil service. The county agricultural representative is therefore within the unclassified service of the civil service.

FWK

Public Officers—Justice of Peace—Mayor—Offices of city mayor and justice of peace are incompatible.

Frank B. Moss,
District Attorney,
Baraboo, Wisconsin.

In your letter of recent date you inquire whether the office of mayor of the city of Baraboo and the office of justice of the peace of one of the wards in the city of Baraboo may be held by one and the same individual.

Subsec. (1), sec. 62.09, Stats., provides that a justice of the peace is one of the city officers. Par. (b), subsec. (4) of the same section provides that the justice of the peace may be required by the city council to file an official bond in such sum as the council may determine. This paragraph specifically provides that such official bonds must be ap-
proved by the mayor. Also the mayor’s vote may be neces-
sary to determine whether such justice of the peace shall
file a bond. In each instance the mayor would be passing
upon his own case; he would be asked to approve his own
bond or, by his own vote, determine whether he would be
required to furnish a bond. Apparently, these two offices
are incompatible, and for one man to hold both offices is
contrary to good public policy.

In *State v. Jones*, 130 Wis. 572, our supreme court held
incompatible the offices of county judge and justice of the
peace. That opinion cited a former Wisconsin case, *State
ex rel. Knox v. Hadley*, 7 Wis. 700. A good discussion in-
volving somewhat the same question will be found in IV
Op. Atty. Gen., 322, where the offices of village president
and justice of the peace were held incompatible.

This opinion does not take into consideration possible
provisions in the special charter, which have not been called
to our attention.

It is not clear to this department just what your other
question is. If the above opinion does not answer it, we
will be glad to have you submit another statement of facts,
together with the question you have in mind.

FWK
Municipal Corporations—Municipal Borrowing—Taxation—Under provisions of sec. 67.12, subsec. (7), Stats., county board in counties other than Milwaukee may, after tax levy has been made, borrow not exceeding fifty per cent of such tax levy and issue county orders therefor on or before February 15 next following.

May 16, 1928.

Harold W. Krueger,
District Attorney,
Crandon, Wisconsin.

You state that your county board at its annual meeting in November, 1927, levied a tax of $176,000 for county purposes; that approximately $90,000 of this amount was returned delinquent by the town treasurers. At that annual meeting the county board also authorized the borrowing of $40,000 which was repaid out of the taxes collected, and the county is now completely out of funds. The board desires to know if it can borrow more money, and you say you advised that it could on the strength of the opinion of this department in XVI Op. Atty. Gen. 491, and you would now like further construction of subsec. (7), sec. 67.12, Stats.

Subsec. (7) makes a specific provision for temporary borrowing by counties and says that can be done at any legal meeting, but you will notice at the close of that subsection it provides that such borrowing may be done at the times and in amounts and manner specified as there enumerated. In par. (b) it says that borrowing can be done at any time after taxes have been levied in any year in a sum not exceeding fifty per centum of the last tax levy for county purposes and payable with interest as provided in par. (a). Par. (a) specifically provides that the money so borrowed for temporary purposes must be repaid with interest on or before the 15th day of February then next following.

Putting the two provisions together, I think it simply means that, after a tax levy has been made, the county can borrow on the strength of that levy not exceeding fifty per centum thereof, to be payable on or before the 15th day of February next following, which seems to indicate quite clearly just as it always has that the temporary borrowing is based on a levy made and pending its collection. Of
course the county could not pay the orders until it received money from the tax levied, and if it could not arrange with the payees of the orders to carry them, it would be subject to suit the same as any other order.

I do not think the previous opinion of the attorney general referred to is in conflict with this opinion.

TLM

Armories—Mortgages, Deeds, etc.—Fond du Lac Guards may sell and dispose of its property provided all holders of certificates join in conveyance.

May 17, 1928.

RALPH M. IMMELL,
Adjutant General.

In your letter of March 15 you inquire whether the Fond du Lac Guards may sell real estate which they own in the city of Fond du Lac. The Fond du Lac Guards is a corporation formed under the provisions of ch. 86, Stats. 1898, for military purposes. It has the power to hold, sell and convey real property.

In view of the articles of incorporation, there can be no question but that the Fond du Lac Guards may dispose of its property.

The articles of incorporation of the Fond du Lac Guards provide that each member shall receive a certificate entitling the owner thereof, upon the dissolution of the corporation, to an equal proportionate share in the assets of the corporation, and each such certificate shall contain a provision that the same shall be assigned or transferred by will of a deceased member or under the statutes of the state of Wisconsin covering the distribution of the personal property of the deceased member.

In view of this provision of the articles of incorporation, it will be necessary, in order to pass title, for all holders of certificates to join in the conveyance.

SOA
National Guard—Public Officers—Adjutant general may sell unserviceable or unsuitable property to board of control in accordance with board’s bid.

May 17, 1928.

RALPH M. IMMELL,
Adjutant General.

With your letter of March 23 you submit copy of a bid made by the state board of control on certain property which has been surveyed, and the survey approved by the governor. You request an opinion as to whether the bid of the board of control is legal.

The bid to which you refer was made pursuant to the provisions of sec. 2, ch. 371, laws of 1927. This chapter created subsec. (2), sec. 21.56, Stats., to read in part, as follows:

"Whenever any chattel property of the state in the official custody of the quartermaster-general shall become unserviceable or unsuitable, or is no longer required for military purposes, the quartermaster-general may, upon recommendation of a board of survey and subject to the approval of the governor, dispose of and sell at public sale any such property; * * *.

The statute further provides that before such sale a written notice containing a brief description of the property and an estimate of its value shall be given to each principal officer of the state, including the board of control. The statute also provides that "if any such officer or institution can use such property to advantage, he or it shall be allowed to purchase the same or any part thereof at any price deemed reasonable by the quartermaster-general."

The bid which you submit conforms to all of the provisions of the foregoing statute. If you deem the bid made by the board of control reasonable, it is clear that you may sell the property to it.

SOA
332  OPINIONS OF THE ATTORNEY GENERAL

Public Health—Beauty Parlors—Permanent waving constitutes practice of cosmetic art under ch. 159, Stats.

RAYMOND EVRARD,
District Attorney,
Green Bay, Wisconsin.

You ask whether permanent waving is within the practice of cosmetic art under ch. 159, Wisconsin Stats.

"Cosmetic art" is defined in part as "manicuring, bobbing, dyeing, cleansing, arranging, waving, curling and marcelling of the hair." The term "waving" would seem to include permanent waving, which is nothing more nor less than a wave given in such manner that it will last for some time.

MJD

Public Health—Hospitals—No law is violated by hospital which retains body of deceased person for three hours after death.

EDWARD MEYER,
District Attorney,
Manitowoc, Wisconsin.

You state that a local hospital in your county has a custom of refusing to allow an undertaker to embalm a body until three hours after the death of the party, even though the relatives are desirous of having the body taken care of immediately. You state that you have been unable to find any statute governing this matter. You inquire whether the hospital authorities have the right to do this.

I know of no statute which is violated by this practice. Hospital authorities have the right to make reasonable rules and regulations as to the operation of the hospital. Any one who makes use of the hospital naturally consents to its rules and regulations.

JEM

May 23, 1928.
Counties—Public Officers—City Supervisors—County Board—Term of office of supervisors elected in cities commences on first day of May succeeding their election.

County board must reorganize and elect new officers at special meeting held after town chairman and town supervisors have been elected and have qualified.

May 24, 1928.

Herman C. Runge,
District Attorney,
Sheboygan, Wisconsin.

In your letter of April 19 you inquire: (1) When does the term of a supervisor elected in a city commence? And (2), when a special meeting of the county board is called prior to May 1, in a particular year, must a board reorganize and elect new officers, or do the old officers hold over until the first day of May?

(1) Subsec. (5), par. (a), sec. 62.09, Stats., provides:

"The regular term of office of mayor and aldermen shall commence on the third Tuesday of April succeeding their election. The regular terms of other officers shall commence on the first day of May succeeding their selection unless otherwise provided by ordinance or statute."

Subsec. (1), par. (a), sec. 62.09 expressly provides that a supervisor of a city is a city officer.

It is clear, therefore, that the term of a supervisor elected in a city commences on the first day of May succeeding his election.

(2) When a special meeting of the county board is called prior to the first day of May, it may be composed of both old and new members. The supervisors from cities hold over until May first. However, supervisors in villages and town chairmen take office as soon as they have duly qualified.

In view of the fact that the board is composed of old and newly elected members, it is apparent that the old organization of the board expires at the time the chairmen from the various towns and supervisors from villages have qualified.

SOA
Corporations—Trade-marks—"The Eastsider" may be registered under sec. 132.01, Stats., as trade name for protection of magazine.

Theodore Dammann, Secretary of State.

You state that Carl F. Deysenroth, of Milwaukee, has made application for registration of the name "The Eastsider" for the protection of the name of a magazine under our statute, providing for the registration of trade-marks or trade names. You refer to the opinions of this department of June 8, 1906*, and of April 30, 1907**, to the effect that names of places of business or firm names cannot be registered under this statute.

You ask to be advised if you are authorized to accept said application and register said name. This question must be answered in the affirmative. It is not necessary to quote the statute—sec. 132.01.

That the names of newspapers may be protected as trade names is well settled by the authorities. See Grocers Journal Co. v. Midland Publishing Co., 127 Mo. App. 356; New York Herald Co. v. Star Co., 146 Fed. 204.

In the latter case it was held that the complainant was entitled to protection in the trade-mark "Buster Brown" as the title of a comic section of a newspaper. In the first cited case it was held that the right of trade-mark exists in the title of a newspaper and that such trade-mark passes to the purchaser upon the sale and delivery of the newspaper, the plant, good-will, and appurtenances to it.

Fish and Game—Bag limit for fish as provided under sec. 29.19, Stats., should be enforced when fish are caught with hook and line from outlying waters, as well as in waters of other parts of state.

Conservation Commission.

You have referred me to sec. 29.19, Stats., which provides:

** Not published.
“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; nor in the open season in excess of the quantity, or under the minimum length for each fish, designated opposite each variety or each locality, respectively, in the column headed ‘Bag Limit.’ Such measurement of length shall be taken in a straight line from the tip of the nose to the utmost end of the tail fin. * * *

Then follows a column headed “Kind of fish and locality,” a second column, “Open season” and a column headed “Bag limit” divided into two parts, the first headed “Quantity” and the second “Minimum length.”

You state the question has arisen as to whether or not this schedule applies to outlying waters. You state it will be noted under sec. 29.33 that provision is made whereby certain fish may be taken by nets, including perch, pike, and pickerel; that under subsec. (6), subd. (a), there is a close season for all varieties of fish, except lake trout, white fish, carp, suckers, and herring from the 15th day of April to the 20th day of May, inclusive, meaning that at other times of the year pike, pickerel, and perch may be taken with nets in any waters. You state that the question has now come up as to whether or not the bag limit under sec. 29.19 should be enforced when the fish are caught with hook and line from outlying waters.

You will note that sec. 29.33 does not refer or include fishing with hook and line. The provisions of sec. 29.19 are broad enough to include the fishing in all locations of which the state has jurisdiction, and I am satisfied that the bag limit under sec. 29.19 must be enforced when the fish are caught with hook and line from outlying waters. I find nothing in the provisions of these statutes which would lead me to any other conclusion.

JEM
336 OPINIONS OF THE ATTORNEY GENERAL

Automobiles—Law of Road—Car owned and used by garage for purpose of towing to garage or for purpose of pulling cars out of mud holes or snow banks for hire must have regular registration as motor vehicle; cannot be operated under manufacturer’s, distributor’s or dealer’s certificate of registration issued under sec. 85.05, subsec. (4), Stats.

Trucks and cars owned by residents of Michigan operated in Wisconsin for purpose of towing cars to garages for repair and towing cars for hire need not be licensed under subsec. (2), sec. 85.15 but are covered by general registration laws and are subject to provisions of subsec. (1), sec. 85.15.

May 28, 1928.

EVERIS H. REID,
District Attorney,
Hurley, Wisconsin.

Your letter of May 1 contains a question which may be stated as follows:

May a car owned and used in a garage either for the purpose of towing to the garage or for the purpose of pulling cars out of mud holes and snow banks for hire be used on the highways for such purposes under a certificate of registration as dealer, manufacturer, or distributor of motor vehicles under sec. 85.05, Stats.?

Subsec. (4), said sec. 85.05 provides:

“No manufacturer, distributor or dealer shall use any vehicle registered under this section for any purpose other than the trial test or adjustment of such vehicle, or for demonstration or exhibition or for some purpose necessarily incidental to his said business or personal use, and in no case shall the vehicle so registered be rented or let for hire.”

Your question must be answered in the negative. The use of such automobile for towing in cars or pulling them out of mud holes is not within the exceptions enumerated in the above-quoted provision of subsec. (4). You will note that a manufacturer, distributor, or dealer in automobiles does not include a service station where automobiles are repaired and the towing in and pulling out of mud
holes of cars is not an incident to the business of a manufacturer, distributor or dealer.

You also inquire whether trucks or cars used by garages in the state of Michigan operating in Wisconsin for the purpose of towing cars to garages for repairs and also towing cars for hire must be registered as provided in subsec. (2), sec. 85.15. Said subsec. (2) provides as follows:

“No motor vehicle, trailer or semitrailer engaged in commercial transportation over regular routes or between fixed termini, whether for direct or indirect hire or otherwise, and no motor vehicle, trailer or semitrailer used regularly for the delivery or distribution of merchandise within this state or for intrastate hauling, 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. The penalty applying to violations of section 85.04 shall apply to this subsection.”

You will note that this section applies to such motor vehicles, trailers and semitrailers as have regular routes and operate between fixed termini. This question must therefore be answered “No.” Such motor vehicles come under the provisions of subsec. (1), said sec. 85.15, which reads thus:

“Any motor vehicle other than those specified in subsec. (2) of this section registered in any state of the United States, the District of Columbia, or any foreign state or province which carries the number plates indicating such registration, may be operated over the highways of Wisconsin without registration in this state, during the year of such registration; provided, that such state, district or province allows motor vehicles registered in this state to be operated tax free upon its streets and highways under conditions substantially as favorable to residents of Wisconsin as granted herein to nonresidents; and provided, further, that the owner of the motor vehicle has not moved to Wisconsin, in which case the vehicle must be registered for the remainder of the calendar year.”

JEM
Municipal Corporations—Bill for electric light furnished by city may be charged up to lot or parcel of real estate to which it is furnished.

May 31, 1928.

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

In your communication of May 25 you state that a certain city in your county buys its electric energy from a power company and then distributes it over its own distribution system to the people in the city; that the city looks after the collecting of the electric light bills and takes care of the distributing system in the city; that the party to whom it has been selling electric energy has failed to pay the bill and the city would like to make the bill a charge against the lot or parcel of real estate to which the electric energy was furnished. You direct my attention to sec. 66.06, subsec. (11), par. (b), Stats., which provides a method by which a charge for water can be charged up to the lot or parcel of real estate, but you say it says nothing about electric energy and that you have been unable to find any other provision in the statute regulating this matter. You inquire whether this can be made a charge against the land and put in the tax roll.

Sec. 66.06, subsec. (11) (b) does provide a method by which a bill for water can be charged up to the lot or parcel of real estate by the city, but you will note that the last sentence in said paragraph reads thus:

"This section shall apply also to other public utility service as far as practicable."

A public utility includes a corporation or a municipality furnishing light, as well as power. See sec. 66.06 which says: "The definition of 'public utility' in section 196.01 is applicable * * *."
Opinions of the Attorney General

Indigent, Insane, etc.—Legal Settlement—Relief given to family in each county and in each state, within year in each case, in which it lived when it moved from one county to another and from one state to another prevents first county in which it lived from being relieved of liability for its support.

May 31, 1928.

Glenn D. Roberts,
District Attorney,
Madison, Wisconsin.

I have your inquiry of May 11, which presents quite a lengthy and complicated statement of facts involving the legal settlement of a family imposing liability of the county under the provisions of ch. 49, Stats., for the support of the poor.

It seems the family had legal settlement in Chippewa county and had been supported there as paupers but they then moved to Dane county and continued to be supported in Dane county as paupers but Chippewa county reimbursted Dane county for such support. The family then went to Illinois but it is claimed the family was supported there as paupers within the year. Within the year Dane county was notified of such fact and Chippewa county was also notified of such fact. The family was then returned to Dane county from Illinois, probably by voluntary subscription, and you say you have advised the authorities of Chippewa county that in your opinion the family is still the charge of Chippewa county. You ask to be advised.

I think under your statement of facts your conclusion is correct, and that Chippewa county is still liable for the support of the family, although I can see where there may be a dispute and controversy over some of the questions of fact. As you say the family has been assisted as a poor family every year since it left Chippewa county, I think under the statutes of this state and under the decisions and opinions of the attorney general, the family would not gain or acquire a legal settlement in any other county or state, so the liability of Chippewa county would continue. Of course, if it could be shown that the relief furnished at any of the places within the year was not necessary for the support or maintenance of the family as a poor family but
was in the nature of a voluntary support for the purpose of preventing the family from gaining a legal settlement in that county, that might relieve Chippewa county of the burden of supporting the family. But I assume that was not true in these cases.

I think the statute, sec. 49.02 and the cases and opinions of the attorney general cited under that section of the statute sufficiently advises on the general principles to be applied to each case, and your attention is especially called to the opinion in XIII Op. Atty. Gen. 503.

TLM
intoxicating liquors—nonintoxicating liquors—applicant for license to sell nonintoxicating liquors under sec. 165.31, subsec. (1), Stats., cannot be denied such license by town board adopting resolution or other similar action limiting number of licenses it will issue in such town.

Each applicant is entitled, as of right, to such license if and when board determines applicant is proper person to license.

June 1, 1928.

Raymond E. Evrard,
District Attorney,
Green Bay, Wisconsin.

In your letter of May 7 you enclose copy of resolution adopted by the supervisors of the town of Preble, in your county, which reads as follows:

"April 3, 1928
"COPY OF RESOLUTION;
"Whereas, conditions in the town of ______ arising from an excessive number of soft drink parlors are most deplorable and most demoralizing to the welfare of the young people of the entire community, and whereas the town board of supervisors have it in their power to limit the number of such soft drink parlors, therefore; be it resolved that the number of soft drink parlors in the town of ______ be limited to fifteen.

"Be it further resolved that the town board of supervisors in granting such licenses shall exercise care in their selections and shall deny the granting of such licenses to parties whom in the past have operated disreputable resorts of any sort whatever.

"Provided further, that the provisions of this resolution shall go in force immediately after the passage thereof.

"Introduced by

"E. J. Delwiche."

Concerning such action of said supervisors you ask:

"Has a town board, under the present law, the right to limit the number of soft drink parlors within such town?"

In view of the provisions of sec. 165.31, subsec. (1), Stats., I think your question must be answered in the negative. So much of that statute as is here material reads as follows, viz.:
“Each town board * * * shall grant licenses to such persons as they deem proper for the sale of nonintoxicating liquors to be consumed on the premises where sold * * *.” (Italics ours.)

Prior to the enactment of ch. 321, Laws 1923, said sec. 165.31, subsec. (1) (then numbered subsec. (29) sec. 1543) read: “may grant licenses,” etc., instead of “shall grant licenses,” etc., as the law now reads. The change of “may” to “shall,” as the same appear in such acts, is a very persuasive indication that the legislature by the enactment of said ch. 321 intended to, and actually did, take away from town boards whatever right they theretofore had to limit the number of such licenses which they would grant, irrespective of the merits of other or additional applications filed therefor.

From the foregoing it will be observed the town board may not by the resolution in question, or other similar action, deny applications, and more especially before such applications are filed.

Each applicant for such a license is entitled to have his application passed upon by the town board, as a board, for the purpose of its determination as to whether or not the applicant is a proper person to license. If the board determines that the applicant is such proper person, it may not refuse to grant the license on account of any other reason.

By holding that the adoption of said resolution, or other similar action, is within the power of a town board, proper and fit persons would thereby be denied those rights safeguarded to them by the legislature, and hence the construction herein placed upon said sec. 165.31, subsec. (1), is that the resolution under consideration is without any authority in the law and of no force whatsoever.
Corporations—Words and Phrases—Securities—Contract between owner of fur farm and purchasers by which purchasers acquire title to units of muskrats, company being obligated to ranch muskrats and purchasers being entitled to receive their prorata share of progeny of units, such progeny not being identified as of any particular unit, is security within meaning of subsec. (7), sec. 189.02, Stats.

Railroad Commission.

With your letter of April 2 you submit copy of contract of the R— fur farm; you also submit copy of contract for purchase of breeding units, bill of sale and ranching service contract with the H— fur farm. You inquire whether these contracts constitute securities within the meaning of sec. 189.02, Stats.

The contract of the R— fur farm provides that the purchaser shall be allowed to purchase from the company one or more units of muskrats, at the price of $75 per unit. The company agrees to ranch each unit. The contract further provides that the company shall be entitled to half of the natural increase of each unit "as nearly as same may be reasonably determined." The pelts of the animals are to be sold by the company and the proceeds of sale prorated in accordance with the units owned by each party.

The bill of sale of the H—fur company provides in forms for the transfer of title to one or more units of muskrats. The ranching contract between the purchaser and the company provides that the company shall care for the animals and that the company shall be entitled to one-half of the natural increase of each unit. It is provided that "the holders in gross shall be entitled" to 50% of the natural increase of the animals. It is expressly provided that the increase of the animals may be sold or pelted by the company, at its option, and that the proceeds shall be divided as heretofore stated.

It is clear from the contracts that the title to the particular units of muskrats is relatively unimportant. The scheme contemplates that payment shall be made to the company for units consisting of three animals, without regard to the identity of the particular animals constituting the units. Neither contract contemplates that the identity
of the increase of the unit shall be preserved. In effect, the contracts constitute a certificate of interest in a profit-sharing agreement, or an interest in the property or profits of the company.

Subsec. (7), sec. 189.02, Stats., provides:

"‘Security’ or ‘securities’ include all bonds, stocks, land trust certificates, collateral trust certificates, mortgage certificates, 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."

In Creasy Corp. v. Enz Bros., 177 Wis. 49, the court held that a contract of partnership in an association which gave the members a right to purchase from the association at a small stipulated percentage above cost, but which gave no other interest in the association to the member, was not "security" within the meaning of subsec. (c), sec. 1753—48, Stats. 1919. This section of the statutes now appears as subsec. (7), sec. 189.02.

The court, in the foregoing decision, in commenting on the scope of the securities law, said, p. 53;

"* * * the Blue Sky Law was enacted for the purpose of protecting against the sale of worthless money obligations and not against entering into other contracts where service is to be rendered, as here, or other obligations are incurred that do not partake of the sale of securities or of a sharing in either the capital or profits of a company."

It will be noted that the court in the Creasy Corp. case distinguished between a contract where service is to be rendered and a contract that partakes of the sale of securities or of a share of either the capital or profits of a company.

In People v. McCalla, 220 Pac. 436, the company executed to the purchaser a deed conveying a 1/4000 part of a large tract of land. The company also gave to the purchaser a certificate containing a declaration and acceptance of trust, and providing for the renting of the tract of land and the collection and disbursement of the income therefrom. The supreme court of California held that the certificate was a
security within the meaning of the blue sky law. To the same effect, State v. Gopher Tire & Rubber Co., 146 Minn. 52; State v. Evans, 1911 N. W. 425; Vercellini v. U. S. I. Realty Co., 196 N. W. 672.

In State v. Summerland, 150 Minn. 266, the court held that a "unit" which entitles the owner thereof to an undivided beneficial interest in the assets of the association and in the profits resulting from the operation thereof and which entitles him to participate in the management thereof by casting one vote at any meeting of the unit holders, the unit being registered in the owner's name on the books of the association, was a security within the meaning of the Minnesota blue sky law.

In State v. Ogden, 191 N. W. 916, the court said, p. 917: "* * * The paternalistic purpose of the statute is to prevent offering to the public, not land contracts, but investment contracts, evidencing a right to participate in the proceeds of a venture, without the commission first ascertaining whether there is behind the venture something so tangible that a sound policy of regulation permits exposing the investing public to them. This is an investment contract within the statute. It is one to which the requirement of the license applies."

While the latter decisions are not squarely in point, we believe they do lay down the principle which should be followed in the situation presented by you. The fact that the contracts convey title to the units of muskrats seems to us immaterial. The dominant idea impressed in the contracts is that the purchasers will acquire an interest in the ventures. An inducement to purchase is the prospective profit which can be made from the sale of pelts of the increase or progeny of the units. The progeny of any particular unit, as we have heretofore shown, cannot be identified. In operation, therefore, the contracts do constitute certificates of an interest in the property and assets of the company. It follows that the contracts are securities within the meaning of subsec. (7), sec. 189.02.

SOA
Public Health—Pharmacy—Public Officers—Pharmacy Board—Board of pharmacy is advised to submit specific facts as to violation of pharmacy law to district attorney of county where offense has been committed; it is for district attorney to pass upon question whether prosecution should be brought under sec 151.05 or under perjury and false swearing statutes.

This department will not express opinion on matter of prosecution unless request is made by district attorney to whom case has been presented.

June 2, 1928.

G. V. Kradwell,
Board of Pharmacy,
Racine, Wisconsin.

You have submitted to this department several letters written to members of the state board of pharmacy which indicate that a certain Mr. A. has made affidavit in which he made false representations to procure registration or permit for himself with your board as a pharmacist.

You also enclose a letter written to the members of the board of pharmacy by Edwin J. Boberg, one of the members, calling attention to sec. 151.05, Stats., which provides a penalty for making false representations by any one to procure registration for himself or for another, and that in subsec. (2) of said section it is provided that it is the duty of each member and officer of the board to institute actions for violations of this chapter and that the district attorney shall promptly prosecute upon notice from any source.

You inquire whether it is our opinion that it is advisable for your board to proceed legally against Mr. A and also the person who has connived with him to make this affidavit on a perjury charge and if so, what procedure you should follow.

In answer to your inquiry will say that you should present this matter to the district attorney of the county where the offense has been committed. It is for the district attorney to pass upon the question as to what crime the person should be charged with, whether the action should be brought under sec. 151.05 or under the perjury or false swearing statute. It would not be proper for this depart-
ment to express an opinion on this matter, for it is for the district attorney to carefully examine all the facts and then use his best judgment in bringing the action. If the district attorney to whom you present the facts should desire the judgment of this department on any phase of the prosecution he has the right to ask for an official opinion, and it is the duty of this department to advise him should he so request, and an official opinion will be gladly given to him. I believe this gives you all the information asked for.

JEM

_Elections—Nomination Papers_—Basis for computing number of names required by sec. 5.05, Stats., on nomination papers is vote of party for presidential elector receiving vote at last preceding election.

June 2, 1928.

GLENN D. ROBERTS,
_District Attorney_,
Madison, Wisconsin.

In your communication of May 25 you inquire whether the basis of percentage in calculating the number of signatures required on nomination papers for Republican candidates for county office should be the number cast for the Republican presidential electors, or whether consideration should also be given to the large vote polled by the independent presidential electors.

Par. (d), subsec. (6), sec. 5.05, Stats., dealing with the signatures on nomination papers, reads in part as follows:

"The basis of percentage in each case shall be the vote of the party for the presidential elector receiving the largest vote at the last preceding presidential election in which such party had candidates for presidential electors.

* * *

"Par. (c) deals with the number of signatures required on nomination papers, and provides in part as follows:

"If for * * * a * * * county office, by at least three per cent of the party vote in at least one-sixth of the election precincts of such district and in the aggregate not less than three per cent nor more than ten per cent of the total vote of his party in such district."
Candidates filing on the Republican ticket should comply with the above quoted sections on the basis of the vote cast for the presidential electors for the Republican candidate for president. They need not be concerned with the vote cast for presidential electors for any other candidate for president than the Republican candidate. The presidential elector receiving the largest vote represents the vote of the party. Par. (d), subsec. (6). See also XII Op. Atty. Gen. 57.

FWK

Agriculture—Dogs—Secs. 174.02, 174.11 and 343.473, Stats., are not broad enough to include mink on fur farm, so that if such mink are killed owner cannot recover damages from owners of dogs under those sections of statutes nor from any local municipality as therein provided.

June 2, 1928.

N. H. Roden,
District Attorney,
Port Washington, Wisconsin.

In your letter of May 25 you state that there are a number of mink farms in your county where considerable property is invested in that enterprise; that dogs have gone through the fences provided for the enclosure and killed a great number of these animals and the owners sustained considerable loss; that they have come to you to learn whether they can recover from the owners of the dogs or from the county under the fund provided in the sections of the statute licensing dogs.

The sections to which you refer are sec. 174.02, sec. 174.11, and sec. 343.473, Stats. You ask for an opinion construing the said sections of the statutes under the facts submitted.

Sec. 174.02 provides:

"Any owner or keeper of any dog which shall have injured or caused the injury of any person or property or killed, wounded or worried any horses, cattle, sheep or lambs shall be liable to the person so injured and the owner of such animals for all damages so done, without proving notice to the owner or keeper of such dog or knowledge by
him that his dog was mischievous or disposed to kill, wound or worry horses, cattle, sheep or lambs."

Under this section the animals enumerated are "horses, cattle, sheep or lambs." Mink on a fur farm are not included in any of these classes and it is my opinion that this section of the statute does not apply to mink on a fur farm.

Sec. 174.11, subsec. (1), contains the following:

"The owner of any domestic animals (including poultry) attacked, chased, worried, injured or killed by a dog or dogs may within ten days after the owner shall have knowledge or notice thereof, file a written claim for damages with the clerk of the town, village or city in which the damage occurred. * * *"

It then provides for the procedural steps to be taken and for the payment to the owners of the animals damaged.

We are here confronted with the question whether the term "domestic animals," including poultry, is broad enough to include wild animals, such as mink on a fur farm. Mink are manifestly not included in the word "poultry." The term "domestic animals" is defined in Webster's International Dictionary as "any of various animals, as the horse, ox, or sheep, which have been reduced from a wild state by man so as to live and breed in a tame condition."

It is very clear that a wild animal on a fur farm is not tamed and domesticated in the sense that a domestic animal, such as a horse, ox, or sheep, is tamed and bred by man.

Sec. 343.473 provides as follows:

"(1) Any owner or keeper of a dog, who, negligently or otherwise, allows or permits such dog to leave his enclosure and which dog shall have killed, wounded, or worried any horse, cattle, sheep or lamb, in addition to being liable in damages therefor according to law, shall be punished by a fine of not less than ten nor more than twenty-five dollars.

"(2) The owner or keeper of any dog which shall have worried, wounded or killed any horse, cattle, sheep or lamb, who shall have verbal or written notice of the fact given him, shall, if such dog again worry, wound or kill any such animal, in addition to being liable in damages therefor according to law, be punished by a fine of not less than twenty-five nor more than fifty dollars, and in default of
the payment thereof be committed to the county jail until payment is made, for not exceeding twenty days."

The animals here enumerated are horses, cattle, sheep, or lambs. A mink on a fur farm is evidently not included. You are therefore advised that a mink on a fur farm does not come within the purview of sec. 174.02, sec. 174.11, and sec. 343.473, Stats.

JEM

Newspapers—Taxation—Lots belonging to one person and advertised under sec. 74.37, Stats., entitle printer to maximum fee of twenty-five cents on total descriptions rather than on each tract.

June 2, 1928.

VICTOR M. STOLTS,
District Attorney,
Eau Claire, Wisconsin.

You state that the question has been raised about the publication charge for advertising a list of tracts and lots on which taxes have not been paid describing the lots as lots 1, 2, 3, 4, and 5 of block 16, and collectively rather than singly. The contention was made that this constitutes but one description and you wish our opinion on this point. Sec. 74.37, Stats., provides the fees received by a printer who shall publish the list and notice of sale of lands for taxes and awards him not to exceed 25¢ for each tract or lot of land in such list. You have suggested that descriptions should be parcelled as to ownership and I concur in your interpretation. In other words, where property is described as lots 1, 2, 3, 4, and 5 of block 1, all owned by the same person, this should be considered as one parcel of land for which not to exceed 25¢ may be received. If there are different owners for each of the above lots, then the tax would be different and it would seem that under such circumstances the lots might be separated in the description, regardless of the ownership.

The area does not necessarily determine the description. It is rather determined on the apparent ownership of the
property and therefore, where several lots or tracts appear to be owned by one person, they should not be made the subject of individual fees.

MJD

Courts—Interpreters—Interpreter’s fees in civil action are not paid for by county.

June 4, 1928.

FREDERICK C. AEBISCHER,
District Attorney,
Chilton, Wisconsin.

You inquire whether the fees of an interpreter, duly sworn in a civil action in the circuit court, are properly payable by the county as an administrative officer of the court or whether such fees are chargeable as a disbursement in favor of the prevailing party in such litigation, to be taxed as other disbursements under the statute.

I find no provision in the statute which would lead me to the conclusion that the interpreter’s fees are to be paid by the county in such cases. The statute fixes the fees for an interpreter and they may be taxed as a disbursement in favor of the prevailing party.

JEM

Marriage—Marriage between girl of fourteen years and man of twenty-one at Waukegan, Illinois, who expected to return to Milwaukee to make their home, is voidable; consent of parents to such marriage would not add anything to legality of it.

June 4, 1928.

JOHN DONNELLY,
Assistant District Attorney,
Milwaukee, Wisconsin.

You state that at the request of the juvenile probation department of your county you ask for an opinion on the legality of a marriage performed at Waukegan, Illinois, between a girl fourteen years of age and a man of twenty-one
years of age without consent of the girl’s parents; that the couple at that time expected to return to Milwaukee to make their home; also whether such marriage would be considered legal in Wisconsin if performed with the consent of the girl’s parents.

In the case of Swenson v. Swenson, 179 Wis. 536, our court held that a marriage entered into by persons below the age of consent and above the age of seven years and capable of consummating the marriage is voidable and not void; sec. 2350, which had been repealed, and sec. 2339—21 (now sec. 245.32) being the same, and that marriage of persons under the age of consent is voidable and not void. Under this decision such a marriage is voidable and not void, but it may be set aside by an action brought for that purpose. The fact that such marriage was performed with the consent of the girl’s parents would add nothing to the legality of it as it is in violation of our law for a girl under fifteen to be married. In other words, the age of consent is fifteen in this state.

JEM

Public Officers—Municipal Judge—Vacancies—Person elected to office who refuses to qualify creates vacancy in office, authorizing governor to fill such vacancy under provisions of statute.

June 4, 1928.

FRANK B. KEEFE,
District Attorney,
Oshkosh, Wisconsin.

You state that under the laws of 1907 a municipal court for the village of Winneconne was created; that the act creating this court provides that the judge thereof shall hold office until a successor is elected and qualified; that the term of the present judge expired this spring and an election was held to choose a successor; that there were no aspirants for the office and no nomination papers were filed.

You state that the name of R. D. Molzow of Neenah, Wisconsin, was written in and he secured the highest number of votes. He, however, refused to qualify and the governor
appointed one Otto Ansorg, who has filed the oath of office and bond as required and has attempted to qualify as such judge. You state that the present incumbent of the office claims the right to continue to occupy the same for the reason that he holds office until his elector is elected and qualified.

You ask to be advised as to whether, on the above statement of facts, a vacancy occurred in the office so as to give the governor the power to appoint or whether the present incumbent still continues to hold office.

In sec. 17.03, Stats., it is provided:

"Any public office * * * shall become vacant upon the happening of either of the following events:

"* * * *

"(7) 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."

Under this provision of the statute I am of the opinion there was a vacancy in the office of municipal judge when R. D. Molzow who had been elected refused to qualify, and the governor was authorized to appoint a person to fill the vacancy. I am of the opinion that Otto Ansorg is entitled to the office.

JEM

Military Service—Soldier who is entitled to receive bonus of federal government and of state government, is also entitled to be buried at public expense, under sec. 45.16, Stats., if he otherwise comes within purview of statute.

June 4, 1928.

L. D. Potter,
District Attorney,
Racine, Wisconsin.

In your letter of May 28 you state that during the year 1918 a man A in your county was called in the draft; that he was sworn in by the draft board in Racine and on the 20th day of October, 1918 he was sent to Camp Shelby,
Mississippi, where he remained until the 31st day of October, 1918, when he was discharged from the draft by the army officials at Camp Shelby; that he was not completely discharged from the draft, as he was informed that he might be in the next call of the draft. He was not sworn into the army or navy at Camp Shelby because he did not pass the physical examination.

You state that this man died about a week ago of tuberculosis; that he had been given the $60 bonus when he left Camp Shelby, and the state of Wisconsin also gave him $50 as a bonus, as it did men who were actually in the army.

You inquire: Does this man come under the provisions of sec. 45.16, Wis. Stats.?

This statute provides for the burial of the body of any honorably discharged soldier who shall have at any time served in the army or navy of the United States when he has no means of his own. It is difficult to pass upon this individual case. From your statement of facts it would appear that this person never was technically a soldier and could, therefore, not have an honorable discharge. I am rather of the opinion, though, that you may not have all the facts, as it also appears by the statement that he was recognized as a soldier by having received the bonus from the federal government and also from the state. I think this statute should have a liberal construction. It would seem that if this man was entitled to get the bonus he is also entitled to be buried as an honorably discharged soldier.

JEM

Education—School Districts—Resolution by school district to raise $300 for band purposes is legal if school board determined to give instruction in band music and fund is to be used for that purpose.

June 7, 1928.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

You state that a certain common school district in the state passed the following resolution:

"RESOLVED, that three hundred dollars be raised for band purposes."
You say the tax levy with this additional amount would not exceed 21/2 per cent allowed by law, and you ask if that resolution would authorize the payment of such money out of the school fund and if the levy was a proper levy for school purposes within the provisions of the law.

Under the provisions of sec. 40.04, Stats., the electors at common school district meetings are given the power among other things to vote a tax for the operation of the school not to exceed 21/2 per cent of the last assessment of the taxable property in the district. Sec. 40.22, subsec. (1), enumerates the branches of study to be taught and then says "and such other branches as the board may determine shall be taught in every common school." So the board would have power to determine that band music be taught as well as other music as a part of the course of teaching. In that event the board would have power to expend money for proper equipment and for proper instruction as a part of the school course. Band and orchestra instruction has become quite common as a branch of school education and training.

The resolution to which you refer is very broad and it might be said would authorize the payment of this fund to employ bands to furnish music in the schools for entertainment rather than for instruction. Of course that could not be done, and, while the resolution is broad, it would have to be construed as only authorizing the payment of school funds for instruction or training as a part of the education of the pupils as a part of the school training, and for that purpose it would be legal.

TLM

Courts—Public Officers—Justice of Peace—There is no law for filing with clerk of court or secretary of state any proof of continued authority to act as hold-over justice of peace.

Theodore Dammann,
Secretary of State.

You refer to the opinion of the attorney general, XVI Op. Atty. Gen. 166, and ask if the name of a hold-over justice should be reported to your department under the pro-
visions of sec. 59.39, subsec. (10), Stats., from the records kept in the office of the clerk of the court under the provisions of subsec. (6) of that section. You say from the certified list of justices filed in your office, the secretary of state issues certificates of magistracy as to official acts of justices of the peace in very much the same manner as such certificates are issued relative to certificates issued by county judges, who file a copy of their official signatures and seals, under sec. 253.08. You state that if hold-over justices of the peace can perform official acts there will be many such acts concerning which your department will be unable to issue certificates of magistracy unless the names of the hold-over justices are also certified.

I do not think the reasons suggested would change the rule of the former opinion. Both the clerk of the court and the secretary of state could certify as to records in their respective offices, but they could not certify as to the effect of a failure to have filed or recorded the required documents.

You could give a certified copy of your record that John Doe was elected a justice of the peace on a certain date and that no other record had been filed with reference to such office. That would indicate that he might have either moved away, discontinued to act, or if acting, that he was a hold-over officer. But those facts would have to be proved by other evidence and you would not be concerned in attempting to supply proof that his subsequent acts were official other than to certify what your records show.

TLM

Insurance—Fraternal benefit society operating under sec. 208.01, subsec. (4), par. (e) and subsec. (5), Stats., should give to each of its members letter or card stating that they are members in good standing without certifying as to amount due on death of holder, as by-laws signify amount of such liability.

M. A. Freedy,
Commissioner of Insurance.

You refer to the opinion of the attorney general of April 19, 1928,* construing the provisions of sec. 208.01, subsec.

(4), par. (e) and subsec. (5), Stats., and state that one of
the benevolent societies directly affected grants a benefit
which is not in excess of $300 and has a membership which
does not exceed 500, but issues a certificate which provides
for the payment of benefits. You state that the society
asks what form of certificate would come within the ex-
emption. You say that, clearly, it could not provide for
the payment of benefits and you ask if a membership card
which recites that the person is a member and that he is
entitled to all privileges and benefits under the membership
comes within the exemption, or whether any reference to
any existing agreement or by-law in which the character
of the benefits is stated would make such a membership
card a certificate providing for the payment of benefits
within the prohibition of the law.

Subsec. (5) of that section is very broad. It makes two
specific exceptions, namely, (1) if it has more than 500
members and (2) if it provides for death or disability bene-
fits. Div. (b) of that subsection then says that any such
lodge, order or society which issues to any person a certifi-
cate providing for the payment of benefits shall not be ex-
empt by the provisions of this section but shall comply with
all the requirements of the law relating to fraternal benefit
societies.

I do not think it would make any difference whether the
writing was in the form of a letter or a card, if it certifies
or states that the person is entitled to the benefit or that
the society would pay the benefit on the death of the person.

A card or letter stating that the person is a member in
good standing would, I think, be a safer practice and the by-
laws could be used to prove the right of the party as such
member. This is a mere suggestion, for it might be accom-
plished in several ways.

TLM
Oil Inspection—Any person who fails to have oils inspected which should be tested under provisions of sec. 168.05, subsec. (3), Stats., and to pay inspection fees should be prosecuted under that section.

June 7, 1928.

FRANK L. KERSTEN, State Supervisor,
Inspectors of Illuminating Oils.

You refer to the opinion of the attorney general of May 2, XVII Op. Atty. Gen. 307, in regard to the inspection of gasoline and kerosene entering the state of Wisconsin and the inspection fees therefor. You state that in accordance with that opinion you attempted to collect a bill from the Allis Chalmers Mfg. Co., West Allis, for gasoline consumed by them which was not inspected and they declined to make the payment, holding in their opinion that the fee for oil inspection is not in any manner a sales tax and for that reason the state cannot make any claim for the same for past transactions where no inspection has been requested or made. You ask for a further opinion in the matter to guide you in making final settlement with this company.

I do not see that we need add anything to the former opinion, for that was very specific that the inspection was required as well where the oils were for use as for sale, for the reasons stated there that the inspection was to prevent accidents by explosion because of the use of inferior uninspected oils, and if uninspected oils have been used, then the person should be prosecuted and fined under the provisions of subsec. (3), sec. 168.05, Stats., which says that any person "who shall knowingly use or furnish for use for illuminating, heating or power purposes any oil, gasoline, benzine, naptha or other like products of petroleum, which shall not have been properly examined or tested, stamped, sealed or marked as provided in sections 168.03 to 168.14, inclusive, shall be liable to a fine of not less than five dollars nor more than five hundred dollars, and any person so offending against the provisions of sections 168.03 to 168.14, inclusive shall be responsible in damages to the party injured, in the event of injury arising or growing out of the use of any oil so offered or provided for sale or use."

So I think if the fees are not paid, the person offending
should be prosecuted under the provisions of that section and could be prosecuted whether the fees are paid or not.

TLM

Fish and Game—Public Officers—Deputy Sheriff—Reward provided for in subsec. (6), sec. 29.63, Stats., to informers, may be recovered by deputy sheriff.

C. E. Soderberg,
District Attorney,
Rice Lake, Wisconsin.

You state that a deputy sheriff of your county informed against a man for a violation of the fish and game laws of this state, made complaint and had the man arrested upon the warrant issued thereon and the man pleaded guilty and paid the fine of $50 and costs.

You state that the municipal judge was uncertain whether the deputy sheriff was entitled to one-third of the fine under the provisions of sec. 29.63, Stats.

Subsec. (6) of said sec. 29.63 provides:

"Any person other than the regular employes of the state conservation commission, informing of the violation of any provision of this chapter and assisting in the prosecution of the offender to conviction shall receive one-third of any fine imposed and collected thereupon."

You state that the deputy sheriffs of your county work under an arrangement whereby they receive $25 per month and the fees collected by them in civil actions. You inquire whether the deputy sheriff is entitled to one-third of the fine in this case. You state that you do not believe that sec. 59.32 of the statutes is applicable. We agree with you. That statute prohibits him from receiving any greater fees than are allowed by law. The reward provided for in said subsec. (6) is not a fee in contemplation of this statute.

You also direct me to sec. 353.24 which provides:

"On conviction of any person for any offense in respect to bribery, forgery, counterfeiting, gambling, houses of ill fame, obscene literature, game and fish, in case the whole or any part of the sentence shall be a fine, a part of such
fine when paid may be awarded to the person or persons who informed against and prosecuted any such offender to conviction, in the discretion of the court, but no part of such fine shall be paid to any public officer whose duty it is to inform against or prosecute such offender.”

This section applies only to those offenses therein named. It does not include violation of the game laws. You will note that the provisions of subsec. (6) above quoted apply to “any person other than the regular employes of the state conservation commission.”

Although sec. 29.07 provides that “all sheriffs, deputy sheriffs, coroners, and other police officers are ex officio deputy conservation wardens, and shall assist the state conservation commission and its deputies in the enforcement of this chapter whenever notice of a violation thereof is given to either of them by the commission or its deputies,” yet this does not make such named officers “regular employes of the state conservation commission.” It does not even make it their duty to enforce the game laws unless a notice of the violation of such laws is given to them by the commission or its deputies. A deputy sheriff does not, therefore, come within the term “regular employes of the state conservation commission.” The words “any person” as used in said subsec. (6), sec. 29.63, in my opinion were intended to include sheriffs and their deputies. I believe it was the intention of the law makers to include all persons except the class expressly exempted.

I am strengthened in my conclusion by the decision of our court in the case of Kinn v. First National Bank, 118 Wis. 537. There a liberal policy was announced by our court. This was a case where the chief of police of Mineral Point arrested a man on suspicion without a warrant for having burglarized the First National Bank in Mineral Point and stolen $25,000 therefrom. The suit was brought to recover the reward offered in such case. The question discussed by the court was whether the police officer was entitled to the reward. The general rule as to the right to receive rewards by public officers was given on page 546 in said case as follows:

“Police and other officers may recover the reward offered when the information furnished or the service per-
formed was extra official, but cannot recover the reward offered if the information furnished or the service performed was within the scope of the duties of such officer.' 21 Am. & Eng. Ency. of Law, 400, 401; * * *"

It was necessary for the court to determine whether it was the duty of the chief of police to arrest the man in question. If it was his duty to arrest, then he would not be entitled to the reward under the above rule. The statute quoted by the court as to the duty of the chief of police on page 545 provides:

"* * * It shall be his duty to obey all lawful written orders of the mayor or common council; to arrest, with or without process, and with reasonable diligence to take before the police justice every person found in the city in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state or ordinance of such city.' Ch. 272, Laws of 1901."

The court said that they found nothing in this statute nor any other making it the duty to make such arrest without process. I deem this quite a fine distinction drawn by the court. He had a right to make the arrest but the court said that it was not his duty to do so and for that reason gave him the reward. The court approvingly quoted from Davis v. Munson, 43 Vt. 676, as follows, p. 546:

"A sheriff acting in reliance upon a general offer of a reward for the capture of a criminal, is entitled to the reward the same as though not a peace officer, where he succeeds in making the capture, having no process in his hands.'"

The case of Reif v. Paige, 55 Wis. 496 was also cited. The Reif case was an action by a fireman of Oshkosh to recover a reward. While a hotel was burning at Oshkosh the wife of the defendant was in an upper story in a certain room. Two firemen had attempted to rescue her through the window but were driven back by the smoke and flames. After this, defendant appeared on the scene and offered $5,000 to any person who would rescue his wife from the burning building dead or alive. Upon the offer of a reward, the plaintiff went into the room and brought out the dead body of the wife. The court there held that a member of the fire department of such city owed no duty by rea-
son of his employment to risk his life in rescuing all persons from the burning building and that he was entitled to the reward under the general rule.

While a sheriff may inform and bring prosecution against the violation of the game laws, it is not made his duty to do so under any statute of this state.

In view of this liberal rule established by our court in the above-cited authorities, I am of the opinion that a construction must be given to subsec. (6) of said sec. 29.63 to the effect that a deputy sheriff may recover one-third of a fine as a reward under said section if he complies with the conditions. 

JEM

Appropriations and Expenditures—University—Purchase of motor car, use of which is part of salary agreed to be paid by board of regents of university of Wisconsin to president thereof, does not require approval of governor; provisions of sec. 14.71, subsec. (4), Stats., are not applicable thereto.

June 9, 1928.

Theodore Dammann,
Secretary of State.

In reply to your letter of June 6, reading as follows, viz., "The university of Wisconsin has presented to this department a list covering the purchase of a Packard motor car which I understand is intended for the president of the university. Does this purchase come under section 14.71 (4) or in other words, does it require the approval of the governor," you are advised:

In passing upon the question submitted by you I find it necessary to take into consideration the terms and conditions set forth in memorandum agreement between committee of the board of regents of the university of Wisconsin and Dr. Glenn Frank at the time of his acceptance of the presidency of the university of Wisconsin, wherein, in fixing the salary of President Frank it was agreed to pay him a certain sum of money and place at his disposal a car and driver for his use in connection with residence furnished to him by the university.
Your attention is also called to the provisions of sec. 36.03, Stats., which prescribes the powers of the board of regents of the university of Wisconsin in the following language, viz.:

"The board of regents and their successors in office shall constitute a body corporate by the name of "The Regents of the University of Wisconsin," and shall possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law, * * *.*"

Sec. 36.06, subsec. (1), Stats., enumerates additional powers of such board, which, among others, are the following, to wit:

"The board of regents shall enact laws for the government of the university in all its branches; elect a president and the requisite number of professors, instructors, officers and employes, and fix the salaries and the term of office of each, * * *.*"

It will be observed that, acting under the foregoing quoted authorization, the board of regents, in fixing the salary of President Frank, included therein the motor car mentioned in your letter, and which it is now sought to purchase for him in fulfillment of said agreement.

In that situation you inquire if such purchase comes under the provisions of sec. 14.71, subsec. (4), Stats., and requires the approval of the governor.

Sec. 14.71, subsec. (4), Stats., so far as is here pertinent, reads:

"Each department, board or commission, upon the written approval of the governor, may purchase necessary trucks and automobiles for its general use, * * *.*"

It is quite obvious from a reading of said sec. 14.71, subsec. (4), that it was never intended by the legislature that its provisions should be made applicable to the situation here under consideration. The car in question is not being purchased for "general use" of any "department, board or commission," but rather for the use of the president of the university and is being furnished him under his contract with the board of regents of that institution.
You are therefore advised that the purchase of the car in question does not require the approval of the governor.

HAM

_Fish and Game_—Waters of Fox River and those of Swan Lake must be held to be separate waters, river and lake respectively, for construing provisions of sec. 29.191, Stats., prescribing rules for open and closed seasons and regulating fishing therein.

June 11, 1928.

CONSERVATION COMMISSION.

Attention Mr. Matt Patterson,

_Assistant to the Director._

In your letter of recent date you state that sec. 29.191, Stats., provides that there shall be no closed season for hook and line fishing excepting for black bass, trout, and sturgeon in many waters of the state, including the Fox river in Columbia county. You also state that your local conservation warden as well as your chief warden have informed you that there is a natural basin formed by the Fox river, making an area of at least one mile long and one-half mile wide called Swan Lake; that they feel that as there is no dam creating this lake it is therefore a natural lake and that, as such body of water is not mentioned in the area wherein fishing is open the year round for hook and line for black bass, trout, and sturgeon, it would be unlawful to fish in Swan Lake for pike and pickerel until the general open season, which is May 25; that notwithstanding a ruling of your department to that effect, many persons within the vicinity of said Swan Lake take issue with you and claim that Swan Lake is not a separate lake but is in reality a part of the Fox river and that therefore there is an open season in such body of water (Swan Lake) the year round for fishing with hook and line for all varieties of fish, excepting black bass, trout, and sturgeon.

In the situation detailed above you request an opinion of this department as to whether or not you should consider Swan Lake separate and apart from the waters of Fox River or whether it should be classed as a part of that river.

You are advised that it is not infrequently a difficult matter to determine with certainty when a body of water consti-
tutes and is to be classed as a mere widening of a river or a separate and distinct body of water coming within the classification of lakes, and in order to determine such question as relates to the situation in the instant case it has been necessary for us to consult with the original federal government plat forming a part of the records in the office of the land commissioners of this state, disclosing a survey of Fox River and Swan Lake made in the year 1833 by Surveyor John Mullett, under contract dated February 16, 1832, and which plat was approved by United States Surveyor General Williams in the year 1834.

Such original government plat shows that the Fox river is not meandered as it enters Swan Lake in section 5—12–10E, but that so much of Swan Lake as lies within township 12, range 9E, is meandered and that so much of said lake as lies within township 12, range 10E is also meandered, including the waters of Fox River as the same flow out of said lake.

With such information before us, including a personal view of said original government plat and surveyor’s notes indicated thereon, together with surveyor’s designation of “Swan Lake” on that portion of said waters between the inlet and the outlet thereof, we think it quite obvious that the waters of Swan Lake must be treated separately from the waters of Fox River in determining whether it would be unlawful to fish in Swan Lake for pike and pickerel until the commencement of the general open season for fishing in that lake.

You are therefore advised that within the rule prescribed by said sec. 29.191 you will be fully justified in holding that the waters of Swan Lake form a separate and distinct body of water from those of Fox River and that your holding and interpretation of that section of our statutes as applied to the situation under consideration is the correct one.

HAM
Counties—Courts—Injunctions—Municipal Corporations
—Ordinances—In absence of any injury to property or
property rights, injunction does not lie to restrain commis-
sion of criminal or illegal acts.

Ordinance adopted by town regulating amusement park
located in town is void if it conflicts with ordinance enacted
by county board regulating amusement parks.

Herman R. Salen,
District Attorney,
Waukesha, Wisconsin.

In your letter of June 5 you state that the manager of the
Mound Kennel Club, in your county, has announced that
the club will continue dog racing, as conducted during the
past year. You request an opinion as to what procedure
should be followed by you in the event that "contributions
and refunds" system is again employed by the operators of
the park. You state that it has been suggested that an ac-

tion be instituted to restrain the operation of the park as a
nuisance, but that you are doubtful as to whether such ac-
tion may be maintained successfully.

You also inquire whether the operators of the park are
subject to the provisions of the ordinance of the county
board of your county enacted under subsec. (9), sec. 59.08,
Stats., in view of the fact that the town of Brookfield, in
which the park is located, has adopted an ordinance provid-
ing for the licensing of amusement parks, after first hav-
ing assumed village powers under subsec. (12), sec. 60.18,
Stats.

1. This department concurs in your opinion that an
action for an injunction to restrain the operation of the
park will not lie.

"The subject-matter of the jurisdiction of equity being
the protection of private property and of civil rights, courts of equity will not interfere for the punishment or
prevention of merely criminal or immoral acts, unconnected
with violations of private right. Equity has no jurisdic-
tion to restrain the commission of crimes, or to enforce
moral obligations and the performance of moral duties; nor
will it interfere for the prevention of an illegal act merely
because it is illegal. * * *." High on Injunctions, 4th
ed., sec. 20.
"* * * It is no part of the jurisdiction of a court of equity to enforce by injunction the criminal or penal statutes of the state, nor will it interfere for the prevention of an illegal act merely because it is illegal. In the absence of any injury to property or property rights, it will not lend its aid by injunction to restrain the violation of public or penal statutes, or the commission of immoral or illegal acts. * * *." *Tiede v. Schneidt, 99 Wis. 201, 213–214.

The reason why equity does not lie to restrain a criminal act is well stated in *State v. O'Leary*, 155 Ind. 526, 58 N. E. 702, 52 L. R. A. 299, 304, where the court said:

"* * * A civil suit by information, in the name of the state, filed by the attorney general and the local prosecuting attorney, is but an indirect method of accomplishing an end which could more properly and more satisfactorily be obtained by indictment. The apathy or sympathy of the local community and the negligence of the public officers, which prevent a criminal prosecution, or render its result doubtful, cannot be regarded as a reason why a civil action should be substituted for a criminal proceeding, and the alleged violation of the criminal law should be tried and determined by a judge instead of a jury."

The situation, as disclosed by your statement of facts, is very similar to that in *State v. O'Leary*, supra. The court, in stating the facts, said, p. 303:

"* * * There was no proof that any person had been annoyed or disturbed by reason of the maintenance of the gambling house, or that any property rights of the state were, or were likely to be, in any manner injuriously affected. The gambling house was remote from any other building, and was situated upon the open and uninhabited plain or prairie: The premises described were within the corporate limits of the town of Roby, and had been so located and operated for a considerable period of time. It was not shown that any of the inhabitants of Lake county in any way or under any circumstances came in contact with the persons who frequented the gambling house. Nothing prevented the enforcement of the ordinances of the town and the statutes of the state against gambling and the maintenance of gambling houses, excepting the indifference or sympathy of the community, or the indolence or faithlessness of the public officers of the town and county charged with that duty. * * *

"
The court, in holding that the gambling house was not such a public nuisance as might be restrained by an injunction, said, p. 303:

"* * * Unless it appears, not only that a public nuisance exists, but that the public is subjected to actual annoyance or injury by it, the courts generally refuse to interfere by injunction, at least before indictment and a trial and conviction at law."

2. Your second question is answered in the affirmative. Subsec. (9), sec. 59.08, Stats., confers on county boards the power to "enact ordinances, by-laws, or rules and regulations, providing for the regulation, control, prohibition and licensing of dance halls and pavilions, amusement parks, * * * and other like places of amusement. * * * *

Ordinances, by-laws or rules and regulations enacted by the county board under this subsection shall not apply to any city in such county which has or may hereafter by ordinance regulate dance halls or other places of amusement."

It will be noted that the foregoing statute authorizes the county board to enact ordinances regulating all amusement parks in the county, except such parks as may be located in cities which have now, or which may hereafter enact ordinances regulating places of amusement. The county clearly has the power to enact ordinances regulating amusement parks in towns and villages. Ordinances enacted by towns and villages in conflict with ordinances adopted by the county board are void. XIII Op. Atty. Gen. 252.

3. Reference procedure which should be followed by your office in the event that the "contribution and refund" system employed by the operators last year is again put into operation, you are advised that, in view of your statement that you are "of the opinion that the system employed is either a violation of our gambling statutes or at best is a subterfuge to avoid the statute," there appears to be but one course open to you—that is, to institute such appropriate criminal proceedings as the proofs at your command will, in your judgment, warrant.

The employment of the "system" referred to constitutes either a violation of the gambling statutes of the state, or it does not, depending upon the proofs you may be able to
submit in that forum which the legislature has provided you with for the prosecution of violations of our criminal statutes. The procedure to be adopted by you is, in my opinion, identical with that which you must necessarily have followed in the past in all other similar situations.

I do not deem it necessary, under the circumstances, to go into greater detail with you on this point.

HAM

Civil Service—Wisconsin Potato Growers’ Association is not department of state and therefore does not come under provisions of civil service law.

June 13, 1928.

Potato Growers’ Association,
Madison, Wisconsin.

Attention J. G. Milward, Secretary-Treasurer.

In your letter of May 28 you present the following questions:

“First: Is the association, in the employment of stenographic or clerical assistance, subject to civil service regulations?

“Second: If subject to such regulations, do the Wisconsin statutes permit the association to employ one stenographer exempt from civil service?”

Ch. 16, Stats., deals with the civil service law; sec. 16.01 thereof defines “civil service” to mean all offices and positions of trust or employment, including mechanics, artisans and laborers, in the service of the state. The Wisconsin Potato Growers’ Association is a voluntary organization, the purpose of which is to promote the potato growing interests of the state. The association is supported by the dues received from its members and the “aid or subsidy” which it receives from the state. Subsec. (4), sec. 20.61 provides for the appropriation to the association:

“There is appropriated from the general fund to the agricultural societies enumerated in this section, but to be disbursed from the state treasury only when necessary to pay actual claims duly audited by the secretary of state, as follows: * * *”

“* * *”

* * *
“(4) Annually, beginning July 1, 1925, four thousand dollars to the Wisconsin potato growers' association, for the promotion of the potato growing interests of the state.”

The association does not come within the definition of "civil service." It is not a department of state and therefore does not come under the civil service law.

AJM

Indigent, Insane, etc.—Legal Settlement—Municipality continues liable for support of pauper who has removed to another municipality wherein she has been supported as pauper within year of such removal and, therefore, is unable to acquire new legal settlement.

June 13, 1928.

LEWIS POWELL,
District Attorney,
Kenosha, Wisconsin.

You inquire in your letter of May 17 whether the city of Kenosha continues to be liable for the support of a woman pauper who has removed to another municipality and refuses to return to Kenosha. By sec. 49.01, Stats., the legislature charges the towns, villages and cities with the burden of supporting the poor and indigent lawfully settled therein. In sec. 49.02, Stats., the legislature sets forth the conditions under which a legal settlement can be acquired in a municipality, which obliges it to support a pauper. Since the legislature has laid down the conditions under which a municipality is charged with the support of a pauper, the municipality cannot impose further conditions.

You fail to state in your letter whether or not this woman is married and, if married, whether her husband is living and his place of settlement. Subsec. (1), sec. 49.02 deals specifically with the legal settlement of married women.

In an opinion rendered by this department on April 23, 1924 (XIII Op. Atty. Gen. 212), it was held where one has a legal settlement in a municipality and receives aid therein as a pauper and then removes to another municipality, receiving aid as a pauper, his legal settlement continues in the first municipality, and so long as this status continues the
first municipality remains liable for his support. I believe
the rule laid down therein covers the statement of facts
you submitted.
AJM

Public Health—Real Estate—Plats—Sec. 140.05, subsec. (7), secs. 236.03 and 236.09, Stats., cannot be construed as
applying to plats of land made prior to enactment of such
law so as to take private property for public use.

June 14, 1928.

Board of Health.

Attention Dr. C. A. Harper, Health Officer.

You refer to the provisions of sec. 140.05, subsec. (7),
sec. 236.03 and sec. 236.09, Stats., and you ask:

1. Whether the plats not requiring approval of the state
board of health as provided in sec. 236.09 are subject to the
sanitation regulations provided for in sec. 140.05 (7).

My answer is yes.

2. Whether the specific sanitation regulations to be
adopted by the state board of health to insure essential
sanitation will apply only to plats recorded since the pas-
sage of the act or whether the law contemplates that they
shall also be applicable to plats recorded prior to the pas-
sage of the law, August 5, 1927.

I do not think the provisions relating to the manner of
platting lots, streets, etc., could be held to apply to plats
already made which were made in compliance with the laws
at the time of the platting. Such a construction would
probably be held to be unconstitutional as taking property
without due process of law. Of course, a street might be
condemned through property either to make new streets or
to continue or extend streets by condemnation proceedings
and determination that would satisfy the constitutional
provision against taking property without due process of
law, but that could not be done by legislative act so as to
take property for public use, and this act should not be
construed as applying to existing plats.

TLM
Insurance—Foreign corporation licensed to transact business in Wisconsin to March 1, 1928 only, which continues to insure in this state through one of its former agents is subject to penalty prescribed by sec. 201.46, Stats.

M. A. Freedy, Commissioner of Insurance.

You state that the Inter-Ocean Casualty Company of Cincinnati, Ohio, was a company duly licensed to transact disability insurance in the state of Wisconsin to March 1, 1928, but the license was not renewed; that during the first part of 1928, one H. L. Bice connected with the company's Cleveland office, solicited a number of insurance policies in this state without a solicitor's license, which policies were accepted by the company.

You then refer to sec. 201.44, subsec. (1), Stats., which provides:

"No policy of insurance shall be issued or delivered in this state by any company, except through an agent who shall be a resident of this state and hold a certificate of authority under section 209.04, for the kind of insurance effected by such policy."

You then refer to sec. 201.44, subsec. (7), Stats., which provides:

"Any company or agent violating this section shall be subject to the penalty provided by subsection (5) of section 207.01."

You then refer to sec. 201.46, which provides:

"Any insurance company or association wilfully violating or failing to observe and comply with any of the provisions of sections 201.44 to 201.48, inclusive, applicable thereto, shall be subject to and liable to pay a penalty of five hundred dollars for each violation thereof and for each failure to observe and comply with any of the provisions of sections 201.44 to 201.48, inclusive; such penalty may be collected and recovered in an action brought in the name of the state in any court having jurisdiction thereof.

You say in order to be guided in invoking the penalty in this case, you desire the opinion of the attorney general as to which section of the statutes applies.
I think the penalty is that prescribed by sec. 201.46, which provides that any insurance company or association wilfully violating or failing to observe and comply with any of the provisions of secs. 201.44 to 201.48, inclusive, applicable thereto, shall be subject to and liable to pay a penalty of five hundred dollars for each violation thereof.

I assume your uncertainty and confusion grows out of the provisions of subsec. (7), sec. 201.44, but you will notice that subsection now does not provide any penalty, so it would be the penalty provided by sec. 201.46.

TLM

Bridges and Highways—Highway authorities may, without creating liability to abutting land owners for damages, lawfully divert surface water which causes damage to roadway from one side of highway to opposite side, although such diverted water flows upon adjoining land.

June 14, 1928.

Wm. M. Gleiss,
District Attorney,
Sparta, Wisconsin.

You inquire whether the county highway authorities may, without entering upon abutting lands, lawfully divert surface water (which at certain times of the year has a considerable flow in a "dry run" parallel to and within the highway limits) from one side of a public highway under their control and supervision to the opposite side thereof through a culvert, such diversion being necessary or expedient in order to prevent such surface water from washing the highway and settling in pools thereon.

The question is answered in the affirmative.

You further inquire whether an abutting land owner upon whose land such surface water will naturally flow if so diverted will be entitled to damages because of such flow onto his land, no entry on such land being made by the highway authorities.

This question is answered in the negative.

For a discussion of the statutes and of the principles of law upon which rest the answers to your questions above
374 Opinions of the Attorney General


FEB

Appropriations and Expenditures—University—Under provisions of sec. 36.06, subsecs. (6) and (7), sec. 20.41, subsec. (5), par. (c), and subsec. (11), Stats., regents of university are empowered to lease to Wisconsin University Building Corporation university lands part of which is occupied by stadium, for purpose of providing for construction, financing and ultimate acquisition of field house; building corporation is authorized to mortgage its leasehold interest therein as security for its obligations incurred or to be incurred in construction of such field house; and revenues derived from operation of field house must, and surplus revenues derived from operation of stadium may, be applied by regents to payment of rentals under lease from building corporation or for acquisition of title to such field house.

June 14, 1928.

Col. J. L. Johns,
Private Secretary to the Governor,
Executive Chamber.

By direction of the governor you have submitted certain documents and a request for an opinion upon three questions relating thereto. The documents submitted are a lease of certain lands on the university campus (being a part of what is known as Camp Randall) from the regents of the university of Wisconsin to the Wisconsin University Building Corporation for the term of fifty years; a lease of the same premises from said Wisconsin University Building Corporation to the regents of the university of Wisconsin; and a mortgage executed by the said Wisconsin Building Corporation to the annuity board of the state retirement system of the state of Wisconsin of the interests of said corporation in said described premises as security for the payment of the note of the said corporation to the said annuity board of three hundred twenty-six thousand dollars ($326,000), all of which have been approved by the
state engineer and are now before the governor for his approval.

I quote the material parts of your statement, and the questions, as follows:

"Under the provisions of subsection (6) of section 36.06 of the statutes, the university proposes to lease certain lands, on part of which is situated the present stadium at Camp Randall to the Wisconsin University Building Corporation, for a period of fifty years at a rental of one dollar, with the understanding that the building corporation is to construct on the leased premises a field house such as the board of regents shall approve, and that the entire property is to be leased to the board of regents of the university of Wisconsin for thirty years at an annual rental of $20,013.63.

"Subsection (6) of section 36.06 of the statutes provides in part as follows:

"'For the purpose of providing dormitories and commons and a field house for university purposes, and completing the memorial union, and to enable the construction, financing and ultimate acquisition thereof, the regents are authorized and empowered to lease university lands to a nonprofit sharing corporation or corporations for a term not exceeding fifty years, upon condition that such corporation or corporations shall construct on such leased land such building, improvements or equipment for dormitories, commons, field house, or addition to the memorial union, as the regents shall designate or approve, and shall lease the same to the regents upon satisfactory terms as to the current rental, maintenance and ultimate purchase by the regents.'

"The governor directs your especial attention to this portion of subsection (6) of section 36.06:

"'For the purpose of equipping the memorial union, the regents are authorized and empowered to lease the lands and memorial union buildings now under construction to a nonprofit sharing corporation or corporations for a term not exceeding fifty years.'

"It will be observed that under subsection (6) of section 36.06 of the statutes, the university has the power to lease lands upon which a field house may be erected, and the statute does not provide for the leasing of any buildings on these lands, while the statute specifically gives the university power to lease lands for the purpose of completing the memorial union and specifically mentioned the memorial building now under construction.
"With these facts before you, the governor would like to have you answer the following questions:

"QUESTION ONE: Was it the intention of the legislature, and does the present subsection (6) of section 36.06 provide any authority for leasing by the university to the building corporation mentioned, lands upon which are now erected the stadium at Camp Randall?

"QUESTION TWO: If you find such power exists under this section mentioned in Question One, has the University Building Corporation the power, under the section, to mortgage not only the lands, but the present stadium to secure funds with which to erect a field house on the premises?

"Again, in subsection (6) of section 36.06 of the statutes it is provided that:

"'Revenues derived from the operation by the regents of such dormitories, commons, memorial union, or field house shall be applied to the payment of such rentals, any surplus which from time to time may accrue to be applied toward the purchase price of the building, equipment, or improvements, or accumulated for subsequent application upon the purchase price.'

"QUESTION THREE: Does this subsection of section 36.06, or any other section of the statutes, authorize the use of revenues that may hereafter be derived from the operation of the stadium at Camp Randall which has already been constructed, to pay rentals under the proposed lease of the premises to be given by the university to the building corporation?"

1. The intent of the legislature, of course, is to be ascertained from the language of the statute itself. The language of the grant of power to the regents is to "lease university lands." It is elementary that the word "lands" includes all buildings and improvements thereon attached to the soil, unless the latter are clearly excepted from the grant. The power to the regents to lease university lands "for the purpose of providing * * * a field house for university purposes, * * * and to enable the construction, financing and ultimate acquisition thereof * * *" was granted by the legislature of 1925. The meaning of the word "lands" was in no way restricted by, and nothing excepting lands on which buildings already exist appears in, the grant. The subsequent amendment of 1927 granting power to the regents to lease the lands and memorial union buildings for the purpose of equipping the memorial union, to which you direct attention, clearly
cannot be construed as limiting or restricting the earlier grant of power to lease lands for the construction, financing and acquisition of a field house. The first question is, therefore, answered in the affirmative.

2. The mortgage of the building corporation is not of the fee of the lands or buildings thereon, but only of its interest therein; or, in other words, of its leasehold only. I assume, therefore, that your question is whether the building corporation has power to mortgage its leasehold interest in the lands, including the stadium. Obviously, since the regents are empowered to lease the university lands in question, including those on which the stadium now stands, to the building corporation for the purposes stated, the latter has, under the express terms of subsec. (7), sec. 36.06, Stats., the power to pledge the whole of such leasehold interest as security for its obligations incurred in the construction of the field house. Of course, it has no power to mortgage the fee, which remains in the regents, and it has not by the mortgage under consideration attempted to do so. These very leases and mortgage were before the supreme court in their entirety in the recently decided case of Loomis v. The Annuity Board, in which the court upheld the constitutionality of the statutes and the acts of the regents and of the building corporation under them. Your second question, as restated, is therefore answered in the affirmative.

3. Your third question is also answered in the affirmative. It will be observed that the part of subsec. (6), sec. 36.06, Stats., which you quote in connection with this question, makes it mandatory upon the regents to apply the revenues derived from the operation of the field house to the payment of the rentals under the lease from the building corporation and to apply any surplus upon or to accumulate the same for subsequent application upon the purchase of the building itself; in other words, the revenues derived from the operation of the field house so long as the title thereto remains in the building corporation cannot be used for any purpose except to pay rentals accruing under the lease from the building corporation or for the permanent acquisition of the field house by the regents. The net rentals received by the building corporation under the lease
will by its terms be applied toward the acquisition of title
to the field house by the regents, and over a period of years
will in themselves result in such acquisition. But, in addi-
tion to this mandatory provision, the regents may, in their
discretion, use any portion of the surplus revenues derived
from the operation of the stadium for the same purpose un-
der the express authority of subsec. (11), sec. 20.41, Stats.,
which provides:

"(11) REVOLVING FUND, DORMITORIES, ETC. (a) Re-
volving fund surplus. Any moneys in any university re-
volving fund which the regents shall determine to be sur-
plus not required for the succeeding fiscal year is hereby
appropriated to the regents for the construction or acquisi-
tion of dormitories, commons, field house or other build-
ings, or for other permanent improvements, or for the pur-
chase of land, or for the equipment of such buildings, or for
investment in bonds or securities, as provided in subsec-
tions (6) and (7) of section 36.06, as the regents may de-
termine, anything in paragraph (k) of subsection (3) to
the contrary notwithstanding; provided, that the approval
of the governor shall be necessary for the purchase of land
under this section."

The receipts from the operation of the stadium are included
in the university revolving fund created by par. (c), subsec.
(5) of said sec. 20.41.

These provisions, in my opinion, compel an affirmative
answer to your third question.

It is worthy of note, however, that under the financial
set-up of the university athletic council, which I have be-
fore me, if the construction of the field house can be begun
at once no resort to any stadium receipts or to funds or
operating revenues other than those derived from the oper-
ation of the field house itself is contemplated, as the net
cash surplus from the operation of the field house is esti-
mated at not less than $20,000, which is in round numbers
the annual rental provided in the lease from the building
corporation here in question.

FEB
Public Officers—County Highway Committee—Duties of members of county highway committee are prescribed and compensation that can be paid them is limited by statute. Whether compensation is sufficient to compensate members for work required to be done is not open to review by county board; it cannot grant additional compensation for such services.

Frank B. Keefe,
District Attorney,
Oshkosh, Wisconsin.

I have your letter of May 25, in which you state that after the opinion of the attorney general dated March 19, 1927, XVI Op. Atty. Gen. 164, relating to the compensation of members of the county highway committee, your county board adopted a resolution on June 13, 1927, directing you not to commence any action against the members of that committee who had drawn amounts in excess of $400 per diem and expenses of members of the county highway committee, and because of that resolution you did not commence any actions for that purpose. You state that at the last meeting of the county board a resolution was adopted authorizing and directing the district attorney to commence actions for the recovery of any money from any person or persons or corporations that had been illegally paid out of the county treasury; that pursuant to that resolution you made demand upon two members of the highway committee to return the money paid to them in excess of the limitations prescribed by sec. 82.05, Stats., and you ask if the resolution adopted on June 13, 1927, would be bar to the commencement of a civil action for the recovery of the excess of moneys paid to the members of that committee.

While you have not quoted the exact language and provisions of the two resolutions, yet from your description of the provisions of the resolutions I think it is clearly your duty to commence the actions against members of the committee for any moneys that had been illegally paid to them out of the county treasury, for the last resolution is general and, being the last direction of the board, would be a modification of the first resolution and your authority for commencing any action within the provisions of that resolution.

June 14, 1928.
You say it appears somewhat of a hardship to be inflicted upon the members of the board if they are required to pay this money back. You are advised that under the law and the direction of the county board you are not concerned in the question of whether or not action may work a hardship upon any person. The law fixes the duties of members of the county board and other officials and the compensation to be paid therefor, and when a person accepts the office with the duties attached, he must perform the duties for the compensation fixed, and if no compensation is fixed or if sufficient compensation is not provided for by law, the services performed to that extent are to be considered honorary or performed out of a sense of duty to the government as a citizen and the office is accepted subject to such conditions.

Many offices are created under our laws with very burdensome duties to be performed without any compensation, and under the common law most public services were rendered without salary and were regarded as purely honorary.

TLM

Appropriations and Expenditures—Municipal Corporations—Public Officers—City Council—Mayor—Expenditure of city’s money by council and mayor for printing pamphlets and other advertising, advising voters to vote for erection of city hall is improper but not violation of criminal law.

June 18, 1928.

R. W. Peterson,
District Attorney,
Berlin, Wisconsin.

You say that during the last election your city voted on the erection of a new city hall and that the common council prepared arguments to present to the voters advising reasons why they should vote for the hall, and by resolution authorized the mayor to publish these arguments in two newspapers and authorized the mayor to pay for the printing out of the city budget and to publish the same in pamphlets. You say you have been asked to commence criminal
proceedings and, while it is your opinion that the expenditure was improper and would justify civil remedy or action against the members of the council compelling them to repay the money to the city, you do not think it is a violation of any criminal law that would authorize you to commence criminal proceedings. You ask to be advised on the question.

I think you are correct in your construction of the law.

TLM

Public Officers—Bank Examiner—Expenses—Bank examiner who lives in village of Shorewood but whose official residence is in the city of Milwaukee cannot charge car fare between Shorewood and Milwaukee, nor can he charge for noonday meal in Milwaukee.

June 19, 1928.

Theodore Dammann,
Secretary of State.

In your letter of June 12 you say that as a matter of convenience and economy a bank examiner lives in Shorewood and works in the city of Milwaukee. This examiner has presented to you an expense account charging street car fare from the village of Shorewood to the city of Milwaukee and return and also charging for one meal daily. You ask to be advised whether this bank examiner under sec. 14.71, subsec. (2), Stats., is entitled to expenses while working in the city of Milwaukee, which you are informed is the official residence of the examiner.

Sec. 14.71, subsec. (2), Stats., provides in part:

"The chief officers enumerated in subsection (1), and their appointees and employees, shall each be reimbursed for actual and necessary traveling expenses incurred in the discharge of their duties."

In Op. Atty. Gen. for 1908, 82, 83, it was said:

"Concerning street car fare: it has been held that an officer whose headquarters were at Madison and whose home was in a suburb of Madison could not properly charge street car fare in going from his home to the capitol."
"It would seem to me that this ruling would apply to an officer whose headquarters were in Milwaukee and his home at such a distance as to require the use of street cars. The interpretation is that an officer traveling from his office to his home on the street cars is not upon official business. It is sometimes quite difficult to draw the line between official and unofficial business but I do not think that the items of car checks can properly be allowed."

In I Op. Atty. Gen. 508 it was held that expenditures for car fare and meals of a public officer not made because of traveling on official business, but necessary only because of the distance between the officer's home and office in the city of Milwaukee, could not be allowed as traveling expenses under sec. 2394—45, Stats. 1911, which provided for payment of "actual necessary expenses while traveling."

Clearly under these opinions the bank examiner in question is not entitled to charge for street car fare from the village of Shorewood to the city of Milwaukee, nor is he entitled to charge for one meal daily.

ML

Courts—Estates—Prisons—County court of county in this state of which deceased prisoner in state prison was resident has exclusive jurisdiction to probate his will and administer his estate; presumption is that county of his residence at time of his commitment continued to be his residence during prison term.

June 25, 1928.

Board of Control.

You transmit a copy of a letter of Warden Oscar Lee of the state prison to you and you submit the following question:

"In case of the death of an inmate of the Wisconsin state prison, shall the estate be probated through the county court of Dodge county or through the county court of the county in which the deceased prisoner had his legal residence?"
It is perfectly clear that if the deceased prisoner was a resident of the state at the time of his commitment to the prison, the county court of the county of his residence has exclusive jurisdiction for the probate of his will, if any, and to administer his estate. If he was a nonresident of the state, the county court of the county in which he left any property or estate has jurisdiction, and the county court first taking jurisdiction in such a case retains it to the exclusion of the county court of any other county, even though there may be estate in such other county also. Secs. 253.03, 253.04, 311.01, Stats.

There is no conflict between this opinion and the opinion of the attorney general found in IX Op. Atty. Gen. 104, 105, to which Warden Lee refers, that "when a convict dies, his property and estate is subject to administration by the proper county court of the county of which he was an inhabitant at the time of his death, * * *." "Inhabitant" and "resident" are synonymous in the statutes relating to the county court jurisdiction. Subsec. (6), sec. 370.01, Stats.; Will of Slinger, 72 Wis. 22; Perkins v. Owen, 123 Wis. 238; Barlass v. Barlass, 143 Wis. 497. It is conceivable that a person who is a resident of another county at the time of his commitment to the state prison located in Dodge county might voluntarily change his residence to Dodge county; but that is a question of fact to be established by proof, and the presumption is that the place of residence at the time of commitment continues to be the legal residence of a prisoner during his confinement.

Marriage—Common Law Marriage—Under provisions of sec. 245.32, Stats., marriage contracted in violation of requirements of sec. 245.12 is null and void.

So-called common law marriage is not now recognized in Wisconsin.

June 25, 1928.

BOARD OF CONTROL.
Attention A. W. Bayley, Secretary.
I have your letter enclosing a letter of Mrs. Florence Davis, executive secretary of Hennepin County Child Welfare Board, Minneapolis, Minnesota, asking if a common
law marriage is recognized in Wisconsin if followed by cohabitation as man and wife.

My first impression was that the answer should be in the affirmative for I have so advised on several occasions while in private practice years ago under the provisions of sec. 245.01, Stats., which makes marriage a civil contract and under the decisions of the supreme court in the case of Becker v. Becker, 153 Wis. 226, and Owen v. Owen, 178 Wis. 609, but I find our marriage laws have been revised and codified so that now under sec. 245.12 marriages may be validly contracted in this state only after a license has been issued therefor in the manner specified. Then follows the procedure. And sec. 245.32 says:

“All marriages hereafter contracted in violation of any of the requirements of section 245.12 shall be null and void (except as provided in sections 245.33 and 245.34),”

which do not affect your question. Apparently because of that specific statute sec. 245.36 provides that the issue of all marriages declared null in law shall nevertheless be legitimate.

Under the provisions of these specific statutory provisions, I think the rule in the earlier decisions has been changed so that a so-called common law marriage or any other form of marriage not in accordance with the provisions of the statute is null and void as provided in sec. 245.32. See 9 Uniform Laws Ann. 218.

TLM

Public Health—Pharmacy—Every drug store and pharmacy conducted under supervision of registered pharmacist is required to be registered annually on first day of June and fee of one dollar paid for such registration; failure to so register subjects person to fine of $50 for each separate offense.

June 25, 1928.

Board of Pharmacy,

Racine, Wisconsin.

Attention G. V. Kradwell, President.

I have your letter of June 18 in which you state that frequently your board receives communications from various
sections of the state complaining that you are negligent in not compelling newly opened drug stores to secure permits before beginning operation. You say your board has taken the position that it is necessary for a permit to be obtained from the board before a new drug store may be legally opened in order that the board may know that it will be operated in accordance with the provisions of ch. 448, laws of 1927, and for the protection of the general public. You say because so many have questioned your interpretation of the law, you ask for an opinion of the attorney general.

You are advised that under the provisions of sec. 151.02, subsec. (9), Stats., no drug store, pharmacy, apothecary shop, or any similar place of business, shall be kept open for the transaction of business until it has been registered with and a permit therefor has been issued by the state board of pharmacy. Then follows an exception as to stores selling proprietary or so-called patent medicines only, and the law then requires that registered pharmacists shall be annually registered on the 1st day of June and the board shall thereupon issue a certificate of registration. The law then requires an annual registration fee of $1.00 to be paid and for failure to register his place of business as required or for failure to comply with any other provision of the section, the person shall upon conviction be fined not more than $50 for each separate offense.

I think there can be no question but that the registration fee must be paid and a certificate of registration obtained each year as required by that statute, and for failure so to do, the person convicted is subject to fine of $50 for each separate offense.

TLM

Courts—Physicians and Surgeons—Hospital Records—Protection afforded by provisions of sec. 325.21, Stats., is for benefit of patient and it may be waived only in manner and in instances therein set forth.

June 25, 1928.

Dr. R. C. Buerki, Superintendent,
Wisconsin General Hospital,
Madison, Wisconsin.

In yours of the 8th inst. you ask if it is proper for you to release a hospital record after the death of a patient, upon
request from a life insurance company prior to the payment of claim. You state that you "understand hospital records are confidential information of the patient which can only be released upon the signature of the patient, unless under court order," and you ask:

"Is it possible for the claimant of the deceased to sign such a release to an insurance company?"

The "hospital records" of which you speak may or may not be such records as are entitled to the protection of the provisions of sec. 325.21, Stats., which reads:

"No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in all lunacy inquiries, (3) in actions, civil or criminal, against the physician for malpractice, (4) with the express consent of the patient, or in case of the death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health, or physical condition."

From a reading of the foregoing quoted section of our statutes it is quite obvious that portions of a patient's hospital record may be entitled to the protection therein provided for, and still other portions thereof may not be so entitled, because of the provisions of sec. 18.01, subsec. (1) and subsec. (2), which, so far as is here material, reads:

"(1) Each and every officer of the state, * * * is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be * * * kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers. "(2) Except as expressly provided otherwise, any person may with proper care, * * * examine or copy any of the property or things mentioned in subsection (1)."

(Italics ours.)

In my opinion, therefore, only such portion of your hospital records as come within the protection of the specific provisions of said sec. 325.21 must be protected by you, all
other portions of such records to be governed by the provisions of sec. 18.01, subsecs. (1) and (2).

Speaking on the same subject matter, our supreme court in the cases of Mehegan v. Faber, 158 Wis. 645, 648, said:

"Deceased was a patient at the Wisconsin Tuberculosis Sanitarium for a time. He was examined by Dr. Coon, the superintendent of the institution, when he was admitted and from time to time thereafter, and a record was made of such examinations by the doctor. Defendant sought to introduce this record, but the court excluded it. Dr. Coon testified that the record contained the information that he obtained from the patient for the purpose of treating him as a physician. It is quite obvious that the record made by the doctor for this purpose was properly ruled out under sec. 4075, Stats." (Sec. 4075 is now sec. 325.21 with amendments thereto and hereinafter quoted.)

To the same effect is the holding in the cases of Dreyfus v. Milwaukee E. R. & L. Co., 161 Wis. 524; Casson v. Schoenfeld, 166 Wis. 401; Markham v. Hipke, 169 Wis. 37; McGinty v. Brotherhood of Railway Trainmen, 169 Wis. 366; Angerstein v. Milwaukee Monument Co., 169 Wis. 502; Maine v. Maryland C. Co., 172 Wis. 350; and Ogodziski v. Gara, 173 Wis. 371.

In the case of Maine v. Maryland C. Co., supra, which was an action to recover on an accident insurance policy, it was held by the court that sec. 4075, Stats. (now sec. 325.21), prohibiting a physician from testifying as to information acquired professionally from a patient was enacted for the benefit of the patient, and the protection or privilege accorded the patient might be waived by him; but it could not be waived by administrators, executors, or personal representatives of the patient or by a beneficiary under the deceased's insurance policy. That case was decided in September, 1920.

In a still later case, that of Borosich v. Metropolitan Life Insurance Co., 191 Wis. 239, decided November 9, 1926, the court again held that under sec. 325.21 (formerly sec. 4075), prohibiting a physician from disclosing information acquired in a professional capacity, the privilege of a patient could not be waived, in an action on an insurance policy, by his executor or by the beneficiary of the policy.

However, subsequent to the holding of the court in the
above cited cases, the legislature by the enactment of ch. 334, Laws 1927, amended said sec. 325.21 in many substantial particulars and, among others, it now provides that the protection or privilege which the court held in the above cases could "not be waived by administrators, executors, or personal representatives of the patient or by a beneficiary under his insurance policy," might by such amendment be waived by such representatives or beneficiary. Such is the last legislative word on the subject of right of waiver of the protection or privilege afforded by that section.

In this connection your attention is again invited to the *Borosich* case, *supra*, wherein the court held: (1) that the testimony of physicians who perform an autopsy is not barred by said sec. 325.21, their information not having been obtained for the purpose of treatment, and (2) that such section does not bar the testimony of an interne, nurse, or attendant, they not having been legally admitted to practice and not being physicians within the meaning of the statute.

From the foregoing holding of our supreme court and the 1927 amendment to sec. 325.21, it is clear that a waiver of the benefits of the statute in its present form may be exercised only by the express consent of the patient himself, or, in case of his death or disability, by his personal representative or other person authorized to sue for personal injury, or by the beneficiary of an insurance policy on his life, health, or physical condition.

I believe that the foregoing sufficiently answers your request and affords you sufficient information to enable you to determine in every particular instance what portions, if any, of hospital records are entitled to the protection and privilege afforded by said sec. 325.21.

HAM
Agriculture—Counties—Public Officers—Agricultural Agent—County Fair Association Secretary—County agent appointed under sec. 59.87, Stats., may be employed also as secretary of county fair association.

June 25, 1928.

L. E. Gooding,
District Attorney,
Fond du Lac, Wisconsin.

You ask if it is possible for the county agent under sec. 59.87, Stats., to be employed also as a secretary of the county fair association.

You say it is your opinion that there is nothing in the statute that would prevent the county agent from acting also as secretary of the county fair association provided he was elected to that position by the county agriculture society, and you feel that opinion is fortified by an opinion of the attorney general in II Op. Atty. Gen. 260, and you ask for the opinion of the department.

I think your opinion is correct, for there is nothing in the law requiring either such officer to devote his entire time to the duties of such office and no statute expressly prohibiting it, and I see nothing in the duties of the two offices that would make them incompatible.

TLM

Fish and Game—Confiscation—Vehicle is not confiscated and conservation commission may return it to its owner if transcript of justice’s docket does not contain order for confiscation of automobile said to have been used in violation of game laws and no proof was taken of such illegal use.

June 25, 1928.

L. B. Nagler,
Conservation Director.

With your communication of June 18 you enclose a letter from James F. Malone, Beaver Dam, and a transcript of the docket of a justice of the peace of Horicon, pertaining to a violation of the fish and game laws. In this case the defendants were fined each $100 and costs and in addi-
tion thereto, although it does not appear on the docket, it is said that the justice confiscated a Star sedan in which the fish were placed after they had been taken from the lake. You inquire whether you or the commission are justified in returning this car to the owner of the same on the theory that the confiscation is invalid. This question will be answered in the affirmative. The docket of the justice does not in any way show that the car was confiscated.

Sec. 29.05, subsec. (7), Stats., provides:

"* * * if it be proven that the same is, or has been within six months previous to such seizure, used in violation of this chapter, the same shall be confiscated if the court shall so direct in its order for judgment."

There was no proof in this case as required by this statute that the vehicle was used in violation of the statute, and the order for judgment does not contain such confiscation.

Tuberculosis Sanatoriums—County judge of county A has not power to commit patient to county sanatorium as charge against county B under provisions of sec. 50.07, Stats.

June 29, 1928.

Board of Control.

You state that the following question has been submitted to you by the manager of the Wisconsin county institutions:

"Can the county judge of A county commit a patient to a county sanatorium as a charge against B county, under the provisions of section 50.07 of the statutes; or is this right reserved by the judge of B county, under the provisions of section 50.07 of the statutes?"

You ask to be advised in regard to this. Concerning admissions of patients to the county sanatorium, sec. 50.07, subsec. (2), Stats., contains the following:

"Any such person who is unable to pay for his care may be admitted and maintained in such institution at the charge of the county in which he has his legal settlement, pursuant to subsection (2) of section 50.03, except that the county chargeability shall be determined by his legal settlement in the county charged. * * *."
Sec. 50.03, subsec. (2), reads thus:

"Any patient unable to pay for his care shall file an application with the county judge of the county within which he has a legal settlement, setting forth the fact that he is unable to pay the maintenance charge. Said judge, upon further presentation of the report of the examining physician, and a statement from the superintendent of the sanatorium that the applicant is eligible and can be received, shall make an investigation in the manner prescribed in subsection (1) of section 46.10, except that in such investigation the term 'residence' or its equivalent shall be construed to mean 'legal settlement.'"

You will note that the application is to be made with the county judge of the county within which the patient has a legal settlement, whose duty it is to make the investigation and determination.

Under this provision of the statute I am constrained to hold that the county judge of A county cannot commit a patient to a county sanatorium as a charge against B county. The charge against B county can only be adjudicated by the judge of B county.

JEM

Indigent, Insane, etc.—Minors—Legal settlement of minor children follows that of their father; another county than that of residence, which has supported them as transients, may be reimbursed under sec. 49.03, Stats.

L. W. Bruemmer,
District Attorney,
Kewaunee, Wisconsin.

In your letter of June 29 you speak of the father of two children residing in another county than Kewaunee who was sentenced to the state prison. You say that the mother abandoned the children and relatives took them and brought them into your county; that they have been in your county long enough to entitle them to aid under sec. 48.33, Stats., but you say you believe their residence follows that of their father and that would still be in the county from which he was committed, inasmuch as he probably could not estab-
lish another residence during the time of his commitment. You inquire whether, if relief is given to the children under ch. 49 for the relief and support of poor or indigent persons, there is any liability for such relief against the county from which the father was committed.

This question must be answered in the affirmative. The legal settlement of the children follows that of the father under sec. 49.02, subsec. (2). The relief may be granted under sec. 49.03 as transient paupers. See said sections for the necessary procedure.

JEM

_Police Officers_—Police justice has civil jurisdiction same as justice of peace; it extends throughout county.

Paul B. Conley,
_District Attorney,_
Darlington, Wisconsin.

Under date of June 15 you inquire whether a police justice has the civil jurisdiction of a justice of the peace under sec. 62.24, Stats., amended during the 1927 session of the legislature. You inquire also, whether, if he has such civil jurisdiction, it extends throughout the county in which the police justice is located, or is confined merely to the city in which his court is situated.

Sec. 62.24, subsec. (2), par. (a), Stats., contains the following:

"The police justice shall have the jurisdiction of a justice of the peace within the county and exclusive jurisdiction of offenses against ordinances of the city."

Under this provision your first question must be answered in the affirmative, as the above quoted statute expressly provides. Said civil jurisdiction extends throughout the county, for the civil jurisdiction of a justice of the peace extends throughout the county.

JEM
Public Officers—County Board—Soldiers' Relief Commission—Offices of member of county board and soldiers' relief commission are incompatible.

June 29, 1928.

FRANK B. KEEFE,
District Attorney,
Oshkosh, Wisconsin.

You ask whether or not the office of member of the county board and the soldiers' relief commission are compatible.

I doubt whether these offices may be held by one and the same person. Under the statute reports are made to the county board concerning the needy veterans in the county. The board thereafter appropriates enough money to take care of these claims. The money is credited to the soldiers' relief commission, who give bond and disburse it according to the merit of the claims. A supervisor would be reporting to himself as commissioner and as a supervisor might be interested in the amounts appropriated to the soldiers' relief commission. He furthermore might be allowing himself compensation, because the county board passes upon the per diem and expenses of the commissioners.

There is a conflict and I believe that a member of the county board cannot hold the office of soldiers' relief commissioner.

MJD

Fish and Game—Public Officers—Deputy sheriff may be appointed by sheriff for various purposes, even for purpose of enforcing fish and game laws.

June 29, 1928.

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

You ask to be advised whether the sheriff under any law has the authority to appoint deputy sheriffs for the sole purpose of enforcing the fish and game law.

Under sec. 59.21 it is provided that the sheriff may appoint as many other deputies as he may deem proper. The
purpose for which the deputy sheriff is appointed is not very material. The sheriff may have different purposes for appointing deputies. It may be to keep the peace in a certain locality under certain emergencies or it may be to enforce any special law of the state. If a deputy sheriff is appointed he has the power to act as such deputy and exercise the duties thereof. It matters not what purpose the sheriff had in view when he appointed the deputy.

JEM

Public Officers—City Supervisors—Any person who is stockholder in telephone company which furnishes telephone service to city of which he is supervisor is ineligible to office of supervisor.

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

In your letter of the 21st inst. you submit the following questions to this department, viz.:

1. Is a member of the county board, elected as a supervisor from a ward in a city, a city officer or is he a county officer?

2. Is a stockholder in an incorporated telephone company which furnishes telephone service to a city eligible to the office of supervisor?

I think the answer to your first question is to be found in the provisions of sec. 62.09, subsec. (1), par. (a), Stats., which says that the officers of a city, among others, shall be two aldermen and one supervisor from each ward. This section undoubtedly leads to the conclusion that a supervisor elected from a city must be held to be a city officer rather than a county officer.

In view of my answer to your first question you are referred to the provisions of sec. 62.09, subsec. (2), par. (c), Stats., which makes ineligible to any city office any person who directly or indirectly has any pecuniary interest in any contract for furnishing heat, light, water, power, or other public service to or for such city, "or who is a stockholder
in any corporation which has any such contract." Said section also provides:

"* * * Any such office shall become vacant upon the acquiring of any such interest by the person holding such office."

I think that the foregoing fully answers both of the questions submitted by you.

HAM

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Appropriations and Expenditures—Military Service—
Soldiers' relief commissioners shall consent to expenditure of funds appropriated to them.

Town board, village board and city aldermen cannot grant burial allowances from soldiers' relief fund without obtaining approval of soldiers' relief commission.

June 29, 1928.

JOHN F. MULLEN, Secretary,
Soldiers' Rehabilitation Board.

You ask whether the soldiers' relief commissioners have authority to grant a burial allowance provided in sec. 45.16 without obtaining the authority of the town board, village board or city aldermen and also whether each town or village board or aldermen may grant a burial allowance from the soldiers' relief fund without obtaining the approval of the commission.

The soldiers' relief commission is appointed by the county judge under sec. 45.12, Stats. It receives reports and is in charge of the soldiers' relief fund appropriated by the county board. The commissioners are under a joint and several bond equal to a tax levied in the current year for expenditure by the commission.

The commission is in direct charge of the expenditure of the fund and dispenses monies or food and clothing as it sees fit.

Sec. 45.16 provides that each town board, village board and the aldermen of each ward in each city shall cause to be interred in a decent and respectable manner in any cemetery in this state, other than those used exclusively for the
burial of paupers, at an expense to the county of not less than $35 nor more than $100, the body of any honorably discharged soldier, sailor or marine who shall have served in the United States service and at his death does not leave sufficient means to defray the necessary expenses of a decent burial or dies in such financial circumstances as would distress his family to pay the expenses of such burial.

Since the various local officers aforementioned are in a better position to know of the death of an exsoldier, sailor, or marine, they should report to the soldiers' relief commissioners or arrange for the burial of the deceased if he was in the United States service. They cannot bind the soldiers' relief fund, however, without express permission from the commissioners.

Sec. 45.17 requires an investigation into the circumstances of each burial and enumerates steps to be taken in connection with obtaining the proper allowances. If the aldermen, village or town board direct the burial and the claim is not honored by the soldiers' relief commissioners, they will have to file the statement with the county clerk and arrange for payment according to law. In no event, however, can they disburse this soldiers' relief fund without the consent of the soldiers' relief commission.

MJD

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Banks and Banking—Where share of bank stock is issued to man and wife jointly, without proxy or other evidence of agency neither one acting alone can vote stock.

June 29, 1928.

W. H. Richards,
Deputy Commissioner of Banking.

In your recent letter you asked the following question:

"Where a share of bank stock is issued to a man and his wife, jointly, can either party vote the full share of stock without a proxy from the other?"

Sec. 221.11, Stats., provides:

"At all stockholders' meetings each share of stock shall entitle the owner of record to one vote. A stockholder may vote at any meeting of the stockholders by proxy, but no active or salaried officer may vote any such proxies."
Since by statute each share of stock entitles the owner to one vote, necessarily a share of stock held jointly likewise entitles the owners to but one vote—it does not entitle each of the joint owners to a fractional vote.

In Fletcher's Cyclopedia Corporations, Vol. 3, page 2811, the rule is stated:

"If shares are owned by two or more persons jointly, the right to vote is in them jointly, and, in order that the shares may be voted, they must agree upon the vote."

This rule is supported by In re Pioneer Paper Co., 36 Howard's Practice 111, 114, and Hey v. Dolphin, 36 N. Y. S. 627, 632. See also 2 Thompson on Corporations, 3d ed., p. 332 and Tunis v. Hestonville, etc., R. Co., 149 Pa. St. 70, 24 Atl. 88, 15 L. R. A. 665.

Without a proxy or other evidence of agency given by one joint owner to the other there is no assurance that the owners agree upon the vote; consequently without a proxy or other evidence of agency neither the husband nor the wife may vote the share of stock.

ML
Bonds—Education—Vocational Education—Municipal Corporations—Municipal Borrowing—Constitutional and statutory limitations on indebtedness which may be incurred by city apply to bond issue for purpose of enlarging existing vocational school.

Neither city council nor local board of vocational education may enter into contract with builder or contractor whereby contractor is to construct addition to existing vocational school and receive compensation therefor in annual instalments extending over period of years.

In absence of regulation adopted by board of vocational education to contrary, any business which may be taken up at regular meeting of board may be disposed of at special meeting of board.

July 6, 1928.

BOARD OF VOCATIONAL EDUCATION.

In your letter of June 21 you submit to this department for an official opinion the following questions:

"1. May a city council, in co-operation with a local board of vocational education, without reference to its bonded indebtedness, borrow money for an additional unit to be constructed along side of its present vocational school unit, by using the present unit and site as collateral for the loan, and make arrangements whereby this loan is to be paid off in annual instalments over a period of years out of the vocational school mill and a half tax?

"2. May a city council, in co-operation with a local board of vocational education, permit a contractor or other party to build on a site owned by the local board an additional unit, such as referred to above, and make arrangements to pay the contractor or other party for the building in annual instalments over a period of years under a contract or agreement?

"3. The statutes do not designate regular meetings for local boards of vocational education. Local boards themselves generally designate a certain evening monthly as the regular meeting night. Frequently special meetings are called on short notice, either by telephone, post card or letter. If the special call does not state the specific items to be considered may the board consider, at the special meeting, any business which it might consider at a regular meeting?"

1. Your first question is answered in the negative. Subsec. (2), par. (b), sec. 67.04, Stats., authorizes a city to
issue bonds to erect or enlarge buildings used for vocational schools. The constitutional and statutory limitations on the bonded indebtedness of the city apply where bonds are issued under the provisions of the foregoing section. The statutes do not confer on the city council or the local board of vocational education the power to use the present unit and site of a vocational building as collateral for a loan. In the absence of such an express delegation of power, neither the city nor the local board of vocational education has the power to pledge vocational school property as collateral for loans.

2. Your second question is answered in the negative. The statute does not grant to the city or to the local board of vocational education the power to enter into an arrangement with a contractor such as suggested by you, and in the absence of a specific grant so to do, neither the city council nor the local board of vocational education may enter into such an arrangement.

3. As stated by you, the statutes do not designate regular meetings for local boards of vocational education. The board itself must fix the date of its meetings. The board likewise has the power to adopt rules and regulations concerning the notice of meetings to be given to the various members of the board. If notice is given to the members in accordance with the rules and regulations of the board, any business which may be transacted at a regular meeting may be transacted at a special meeting. Of course the board may adopt a rule that certain specified business may be taken up only at a regular meeting. If the question which you have raised applies to a situation which has arisen in the past, the facts should be submitted to this department so that a more definite answer may be given.

SOA
Fish and Game—Fish Hatcheries—Slough not connected with Mississippi river by reason of erection of dam of Chicago, Burlington & Quincy Railroad Company does not come within purview of sec. 29.53, Stats., authorizing owner thereof to receive certificate to operate private fish hatchery.

July 6, 1928.

Conservation Commission.

You refer me to sec. 29.53, Stats., which provides for the issuing of a certificate by your commission, designating the use of a certain pond, lake or slough for the hatching, propagation and fishing of rough fish therein.

Subsec. (1) of said section provides:

"The owner or lessee of all of the lands underlying, surrounding, or bordering upon any pond, lake or slough, natural or artificial, navigable or nonnavigable, meandered or not meandered, tributary to and connected with the Mississippi river, which pond, lake or slough does not exceed at low water one square mile in surface area, shall have the right, upon complying with the provisions of this section, to erect, establish, operate and maintain on, in or about such pond, lake, or slough, a private hatchery and fishery for the purpose of hatching, propagating and fishing therein rough fish, including buffalo fish and carp."

You state that before 1913 there was a small slough connected with the Mississippi river known as DeSoto Bay; that during this same year the Chicago, Burlington and Quincy Railroad changed the location of their tracks, necessitating a fill across this slough, pond or lake, so that the pond or lake has no outlet or connection at all with the Mississippi river. It is fed either by seepage or by springs.

You inquire whether we would consider that the owner of the land surrounding such pond would be entitled to a certificate for the operation of a private fish hatchery under said sec. 29.53.

You will note that the pond, lake or slough not only must be tributary, but also connected with the Mississippi river. I am of the opinion that since the erection of the dam by the Chicago, Burlington & Quincy Railroad this slough cannot longer be considered as connected with the Mississippi
river under the facts stated by you. Your question is answered in the negative.

JEM

Charitable and Penal Institutions—Indigent, Insane, etc.—Commitment to poor farm must be made by court of record under sec. 49.07, Stats.; transient cannot be so committed.

JULY 6, 1928.

G. ARTHUR JOHNSON,
District Attorney,
Ashland, Wisconsin.

You have referred me to an opinion of this department, XVI Op. Atty. Gen. 105, the last paragraph of which you quote as follows:

"Commitments to the poor farm must be made by a court of record under sec. 49.07, Stats. Neither the trustees of the institution nor the chairmen of the towns have any right to send any poor person to the poor farm without such commitment."

You state that sec. 49.07 applies only to poor having a legal settlement in a town, city, village or county and you inquire whether there is no way of committing transients, such as lumberjacks, to the poor farm in your county, although they have no legal settlement in the county. You refer to sec. 49.04, but you admit that there is no statute which makes provision as to the procedure which should be adopted in committing such persons.

The opinion to which you referred cited a former opinion of this department, V Op. Atty. Gen. 300. That opinion was given on April 11, 1916, after carefully considering the question. I see no escape from the position taken in the two opinions referred to. There is no statute which authorizes the commitment to the poorhouse, except the one given in sec. 49.07. If it is thought necessary to commit others to such institutions then additional legislation should be secured, providing for the same. The legislature has been in session five or six times since the first opinion was
rendered, and no change was made in the statutes. I do not believe that this department should change its ruling in view of this fact.

JEM

Mothers' Pensions—Emergency aid specified in sec. 48.33, subsec. (6), Stats., may not be granted for hospital and surgeon's charges on account of surgical operation on mother of dependent children; aid under such section is for dependent children only.

July 6, 1928.

W. R. Kirk,
District Attorney,
Hudson, Wisconsin.

In your letter you state that aid has been granted to one Mrs. T. for her dependent children under the provisions of ch. 48, Stats., and that her doctor now advises that she (the mother of said dependent children) must undergo an operation and in connection therewith will require hospital attention. In that situation you inquire whether the hospital and surgeon's expenses and charges for such surgical operation and attention should be borne by the municipality or whether emergency aid may be granted therefor to the mother under subsec. (6), sec. 48.33, Stats.

The subsection to which you refer reads as follows:

"The aid granted shall be sufficient to enable the mother, grandparents or person having the custody of such children to properly care for the children and shall not exceed fifteen dollars per month for the first child excepting in emergency cases where the aid to such first child shall be left to the discretion of the court and ten dollars per month for each additional child. Such aid shall be the only form of public assistance granted to the family excepting medical aid and no aid shall continue longer than one year without reinvestigation."

Subsec. (4) of the same section, in so far as the same may have any bearing upon the question here under consideration, reads as follows:

"* * * the judge may, as the best interest of such child requires, grant aid to it or to its parents," etc.
However, none of such aid is for the parents. It is for the child or children, alone, although it may be paid to the parents.

"Emergency cases" as used in subsec. (6), quoted above, have been construed in an official opinion of this department, in VII Op. Atty. Gen. 218, where it was said, pages 219–220:

"The purpose of the act as disclosed in subsec. 6, above quoted, that 'the aid granted shall be sufficient to enable the mother to properly care for the children' and limiting the amount of aid in ordinary cases to fifteen dollars for the first child and ten dollars for each additional child, indicates that any unusual, sudden or unexpected happening or occasion, or combination of circumstances of pressing necessity in the form of sickness, disease or incapacity of any kind which, in the judgment of the court rendered it impossible for the custodian of the children with the ordinary aid to properly care for them, would, in that individual case, constitute an emergency within the meaning of the statute. It is also difficult to lay down any general rule as to what shall constitute an emergency, as each case must be determined upon all the facts and circumstances surrounding it."

Accordingly, in a subsequent official opinion, XIII Op. Atty. Gen. 457, this department held that a county judge had the power to increase the aid in order to defray expenses of an emergency caused by sickness of one of the children.

HAM

Criminal Law—Firearms—Sale of toy firearms is prohibited under sec. 340.70, Stats.

E. J. Morrison,
District Attorney,
Portage, Wisconsin.

You inquire whether the devices described in the accompanying circular which you enclose violate the statute pertaining to the sale of fire crackers and other explosives.

Sec. 340.70, Wis. Stats., provides:

"Any person who shall sell or use or have in his possession for the purpose of exposing for sale or use any toy
pistol, toy revolver or other toy firearm shall be punished by imprisonment in the county jail not more than six months or by fine not exceeding one hundred dollars, or by both fine and imprisonment."

The circular enclosed gives the picture of and describes a toy pistol, toy army tank, toy speed gun, toy gun boat, and toy artillery field cannon.

"Firearm" is described:

"Any weapon from which a missile, as a bullet, is hurled by an explosive, as gunpowder." Funk and Wagnalls College Standard Dictionary.

Without describing these toy firearms any further I will simply quote from the 6th paragraph of the instructions for using safety pistol:

"6. Allow a few seconds for gas to form and mix with the air in the gun. Pull back the Igniter Plunger and GIVE THE TRIGGER A QUICK PULL,—BANG! Sparks given off ignite the mixture of gas and air just like a gas engine."

The instructions for the cannon, tank and boat are similar, except that the plunger is to be given a "quick push" instead of a "quick pull."

I am of the opinion that devices described in the circular come within the definition of "firearms" and therefore are prohibited under the provisions of said sec. 340.70.

JEM

Intoxicating Liquors—Nuisances—Sec. 165.24, Stats., is construed to subject premises to lien for fines imposed only after conviction for maintaining nuisance on premises.

July 6, 1928.

C. E. Soderberg,
District Attorney,
Rice Lake, Wisconsin.

You state that one A of your county was convicted of the manufacture of intoxicating liquor and fined $100 and costs; the fine has not been paid and evidently the defendant does not intend to pay the fine and costs. You say
that the defendant was running a still in his father's house with his father's knowledge and that there is no doubt but that the place was a nuisance. You refer to sec. 165.24, Stats., which defines "nuisance" and you state that the question now comes up whether the premises can be held subject to a lien and sold to pay the fine and costs assessed against the defendant.

Said sec. 165.24 provides as follows:

"Any room, house, building, board, vehicle, air craft, or place where intoxicating liquor is manufactured, sold or kept in violation of any of the provisions of this chapter, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared a public nuisance, and any person who maintains such nuisance, upon conviction thereof, shall be fined not more than one thousand dollars or be imprisoned for not more than one year or both. If a person has reason to believe that his room, house, building, boat, vehicle, air craft, or place, is occupied or used for the manufacture or sale of liquor, contrary to the provisions of this chapter, and suffers the same to be so occupied, or used, such room, house, building, boat, vehicle, air craft, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance and any such lien may be enforced by action in any court having jurisdiction."

You will note that this section provides that any person who maintains such a nuisance upon conviction thereof shall be fined not more than "one thousand dollars or be imprisoned for not more than one year or both." It is necessary, therefore, in order to come within the purview of the statute that there must be a conviction of the maintenance of a nuisance. A was not convicted of the maintenance of a nuisance under your statement of facts. He was convicted for manufacturing intoxicating liquors illegally.

I am constrained to advise you that all fines referred to in said section apply merely to fines assessed for a conviction for maintaining a nuisance. A never having been convicted for that offense, the fine may not be collected as a lien against the property.

JEM
Banks and Banking—Banking law is violated by insurance company issuing bonds maturing in certain number of years or on death of holder, price of bonds being dependent upon maturity date and age of purchaser.

July 7, 1928.

C. F. SCHWENKER, Commissioner,
Banking Department.

You submit to this office an advertisement of a life insurance company for the sale of certain bonds and you ask whether this scheme is in contravention of secs. 224.02 and 224.03, Stats.

Sec. 224.02 defines “banking”: "The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal."

Sec. 224.03 makes it unlawful to do a banking business without obtaining a charter as a bank. The bonds in question are issued in units of $100 each, maturing in from five to thirty years and the price of the bonds is dependent upon the maturity date and the age of the purchaser. The bond matures immediately upon the death of the holder. To quote from the circular:

"The purchaser of these bonds does not obligate himself to future payments. He simply buys his bonds, puts them away, and lets the principle of compound interest work itself out."

The plan outlined in the advertisement involves the offense of unlawful banking and is in violation of sec. 224.03, Stats. The plan clearly involves the soliciting, receiving, and accepting of money on deposit as a regular business. As you very aptly phrase it in your letter, these bonds are nothing more or less than certificates of deposit which, by the accumulation of interest, will provide a definite amount at the end of a certain number of years. The mere fact
that there is an insurance feature involved—that of paying the face value of the bond in case death occurs prior to the maturity date—does not obliterate the banking features.

**Banks and Banking—State Banks—** Transferor of bank stock less than six months prior to closing of bank should be joined with record owner in suit to enforce stockholder's liability.

C. F. SCHWENKER, Commissioner,
Banking Department.

You state that in the liquidation of the Bank of Ham mond you are proceeding to collect double liability on the shares as provided by sec. 221.42, Stats. That section provides that the liability on stockholders 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."

An estate transferred a block of stock to the cashier less than six months prior to the closing of the bank, so that the owner of these shares is now the cashier. You ask whether you should proceed against the cashier and the estate from whom he bought the shares jointly or whether you must proceed first against the record holder and then proceed against the former holder for the deficiency.

The proper procedure is for you to proceed jointly against the cashier and the estate from which he purchased the shares. The liability of both the cashier and the estate arises from the fact that they were stockholders. In XIII Op. Atty. Gen. 470 it was held that a stockholder's liability should be enforced by one suit commenced by the commissioner of banking against all stockholders, reliance there being placed upon Coleman v. White, 14 Wis. 700.
Fish and Game—Search—One who has in his possession unlawfully caught fish or game may not be searched without search warrant unless he has been legally arrested prior to such search.

Automobile carrying illegally caught fish or game may be searched by officer if he has proper cause to believe that such automobile is used in violation of game laws by unlawfully transporting such fish or game.

July 9, 1928.

FREDERICK C. AEBISCHER,
District Attorney,
Chilton, Wisconsin.

You have submitted two questions to this department. The first question reads thus:

"1. Has a deputy conservation commissioner or game warden, as commonly known, a right to search a person to determine whether he is carrying on his person fish or game taken or being transported in violation of chapter 29 of the statutes relating to fish and game? In other words may a game warden demand the right to search the pockets of a fisherman or hunter or investigate into the contents of a trout basket or pockets of a fisherman or hunter without first obtaining a search warrant?"

Sec. 29.05, subsec. (6), Stats., reads thus:

"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."

Art. I, sec. 11, Wis. Const., provides:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."
You will note that said subsec. (6), sec. 29.05, above quoted, does not expressly authorize the search of a person. I know of no law to authorize such search without a search warrant unless the person has been lawfully arrested for an offense which he has committed.

In Thornton v. State, 117 Wis. 338, our court held that a person lawfully arrested may be searched. On page 346 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. * * *"

Under our constitutional provisions and the decisions of our court I believe that your first question must be answered in the negative.

Your second question reads thus:

"2. May a game warden search an automobile without a search warrant to determine whether fish or game are being transported in violation of chapter 29 of the statutes relating to fish and game?"

I believe this question is answered by the decision of our court in Wilder v. Miller, 190 Wis. 136. In that case, of course, it was intoxicating liquor found in an automobile that was the subject of the decision. I can perceive no distinction to be made in case the articles carried in the automobile are illegally caught fish or game. The rule is well stated in that decision as follows, p. 140, quoting from Carroll v. United States, 267 U. S. 132.

"On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, this is, upon a belief reasonably arising out of circumstances known to the seizing officer, that an automo-
bile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.”

Your second question must therefore be answered in the affirmative, provided the search is made upon probable cause.

JEM

Charitable and Penal Institutions—Minors—Child Protection—Boy charged with murder in first degree, tried in juvenile court, cannot be sentenced to serve term in industrial school until he is eighteen years of age and thereafter balance of definite term in some other institution.

July 19, 1928.

G. Arthur Johnson,
District Attorney,
Ashland, Wisconsin.

You state that on the 9th day of June, 1928, Ralph Carlson, a boy who attained the age of sixteen years on the 26th day of December, 1927, shot and killed his father; that he has been arrested under a warrant charging him with first degree murder, and the preliminary hearing has been held in the municipal court of your city. You refer to sec. 48.15, subsec. (3), Stats., which provides that all commitments to any industrial school in the juvenile court shall, in the case of boys, be to the age of eighteen years, but in the more serious cases the juvenile court, under sec. 48.11, subsec. (2) has the same powers as the circuit court as far as trial, sentence and commitments are concerned. You inquire whether this boy can be committed to the industrial school until eighteen years of age and then transferred to some other institution.

In answer to your inquiry permit me to say that I do not know of any statute which expressly authorizes a sentence of that kind. It would, in effect, be a sentence to one institution for a certain period and, subsequent to that, to another institution. The statute does not authorize such a sentence. If the boy is sentenced to the industrial school, he is entitled to be discharged at the age of eighteen.
fact, the board of control can discharge him for reasons of their own any time before that time. It was not contemplated that a boy could be sentenced to the industrial school for a certain period and, as part of the same sentence, to serve in some other institution for a further time. It seems very clear to me that no such sentence is permissible.

JEM

_Bridges and Highways—_Limitation on amount of tax to provide proportion of cost of highway improvement assessed against municipality by county board under provisions of sec. 83.03, subsec. (6), Stats., is not upon total proportion assessed but only upon amount of tax to be raised by municipality in any one year; and where cost of improvement requires it, total assessment may be spread over series of years, tax for each year being within limitation.

July 12, 1928.

FRANCIS J. GOLDEN,
_District Attorney,
Merrill, Wisconsin._

You state that the county board of your county at its November 1927 session by resolution determined to build a bridge in the town of Scott across the Copper river and levied a tax for the payment of the cost thereof amounting to $9,000, assessed 40% of such cost, or $3,600, as a special benefit against the town of Scott and directed the county clerk to certify $1,000 of said $3,600 to the town clerk for collection on the tax roll of the town for the year 1927, $1,000 for the year 1928, $1,000 for the year 1929 and $600 for the year 1930; that the $1,000 for the year 1927 was so certified and extended on the tax roll of the town for the year 1927 and collected and paid (under protest) into the county treasury.

You inquire whether the action taken is legal, and whether the town is required to raise the said amounts for the years mentioned.

I assume that the road on which the bridge is situated is a town highway, although it may be a portion of the
county system of prospective state highways; that is, it has not become a state highway by adoption as such by the county board or declared to be such by the state highway commission, as provided by sec. 83.01, subsec. (5), Stats., and is therefore a highway which the town is required by law to maintain and which the county board cannot be compelled to construct or improve or aid in the constructing or improving. See VI Op. Atty. Gen. 677, VIII Op. Atty. Gen. 741.

In my opinion, the question should be answered in the affirmative.

Sec. 83.03, subsec. (6), provides:

"The county board may construct or improve or aid in constructing or improving any road or bridge in the county. If any county board shall determine to improve any portion of the county system of prospective state highways with county funds, it may assess not more than forty percent of the cost of such improvement against the town, village or city in which the improvement is located as a special tax, provided that the amount of such tax shall not exceed one thousand dollars in any one year. The county clerk shall certify such tax to the town, village or city clerk who shall put the same in the next tax roll, and the same shall be collected and paid into the county treasury as other county taxes are levied, collected and paid. A portion or all of such special assessment may be paid by subscription or donation."

All of this statute after the first sentence was added by ch. 20, laws of 1927, which restored the substance of repealed subsec. (5), sec. 83.03, Stats. 1923, with the addition of the limitation as to the amount of tax that the town could be required to levy in any one year.

The construction of the bridge in question was optional with the county board. I think it is clear that the only limitation on the power of the county board is that the tax necessary to provide the town's share of the cost of the construction of the bridge shall not exceed $1,000 in any one year. Construed otherwise, the county board would be able to exercise the power to assess 40% of the cost to the town in hardly any case, because very few bridges can be constructed for $2,500, which would be the limit of the cost where 40% is assessed to the town if the total tax that the town could be required to levy was $1,000. It must be
presumed that the legislature had this fact in mind, and in-
tended to limit only the amount of tax in any one year—not
the total cost or total proportion thereof assessable to the
municipality. I am of the opinion, therefore, that the ac-
tion of the county board is within the statute.

Loans from Trust Funds—School Districts—First meet-
ing of newly created school district held outside boundaries
of district is not lawful meeting.
Loan cannot be authorized at meeting of school district
held outside boundaries of district.

July 16, 1928.

GERALD J. BOILEAU,
District Attorney,
Wausau, Wisconsin.

In your letter of June 26 you submit the following
questions for an official opinion:

"1. A newly organized school district held its first elec-
tion of officers at a meeting held outside of the boundaries
of the school district. Assuming that the other proceedings
were legal, were the officers elected at such meeting legally
elected?
"2. Will a loan authorized at a meeting held outside of
the limits of the school district be legally authorized?"

1. The statutes do not expressly provide that the first
meeting of a newly organized district shall be held within
the boundaries of the district. However, subsec. (2), sec.
40.03, Stats., provides:

"The first school meeting in any district shall be con-
sidered an annual meeting."

Subsec. (1), sec. 40.03 provides:

"The annual meeting in all common school districts shall
be on the second Monday of July, * * * ."

It is clear from the provisions of these sections that the
legislature intended not only the first meeting of a newly
created district, but also all annual meetings to be held
within the boundaries of the school district.
We are of the opinion, therefore, that a meeting held outside the district is not a legal meeting.

In this connection it is proper to call your attention to the fact that while the first meeting did not comply with the statutory requirements for lawful meeting, yet the district, nevertheless, may be a duly organized district. Subsec. (1), sec. 40.31 provides:

"When a district has exercised the rights and privileges of a school district for a period of four months, no appeal or other action attacking the legality of the formation of such district, either directly or indirectly, shall be taken."

If, therefore, the district to which you refer has exercised the rights and privileges of a school district for a period of four months, and no appeal or other action attacking the legality of the formation of the district has been taken, the district to all intents and purposes is a legal school district.

2. Your second question is answered in the negative. The meeting which authorized the loan was not a lawful meeting, and while the exercise of the rights and privileges for a period of four months with no action attacking the validity of the formation will cure the defect as to organization, there is no statute which operates to validate the meeting so far as the authorization of the loan is concerned.

SOA

Civil Service—University—Director of memorial union is not within unclassified service of civil service.

July 16, 1928.

A. E. Garey,

Secretary and Chief Examiner,
Civil Service Commission.

The question you present is whether the proposed house director of the memorial union qualifies as an instructor within the meaning of par. (d), subsec. (2), sec. 16.07, Stats. This paragraph provides that the unclassified service of the civil service comprises:
“(d) All presidents, deans, principals, professors, instructors, a scientific staff and other teachers in the university, normal or public schools * * *.”

Sec. 36.13 cites the object of the university of Wisconsin, to be:

"* * * To provide the means of acquiring a thorough knowledge of the various branches of learning connected with literary, scientific, industrial and professional pursuits, and to this end it shall consist of the following colleges or departments, to wit:

"(1) The college of letters and science.
"(2) The college of mechanics and engineering.
"(3) The college of agriculture.
"(4) The law school.
"(5) The medical school.
"(6) The school of education.
"(7) Such other colleges, schools or departments as are now or may from time to time be added thereto or connected therewith. No new school or college shall be established unless authorized by the legislature.”

To carry out the object of the university as prescribed in this section, namely, “to provide the means of acquiring a thorough knowledge of the various branches of learning,” and so on, teachers are employed. Such teachers are, by par. (d) of the above cited civil service section, placed in the unclassified service. A careful study of the statement of facts submitted by you, as well as the statement of facts submitted by Dr. Bradley and President Glenn Frank to the civil service commission, fails to establish the functions of the director of the memorial union to be that of a teacher in one of the colleges determined by sec. 36.13. Not being a teacher in one of those colleges, he does not qualify under par. (d), subsec. (2), sec. 16.07, which paragraph determines the unclassified service of the civil service in the university.

FWK
Labor—In advertisement for labor for Waukesha plant of firm subsequent to strike in its Milwaukee plant it is not necessary to state that strike exists in Milwaukee.

July 16, 1928.

Herman R. Salen,
District Attorney,
Waukesha, Wisconsin.

You state that David Adler & Sons Company, subsequent to a strike situation existing in their Milwaukee plant, equipped and are operating a plant in the city of Waukesha, Wisconsin. They have advertised for help without any notice in their advertisement that any strike exists in their plant.

You inquire whether under this situation a violation exists under sec. 103.43, Stats. Said section, in subsec. (1), provides as follows:

"It shall be unlawful to influence, induce, persuade or attempt to influence, induce, persuade or engage workmen to change from one place of employment to another in this state or to accept employment in this state or to bring workmen of any class or calling into this state to work in any department of labor in this state, through or by means of any false or deceptive representations, false advertising or false pretenses concerning the kind and character of the work to be done, or amount and character of the compensation to be paid for such work, or the sanitary or other conditions of the employment, or failure to state in any advertisement, proposal or contract for the employment that there is a strike or lockout at the place of the proposed employment, when in fact such strike or lockout then actually exists in such employment at such place. Any of such unlawful acts shall be deemed a false advertisement, or misrepresentation for the purposes of this section."

Here it is provided that failure to state in any advertisement for labor that there is a strike or lockout at the place of the proposed employment when in fact such strike or lockout then actually existed in such employment at such place is in violation of law.

You state that this company has had no labor trouble in the city of Waukesha. In view of the fact that this plant at Waukesha was opened subsequent to the labor trouble in Milwaukee and that no strike occurred in Waukesha, no
conviction can be secured under such statement of facts. The place of the proposed employment is at Waukesha and it is necessary to prove that a strike occurred in the employment at such place.

In Oeflein v. State, 177 Wis. 394, our court strictly construed the statute here under consideration against the state and in favor of the accused. It was there held that said statute, requiring an advertisement for labor to state that a strike or lockout existed in such employment at such place, does not require an advertisement for bricklayers to state that there is a strike at the employer's plant unless the strike affects the particular craft in which the advertisement is made to hire help.

I am of the opinion that this statute is not violated by the company under the statement of facts given by you.

JEM

Banks and Banking—Delinquent bank may be reorganized under provisions of sec. 220.08, subsec. (15), Stats., and assessment levied by directors prior to delinquency may be enforced.

July 17, 1928.

C. F. SCHWENKER, Commissioner,
Banking Department.

You state that in a bank which is now delinquent, just prior to such delinquency, the board of directors levied an assessment of 150% as provided in sec. 220.07, Stats. This bank was then taken over by the banking commissioner and pursuant to sec. 221.42 double liability was assessed. You ask whether such delinquent bank can be reorganized and the assessment levied by the directors before the delinquency be enforced. If so, can the shares be transferred?

A delinquent bank may be reorganized under the provisions of subsec. (15), sec. 220.08 and the assessment levied by the directors prior to the delinquency may be enforced. Sec. 220.07 provides:

"Whenever the commissioner of banking shall become satisfied that the capital of any bank is impaired or re-
duced below the amount required by law or the articles of incorporation, or below the amount certified to the commissioner of banking as paid in, he shall have the power to require such bank under his hand and seal of office to make good such impairment or deficiency within sixty days after the date of such requisition. In any case, where the capital of a bank shall have become impaired or reduced below the amount required by law or the articles of incorporation, the board of directors of such bank shall have the power to make a pro rata assessment upon all of the stock of said bank to make good such deficiency, and may provide that the amount of such deficiency shall be due and payable at a time to be fixed by such board of directors, which time shall be not less than ten days after notice of said assessment; provided, that notice to stockholders residing in another state shall be given by registered mail and a return receipt demanded. If any stockholder shall fail or neglect to pay the amount of the assessment against his stock for ten days after the same shall have become due and payable, the directors of such bank may offer said stock for sale, and sell the same at public sale upon ten days' notice to be given by posting copies of such notice of sale in five public places in the town, village or city where such bank is located. Upon such sale, the purchaser shall forthwith pay the amount of the assessment against said stock. The amount received from the sale of said stock, less the cost and expenses of such sale, shall be paid to the original owner of such stock.

The liability imposed under this section is entirely against the stock. It cannot be enforced in a personal action against the stockholders. *Finney v. Guy*, 106 Wis. 256; *Bank of Prentice v. Beyer*, 189 Wis. 253. The liability imposed by sec. 221.42 is against the stockholders as individuals. There is no inconsistency in enforcing both liabilities. In *Northwestern Trust Company v. Bradbury*, 134 N. W. 513, it was held that the stockholder's liability was not discharged by the payment of a 100% assessment ordered because of the impairment of the bank's funds. This case has been generally followed.

Since the payment of the assessment does not relieve from the stockholder's liability it would be entirely unfair to release stock from this obligation in reorganization proceedings. Obviously stockholders paying the assessment have no claim for refund in liquidation proceedings. It would be entirely unfair to reward dilatoriness by releas-
ing stock from the payment of assessments as soon as the stockholder's liability accrues and becomes payable.

Sec. 221.43, Stats., while preventing the transfer of stock while the bank is under notice to make good an impairment of its capital, does not prevent the transfer of the shares in accordance with the provisions of sec. 220.07, which provides the machinery for sale at public auction. Naturally this procedure is seldom of value when stockholder's liability is levied.

ML

Education—Minors—Normal Schools—Minor child who has been emancipated and who has established residence in state of Wisconsin may attend normal school without paying nonresident tuition even though parents of such child are nonresidents.

July 18, 1928.

BOARD OF PUBLIC AFFAIRS.

The material facts presented in your letter of June 14 are as follows:

A young lady now eighteen years of age formerly lived with her parents at Spooner, Wisconsin, and graduated from the Spooner High School. She attended River Falls Normal School during the school year 1926-1927 and has since been teaching in Wisconsin and will continue to teach in Wisconsin next year. Her parents, during the year 1926-1927, removed from the state to St. Paul, and now are residing in that city. The young lady is entering this year's summer school at River Falls.

You inquire whether the young lady may be required to pay the tuition fee of a nonresident.

The young lady to whom you refer was a resident of the state of Wisconsin at the time she first entered the normal school. She was living with her parents, who were residents of this state. Ordinarily, the residence of a minor child follows that of the parents. IV Op. Atty Gen. 929; V Op. Atty. Gen. 456.

To the general rule that the residence of a minor child follows that of the parents, there is an exception. Where
the child has been emancipated, he may establish a residence the same as an adult. To establish a residence there must be a physical presence and intent to make the state his permanent place of abode. IV Op. Atty. Gen. 929, 931.

Under your statement of facts the young lady is in this state, and intends to make the state her permanent residence. If she has been emancipated, she is clearly a resident of this state.

The question as to whether a minor child has been emancipated depends largely upon the facts in each particular case. "Emancipation of a child is an entire surrender of all the parent's right to the care, custody and earnings of the child, as well as a renunciation of parental duties, and leaves the child, so far as the parent is concerned, free to act on its own responsibility and in accordance with its own will, * * *." IV Op. Atty. Gen. 929, 931.

Assuming that the young lady to whom you refer has been emancipated, we are of the opinion that she is not required to pay nonresident tuition for attending a normal school. Subsec. (8), sec. 37.11 confers on the board of regents of normal schools the power:

"To require any applicant for admission, who shall not have been a bona fide resident of the state for one year next preceding his first admission to any normal school, or whose parents shall not have been bona fide residents of the state for one year next preceding the beginning of any semester, to pay or to secure to be paid such fees for tuition as the board may deem proper and reasonable; provided, that any person who after his first admission to a normal school shall thereafter have been a bona fide resident of this state for four years shall be entitled to readmission without payment of tuition. The board may also charge any student laboratory fees, book rents, fees for special departments or an incidental fee covering all such special costs."

It is clear that the statute was not designed to require a resident of the state of Wisconsin to pay a nonresident tuition fee for attending a normal school. True, the statute does provide that the board may require any applicant to pay nonresident fees "whose parents shall not have been bona fide residents of the state for one year next
preceding the beginning of any semester.” This section, however, does not apply to an adult student, or a student who is an emancipated minor. If the student is a bona fide resident of the state of Wisconsin, he may attend the normal school without paying nonresident tuition.

SOA

**Elections—School Districts**—One not legal elector who votes at regular school election can be prosecuted for illegal voting although conduct of election and canvass of votes may have been illegal so as to avoid election.

July 18, 1928.

HAROLD KRUEGER,

*District Attorney,*

Grandon, Wisconsin.

You say that on June 25, 1928, the city of Grandon held its annual meeting of the Grandon high school district for the election of school officers. That the board consists of three officers, namely, director, clerk and treasurer. That the terms of clerk and treasurer were about to expire and the election was held for the election of their successors. The polls were open from 1:00 to 8:00 p.m. The director was not a candidate at the election; he appointed two persons to act as ballot clerks and two others who with himself acted as inspectors of election. A ballot box such as is used at the regular fall primary was provided. The two outgoing officers were candidates for re-election. The inspectors prepared ballots on ordinary typewriter paper on which were typewritten the title of the offices and the names of the two officers who were candidates for re-election. Shortly after the polls had opened an elector appeared with an armful of ballots which were printed on paper entirely different in size, color and texture, on which there were printed the names of two candidates for the respective offices, that is, one candidate for each office. You say the election board was persuaded to and did accept these ballots and thereafter and until the polls were closed handed each elector both ballots. After the elector had marked his ballot and returned to deposit it, the inspector
in charge of the ballot box instructed him to throw one of the ballots into a waste basket and deposit the ballot voted in the ballot box, so it was not a secret ballot, as any one could tell from the ballot for whom the candidate had voted.

When the votes were counted the ballot box contained 686 ballots while the poll list contained the names of only 629 voters. Among the list of voters appears the names of two felons who had never been restored to their civil rights. You ask for the opinion of the attorney general on the following questions:

"(1.) Was the election a legal one?

"(2.) If this was not a legal election, then can I prosecute the felons under the statute providing a penalty for illegal voting?

"(3.) If the election is an illegal one, then what is the proper procedure to prevent the candidates receiving the highest number of votes from taking over the offices?"

It seems to me the only questions with which you are concerned officially as district attorney are questions 1 and 2, and those questions should each be answered in the affirmative.

The election was evidently held as the annual school election under the provisions of sec. 40.40 and subsections thereof. I understand your school district is composed of the territory in the city and considerable outside territory, so, the election being a proper election, if a person voted having no legal right to vote he would be subject to prosecution.

There were no doubt irregularities in the conduct of the election and the canvass of the votes, and while that might affect the result of the election, I do not think that would affect your right to prosecute for illegal voting.

Sec. 6.57 provides the method for reducing the number of ballots in the ballot box to the number on the poll list, which, as I understand it, was not done, which would, I think, avoid the election or rather the result of the election, but that would not exonerate a person from prosecution for illegal voting.

TLM
Courts—Minors—Child Protection—Crippled and deformed boy thirteen years of age whose condition cannot be cured by surgical or medical attention cannot be committed to state public school at Sparta; if conditions are such that he cannot be committed to any other state institution or county asylum he may be committed by judge to care, custody and guardianship of some incorporated association willing to receive him until age of sixteen years, when he may be committed to county poor farm.

July 19, 1928.

Board of Control.

You have submitted to this department a request sent to you by the Honorable James H. Hill, county judge of Sauk county. Judge Hill calls attention to a boy thirteen years of age who is deformed and physically defective. He says he has been advised to send this child to the county poor farm, but that this suggestion fails to take into consideration sec. 48.05, Stats., which provides that no child under sixteen years of age shall be sent as a poor person to any county home for support and care, excepting for a period not to exceed three months pending the finding of a suitable home or institution for it; but the county superintendent or other officer having the care of the poor shall bring all such cases when brought to their notice into the juvenile court in the manner provided in sec. 48.06.

Judge Hill says that such boy could not be committed to and held at the state public school at Sparta for he is informed that the crippled and deformed condition of this boy is not amenable to cure or amelioration by surgical or other means as required under sec. 48.21. He is wondering if the child could be examined mentally and committed to the county asylum the same as an adult person might be committed to the county asylum and not to Mendota, but he meets the bar of subsec. (5), sec. 51.05, which provides:

“No person idiotic from birth shall be committed to either state hospital for the insane; neither shall any person physically infirm or mentally imbecile and not deemed dangerous when at large be committed solely because of such infirmity or imbecility.”

Judge Hill says that this is a child that has no proper home to get the care in its crippled physical and subnormal
mental condition; that his mental test is too high to justify his commitment to Chippewa Falls. He asks what humane solution we have of this matter and asks for our suggestion.

This is a neglected or dependent child as defined in sec. 48.01, subsec. (1), par. (a), Stats. Such child may be brought before the county judge under sec. 48.06 by the petition of any resident of the county having knowledge of such child’s being neglected and dependent. The county judge may dispose of such child under sec. 48.07 by making 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.

Under the above provision the county judge may dispose of the child for the present and later, after the boy has become sixteen years of age, he may then be committed to the county poor farm if that is the best place for him under all the circumstances.

JEM

Public Health—Pharmacy—Under provisions of sec. 151.02, subsec. (9), Stats., no drug store, pharmacy, apothecary shop or any similar place of business shall be kept open for transaction of drug business until it has been registered with and permit therefor has been issued by state board of pharmacy.

July 19, 1928.

Board of Pharmacy,
Racine, Wisconsin.
Attention G. V. Kradwell, President.

I have your letter of June 18 in which you state that frequently your board receives communications from various sections of the state complaining that you are negligent in not compelling newly opened drug stores to secure permits before beginning operation. You say your board has taken the position that it is necessary for a permit to be obtained from the board before a new drug store
may be legally opened in order that the board may know that it will be operated in accordance with the provisions of ch. 448, laws of 1927, and for protection of the general public. You say because so many have questioned your interpretation of the law, you ask for an opinion of the attorney general.

You are advised that under the provisions of sec. 151.02, subsec. (9), Stats., no drug store, pharmacy, apothecary shop, or any similar place of business shall be kept open for the transaction of drug business until it has been registered with and a permit therefor has been issued by the state board of pharmacy. Then follows an exception as to stores selling proprietary or so-called patent medicines only, and the law then requires that registered pharmacists shall be annually registered on the 1st day of June and the board shall thereupon issue a certificate of registration. The law then requires an annual registration fee of $1.00 to be paid and for failure to register his place of business as required or for failure to comply with any other provision of the section, the person shall, upon conviction, be fined not more than $50.00 for each separate offense.

TLM

Appropriations and Expenditures—Public Officers—Sheriff—Sheriff’s fees and expenses incurred in executing governor’s warrant under sec. 57.11, in proceedings for revocation of pardon and remanding convict to prison are chargeable to appropriation provided for in sec. 20.02, sub-sec. (4), Stats.

Theodore Dammann, Secretary of State.

With your letter of the 10th inst. you enclose two vouchers covering fees and disbursements of the sheriff of Dane county in regard to apprehension and return of Edward Haumschild to Waupun pursuant to the warrants of the governor, and you request to be advised to what appropriation such expenses should be charged.

You are advised that examination of the records in the governor’s office discloses that the items set forth in said
vouchers were incurred under and by reason of the statutory provisions hereinafter cited, under the following circumstances, viz.:

Haumschild, while a convict in the state prison at Waupun, was granted a conditional pardon, and prior to the expiration of his sentence complaint was made to the governor that he had violated the condition in said pardon set forth. Thereupon the governor issued his warrant directed to the sheriff of Dane county, commanding him to arrest such convict and bring him before the governor. This warrant the sheriff executed, as is set forth in one of said vouchers.

Upon further inquiry before the governor he issued his further warrant directed to said sheriff remanding such convict to the institution from which he was discharged at the time he was conditionally pardoned. This warrant said sheriff also executed as is set forth in the other of said vouchers.

All of the foregoing proceedings are fully authorized by the provisions of sec. 57.11, Stats.

Sec. 59.31, Stats., directs payment out of the state treasury of all sheriffs' fees whenever any such officer is required to perform any services for the state, which is not chargeable to his county or some officer or person. The services performed in the instances here under consideration were for the state pure and simple and none of the items charged for can be said to be chargeable to Dane county or to any officer or person.

Sec. 20.02, subsec. (4), Stats., provides:

"There is appropriated from the general fund:

"PARDON PROCEEDINGS. To the executive department, sufficient sums to pay such fees and expenses in proceedings for the pardoning of convicts as may be approved by the governor."

In my opinion the provisions of this last section are sufficiently broad and comprehensive to include the costs and expenses of proceedings for the revocation of pardons, as well as those incurred in the granting or denial of pardons, and is your authority for charging the amount involved to the appropriation therein mentioned.

HAM
Corporations—Securities—Contracts between owners of fur farms and purchasers which provide in express terms that delivery of animals shall be made to purchaser, but which, in operation, do not contemplate delivery of animals, constitute securities within meaning of sec. 189.02, Stats., XVII Op. Atty. Gen. 343 quoted and followed.

July 19, 1928.

RAILROAD COMMISSION.

In your letter of June 15 you submit certain contracts which you have designated for the purpose of identification as exhibit "B". The exhibit consists of a purchase agreement to be entered into with the purchaser of muskrats and the Cornell Fur Farms, Inc., by the terms of which contract the Cornell Fur Farms will convey to the purchaser a certain number of muskrats. The exhibit also contains a pen lease and service agreement by which the Cornell Fur Farms agree to keep the animals sold to the purchasers in separate pens, to care for said animals and to dispose of them as directed by the purchaser of the animals. You also submit a copy of the transcript of testimony taken at a conference held in your office with Mr. Wallblon, the president of the Cornell Fur Farms. You inquire whether the instruments comprising Exhibit B constitute securities within the meaning of sec. 189.02, Stats.

The contract of sale provides in express terms that an actual delivery of the muskrats shall be made to the purchaser. However, it appears from the transcript of testimony taken at the conference that actual transfer of the animals is not contemplated. Mr. Wallblon testified, page 6, of the transcript of testimony:

"Q. No deliveries contemplated? A. No.

"Q. Although the forms of your contracts state the rats will be delivered direct to the unit holder, and they contract to deliver rats to the farm, that is just a matter of form? A. Yes."

It thus appears that the contract amounts to a mere subterfuge to evade the securities law. The purchaser of the rats under the contract does not, in fact, obtain the animals; he obtains an interest in the venture of the Cornell Fur Farms. The case here presented is not essentially
different from that presented in XVII Op. Atty. Gen. 343, where it was held that similar instruments constituted securities within the meaning of sec. 189.02, Stats.

Corporations — Land Mortgage Associations — Public Officers—State Treasurer—Under provisions of ch. 225, Stats., state treasurer is not required to maintain collateral issued by land mortgage association segregated to cover each series of bonds issued.

C. F. SCHWENKER, Commissioner,
Banking Department.

You ask whether under the provisions of ch. 225, Stats., the state treasurer as trustee is required to maintain the collateral issued by a land mortgage association segregated to cover each series of bonds issued.

An examination of the statute discloses nothing which requires that the mortgages deposited with the state treasurer be security for any particular group of bonds. The statute seems to contemplate that all of the mortgages are security for all of the bonds. Subsec. (1), sec. 225.34 requires the pledging as security for such bonds, notes and mortgages “equal to or exceeding the aggregate amount of bonds issued or to be issued.”

Subsec. (2), sec. 225.34, Stats., provides:

“The total amount of bonds actually outstanding shall not at any time exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and moneys as may be on deposit with the state treasurer under the provisions hereof.”

The provisions of sec. 225.35 allowing the substitution of mortgages deposited with the state treasurer indicate rather strongly that there is no attempt to make certain notes and mortgages securities for certain bonds. The only requirement is that the substituted mortgages, moneys, etc., be in an amount equal or greater than the amount unpaid upon the notes secured by the mortgages withdrawn. The statute provides no machinery for segregating the notes
and mortgages securing each particular bond issue; and any attempt at segregation would lead to difficulties, confusion, and inequities.
ML

Corporations—Public Officers—Secretary of State—Corporation in promotional stage which has been declared forfeited by secretary of state for failure to file annual report may perfect its organization and submit to secretary of state affidavit under subsec. (6), sec. 180.08, Stats.
Secretary of state may rescind forfeiture if affidavit contains facts required by subsec. (6), sec. 180.08.

July 19, 1928.

SECRETARY OF STATE.
The material facts presented in your letter of May 29 are as follows:
On September 6, 1924, articles of incorporation of the H. F. Corporation were filed in your office. The corporation has since remained in a promotional stage. During the years 1925 and 1926, annual reports were made to you by one of the incorporators. On January 1, 1928, the corporate rights and privileges of the corporation were forfeited for failure to file an annual report in your office during the year 1927. You inquire whether the forfeiture may be rescinded.

A corporation in the promotional stage is required to file with the secretary of state an annual report as provided in sec. 180.08. VII Op. Atty. Gen. 300, 301.
Under your statement of facts no report was filed with the secretary of state during the year 1927. Consequently the secretary of state had the power to declare the corporation forfeited under the provisions of subsec. (2), sec. 180.08, Stats., which provides, in part, as follows:

"* * * In case said report is not filed by the following January, the corporate rights and privileges granted to such corporation shall be declared forfeited by the secretary of state, and he shall enter such forfeiture on the records of his department."

While subsec. (2), sec. 180.08 provides in express terms that the secretary of state shall enter the forfeiture on the
records of his department in those cases where the annual report of the corporation is not filed, the forfeiture is not consummated until the attorney general has acted under the provisions of sec. 286.36, Stats. On this point the court in West Park Realty Co. v. Porth, 192 Wis. 307, said, p. 312:

"The secretary of state is a mere ministerial officer. He possesses no judicial powers, and in fact, if the legislature had attempted to vest him with such, the act would be unconstitutional and void. It therefore becomes apparent that when the legislature authorized the secretary of state to declare a forfeiture, it merely intended that such declaration should operate as a cause for forfeiture, which could be enforced in a proper action brought by the attorney general or by any private party in the name of the state, under the provisions of sec. 286.36 of the Statutes."

It is significant to note that the forfeiture provided in subsec. (2), sec. 180.08 is not a forfeiture ipso facto, but merely a cause for forfeiture.

In West Park Realty Co. v. Porth, supra, the court said, p. 313:

"* * * In this connection we call specific attention to the following portion of sub. (2) of sec. 180.08 of the Statutes, which reads: 'In case said report is not filed by said January first, the corporate rights and privileges granted to such corporation shall be forfeited. . . .' Considering that portion of the section just quoted together with the other provisions of ch. 180, we are constrained to hold that what the legislature intended was not a forfeiture ipso facto but a cause for forfeiture, which could be enforced in accordance with the provisions of sec. 286.36."

Since no action was taken by the attorney general under sec. 286.36, Stats., it is clear that the H. F. Corporation has not lost its corporate rights and privileges. The corporation, therefore, may complete its organization and apply to the secretary of state for a rescission of the forfeiture as provided in subsec. (6), sec. 180.08, Stats. This section provides as follows:

"The secretary of state may rescind the forfeiture on payment of twenty-five dollars and presentation of an affidavit signed by the president and secretary of the corporation to the effect that such corporation has at no time suspended its ordinary business; or that the corporation at
the time of the forfeiture held title to or transferable interests in real estate. The secretary of state may demand such further proof as he may deem necessary.”

If the H. F. Corporation submits to the secretary of state an affidavit containing the facts required by the foregoing section, the secretary of state may rescind the forfeiture.

SOA

Counties—Dance Hall Ordinances—Dance hall ordinance passed by county board which permits licenses to be issued for dances in pavilion but does not permit them in barn is not in violation of constitutional provisions against discrimination between members of same class.

July 19, 1928.

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

You refer this department to sec. 351.57, Wis. Stats., concerning the regulation of dance halls by county board. You state that under an ordinance issued by a dance hall committee of the county board of your county barn dances are prohibited from obtaining a license to conduct a dance to which the public is admitted; that licenses, however, are issued to any one making application for a pavilion dance.

You inquire whether there is enough discrimination between a barn dance and any pavilion dance to make such a resolution constitutional or whether it would be a discrimination between members of the same class.

It is very difficult to pass upon the constitutionality of an ordinance passed by a county board without having a copy of said ordinance before us. I do, however, see quite a difference between a barn used as a dance hall and a pavilion used for such purposes. A pavilion generally has all sorts of provisions to accommodate the crowd. It is built for purposes of amusement and dances. A barn is built for another purpose and is not, as a general rule, equipped with facilities to accommodate the public. There may be a great many reasons why no license should be
issued for a dance to be held in a barn that would not apply to a pavilion.

This department will not declare a statute or a municipal ordinance unconstitutional without being well satisfied that it is so. I will say that we do not see any reason why the ordinance in question should be declared void as violative of the provisions of the constitution against discrimination between members of the same class.

Minors—Child Protection—County is liable under sec. 48.07, Stats., for cost of maintenance of child committed temporarily to boarding home.

July 21, 1928.

BOARD OF CONTROL.

In your letter of July 6 you state:

"May we have an opinion from you as to whether it is possible under sec. 48.07 for a county to pay for the board of a child on order of the juvenile court when placed in a boarding home? We understand from the opinion XV Op. Atty. Gen. 338 that the county is liable when a child is committed to a private institution. Is there any ground for a distinction?"

Subsec. (1), sec. 48.07 provides that the disposition of a dependent child "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."

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, * * *

It will be noted that the statute expressly provides for a temporary commitment by placing the child in the care or custody of some suitable person or institution, and that
during such period of probation, the county shall be liable for the reasonable expense of the maintenance of such child.

In XV Op. Atty. Gen. 338 this department held that the county shall be liable for a child committed temporarily to a private institution. There is no distinction, as we view subsec. (1), sec. 48.07, between an ordinary private institution and what you term in your statement of facts as a boarding home. A boarding home may be operated by "a private institution" within the meaning of the statute, or it may be run by "some suitable person" within the meaning of the statute.

We therefore hold that a child may be committed to a boarding home, and that during such period the county is liable for the maintenance of the child.

SOA

Counties—Air Ports—County board has no power to enact rules and regulations governing air ports.

July 21, 1928.

L. D. Potter,
District Attorney,
Racine, Wisconsin.

In your letter of July 5 you inquire whether the county board of your county may enact rules and regulations governing air ports located in your county.

The statutes conferring the powers on counties are silent as to location of air ports.

"* * * They [counties] are purely auxiliaries of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. * * *"

Frederick v. Douglas County, 96 Wis. 411, 417, quoting from I Dillon, Mun. Corp. 25.

Since the statutes do not confer on the county board the power to regulate air ports, it is the opinion of this department that no such power exists.

SOA
School Districts—First meeting should be called and held within newly created district.

Where meeting was called and held outside newly created district election is void; new meeting should be called and held within district for election of proper officers thereof.

July 23, 1928.

John Callahan, State Superintendent,
Department of Public Instruction.

You state that school district No. 1, town of Wausau, Marathon county, is a new district set off by the town board and you say the meeting at which the new district was formed was held in the old schoolhouse which is now located in that part of the old district that is district No. 3. You say the meeting to elect officers for district No. 1 was called by the town board in the same schoolhouse. At that meeting, school district officers were elected by *viva voce* vote and not by ballot. The meeting was adjourned for less than thirty days to be held at the same place. At the adjourned meeting a school site was selected and adjournment for less than thirty days was taken to meet at the same place. At this adjourned meeting, the people having had information that officers were to be elected, proceeded to elect by ballot. You ask if the district is legally organized, and if so what set of officers are entitled to hold office.

Sec. 40.07, subsec. (4), Stats., provides that the election shall be by ballot, so that would make the first election void. The second election was by ballot, but at the same place, which was outside of the newly formed election district. I do not believe that election was valid.

Sec. 40.30, subsec. (1), provides:

"Town and village boards and councils of cities of the fourth class may, by order, create, alter, consolidate or dissolve common school districts."

Subsec. (2) requires that the clerk of the town, village or city proposing to change a school district shall give five days' notice in writing to the clerk of each district of the time and place of the meeting to decide the proposed change, and if a change is made, it shall be by order which, subsec. (6), shall be filed and recorded in the office of the
clerk of the municipality in which the district is situated and a copy shall be mailed to the county superintendent. The town or village board or city council, if it creates a new district, subsec. (7),

"shall fix the time and place for the first district meeting, and shall give six days' notice thereof in the manner provided for giving notice of an annual district meeting, * * *.""

That makes quite a specific procedure for organizing districts and holding meetings for the election of officers. But it will be noticed the election is not held until after the district is formed or created, and, there being no officers to start the election machinery, subsec. (7) specifically provides that the municipal board of the town, village or city creating the district shall fix the time and place of the first district meeting and give the proper notice therefor. That being after the creation of the district as a municipal body, I think the meeting must be called and held in the district so the electors could act as a quasi municipal corporation within its district, and I do not believe the electors of the district are acting as such at a place outside of their district.

It is true the statute is not as specific on that question as it might very easily have been made, but in the absence of specific statutes, I think the district should meet and act as a district within its territory and not outside of the district and, for the reasons stated, I think the first meeting of the newly created school district should be called and noticed by the town board in the new district and a meeting held and officers elected by ballot at such meeting so as to have a legally created and organized school district before any other action is attempted. See opinion to district attorney of Marathon county July 16, 1928.*

TLM

Insurance—Fraternal Benefit Societies—Societies mentioned in sec. 208.01, subsec. (4), par. (e), Stats., must, in order to remain within limits of statute, elect to grant one of benefits referred to; it cannot remain within limits of statute if it grants both benefits.

July 24, 1928.

Commissioner of Insurance.

In your letter of July 11 you inquire whether a society must, in order to remain within the limits of subsec. (4), par. (e), sec. 208.01, Stats., confine itself to the granting of a death benefit or disability benefit, or whether it may grant both death and disability benefits.

Subsec. (4), sec. 208.01 provides, in part, as follows:

"Unless express reference is made to this subsection, no law now in force or hereby or hereafter enacted shall include or apply to:

"**(b)** Nor to an association of local lodges of a society now doing business in this state which provides: (1) Death benefits not exceeding three hundred dollars to any one person; (2) disability benefits not exceeding three hundred dollars in any one year to any one person; (3) or both.

"**(e)** Nor to domestic lodges, orders or associations of a purely religious, charitable and benevolent description which do not provide: (1) For a death benefit of not exceeding three hundred dollars; (2) or for disability benefits of more than one hundred and fifty dollars to any one person in any one year."

The foregoing sections were created by ch. 216, laws of 1911. Originally, subsec. (4) (c) limited the amount of death benefits to one hundred fifty dollars, but by ch. 170 of the laws of 1927, the amount was increased to three hundred dollars.

This department is of the opinion that the legislature intended to restrict the societies mentioned in subsec. (4) (e), sec. 208.01 to the granting of one type of benefit only, that is, either a death benefit or a disability benefit. The statute, it will be noted, uses the word "or," which is an indication of an intent on the part of the legislature that the society might adopt one of the two forms of benefits, but
not both. A further, and perhaps more significant manifestation of such intent on the part of the legislature is found in the provisions of subsec. (4) (b), which expressly provides that the society therein mentioned may adopt both forms of benefits.

Since subsecs. (4) (b) and (4) (e), sec. 208.01 were created by the same act of the legislature, the section must be interpreted that when the legislature used the word “both” in the former section and omitted it in the latter, it intended that a society mentioned in the latter section was compelled to elect which form of benefit it would grant, and that such society cannot grant both benefits.

SOA.

**Municipal Corporations — Towns — Fire Protection —**

Town containing unincorporated village has not power to enter into agreement with another town or with city to purchase and maintain for use of towns or town and city jointly fire fighting equipment.

**July 24, 1928.**

**George S. Geffs,**

*District Attorney,*

Janesville, Wisconsin.

The material facts presented in your letter of July 3 are as follows:

The towns of Albion, Dane county, Porter, Rock county, and Fulton, Rock county, at their annual town meeting, voted to appropriate a sufficient sum to pay the purchase price of a fire engine and necessary equipment. The city of Edgerton, Rock county, is a party to the agreement. This city is to furnish a suitable place to keep the fire truck and equipment, the necessary fire company to operate the same and to fight fires; to keep the truck in repair and have a right to use the truck to fight fires in Edgerton, whenever necessary. Each of the three towns contains an unincorporated village; the town of Albion the village of Albion, the town of Porter the unincorporated village of Cookville, and the town of Fulton the unincorporated village of Fulton.

You inquire whether the towns of Fulton and Porter had
the power, at their annual town meeting, to appropriate money for the enterprise which you have outlined.

It is fundamental that towns have only such powers as are specifically delegated or necessarily implied from the statutes creating them.

Subsec. (18), sec. 60.29, Stats., confers on the town board the power "to establish a fire department in any town which contains a population of not less than three hundred and which has therein one or more unincorporated villages, when authorized by resolution adopted by ballot at any town meeting." It is clear that a town has the power to establish a fire department for its own use. However, there is no statute which I have been able to find that confers upon towns the power to enter into an agreement such as that presented by you.

While it may in some cases be very desirable for towns to co-operate, in order to reduce fire losses, in so doing the statutes must be complied with. In my opinion, the plans proposed by the towns of Fulton, Porter, and Albion cannot be consummated unless the legislature specifically confers such powers on towns.

SOA

Workmen's Compensation—Fifteen per cent penalty may be assessed against employees of governmental subdivisions only where order or law applies to state or its subdivisions.

Laws concerning safety devices, etc., and consequently commission orders thereon, apply to state and its subdivisions as owner but not as employer.

Penalty is payable whether accident occurs in governmental or nongovernmental function when accident happens because of violation of law or order placing duty upon owner.

July 26, 1928.

A. J. Altmeyer, Secretary,
Industrial Commission.

Some time ago you asked for an opinion as to whether sec. 102.09, subsec. (5), par. (h), Stats., is applicable to the state, counties, towns, cities and villages while performing
governmental functions and while performing nongovernmental functions. Sec. 102.09, subsec. (5) (h) provides:

"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."

In *New Holstein v. Industrial Comm.*, 191 Wis. 93, 94—95, in which the question involved was whether a town was required to pay treble compensation in a case where a minor of permit age without a permit was injured, the court, after quoting the statute involved, said:

"Thus in plain language the legislature said that a town employing a minor without a permit must respond in treble damages if an injury occurs to the minor in the course of such employment. It is not the province of the court to construe away this unmistakable legislative mandate."

The court then pointed out that the act was intended to safeguard the life and health of minors and should receive a liberal construction in order to effectuate that purpose. "The legislature made no exceptions in favor of the state or its subdivisions and the court can make none" (p. 95). The minor in that case was engaged in road work, which was undoubtedly a governmental function. The court, however, made no distinction between injuries occurring in governmental and nongovernmental functions.

Just as the purpose of the treble compensation provision is to safeguard the health and life of minors, the provisions for fifteen per cent increased compensation are for the purpose of protecting the life and limbs of the employees by requiring the employer to comply with the statute and safety orders.

There is no reason why the penalty provision should not be applied to the governmental units regardless of the function the government is engaged in at the time the accident occurs. The governmental units are made subject to the compensation act and the measure of damage, in case they fail to comply with state statutes or orders of the commission, is an increase of fifteen per cent. If, then, the statutes or orders of the commission are applicable to the state, counties, towns, cities and villages, the fifteen per
cent penalty attaches whether the employe is engaged in governmental or nongovernmental functions.

Whether the law or order applies to municipalities is a matter to be decided in each case. The industrial commission makes its orders under the provisions of ch. 101. This chapter defines employer as follows:

"The term 'employer' shall mean and include every person, firm, corporation, agent, manager, representative or other person having control or custody of any employment, place of employment or of any employe." (Sec. 101.01, subsec. (3).)

Subsec. (13) of this same section provides:

"The term 'owner' shall mean and include every person, firm, corporation, state, county, town, city, village, manager, representative, officer, or other person having ownership, control or custody of any place of employment or public building, or of the construction, repair or maintenance of any place of employment or public building, or who prepares plans for the construction of any place of employment or public building. Said sections 101.01 to 101.29, inclusive, shall apply, so far as consistent, to all architects and builders."

Sec. 101.06 provides:

"Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building, and every architect shall so prepare the plans for the construction of such place of employment or public building, as to render the same safe."

In Sullivan v. School District, 179 Wis. 502, 507, the rule is stated:

"In connection with what has been said there is also the general rule, adopted both by this court and the supreme court of the United States, that general statutes are not to

In that case, a school district was held not liable for injuries sustained by a pupil in the manual training department resulting from the failure to equip certain saws with proper safety devices.

Under the statutory definition of "employer," it seems clear that governmental subdivisions are not within the provisions of sec. 101.06; they are, however, as "owner." But see X Op. Atty. Gen. 348.

When the industrial commission's order applies to an "owner," the governmental subdivisions are included in the order. When the order applies to "employers," governmental subdivisions are not included. It follows that governmental subdivisions are not liable for increased compensation for violating the industrial commission orders applying to employes; they are liable for increased compensation for violation of the commission's orders relating to owners.

Public Officers—Board of Health—Expenses of Public Officers—In fixing salary or wages of social workers under board of health in cities agreement can be made that in addition to salary persons shall be paid street car fare to and from places where they are sent to perform their work.

July 27, 1928.

**DR. C. A. HARPER,**

*State Health Officer.*

I have your letter of June 29, in which you say you notice a recent opinion given by this department concerning the expenses incurred on the part of a state worker in the city in which such state worker lives and I assume you refer to XVII Op. Atty. Gen. 381, holding that a bank examiner can not charge for street car fare in traveling from his house to his office and from his office to his house in the same city nor for his midday meal down town while in that city. You say you have a number of social workers in the
larger cities who are sent out to different places in the city to perform certain duties, and while they do not charge their midday meal to the state, they have been in the habit of charging their street car fare and you ask if that can be done.

I do not think the opinion you have cited necessarily covers the situation to which you refer. That was the case of an officer whose salary was fixed and in order to perform the duties of that office he had to go to his office and whatever expense might be incurred in doing that was covered by the salary.

I see no objection to your arranging with your social workers in fixing their salary or compensation to provide that they should receive such salary and such necessary street car fare as should be paid out in traveling to and from the places in the cities to which they are sent, and where that has been the practice and is understood in fixing the amount of their wages or salary, I think that would be implied, but it would be better to have that expressly provided for in the salary fixed.

TLM

Public Officers—Alderman—County Supervisor—Offices of alderman and county supervisor may be held by same person.

N. H. Roden,
District Attorney,
Port Washington, Wisconsin.

You ask if the same person can be alderman and supervisor. You are referred to the provisions of sec. 59.03, subsec. (3), Stats., which expressly authorizes it.

TLM
Criminal Law—Navigable Waters—Owner of land on shore of Lake Michigan has no right to dredge out and sell sand under such waters.

He cannot be criminally prosecuted under sec. 348.42, Stats., because that section makes person criminally liable only where he is not riparian owner.

July 31, 1928.

L. D. Potter,
District Attorney,
Racine, Wisconsin.

You say the town of Caledonia, in Racine county, borders on Lake Michigan. A man owns land in that town bordering on Lake Michigan and a public highway runs along near the edge of the lake, although there is a small strip of land between the highway and the bank.

Some years ago the county of Racine erected piers extending out into the lake to keep the water from washing away the land, for the protection of the highway, and the beach has been extended into the water somewhat because of those piers.

You say the land owner has leased a strip of land between the highway and the water and the lessee has been selling land from the beach for commercial purposes and has sucked sand from under the water onto the beach and sold that.

You ask to be advised if that is a violation of sec. 348.42, Stats., and if there is any way he can be stopped.

I do not think he can be prosecuted criminally for violating sec. 348.42, for that makes it a crime only when the person is not a riparian owner. But he has no right to take the sand or soil from under the waters of the lake, for under the general rule the state owns the ground under the lakes and the shore owner owns only to the shore line, and that is held by the state in trust to preserve the waters for public uses of navigation and fishing, and such other public uses as are incident thereto, and he is a trespasser in carrying away and converting to his own use any of the soil or sand under the waters of the lake. We are calling the attention of the railroad commission to the facts, as they have jurisdiction in such matters.

TLM
School Districts—Eminent Domain—School district may condemn land for addition to schoolhouse site if owner will not sell at proper price.

Intoxicating Liquors—Nonintoxicating Liquors—Town or village board or city council cannot refuse license for so-called soft drink parlor under sec. 165.31, Stats., because premises are near schoolhouse, if applicant is unobjectionable.

August 1, 1928.

COMMISSIONERS OF PUBLIC LANDS.

You say a school district at present owns a schoolhouse site and desires to increase the size of the site but the owner of the adjoining land will not sell the land desired and you ask if it can be condemned and, if so, what the laws are covering the proceedings.

The school district can condemn land for schoolhouse site or addition thereto under the provisions of sec. 32.02, subsec. (1), Stats., and sec. 32.04, which prescribes the procedure.

You say they are also considering another schoolhouse site some distance away from the old one but you say there is a saloon or so-called soft drink parlor in the vicinity, and you ask if that has any bearing upon the location of the schoolhouse site.

I do not think it does. A so-called soft drink parlor is assumed under our laws to be respectable and unobjectionable if conducted in accordance with law. You will notice now that sec. 165.31, subsec. (1), provides that each town board, village board and common council shall grant licenses to such persons as they deem proper for the sale of non-intoxicating liquors. That is mandatory except where the licensing board determines that the person is not a proper person to be so licensed. That language is quite different from the language of sec. 1548, under which the saloons were licensed to sell intoxicating liquors and which gave the board or council a discretionary power to refuse license on account of location. Under that provision the writer of this opinion always used to hold that the board or council had the power to refuse any license, but under this new law I always held the applicant was entitled to a license.
unless the board or council refused it because of some objection to the applicant. I think that is the effect of the change in that language.

TLM

_Appropriations and Expenditures—Counties—_County board cannot appropriate $5000 to district attorney for purpose of making investigation of files, records and accounts of county to determine what moneys have been misappropriated, paid out on illegal contracts for illegal purposes, or illegally paid out of county funds; should proceed under provisions of sec. 73.03, subsec. (14), par. (a), Stats., or sec. 59.72 in case audit of county’s books is desired.

August 1, 1928.

_Frank B. Keeffe,_
_District Attorney,_
_Oshkosh, Wisconsin._

You state that on May 2, 1928, a resolution was presented to and adopted by the county board which recites that information and evidence has been presented to the board and citizens of the county indicating that funds have been illegally paid out of the county treasury and that certain officers have committed malfeasance in office; that it is due to the taxpayers of the county that all moneys paid out illegally should be returned to the county and the persons guilty of malfeasance should be prosecuted; that to that end it was resolved that the district attorney with the aid of such assistance as be deems necessary make a thorough investigation of the books, records and accounts of Winnebago county and bring appropriate actions against all persons whom he deems legally liable for any and all moneys paid out of the county treasury on illegal contracts or illegally appropriated or misappropriated, and to institute actions to bring to justice any officer guilty of malfeasance in office. That resolution then provides for an appropriation to the district attorney of $5000 out of the general fund of the county to make a thorough investigation and determine and ascertain what moneys have been misappropriated and paid out on illegal contracts for illegal purposes
or illegally paid out of the county funds. You enclose a copy of the resolution and say the clerk wishes to know whether the county board has authority to make the appropriation and whether the appropriation is legally made in its form.

My answer is “No.” The general rule is that counties must first contract or make debts or liabilities and then pay them, so that the county board determines the proper amount to be paid for any article or service and that power can not be delegated to the district attorney or to any other person.

Sec. 59.15, subsec. (1), Stats., provides that the county board at its annual meeting shall fix the annual salary for each county officer and that salary shall not be increased or diminished during the officer’s term except in the cases there specified. Par. (c) then provides that the county board may reimburse the district attorney for the amount of his expenses actually and necessarily incurred in briefing and arguing criminal cases before the supreme court as required by subsec. (7), sec. 59.47, and in traveling within and without his county in the performance of his official duties.

Par. (e), subsec. (1), sec. 59.15 authorizes the county board at its annual meeting to fix the salary or compensation for any office or position other than the county offices designated in sec. 59.12 created by any special or general provisions of the statute. Subsec. (3) provides that the county board may at any time fix or change the number of deputies, clerks or assistants that may be appointed by any county officer and fix or change the annual salary of each such appointee.

You will notice those several provisions are very specific that when help is needed assistants or deputies should be provided for and compensation or salary fixed, so the compensation would be paid out by the county board as earned and not advanced in lump sums to be paid out by any county officer.

There is a specific provision in sec. 73.03, subsec. (14) par. (a), for towns, villages, cities, counties, school districts and boards of education to have their books audited by the tax commission.
There is also a specific provision in sec. 59.72 and subsections thereof for investigating and auditing the books of the several county officers either by the county clerk or by a special county auditor to be appointed by the county board and whose compensation should be fixed by such resolution, and the person so appointed can be required to perform all of the duties imposed upon the county clerk in making such audit and investigation and such other duties as the board may from time to time direct by resolution.

If any misappropriations or liabilities are disclosed by such investigation, the county board can authorize and direct the district attorney to commence and prosecute the appropriate actions to recover the funds or enforce the liability and can direct the prosecution in cases where criminal liability is shown although it is the duty of the district attorney to make such prosecutions without direction if he is satisfied that the evidence justifies such prosecutions.

I think the county board should proceed under one of those specific provisions of the statute if they desire an auditing of the books of any of the officers of the county instead of advancing money in this unauthorized way to be disbursed by the district attorney instead of by the county board, which is required to make the disbursements.

TLM

Fish and Game—Mink—Musk rat—Provision of sec. 29.18, subsec. (4), Stats., is interpreted to provide that there shall be open season in even numbered years only in Oneida county from January 1 to April 1 and again from October 25 to January 1, following.

August 1, 1928.

E. L. Kennedy,
District Attorney,
Rhinelander, Wisconsin.

In your letter of July 24 you refer to sec. 29.18, subsec. (4), Stats., which in the first sentence provides that the open season in counties enumerated, of which Oneida county is one, shall be from October 25 to April 1 and then in the same paragraph provides that there shall be no open season.
in other counties, including Oneida county, in the odd numbered years.

You inquire whether this means that during even numbered years the season in Oneida county shall run from January 1 to April 1 and from October 25 to January 1, following, or whether it means that there shall be an open season each year from October 21 to April 1.

It seems the thing that confuses you is the fact that the period from October 25 to the following April overlaps part of an even and odd numbered year, but I see no difficulty in giving a common sense interpretation to this statute. It manifestly means that there shall be an open season only in the even numbered years in Oneida county from January 1 to April 1 and again from October 25 to January 1, following.

JEM

Fish and Game—Provision of sec. 29.26, Stats., that no person shall fish for any variety of fish from motor-driven boat or from any boat in tow of motor boat when motor is in motion applies to outlying waters as well as to inland waters.

Conservation Commission.

You refer us to sec. 29.26, Stats., which provides that no person shall take, capture or kill fish of any variety from a motor-driven boat or from any boat in tow of a motor boat, when the motor is in motion. You state that the question has arisen whether this provision is effective in outlying waters, such as Green Bay, Lake Michigan, and Lake Superior. The people would like to troll for lake trout in Lake Superior behind a motor boat. You ask whether this is permissible.

The waters enumerated by you are outlying waters and the waters of this state are classified under sec. 29.01, sub-sec. (4), as “outlying waters” and “inland waters” and both classes are under the jurisdiction of the state.

The statute here in question is in general terms broad enough to include both “inland waters” and “outlying
waters." I believe the prohibition therein contained applies to outlying waters as well as inland waters.

JEM

Criminal Law—Search Warrants—Issuing of search warrant when neither complaint for said warrant nor docket of magistrate discloses that facts and circumstances were adduced sufficient to justify finding of probable cause by such justice is illegal; evidence obtained by such search warrant cannot be introduced in criminal prosecution.

August 2, 1928.

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

You state that on April 30, 1928, before one of the justices of the peace of Rusk county, complaint for search warrant was made by E. P. Johnson, deputy conservation warden, and that the complaint is as follows:

"State of Wisconsin ss.
Rusk County

"E. P. Johnson being first duly sworn on oath before me, says that he knows or has good reason to believe that beaver skins and venison caught, taken, killed or had in possession contrary to the provisions of the Wisconsin statutes, are concealed in the dwelling house and premises of D. H. Hayen on the following described property: S1/2 SW1/4 Sec. 31, T. 35, R. 3 W. in the town of Richland, in said county; and that the following are the reasons and grounds of such belief or knowledge: Reliable information and personal observation.

"Subscribed and sworn to before me this 30 day of April, A. D. 1928.

E. P. Johnson

"E. A. Kirvan
Justice of the Peace."

You state that no further evidence was taken or adduced at the time the complaint was made; that the entry in the justice's docket discloses copy of complaint as set out above; that upon this complaint so made search warrant was issued and illegal venison discovered in the dwelling house. You inquire whether illegal vension so found can
be used as evidence in a criminal prosecution. You refer me to the case of Nick Glodowski v. State, which was recently handed down by our supreme court, 220 N. W. 227.

In the Glodowski case our court said, p. 229, after quoting authorities:

"It follows that a search warrant cannot be issued upon a statement under oath based entirely upon information and belief, unless competent evidence of the facts which are the basis of the belief are stated, and unless those facts are sufficient to support a finding of probable cause. If the complaint contains a bare statement on information and belief, without giving the basis for the same, it permits the complainant to determine probable cause, rather than the magistrate, whose duty it is to perform this judicial function."

There are no facts stated upon which the affidavit is predicated. There is no entry in the docket of any such facts. While the court had under consideration search warrants in the enforcement of the liquor laws in the Glodowski case, the principle announced is equally applicable to search warrants issued for other purposes.

That the search was illegally made is my opinion, and it follows under the authority of that case that the evidence cannot be introduced in evidence in a criminal prosecution.

JEM

Fish and Game—Minnow Nets—Deputy sheriff or police officer may supervise seining of minnows under sec. 29.32, subsec. (2), Stats., for conservation commission.

It is within discretion of conservation commission to furnish such supervising deputy in any particular case; statute is not mandatory.

E. L. Kennedy,
District Attorney,
Rhinelander, Wisconsin.

In your letter of July 26 you refer me to sec. 29.32, subsec. (2), Stats., which provides as follows:

"Minnow seines not exceeding forty feet in length and five feet in depth, and minnow dip nets not exceeding six
feet in diameter may be used in all inland waters for taking, catching or killing rough fish minnows for bait only; but not in any such waters, creeks or streams inhabited by trout or in which trout have been planted, or in Turtle creek in Walworth and Rock counties, unless supervised by the state conservation commission or its deputies.”

You say that the question has now arisen whether it is absolutely necessary that the conservation commission instruct the game wardens to so supervise the seining above referred to or whether it is permissible to have a deputy sheriff or a police officer accompany the seiner in these trout streams.

Sec. 29.07 provides as follows:

“All sheriffs, deputy sheriffs, coroners, and other police officers are ex officio deputy conservation wardens, and shall assist the state conservation commission and its deputies in the enforcement of this chapter whenever notice of a violation thereof is given to either of them by the commission or its deputies.”

Under this provision all sheriffs, deputy sheriffs, coroners and other police officers are ex officio deputy conservation wardens. The supervision under sec. 29.32, subsec. (2), must be made by the state conservation commission or its deputies. I see no escape from the conclusion that the supervision may be made by deputy sheriffs or police officers as well as regularly appointed deputy conservation wardens. The express provision of the statute requires such ruling.

You also inquire whether under this section it is not possible to compel the conservation department to furnish a warden to go with the seiners in their operation. There is nothing in the statute which makes it mandatory for the conservation commission to furnish such deputy to accompany the seiners. This is a matter left to the discretion of the conservation commission and a seiner who wants to do this work will have to apply to the commission for a deputy or have the supervision done by a sheriff, deputy sheriff, coroner or police officer. The statute goes on the theory that the conservation commission will do its duty in all cases and serve the best interests of the state in every individual case, but its language has no mandatory signifi-
cance in the sense that a seiner may compel the state con-
servation commission to furnish a deputy in any particular
case.
JEM

Public Officers—District Attorney—Salary of district
attorney cannot be increased during term on theory that he
should devote his entire time to duties of office.
Salaries of county officers may be changed by county
board at its annual meeting only; such action affects only
such officers as are elected during ensuing year.

L. D. Potter,
District Attorney,
Racine, Wisconsin.

You say that at the annual meeting of the county board
of supervisors, Racine county, November, 1927, the salaries
of all county officers were fixed, the salary of the district
attorney being fixed at $2500 a year, and he was not re-
quired to devote his entire time to the duties of the office;
that at a special meeting of the county board held in May,
1928, a resolution was passed making the office of district
attorney a full-time office and fixing the salary at $6,000
per year; that the county board of supervisors intended
that the resolution making the office of district attorney a
full-time office become effective on January 1, 1929, and
you say, under the above facts, the following questions
arise:
1. Has the board of supervisors the power to change the
office of the district attorney from a part-time office to a
full-time office as above provided, at its special session?
2. Does the action of the county board at its special
session in May, 1928, violate subsec. (1), sec. 59.15, Stats.?
3. Does the action of the county board come within the
provisions of sec. 59.15, subsec. (5) ?
4. If such action of the county board is not legal, is there
any way that the board can legally change the office of dis-
trict attorney from a part-time to a full-time office, com-
mencing immediately upon the passage and publication of
such resolution, or at some future date prescribed?
These questions must be answered under the provisions of sec. 59.15 (1) as modified by subsequent express provisions.

Subsec. (1) provides:

"The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer’s term, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions: * * *"

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."

Subsec. (5) gives the right to the board to change the compensation of any officers from fees to salary and fix the salary and to change back from salary to fees or to part salary and part fees, but that can not be done during the term except in the cases specified. The circuit court may, under sec. 59.44, subsec. (3), Stats., on application of the county board by order filed with the clerk of the county, appoint an attorney or attorneys to assist the district attorney and fix the compensation when there is an unusual amount of civil litigation to which the county is a party or in which it is interested.

You will see by these several provisions that the prohibition in sec. 59.15 (1) has been changed and modified to meet several situations, but, except as so modified, the prohibition against increasing or diminishing the salary during the term is as absolute as it ever was. It has been repeatedly held by our court that a public officer takes his office cum onere, except of course where express authority is given to change it. Under these general provisions and principles I think your questions should be answered as follows:
Criminal Law—Public Officers—Deputy Sheriff—Sec. 343.485, Stats., does not authorize deputy sheriff acting under instructions of town board to order removal from town highway of automobile temporarily parked on such highway while occupants are swimming in lake adjoining said highway.

August 2, 1928.

HERMAN R. SALEN,
District Attorney,
Waukesha, Wisconsin.

You inquire whether a deputy sheriff acting under instructions of a town board may under sec. 343.485, Stats., order the removal from a town highway of an automobile temporarily parked on such highway while the occupants are swimming in a lake adjoining said highway, said parking not being a violation of sec. 85.02.

Sec. 343.485, Stats., provides as follows:

"It shall be unlawful for any person or persons to camp in wagons, tent or otherwise on the public highways or lands adjacent thereto, after a notice to remove therefrom by the owners of such adjacent lands, or the owner of land abutting on the highway, or by a member of the board of supervisors or any trustee of any town or village where such camping place is made. Any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding ten dollars, or imprisoned in the county jail not exceeding thirty days, or both."

Sec. 85.02 reads thus:

"Except when making absolutely necessary repairs, no person shall park or leave any vehicle along, upon or within the limits of any public highway in such manner as to interfere with the free passage of vehicles over and along
such highway. In all cases there shall be left a free and usable passage-way of at least eighteen feet so that vehicles going in opposite directions may pass without interference from any standing vehicle. Whenever any peace officer shall find a vehicle standing upon a highway in violation of the provisions of this section, he is hereby authorized to move such vehicle or require the driver or person in charge of such vehicle to move said vehicle to a position permitted under this section.”

Your question must be answered in the negative. Sec. 343.485 does not give the deputy sheriff any such rights in cases where the provisions of sec. 85.02 are not violated.

JEM

Intoxicating Liquors—Provisions of subsec. (2), sec. 165.29, Stats., providing that prosecuting attorney shall plead and prove previous convictions of accused for any violation of this act apply only to previous convictions under ch. 165; but it may be duty of prosecuting attorney to prove previous conviction under sec. 359.14 when such section applies under decision in Barry v. State, 190 Wis. 613.

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

You refer me to subsec. (2), sec. 165.29, Stats., which provides:

“The prosecuting attorney shall plead and prove previous convictions of the accused for any violation of this act.”

You inquire whether this provision imposes upon the district attorney the obligation to plead and prove previous convictions under the federal act or under city ordinances adopted by reason of the provisions of ch. 165, Stats., or whether the previous convictions to be proved under this provision are simply limited to the convictions in our state courts for violation of ch. 165.

This particular provision applies only to previous violations of chapter 165, but sec. 359.14, which is the repeater statute, is sometimes applicable in criminal prosecutions
under chapter 165 and it may be the duty of the district attorney in certain cases to prove and call the court's attention to such previous convictions.

I refer you to the decision of our supreme court relative to this matter in the case of Barry v. State, 190 Wis. 613.

JEM

Elections—Nominations—Nomination papers in which elector did not sign affidavit before officer and no officer's name is attached to jurat is hopelessly defective and should be disregarded.

August 3, 1928.

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

You have stated over the telephone that a nomination paper was filed in your county office signed by a qualified elector who subscribed to an affidavit, but the jurat of the officer was not signed by the officer, nor was the affidavit signed before any officer. You inquire whether such nomination paper is void or whether the same may be filed and considered as valid.

Sec. 5.05, subsec. (5), par. (b), Stats., provides:

"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 papers 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."

In IX Op. Atty. Gen. 383 it was held by this department that where the affidavit appended to a nomination paper fails to comply with sec. 5.05, subsec. (5) (b), the nomina-
tion paper is defective and should be disregarded by the county clerk. This ruling is applicable to the present case. The affidavit was not executed by the elector. Had the elector duly signed the affidavit before an officer and such officer had failed through inadvertence to attach his signature it might be that it would be proper to permit the officer to attach such signature and supply the omission, but here where no affidavit was really made before an officer the statute has not been complied with and I am of the opinion that the nomination paper is hopelessly defective and must be disregarded.

JEM

Trade Regulation—Trading Stamps—Trading stamp law is not violated where merchant issues coupon which states that it is redeemable in cash for one cent, to be redeemed by certain bank which has been made agent of merchant and in which bank he has deposited enough money to cover all coupons issued.

August 3, 1928.

C. STANLEY PERRY,
Assistant District Attorney,
Milwaukee, Wisconsin.

You ask for an opinion as to the legality under the Wisconsin trading stamp law of a business plan described in your letter. You say that the system submitted to you for consideration is substantially as follows:

"The Bankers Savings Certificate Company is a corporation promoting the system. Its representatives solicit merchants to buy the system. If a merchant buys the system, he executes a contract with the company calling for a certain number of certificates, in the general nature of trading stamps, having a redemption value of one cent. Thereafter, he distributes these certificates to his customers, when such customers make cash purchases from him.

"The contract between the merchant and the company further requires that the merchant execute an agreement to deposit enough money with a named bank to pay for all of the certificates purchased by him at their total face value, and further appoints such bank as the merchant's
depository and agent for redemption of these certificates, if, as and when presented either in cash or in credit on a savings account to be started in such depository bank by the bearer of the certificate.

“A time limit of six months is fixed for the redemption of the stamps in this manner. After the certificates have been redeemed by the bank, it cancels and returns them to the merchant as voucher receipts of the account between the merchant and the bank.

“If there are any certificates which have been distributed by the merchant to his customers and which have not been returned within the six-months period and redeemed by the bank in the manner above indicated, they will thereafter be redeemed by the merchant who originally purchased them from the company.”

Under this statement of facts it appears that the coupon is redeemable in cash by the bank which has been made the merchant’s depository and agent. The question which confronts us is: Does this arrangement bring the transaction within the exception of the statute which reads thus, sec. 134.01, subsec. (1), Stats.:

“* * * 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; * * *”

The provision in this statute that the redemption must be made by the person, firm or corporation issuing the same is not violated where the merchant redeems the same through an agent, servant, or employe. In fact, corporations must always work through agents, servants, officers or employes.

In the case of State ex rel. Downey-Farrell Co. v. Weigle, 168 Wis. 19, our court used the following significant language, pp. 28-29:

“* * * Under the facts as are here presented, the United Profit Sharing Company is a company engaged in the trading-stamp business and must be considered more as an independent contractor with the plaintiff than as such an agent, servant, or employee through whom the plaintiff
as a corporation must necessarily perform its lawful transactions. So far, therefore, as the plaintiff issues coupons redeemable in cash but only through such a corporation as the United Profit Sharing Company appears to be, it is violating ch. 480, Laws 1917, and is not entitled to any restraining order from this court as against the defendant in that regard."

It must therefore be held that the redemption of the coupon is made by the company through the agency of the bank and is not in violation of the statute. The coupons are given in connection with the sale of merchandise and bear upon their face a stated cash value. I find that such coupons or certificates are redeemable when presented to such bank and after six months by the person, firm or corporation issuing the same. They will be redeemed upon presentation in amounts aggregating twenty-five cents or over of redemption value in cash and even for less amounts. I believe this statute is not violated by this transaction. It clearly comes within the exception.

JEM

_Criminal Law_—Definite sentence for offense for which statute does not provide minimum penalty must be considered as definite sentence and should be so recorded by prison authorities.

August 6, 1928.

**Board of Control.**

You have enclosed with your letter of August 1 a certificate of conviction and sentence in which the defendant was convicted of false swearing under sec. 346.02, Stats. You direct our attention to the penalty prescribed, which is imprisonment in the state prison not more than three years. No minimum penalty is prescribed and you say that the judge sentenced this person for a term of one year, a definite term. You inquire what minimum sentence should be recorded by the Wisconsin state prison in this case.

In an official opinion to your board dated November 24, 1926 we held that a definite sentence for an offense for which the statute does not provide a minimum penalty must be considered as a definite sentence and the board of con-
trol will then have the right to parole after the prisoner has served one-half of the sentence. XV Op. Atty. Gen. 442.

This ruling practically disposes of your question. In the opinion referred to it was stated:

"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."

The prison authorities should record the sentence as given by the court, being a definite sentence for one year.

JEM

Bridges and Highways—In absence of action taken at town meeting town board has no power to transfer money from general funds for improving highway on prospective state highway system.

HERMAN R. SALEN,
District Attorney,
Waukesha, Wisconsin.

In your letter of August 1 you inquire whether a town board may transfer from the general funds of the town a sufficient sum to meet the town's share of the expense of improving a highway on the prospective state trunk highway system without being authorized to do so at the annual town meeting.

Your question is answered in the negative.

Sec. 83.14, Stats., provides two methods by which towns may raise money to improve a highway on the prospective state trunk highway system: Subsec. (1), 83.14 provides that any town meeting or village board may vote a tax of not less than five hundred dollars to improve a designated portion of the system of prospective state highways. Subsec. (7), 83.14 provides that towns may take the initiative in the improvement of prospective state highways by issuing bonds under the authority and subject to the conditions
Opinions of the Attorney General 461

contained in sec. 67.16. Sec. 67.16 provides that the bonds shall be authorized by the electors at a town meeting.

I find no provision in the statutes which authorizes the town board to transfer money from the general fund for the purpose of improving a highway on the prospective state trunk highway system. In the absence of such a provision, and in view of the fact that the legislature has provided specific methods for the raising of such funds, it is the opinion of this department that the town board has no power to provide funds for the improvement of a highway on the prospective state trunk highway system.

SOA

Contracts—Public Printing—Contractor for state printing is required to furnish customary bond for faithful performance of contract whether service is performed personally or is farmed out to others; he is only one whom state recognizes in premises.

August 6, 1928.

Granville Trace, Editor,
Public Printing.

You state that one of the successful bidders for printing contracts which are about to be let wishes to assign some of his contracts to other printing firms, and you inquire:

1. "Will such assignment release him from the necessity of furnishing the customary bond?"

2. "Will the firm to whom an assignment is made be then to all intents and purposes the contractor, to be dealt with directly as such by this board?"

You are advised that each of the questions submitted by you is answered in the negative. The customary bond must be furnished and that is the bond that you will look to for full performance of the contract, and it matters not to the board whether the contractor furnishing such bond personally performs the services or farms it out to others. Your dealings will be with the contractor, and with him alone.

HAM
Public Officers—Register of Deeds—Taxation—Forest Crop Lands—List of lands under forest crop law forwarded to register of deeds under sec. 77.02, subsec. (3), Stats., must be filed by register of deeds and indexed, but he is not required to record it and does not receive any fee for indexing and filing aforesaid list.

August 7, 1928.

L. B. Nagler,
Conservation Director.

You state that the forest crop law provides that a list of lands which are accepted by the conservation commission to be thereafter designated as forest crop land shall be transmitted to the register of deeds, and that you have a letter from the register of deeds of Ashland county inquiring what he should do with this list, whether it should be recorded and if so, who pays the recording fees. You ask for an official opinion on this question.

Sec. 77.02, subsec. (3), Stats., contains the following:

"* * * If the request of the petitioner, after thirty days is granted a copy of such order shall be forwarded to the state tax commission and to the clerk of each town and to the register of deeds of each county in which any of the lands affected by said order are located."

Sec. 59.53 provides, concerning the duties of the register of deeds:

"He shall keep an index of all records or files kept in his office showing the number of the instrument or writing consecutively, the kind of instrument and where the same is recorded or filed, thus: [then gives form]"

I find no provision in the statute which requires the recording of a list of these lands. In the absence of such statutory authority I am of the opinion that it is not required of the register of deeds to record the list of forest crop lands, but he is required to file them and to index them. There being no fees provided for these services, the register of deeds is not entitled to receive any under the general rule that only such compensation as is provided by law may be received by a public officer. All other duties are considered compensated by the fees specifically prescribed by law.

JEM
Fish and Game—Closed Seasons—Conservation commission has power to order closed season for game bird after investigation and public hearing in which it finds that it is reasonably necessary to secure perpetuation of such game bird and maintenance of adequate supply thereof, under sec. 23.09, subsec. (7), par. (a), Stats.

August 7, 1928.

L. B. Nagler,
Conservation Director.

You state that the conservation commission is receiving many requests from many parts of the state to declare a closed season on grouse throughout the state because it is reported that this splendid game bird is becoming very scarce and that it seems to be suffering from an epidemic of some kind which is killing large numbers. You inquire whether under these conditions the conservation commission has the power to declare a closed season on grouse throughout the state after holding a single public hearing or whether it is necessary to hold public hearings in each county in the state.

Sec. 23.09, subsec. (7), Stats., provides in part as follows:

"The commission is hereby authorized to make such rules and regulations, inaugurate such studies, investigations and surveys, and establish such services as they may deem necessary to carry out the provisions and purposes of this act, and any violation of any provisions of this act, or of any rules or regulation promulgated by the commission, shall constitute a misdemeanor and be punished as hereinafter provided. The commission shall also have authority:

"(a) To close seasons in cases of urgent emergency on any species of game or fish in any specified locality or localities, when it shall find after investigation and public hearing, that such action is reasonably necessary to secure the perpetuation of any species of game or fish, and the maintenance of an adequate supply thereof. The statutes governing such subjects shall continue in full force and effect, except as further restricted and limited by the rules and regulations promulgated by the commission as herein provided."

You will note that the statute does not provide that a public hearing must be held in every county. I do not be-
lieve that it is necessary to hold a public hearing in every county. I do believe, however, that under the provisions of this statute the public hearings held should be of a nature that the commission will be able to determine the exact situation in all localities of the state. If this can be done with one public hearing it may be sufficient. It may be well, however, if the commission would hold hearings in different sections of the state so as to give people from the different sections an opportunity to attend a meeting not too far away from their homes and in that way become conversant with all the conditions relative to this game bird. This matter is left to the discretion of the conservation commission. One hearing must be held.

I am of the opinion that if a fair hearing is held in which the conservation commission feels that it is arriving at the actual condition of things in this state its order will be valid fixing a closed season.

JEM

Criminal Law—Navigable Waters—Motor Boats—There is no statute regulating speed of motor boats in navigable waters of state, but driver may be liable in civil action for damages for recklessly or carelessly operating his boat and may also be liable for manslaughter in case of death of his victim caused through negligence.

August 7, 1928.

N. H. RODEN,
District Attorney,
Porf Washington, Wisconsin.

In your letter of August 1 you state that in the Milwaukee river in the town of Mequon, Ozaukee county, there are many summer cottages and a great number of these people have speed boats which are operated by youngsters; that many of the people who live there have children who go bathing in the river and their lives are put in danger through the reckless operation of these speed boats. You inquire whether there is any possibility of preventing the operation of these boats in a reckless manner.

Sec. 30.06, Stats., provides for safety regulations for boats and sec. 348.424 provides that a violation of these
regulations is a misdemeanor and fixes a penalty. I find no provisions in any of our statutes regulating the speed of these motor boats. Speed boats have been so recent an invention that the legislature has not yet provided for the danger that is connected with their operation on the waters in this state.

You of course understand that should any one be injured or even killed by one of these motor boats when it is driven recklessly and carelessly, the driver may be liable in a civil action for damages and in some cases even criminally liable for one of the degrees of manslaughter.

JEM

Live Stock—Dehorning of cattle is not practice of veterinary medicine or surgery but castrating of horses for compensation is.

August 8, 1928.

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

You inquire whether an individual who is not a practicing veterinarian can dehorn cattle or castrate horses if no charges are made for such services.

This question is practically answered by sec. 94.45, Stats., which provides:

"No person is prohibited by this chapter from castrating domestic animals, except horses and mules, from dehorning cattle, from treating sprains, cuts or other ordinary minor injuries; nor shall said chapter be construed to prohibit any person from treating diseases of domestic animals for compensation at any place which shall be five or more miles distant from the office or place of business of a practicing veterinarian."

Sec. 94.47 provides:

"A person shall be deemed to be engaged in the practice of veterinary medicine and surgery who shall ask or receive directly or indirectly any pay, or compensation for the treatment of any domestic animals, also menagerie animals, or any person who shall advertise or hold himself out to the public as a veterinary physician, surgeon or specialist, or
who shall use the title 'doctor,' or who shall append to his name the letters V. S., M. D., D. V. S., or M. D. V."

You will note that the castrating of horses and mules is included in the practice of a veterinarian, but if no charges are made in view of the provisions of sec. 94.47 it will not come within the prohibition of the statute.

Dehorning of cattle is excepted in all cases. Even charges may be made for that without violating the statute.

JEM

_Agriculture—Public Officers—County Board—County Treasurer—President of County Agricultural Society—_

Offices of member of county board and county treasurer are incompatible. Upon election and qualification to office of county treasurer, one _ipso facto_ vacates office of member of county board.

Question of incompatibility of offices is not presented by one person's holding office of county treasurer and president of county agricultural society.

August 9, 1928.

Edward Meyer,
_District Attorney,_
Manitowoc, Wisconsin.

In your letter of June 29 you submit the following statement of facts:

"A member of the county board, whose term of office expires next spring, is contemplating running for the office of county treasurer. The statute 29.18 provides that no person holding the office of a member of the county board shall be eligible to the office of county treasurer. Is it your opinion that it would be necessary for this member to resign from the county board immediately or could he remain in such office until elected to the office of county treasurer, at which time he could resign?

"This man is also the president of the county fair association. It is your opinion that the office of the president of the county fair association and the county treasurer office are incompatible?"

In your letter you mention sec. 29.18, Stats., which deals with close seasons for wild mammals and birds. The
section of the statute is not in point. No doubt you intended to refer to sec. 59.18, Stats., which provides as follows:

No person holding the office of sheriff, undersheriff, county judge, district attorney, clerk of the circuit court, county clerk or member of the county board shall be eligible to the office of county treasurer or deputy county treasurer."

This section of the statutes does not prohibit a member of the county board from becoming a candidate for the office of county treasurer; it renders the office of county treasurer and member of the county board incompatible. When a person qualifies and thereby accepts an office which is incompatible with an office he already holds, he ipso facto vacates the first office. State ex rel. Stark v. Hines, 194 Wis. 34, 215 N. W. 447; State ex rel. Johnson v. Nye, 148 Wis. 659. I see no reason why a member of the county board should resign when he becomes a candidate for the office of county treasurer.

There is no question of incompatibility of offices involved where one party holds both the office of president of the county fair association and the office of county treasurer. The county agricultural societies are private corporations organized under the provisions of sec. 93.11, Stats. Such societies receive aid under the provisions of sec. 59.86, Stats.

AJM

Fish and Game—Muskrat Farms—License for muskrat farm may be issued for land covering former bed of Trempealeau river as described in application. This license must be considered new license and not renewal of old license for fur farm covering part of said territory when several months have elapsed since expiration of former license.

August 14, 1928.

Conservation Commission.

In your letter of August 9 you state that you have just received from Michael N. Lipinski and Frank J. Fugina an
application under the name of the Delta Fish & Fur Farms, Inc., for a muskrat fur farm license and you submit two questions on which you desire an answer before issuing a license.

You give a history of this area and the license in your letter. The information was furnished you by the Delta Fish & Fur Farm, Inc., from which it appears that in 1912 a Mr. Clark received permission from the state to build a levee and divert the Trempealeau river to a different channel.

Mr. Clark, you believe, intended to drain the land through which the former bed of the river ran and use it for agricultural purposes, but as there was considerable water he entered into a contract with one E. E. Liers of Homer, Minnesota, for a certain part of the land and water area to be used as a muskrat fur farm.

On February 2, 1927 Mr. Liers made application to you for a muskrat fur farm license for the water area lying south and east of the Green Bay and Western Railway right of way and north of the Chicago, Burlington & Quincy Railway right of way and highlands south of the levee or new channel of the Trempealeau river. A license was issued covering this area which was not more than three hundred acres according to an estimate of former Commissioner Elmer S. Hall and Mr. Emil Liers. Mr. Liers paid the state the statutory amount of fifty cents apiece for twenty-five muskrats said to be found on this area.

On December 28, 1927 an attorney, Mr. Owen of the law firm of Weber, George, & Owen of Winona, Minnesota, sent to the commission the license of E. E. Liers with an assignment to Frank J. Fugina and Michael N. Lipinski and enclosed check for $48.50 renewal fee for license. The commission was not satisfied with the description and it finally submitted an application which stated that it was for the same territory as held by Mr. Liers.

The matter was held in abeyance and on March 3 a request was made for a better description, but nothing was done until July 30, when Messrs. Fugina, Lipinski and Clark visited the office and talked the matter over, when it was decided that they would make application for a muskrat fur farm license covering the area of their holdings,
which includes not only the land formerly owned by Mr. Liers but a much larger area.

Your first question is whether you can issue a muskrat fur farm license covering the entire area as included in the application. It includes the former bed of the Trempealeau river prior to the time when the course of the river was changed by Mr. Clark as authorized by the state. As I understand, this area was never covered by a lake. Your question must be answered in the affirmative.

In an official opinion to your commission dated January 20, 1928, XVII Op. Atty. Gen. 52, this department held that licenses for muskrat farms may not issue covering any land submerged by a navigable lake or pond but may be issued covering navigable streams. I see no objection, therefore, to issuing a muskrat fur farm license for the area as described in the application.

Your second question is: If the license can be issued, is it to be called a renewal of the Liers license, considering that seven months have expired and no renewal made of the Liers license or must a new license be issued covering the entire area and payment made on the terms for the entire area?

I believe the only safe course to pursue is to consider the license a new license and to require payment for all the rats on the entire area. A period of seven months would be too long a period to hold a matter in abeyance when it was not definitely decided during that time whether the parties wanted a license or not on the whole area.

JEM

_Bridges and Highways — Law of Road — Navigable Waters—Motor Boats—Words "motor vehicle on a highway," as used in sec. 85.09, subsec. (2), par. (a), Stats., are not broad enough to include motor boat on navigable lake or river._

_Herman R. Salen, District Attorney, Waukesha, Wisconsin._

You ask for an official opinion as to whether the operation of motor boats on a lake or navigable stream without

August 14, 1928.
an approved muffler is prohibited by sec. 85.09, subsec. (2), par. (a), Stats., on the theory that a motor boat is a motor vehicle and a lake or navigable stream a highway of this state.

"Vehicle" is not definitely defined in ch. 85 of our statutes, but whatever definition is given to the term it seems to me it must be the definition given to the term as used throughout the chapter.

In Anderson's Law Dictionary, "vehicle" is defined as follows:

"In the Revised Statutes, acts and resolutions of Congress includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.

"A ferry boat is not a vehicle, within a statute providing for a specific tax on 'carriages and other vehicles used for passengers for hire,'" citing Duckwall v. New Albany, 25 Ind. 286.

In Davis v. Petrinovich, 112 Ala. 654, a vehicle is defined:

"'Any carriage moving on land, either on wheels or on runners; a conveyance; that which is used as an instrument of conveyance, transportation or communication,'" quoting from Century Dictionary.

I find no authority or definition anywhere where the word "vehicle" as used in law is defined as a boat. The rules and regulations concerning highways and vehicles as given in sec. 85.09 are not applicable to boats. They are manifestly intended for rules on land only. Boats and navigable waters have maritime rules and laws which govern them. The statute cited by-you reads as follows:

"No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise or annoying smoke."

This is a criminal statute which must be given a strict construction so far as the defendant is concerned, and I am of the opinion that it cannot be so liberally construed as to include a motor boat under the term "motor vehicle."

JEM
Insurance—Fraternal Benefit Societies—Under provisions of sec. 208.01, subsec. (9), Stats., fraternal reserve association can adopt by-laws requiring claims to be filed within ninety days and action to be commenced within six months from disallowance; but in absence of such provision in law, sec. 330.19, subsec. (3) would apply to such societies.

Sec. 208.01 (9) exempts fraternal or benefit societies only from provisions of insurance laws, and those laws specifically made application to such societies.

August 29, 1928.

M. A. Freedy,
Insurance Commissioner.

You say that sec. 30 of the by-laws of the Fraternal Reserve Association of Oshkosh, a domestic mutual benefit society duly authorized to transact the business of fraternal insurance in this state, contains the following provisions:

“All claims for disabilities or deaths or otherwise shall be filed within ninety days from the time the claim accrued, and if not so filed, the claim shall be forever barred. If not allowed and paid, action at law must be commenced thereon within six months after the claim was rejected, and if not commenced within said period, the claim will be forever barred.”

You then quote sec. 208.01, subsec. (9), Stats., which provides:

“Unless express reference is made to this subsection or unless expressly designated therein, no law now in force or hereafter enacted, shall apply to any fraternal benefit society or mutual benefit society.”

You say that provision was taken from or grew out of the “Mobile Bill” which provided:

“Sec. 4. (Exemptions.) Except as herein provided, such societies shall be governed by this act and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein.”

You ask to be advised on the following questions:
1. Whether or not the society can be permitted to have the above quoted provision in its by-laws.

2. Whether or not, in the absence of such provision, ch. 330 and especially sec. 330.19, subsec. (3) thereof, would apply to the society.

3. Generally, does subsec. (9) of sec. 208.01 exempt fraternal or mutual benefit societies only from the provisions of the insurance laws or does it exempt them from the provisions of all laws except those specifically made applicable to such societies?

I think your first question must be answered: Yes, under authority of Graves v. United Commercial Travelers, 165 Wis. 427.

Your second question must be answered: Yes.

Your third question must be answered: Only from the provisions of the insurance laws and laws specifically made applicable to such societies.

TLM

Insurance—Fraternal Benefit Societies—Commissioner of insurance should file form of application and certificate of insurance of Women's Benefit Association of Port Huron, Michigan, fraternal benefit society, containing certain limitations of liability, in view of sec. 208.01, subsecs. (4) and (9), Stats., and also in view of fact that if such limitations are unauthorized they are inoperative.

August 30, 1928.

M. A. Freedy,
Commissioner of Insurance.

You say the Women's Benefit Association of Port Huron, Michigan, which is authorized to transact the business of fraternal insurance in this state, has submitted to you for filing an application form which contains the following provision:

"I do hereby expressly warrant, that all the statements and answers contained in this application, on pages 1, 2, and 3 thereof, are true and absolutely correct in every particular; and I do hereby agree and consent that the benefit certificate in said association hereby applied for, shall be issued to me upon the strength of the warranties herein
contained and in consideration of the application, which is made a part of my contract with said association; and I further agree that any breach of any of the warranties herein contained shall render my benefit certificate null and void; and all payments made by me shall be forfeited to the association in case of such voidance."

You then say some of the certificate forms submitted contain the following provision:

"This certificate is issued upon the express understanding and agreement that all the statements and representations of every kind or description contained in said application for membership and in her medical examination are guaranteed and warranted by said member to be true and correct in every particular and are to be construed as warranties."

In view of the provisions of sec. 209.06, Wis. Stats., you state that you are in doubt as to whether you are obliged to file such forms in your office, and you ask to be advised.

You are advised that I see no objection to your filing such forms in your office. If any of the provisions of the application or certificate are contrary to the provisions of the statutes, they are inoperative and do not defeat or avoid the policy or liability thereon, notwithstanding such provision. In view of the provisions of sec. 208.01, subsecs. (4) and (9), which expressly exempt fraternal benefit societies from the provisions of any law of the state unless express reference is made to those subdivisions of the section, I would advise you to file the forms submitted.

TLM
Elections—Four questions answered as to rights of voter to vote where he moves from one place to another in precinct or from one ward to another or from one town or city to another within five days before primary election.

September 1, 1928.

GLENN D. ROBERTS,
District Attorney,
Madison, Wisconsin.

You submit the following questions:

1. Can a registered voter moving from one precinct to another of the same ward three days before primary vote, and if so, in which precinct?

2. Can a registered voter moving from one ward to another in the same city three days before the primary vote, and if so, in which ward?

3. Can a registered voter moving from the city to another town, village or city, or vice versa, three days before the primary vote, and if so, at the place of the old or new residence?

4. What will be the situation in the foregoing cases if the voter is not registered?

Your questions must be answered under the following provisions of law, sec. 6.01, which defines an elector as a person twenty-one years old who has resided in the state one year and in the election district where he offers to vote, ten days.

Sec. 6.02, subsec. (1), Stats., provides that no elector shall vote except in the town or village or election district in which he actually resides.

Under those general provisions, your first question should be answered: Yes, in the precinct where he lives by presenting affidavit as provided by sec. 6.51, par. Twelfth. That is a modification of the provisions of sec. 6.01 declaring ten days' residence. See V Op. Atty. Gen. 790.

Your second question should be answered: No. That would not be moving from one precinct to another in the same ward or town within that exception.

Your third question should be answered: No, for he would not come within the exception specified in sec. 6.51, par. Twelfth.
Your fourth question should be answered: He could swear in his vote under sec. 6.44 (1) if he was a qualified elector in the precinct within either of the above provisions; otherwise, he could not.

I think if there is anything in the opinions of this department in III Op. Atty. Gen. 314 and X Op. Atty. Gen. 433 that is inconsistent with the above rules they should be considered as modified by the express provisions of the statutes named.

TLM

Indigent, Insane, etc.—Public Officers—Board of control has no power to enter into contract with other states or representatives of other states for exchange of insane patients.

September 5, 1928.

BOARD OF CONTROL.

With your letter of July 20 you present a form of agreement to be entered into by the board of control of Wisconsin and the department of public welfare of Illinois, as follows:

This agreement entered in upon by the department of public welfare of Illinois and the board of control of Wisconsin shall be strictly observed.

Art. 1—A patient leaving Illinois and moving into Wisconsin becomes mentally incapacitated and it is necessary to commit him to an institution. The authorities of Illinois shall accept this patient providing the state of Wisconsin pays the expenses of return.

A patient leaving Wisconsin and moving to Illinois becomes mentally incapacitated and an inmate of one of our state institutions. Wisconsin shall accept same providing deportation expenses are borne by the state of Illinois.

Art. 2—That wherever it is possible to work out an exchange of patients to save expenses, same shall be complied with by both states.

Art. 3—That whenever a patient escapes from an institution in Illinois and is recommitted in Wisconsin, regardless of the fact that he has a legal residence in Illinois, Illinois shall accept him on the basis of an escaped patient.

That whenever a patient escapes from an institution in Wisconsin and is recommitted in Illinois, regardless of the fact that he has a legal residence in Wisconsin, Wisconsin shall accept him on the basis of an escaped patient.
You inquire whether the board has the power to enter into such agreement.

I find no specific provision in the statutes conferring power on the board of control to enter into the agreement you have submitted.

Sec. 46.03, Stats., enumerates the general powers of the board of control, but does not confer any power to enter into an agreement concerning insane patients. The only section I have been able to find bearing upon the question presented is subsec. (6), sec. 51.12, which provides as follows:

"Whenever it shall be found that any inmate of any hospital or asylum for the insane is a nonresident of the state the board shall, if possible, ascertain the state, country or other political division in which such inmate has his legal residence or is entitled to support, and cause him to be transported there if that can be done at a cost not exceeding two hundred fifty dollars; provided that such transportation shall be by the most direct and usual route both going and returning and shall be accomplished in the shortest practicable time and that only necessary and reasonable expenses shall be allowed and actual time necessarily taken by said trip."

The foregoing statute makes provision for the return of certain insane patients but does not authorize the board of control to enter into contracts for the reciprocal exchange of insane patients.

We do not pass upon the question as to the desirability of entering to a contract such as that you have submitted but call your attention to the fact that such an agreement cannot be entered into unless specific statutory authority exists therefor.

SOA
Appropriations and Expenditures—Bridges and Highways—Appropriation made by sec. 20.495, Stats., is based on actual receipts as shown by books of state treasurer.

Apportionment tax levied under sec. 76.54 for year 1927 may be made at present time.

Funds available under sec. 20.495 must be paid to counties to which they are apportioned.

Provisions of subsec. (9), sec. 84.03 apply to apportionment of funds derived under sec. 20.495.

Highway commission cannot, under subsec. (9), sec. 84.03, use funds allotted under provisions of sec. 20.495 for execution of improvements of highway as federal aid project.

September 5, 1928.

HIGHWAY COMMISSION.

In your letter of July 31 you present the following questions for an official opinion:

1. Is the appropriation made by sec. 20.495, Stats., based on the actual receipts as shown by the books of the state treasurer or is it the amount of the tax levied in any one fiscal year?

Sec. 20.495 provides in part as follows:

"There is appropriated from the general fund to the state highway commission, annually, an amount equal to the taxes received from auto transportation companies under the provisions of section 76.54, prior to the end of each fiscal year.* * *"

It is clear from the provisions of the foregoing section that the appropriation is based on the actual receipts as shown by the books of the state treasurer. The statute appropriates, not the amount of taxes levied, but "taxes received."

2. When is the apportionment of the 1927 tax, payment of which was referred pending a decision of the supreme court as to the legality of the law, to be made? No portion of this tax was paid until after July 1, 1928.

Sec. 20.495, Stats., provides:

"* * * This amount shall be apportioned and distributed by the state highway commission to the several counties of the state in proportion to the ton miles of oper-
ation for which such tax has been paid in each of said counties. * * *"

It will be noted that the statute does not fix the time at which such apportionment shall be made. Had the constitutionally of ch. 194 and sec. 76.54 of the statutes not been attacked in the supreme court, the tax provided in the latter section, which became due prior to the end of the fiscal year, would have been in the hands of the state treasurer. No reason is perceived, therefore, why such apportionment may not be made at the present time.

3. Are the funds available under this section to be paid to the treasurers of the respective counties as soon as the apportionment is completed, or are these funds set up to the credit of the various counties the same as other highway funds apportioned to counties under the provisions of sec. 84.03 (9)?

The funds appropriated by sec. 20.495 must be paid to the treasurers of the respective counties when the apportionment has been completed. Sec. 20.495 provides that the tax "shall be apportioned and distributed by the state highway commission to the several counties." This section further provides:

"* * * Such funds so apportioned shall be set aside by such county in accordance with the provisions of subsection (9) of section 84.03."

It is apparent that the funds cannot be set aside by the counties unless they have been paid to the county.

4. What provisions of subsec. (9), sec. 84.03 affect the funds apportioned to the county under sec. 20.495?

It must be conceded that the answer to your fourth question is somewhat doubtful. Sec. 20.495 provides that the tax apportioned by the highway commission "shall be set aside by such county in accordance with the provisions of subsection (9) of section 84.03, and expended for the purposes and in accordance with the percentages provided by said subsection."

Subsec. (9), sec. 84.03, governs the allotment of funds due counties, derived from surplus motor vehicle registration fees, operators' license fees, and motor vehicle taxes levied and collected under the provisions of chs. 78 and 85,
Stats. This section must be interpreted in the light of the aim of the legislature in enacting sec. 76.54, and ch. 194, Stats. These latter sections were enacted to compel automobile common carriers to reimburse the state for the wear and tear on the highways caused by their operation, and also to reimburse the state for the highway facilities furnished. State ex rel. Northern Transportation Co. v. Railroad Comm., 220 N. W. 390 (Wis.).

Thus interpreting subsec. (9), sec. 84.03, we are of the opinion that the following provisions apply:

"** Twenty per cent of the allotment due each county shall be set aside for the improvement of the county trunk highway systems, and shall be used for constructing, repairing and maintaining the county trunk highways, and the bridges thereon under the supervision of the county highway committees; ** . The remainder shall be expended in the improvement of the state trunk highway system. ** "

In this connection we wish to call your attention to the fact that the provision of subsec. (9), sec. 84.03 authorizing "the county board of any county having a population of two hundred fifty thousand or more, may appropriate any portion of the state aid funds allotted to such county under this subsection and cities and villages within such county for street construction," does not apply to the apportionment under sec. 20.495, since the latter section contains an express provision: "that no portion of such fund shall be expended for the maintenance and improvement of any highway within the limits of any city or village."

5. Can this commission under the provisions of subsec. (9), 84.03 determine to improve a portion of the state trunk highway system which is also a federal aid highway, and use the funds allotted to a county under the provisions of sec. 20.495 for that purpose, and execute the improvement as a federal aid project in the manner provided by sec. 84.06, Stats.?

In view of the answers to your third and fourth questions, it is clear that your fifth question must be answered in the negative.

SOA
Public Officers—County Judge—Divorce Counsel—
Offices of county judge and divorce counsel are incompatible.

Jerome V. Ledvina,
District Attorney,
Park Falls, Wisconsin.

In your letter of August 17 you inquire whether the offices of county judge and divorce counsel are compatible. Subsec. (2), sec. 256.02, Stats., provides:

"The judge of any court of record in this state shall be ineligible to hold any office of public trust, except a judicial office, during the term for which he was elected * * *.*"

In XII Op. Atty, Gen. 183, this department held that the county judge was a judge of a court of record. Sec. 247.13 provides for the appointment of divorce counsel. The statute provides:

"* * * Before entering upon the discharge of his duties, such counsel shall take and file in the office of the clerk of the circuit court, an oath to support the constitution of the United States and of the state of Wisconsin and to faithfully, fearlessly, and impartially discharge the duties of such office."

In view of the foregoing provision, it is clear that the position of divorce counsel is an office of public trust. It follows, therefore, that the offices of county judge and divorce counsel are not compatible.

SOA

Banks and Banking—Small Loans Act—Corporations—Blue Sky Law—Securities issued by corporation conducting small loans business under ch. 214, Stats., are not exempt from provisions of blue sky law.

Railroad Commission.

In your letter of July 30 you inquire whether securities issued by a corporation created solely for the purpose of conducting a small loans business, licensed under ch. 214, Stats., are exempt from the provisions of ch. 189, Stats.—
the so-called blue sky law. You also inquire whether the situation is any different where the corporation is organized for the purpose of carrying on other lines of business in addition to the small loans business.

Subsec. (5), sec. 189.03 provides that ch. 189 shall not apply to

"Securities issued by any bank or trust company or building and loan association or land mortgage association or other corporation, whose business is subject to the control and supervision of the banking commissioner of this state."

It will be noted that the statute expressly exempts the securities issued by a bank or trust company, building and loan association or land mortgage association. It also exempts the securities issued by a corporation whose business is subject to the control and supervision of the banking commissioner. Obviously, the securities of a corporation licensed to conduct a small loans business have not been specifically mentioned as exempt. We must, therefore, determine whether such corporation is one "whose business is subject to the control and supervision of the banking commissioner."

Ch. 540, laws of 1927, created ch. 214, Stats., and is known as the small loans act. Sec. 214.01 provides for the licensing of a corporation engaged in the business of making small loans.

Sec. 214.04 provides that upon the filing of an application and the approval of a bond, the commissioner of banking shall issue a license.

Sec. 214.06, Stats., provides that the commissioner of banking may revoke the license in case the licensee violates any of the provisions of ch. 214.

Sec. 214.10 provides that the commissioner of banking shall have the power to investigate the business of a corporation conducting a small loans business to determine whether such corporation has violated any of the provisions of ch. 214.

It is apparent from the provisions of ch. 214 that the powers of the commissioner of banking with reference to the supervision of corporations conducting a small loans business is very limited. The commissioner of banking must grant a license to conduct such business upon applica-
tion and filing of a bond, and he is given no discretion to refuse to issue such license. Further, the commissioner is given the power to investigate the business of a small loans company only for the purpose of determining whether such company has violated the provisions of ch. 214. If the commissioner shall find that such company has violated the provisions of ch. 214 he may revoke the license.

It is significant to note that ch. 214 does not confer on a corporation licensed to conduct a small loans business the power to issue securities. In case securities are issued by such corporation, they are issued by virtue of the authority granted under its articles of incorporation and not by virtue of the power conferred by the license to conduct a small loans business. It is apparent that the commissioner of banking has absolutely no control over the issuance of such securities.

In XIV Op. Atty. Gen. 137 this department held that securities issued by a corporation mentioned in subsec. (1), sec. 216.01 were not exempt from the provisions of ch. 189, Stats. In this opinion it was said:

"The supervision by the banking commissioner, as provided by ch. 216, is a somewhat limited supervision. XIII Op. Atty. Gen. 300. Therefore, I am of the opinion that there is grave doubt as to whether the business of the company is subject to the control and supervision of the banking commissioner to the extent that the securities, that is, the special income bonds of the company, are exempt from the requirements of a license, under the provisions of sec. 183.26, subsec. (1), subd. (e), Stats. Accordingly, the company should be advised that in addition to meeting the requirements of ch. 216, it should apply to the railroad commission under the blue sky law for a license to sell its securities in Wisconsin."

We are of the opinion that the supervision of the banking commissioner over a small loans company under ch. 214, Stats., is more limited than the control over corporations mentioned in sec. 216.01. It follows upon the authority of XIV Op. Atty. Gen. 137, that securities issued by a small loans company are not exempt from the provisions of the blue sky law.

SOA
Public Officers—Register of Deeds—Real Estate Plats—
Register of deeds in county which has adopted tract index system is entitled to receive three cents for entering each lot in plat in tract index.

September 5, 1928.

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

In your letter of August 3 you request an opinion under the following facts:

"An attorney has presented a plat containing certain lots for recording. Eau Claire county has the tract index system, and it has been the practice of former register of deeds, upon the delivery to him of a plat for recording, to place in the tract index at the space provided for each lot of the new plat, the notation of each entry previously recorded which affects the particular lot and then in addition to the fee provided in subsec. (10) of sec. 59.57 of the statutes, charge three cents for each entry made in such tract index for the lots contained in said plat.

"The attorney for the person presenting the plat for recording contends that his client is only liable for the recording fee provided in subsec. (10), and is not liable for the individual entry which might be made in the tract index by the register of deeds in order to complete the recording of the plat. He further contends that if this client is liable for the additional entry made in the tract index, then the tract index for such subdivision or plat should be commenced without the placing in such tract index, the entries heretofore made which might affect the lots in question. In other words, the tract index for such plat should merely refer to the entry previously made in the tract index for the tract of land which a plat is a part of. That is, the tract index for the plat should refer merely to the entry made for the quarter section containing the plat."

Subsec. (1), sec. 59.55 provides that the register of deeds shall keep a tract index so arranged that opposite to the description to each quarter section, sectional lot, town, city or village lot or other subdivision of land in the county, in which he shall enter the volume and page "upon which any deed, mortgage or other instrument affecting the title to or mentioning such tract or any part thereof shall heretofore have been or may hereafter be recorded or entered."
The statute requires an entry in the tract index for each town, city or village lot or other subdivision of land in the county. It is likewise provided that an entry shall be made of any deed, mortgage or other instrument affecting the title to or mentioning the tract or any part thereof, whether such mortgage or other instrument has heretofore been recorded or whether it may hereafter be recorded.

In view of the statutory language, there can be no escape from the conclusion that the register of deeds must prepare a complete tract index for each lot in a new subdivision or plat.

Subsec. (1), sec. 59.57 provides that the register of deeds shall receive,

“For entering and recording any deed or other instrument, ten cents for each folio and three cents for every necessary entry thereof in the tract index when kept.”

Subsec. (10), sec. 59.57 provides that the register of deeds shall receive,

“For recording plats containing from one to twenty lots, thirteen dollars, and for plats containing from twenty to fifty lots, fifteen dollars, and of each additional lot, ten cents.”

The latter sections are separate and distinct and have no relation to each other. In counties which have no tract index the register of deeds is entitled to receive for recording plats a fee prescribed in subsec. (10), sec. 59.57. In counties where the tract index has been adopted, the register of deeds is entitled to receive for recording plats the fee prescribed in subsec. (10), sec. 59.57, and in addition thereto he is entitled to receive three cents for each tract index entry as is provided in subsec. (1), sec. 59.57.

SOA
Courts—Taxation—Action to enforce turning over to county tax levied by county for highway purposes and collected in part by city in county should be commenced in name of county against city treasurer and his bondsmen for amount of such tax, penalties, damages and interest, as provided in secs. 74.22 and 74.23, Stats.

September 7, 1928.

Herman C. Runge,
District Attorney,
Sheboygan, Wisconsin.

You say your county board levied a tax of $407,100 in 1926 for highway purposes; the city and others brought the question in the circuit court claiming it was in violation of sec. 83.06, Stats., and the circuit court decided that the tax was illegal, but on appeal the supreme court in State ex rel. Sheboygan v. Sheboygan Co., 194 Wis. 456, reversed the circuit court on the ground that the city was not a taxpayer; the tax was paid and the different units of the county turned it over except the city. You say the city has the money on hand and the county board has instructed you to commence the necessary action to compel the city officers to pay the money to the county. You ask for the opinion of this department on the following questions:

1. Is mandamus the proper form of action, or an action for money had and received?

2. If the action is for money had and received, may separate causes of action be stated in the complaint for penalties and interest? If the form of the action is mandamus, you state that it is your opinion that interest and penalties can probably not be collected in that proceeding.

3. Who are proper parties to the action? Should the action be commenced by the county treasurer or in the name of Sheboygan county, and should the action be commenced against the city of Sheboygan or against its treasurer?

I think the county treasurer should first issue his warrant directed to the sheriff of the county commanding him to levy the amount remaining unpaid with interest and damages together with the fees for collecting the same as provided in sec. 74.23. If it cannot be collected in that
way, then an action should be commenced in the name of the county against the city treasurer and his bondsmen, as provided in sec. 74.22.

Sec. 62.09, subsec. (9), par. (a), provides that 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 in his hands according to law. That is a plain, specific duty which might be required to be performed by mandamus action, but mandamus, like injunction, is an action resorted to only when no other adequate remedy is found, and, as that would only require the payment of the money collected, while the action provided in sec. 74.22 and sec. 74.23 covers interest and penalties as there provided, I would think it safer, if not necessary for the protection of the treasurer, to proceed under those sections against the treasurer and his bondsmen for the amount due and the interest and penalties as there provided and that action should be in the name of the county on the official bond.

TLM

Automobiles—Law of Road—Minnesota owned motor vehicles used regularly for delivery of merchandise in Superior from Minnesota points are required to pay Wisconsin registration fee and to display Wisconsin number plates.

JAMES R. HILE,
District Attorney,
Superior, Wisconsin.

You ask whether wholesale dealers of Duluth, who deliver goods in Superior by motor vehicle, are exempted from the payment of a Wisconsin license fee under the reciprocal clause contained in sec. 85.15, Stats., relating to foreign owned motor vehicles.

The answer is in the negative, if the motor vehicles mentioned are used regularly for the delivery or distribution of merchandise in Superior. The reciprocal provisions of subsec. (1) of sec. 85.15 have no application to such a situation.

September 11, 1928.
Subsec. (2), sec. 85.15 expressly provides, among other things, that no motor vehicle used regularly for the delivery or distribution of merchandise within this state or for intrastate hauling shall be operated on the public highways of Wisconsin, unless it has paid the registration fee, and must display Wisconsin number plates.

Intoxicating Liquors—Licensing board is not required to grant license to sell nonintoxicating liquors if applicant is not deemed proper person to receive such license.

September 12, 1928.

N. H. Roden,
District Attorney,
Port Washington, Wisconsin.

In your communication of August 21 you state that a person makes application for a soft drink parlor license; that the proprietor making the application was arrested two years ago and convicted; that his wife now makes application for a new license; that she is of good character and an American citizen. You inquire whether the town, city or village board must grant her a license to operate a soft drink parlor if such application is made to the board.

Under sec. 165.31, Stats., it is provided that the town, village board or common council

"shall grant licenses to such persons as they deem proper for the sale of nonintoxicating liquors" etc.

There is a discretion vested in the board as to who is a proper person to receive a license. It is not required to grant a license in a case such as you refer to in your letter.

JEM
Banks and Banking—Where insolvent bank turned over assets to another bank for liquidation purposes and losses resulted to guarantors, commissioner of banking may still take possession of insolvent bank under provisions of sec. 220.08, Stats.

September 13, 1928.

W. H. Richards,
Deputy Commissioner of Banking.

You say that in 1922 the Bank of S. W. when faced with a crisis decided to liquidate through another bank. In order that the bank which agreed to liquidate could be properly secured, two of the directors of the Bank of S. W. executed a guaranty, and it was understood that these men with one other were to form a liquidating committee to distribute any assets after liability had been met. As a matter of fact, no assets remained and the loss borne by the guarantors amounted to $65,000. A petition has been presented to you on behalf of the guarantors asking you to take charge of the Bank of S. W., the charter of which has never been canceled. You ask whether you have authority under sec. 220.08, Stats., to take over this bank when it has no assets, although it still does have a liability to the guarantors.

It is the opinion of this department that you have the authority to take over the bank in question.

Sec. 220.08, Stats., authorizes the commissioner of banking to take possession of the property and business of banks or banking corporations under certain circumstances. Partial liquidation through another bank in no way limits the power of the commissioner to exercise his statutory powers.

In Harris v. Briggs, 263 Fed. 726, 733, where a substantially similar situation was presented, the court said:

"* * * We do not think the fact that the commissioner did not appoint a special agent and make his assessment until nearly four years after the contract between the Farmers' Bank and the Continental Bank was made affects his right or authority to act in the premises. The bank as a corporation still exists. It was insolvent, and owed a debt which, so far as the record shows, could not
be paid, except by enforcing the so-called double liability of the stockholders. It is true the special agent appointed never received any property of the Farmers' Bank, but that may happen in many cases. The double liability of the stockholders and the power of the commissioner to enforce the same does not depend upon whether the bank has assets, or whether the special agent appointed to act for the commissioner is able to take possession of them. So far as we are informed there is no law which restricted the right of the commissioner to make a stock liability assessment and bring suit to enforce the same at the time he did.”

MD

Elections—Citizenship—Several questions answered as to right of woman to elect to change her residence for voting purposes from residence of husband.

September 15, 1928.

THEODORE DAMMANN,
Secretary of State.

I have your letter submitting three questions as to residence of married women for voting purposes and to which I reply as follows:

Question 1. When a Wisconsin woman, in the service of the federal government at Washington, D. C., marries a man of another state, does her voting residence automatically become that of her husband, or, does sec. 6.015, Stats., continue her right of choice of separate voting residence in Wisconsin?

The first part of your question should be answered "yes," on the theory that a married woman is presumed to intend to live with her husband, not temporarily, but permanently, and for that reason she should be held to have adopted his legal residence as her legal residence. I think if she changes that election residence thereafter, it must be based upon a changed intent and condition.

The second part of your question I think should be answered "no," except as it might be affected by subsequent conditions based on a changed intent and changed residence.
Question 2. When a Wisconsin citizen, in the employ of the state government at Madison, who has continued his voting residence in his home town in Washington county, marries a woman from Grant county, who now resides with him in Madison, is his wife permitted to select her husband's home town as her voting residence although she has never actually resided there?

The answer to the above question is "yes." While an intent to change the residence is ordinarily not held to be sufficient to change such residence without an actual change, that is, the intent must be accompanied by the act, yet I think that under the conditions named, the husband and wife becoming one in law, and the husband's residence is adopted as the residence of the wife, the marriage itself would be an adoption of the husband's residence by the wife and would so continue until some subsequent act and intent changed that legal residence for voting purposes.

Question 3. When an officer of the United States army who is a citizen of Wisconsin, marries a woman from California, may this woman vote in the same Wisconsin precinct as her husband without ever having actually resided in this state?

I think under the foregoing answers that question must be answered "yes" unless subsequent acts and intent of the wife change that right, for I think, as above stated, by the marriage itself the wife adopts the legal residence of the husband and must be held to have intended to adopt that residence as her own and live with him until that presumption is changed by not only a changed intent but a changed condition showing that she did not intend to continue to reside with him as his wife.

TLM
Fish and Game—One charged with violating fish and game laws and bound over to circuit court, but case not having been tried and defendant not having been convicted of any other violation of fish and game laws, is entitled to license for fishing and hunting; should he thereafter be convicted, license so issued to him is ipso facto revoked.

September 18, 1928.

Arthur M. Sells,
District Attorney,
Florence, Wisconsin.

In your recent letter you state that one A was arrested during the winter months of 1928 for serving venison in a logging camp and bound over to the circuit court for trial; that you have not yet been able to force the matter on for hearing in circuit court; that said A had never been convicted of any other violation of the fish and game laws. You ask to be advised whether the county clerk can refuse to issue a license to A under the provisions of sec. 29.63, subsec. (3), pars. (a) and (b), which provides as follows:

“(a) Conviction for violation of this chapter, in addition to all other penalties, revokes any license theretofore issued pursuant to this chapter to the person convicted, and no license shall be issued to such person for a period of one year thereafter.
“(b) No license shall be issued to any person for a period of one year following a conviction of such person for a violation of this chapter.”

This language is clear and explicit. Said A has not yet been convicted and does not come within purview of these provisions. Should he be convicted after the license has been issued to him under the above provisions of par. (a) his conviction ipso facto revokes the license issued to him.

JEM
Elections—Public Printing—Newspapers—Under sub-
sec. (1), sec. 6.21, Stats., compensation cannot be paid for
publication of election notices in weekly newspaper not
printed in county for which election notices are published.

September 19, 1928.

J. C. Davis,
District Attorney,
Hayward, Wisconsin.

In your letter of September 6 you state that three weekly
newspapers have a circulation in your county. Two of the
publications are printed in the county, while the third is
printed outside the county. You inquire whether sec.
331.20, Stats., applies to weekly papers, and whether a
weekly newspaper printed outside the county is entitled to
be paid for publication of election notices in a county.

The provisions of sec. 331.20, Stats., are clear and un-
ambiguous. The statutes expressly apply only to daily
newspapers.

Subsec. (1), sec. 6.21, Stats., provides:

"Before an election to fill any public office, the county or
city clerk of each county or city shall cause to be published
in at least two and not more than four newspapers pub-
lished within the county or city the nominations to office
certified to or filed with him, which publication shall be a
facsimile of the official ballot."

The statute requires the county clerk to "cause to be pub-
lished" the election notices in at least two and not more than
four newspapers. The intent of the legislature in enact-
ing this provision was to provide adequate notices to voters
of impending elections. The duty imposed on the county
clerk by the statute to cause election notices "to be pub-
lished" consists in causing the notices to be printed in
newspapers which have a general circulation in the county.

The statute also provides that the clerk shall cause no-
tices to be published in at least two and not more than four
newspapers "published within the county." It is clear
that the word "published" in this connection has a different
meaning from the word "published" in the former portion
of the statute. The context demonstrates clearly that the
word "published" does not have the same meaning in both
cases; in one case, the word appears in the expression “cause to be published” and in the other case it appears in the expression “newspapers published within the county.” In accordance with the common and approved usage of language, a newspaper is published where it is printed, and this construction, under subsec. (1), sec. 370.01 ought to be applied to the term. In other words, a newspaper is not published in a county unless it is printed in such county.

Since the weekly to which you refer is not published in your county, this department is of the opinion that compensation cannot be paid for the publication of election notices in such paper under subsec. (1), sec. 6.21, Stats.

Public Officers—School District Clerk—Village Treasurer—Offices of school district clerk and village treasurer are compatible.

September 19, 1928.

L. D. Potter,
District Attorney,
Racine, Wisconsin.

In your letter of September 8 you state that “A” holds two offices: one, the office of village treasurer, and the other, clerk of a school district. You inquire whether the two offices are compatible.

Sec. 40.11, Stats., prescribes the duties of a school district clerk. Sec. 61.26, Stats., prescribes the duties of a village treasurer. There is nothing in these sections to indicate incompatibility of the two offices.

In V Op. Att'y. Gen. 852, it was held that the offices of town clerk and school district clerk are compatible. In X Op. Atty. Gen. 740, it was held that the offices of town treasurer and school director are compatible. So far as conflict of duty is concerned, I see no distinction between this case and the cases passed upon in the foregoing opinions of the attorney general.

This department, therefore, is of the opinion that the two offices are compatible.

SOA
Courts—Fish and Game—Under sec. 29.63, subsec. (3), Stats., conviction for violation of fish and game law ipso facto revokes any license theretofore issued pursuant to ch. 29. This does not include conviction obtained in justice court from which appeal has been taken entitling applicant to trial de novo in circuit court. In that case license is not revoked until conviction is obtained in circuit court.

Bruce M. Blum,
District Attorney,
Monroe, Wisconsin.

You state that on or about the first day of April a defendant was convicted of a violation of the fish and game law on his plea of nolo contendere in justice court; that he took an appeal to the circuit court and this appeal will be tried the next regular term of the circuit court for Green county, commencing on the 4th Monday in October. You state that the defendant has made application for a hunting license and you inquire whether his appeal operates to stay the penalty provided by sec. 29.63, subsec. (3), Stats. Said section provides:

“(a) Conviction for a violation of this chapter, in addition to all other penalties, revokes any license theretofore issued pursuant to this chapter to the person convicted, and no license shall be issued to such person for a period of one year thereafter.

“(b) No license shall be issued to any person for a period of one year following a conviction of such person for a violation of this chapter.”

The trial in the circuit court from an appeal from justice court in this state is a de novo one and consequently a trial on the merits. In 2 R. C. L. 118 it is said:

“* * * An appeal which brings up the entire cause for trial de novo in the appellate court operates to annul the judgment, in the absence of a statute providing otherwise.”

These authorities sustain the said proposition. There is nothing in our statute which in my view abrogates this rule. An appeal from justice court in a case where a trial *de novo* can be had in the circuit court is really a continuation of the same trial which culminates in a judgment in the circuit court. See sec. 358.01, *et seq.*

In the case of *Neuman v. The State*, 76 Wis. 112, 118, our court strongly intimated that this rule is still in force in this state, and there the court distinguished between an appeal giving a new trial on the merits and an appeal tried on the record, that in the latter case clearly there would be no stay of the penalty unless special proceedings were taken to stay the penalty.

I am of the opinion in view of the above authorities that a conviction which *ipso facto* revokes the license under sec. 29.63, subsec. (3), cannot include a conviction had in justice court from which an appeal is taken to the circuit court entitling the applicant to a trial *de novo* in circuit court. In such cases a conviction in circuit court must first be obtained before the license is revoked.

JEM

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*Criminal Law—Search Warrants*—Sec. 353.10, Stats., which provides that offenses committed within one hundred rods of county line may be prosecuted in either county, includes within its purview proceeding for issuing search warrant.

E. J. Morrison,

*District Attorney,*

Portage, Wisconsin.

You state that for some time you have had complaints that liquor violations are being committed over the county line but well within one hundred rods limitation; that recently your officers went across the line and observed conditions which convinced them that liquor violations were going on and that they returned into your county and secured search warrants for two residences which were afterwards searched; that the owner of one residence consented to a
search of his place without the search warrant and that in both instances moonshine was obtained and the parties arrested.

You state that the defendants' attorneys now question the right to search the premises over the county line even though the places may be within one hundred rods of the dividing line. They contend that sec. 353.10, Stats., is meant to apply only in those cases where a crime has been committed and it is necessary that quick action be had.

You argue that the statute gives us authority to prosecute and punish crime within this territory and that all the means necessary to a successful prosecution, including the issuing of a search warrant and the search thereunder, go with this right to prosecute. You ask for a construction of sec. 353.10. Said section reads:

"Offenses committed on the lines of two counties or within one hundred rods of the dividing line between them may be alleged in the indictment or information to have been committed in either of them, and may be prosecuted and punished in either county, and the court of either such county whose process shall have been first served upon the defendant shall have priority of jurisdiction."

A search warrant is issued for the discovery of illicit property or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense. It can only be invoked in the furtherance of public prosecutions. Neither at the common law nor under the statute is such process available to individuals in the course of civil proceedings nor for the maintenance of any mere private right. It is in the nature of a criminal process and intended to aid in detecting and punishing crime and has no relation to civil process or trials. 24 R. C. L. 701-702.

The above quoted statute was intended and has the legal effect to extend the jurisdiction of criminal courts in any county one hundred rods beyond the county line. Your attention is particularly directed to the last phrase of said quoted section, reading, "and the court of either such county whose process shall have been first served upon the defendant shall have priority of jurisdiction." A search warrant is a process and is issued and served in aid of the prosecution of the defendant for the crime committed. It
is an arm of a criminal court only stretching further to obtain evidence in aid of a criminal prosecution.

Your position in the matter in my opinion is sound and is fully warranted under the statute cited. The search warrant proceedings conducted by you must, I think, be held to come well within the statute.

JEM

Public Health—Pharmacy—Aspirin—Bayer tablets of aspirin, patented as "monacticacidester of salicylic acid" with word "aspirin" registered as trade-mark, may be sold by persons or stores not licensed to sell drugs.

September 20, 1928.

Charles M. Williams,
District Attorney,
Whitewater, Wisconsin.

You state that there is a product on the market called "Bayer-Tablets of Aspirin"; that you understand that this product is now patented as "Monacticacidester of salicylic acid" with the word "aspirin" registered as a trade-mark. You inquire whether this product can be sold by stores selling other patent medicines in original packages or only by a licensed person under the pharmacy law.

In an official opinion of this department in XVI Op. Atty. Gen. 140, to which you refer, this department held that aspirin, being a poisonous drug on which the patent or copyright has expired, can be sold as a drug only by licensed persons named in the statutes. In the same volume, on page 318, another opinion is given to G. V. Kradwell, president of the board of pharmacy, in which the former opinion was adhered to. The ground for the ruling in said opinion is the provision of the statute, sec. 151.04, subsec. (3), which provides:

"This shall not interfere with the dispensing of drugs, medicines or other articles by physicians, nor with the sale of proprietary medicines in sealed packages, labeled to comply with the federal pure food and drug law, with directions for using, and the name and location of the manufacturer, * * *"
If you are correct in your statement that this medicine has been patented, then the opinions referred to do not now apply, as the medicine you mention, if patented, is a proprietary medicine within contemplation of this statute in which a certain person or corporation has proprietorship. You are therefore advised that this product, if really patented, may be sold by stores as other patent medicine in original packages, containing printed directions for their use.

JEM

Public Officers—City Supervisor—Water and Light Commission—Mayor—County Physician—Offices of supervisor of city and member of water and light commission are compatible, except where water and light commission furnishes service to county.

Offices of mayor and county physician are compatible.

September 24, 1928.

George S. Geffs,
District Attorney,
Janesville, Wisconsin.

In your letter of September 20 you submit the following questions for an official opinion:

1. Is the office of supervisor of a city compatible with the office of a member of a light and water commission? You state that the supervisor elected from a ward of the city sits upon the county board as a member thereof. You further state that the members of the light and water commission are appointed by the common council.

2. Is the office of county physician compatible with the office of mayor of a city? You state that the county physician is appointed by the trustees of the county farm who have charge of outdoor poor relief. You state that the city involved is located within your county.

1. Generally speaking, two offices are compatible where there is no statutory prohibition against the holding of the two offices by the same person. Where the incumbent of one office has supervision or control of the incumbent of the other, or has the power to appoint the other, or where there
is a conflict of duty between the two offices, the offices are incompatible.

Under the facts stated by you your first question is answered in the negative. It should be noted, however, that the offices are incompatible if the water and light commission furnishes service to the county. In this event it is the duty of the water and light commission to obtain as high a price for the service as possible, while it is the duty of the county board to obtain such service at as low a price as possible. In case of dispute between the county board and light and water commission, the county board may petition the railroad commission under the provisions of ch. 196, Stats., for a rate lower than that fixed by the water and light commission, in which case, the water and light commission would be obliged to defend its rate before the railroad commission. It is clear, therefore, that where a water and light commission furnishes service to the county, there is a conflict of duty between the offices of supervisor and member of the water and light commission.

Your second question is answered in the affirmative.

Under the facts stated, the mayor is not a member of the county board. The county physician is appointed by the trustees of the county poor farm (sec. 46.19) who, in turn, are appointed by the county board (sec. 46.18). It follows that the mayor does not have any voice in the selection of the trustees of the county poor farm; neither is there any conflict in the duties of the two offices.

This department, therefore, is of the opinion that the offices are compatible.

SOA

Banks and Banking—Trust Company Banks—Sec. 223.02, Stats., requiring deposit of securities with state treasurer, is not complied with by depositing trust receipt of federal reserve bank covering such securities.

September 24, 1928.

C. F. SCHWENKER,
Commissioner of Banking,
In your letter of September 17 you invite attention to the fact that banks given fiduciary powers under sec. 221.04,
subsec. (6), Stats., may deposit approved securities with the state treasurer as a guaranty fund for the operation of a trust department in lieu of executing a surety bond for each trust. You ask this question:

“If a bank, which elects to take a deposit of securities, deposits them with the federal reserve bank, which in turn will execute a trust receipt in favor of the state treasurer for such bonds, which would in turn be approved if the securities represented by such trust receipt are approved by the commissioner of banking,—

“Would such trust receipt of the federal reserve bank comply with the requirements that approved securities had been deposited with the state treasurer?”

The trust receipt of the federal reserve bank would not satisfy the requirements of law.

Sec. 223.02, Stats., provides in part:

“Before any such corporation shall commence business it shall deposit with the state treasurer not less than fifty per centum of the amount of its capital stock, provided, however, that no such corporation shall be required to deposit more than one hundred thousand dollars, such deposit to be in cash, bonds, or mortgages, or notes and mortgages on unincumbered real estate within this state worth double the amount secured thereby, or federal or joint stock farm loan bonds issued under the provisions of the federal farm loan act approved July 17, 1916, or public stocks or bonds of the United States, or of any state of the United States that has not defaulted on its principal or interest within ten years immediately preceding the date of such deposit, or of any county, town, village, or city in this state, and upon all which bonds and other securities there shall have been no default in the payment of interest or principal for a longer period than thirty days; * * *.”

If a state bank desires to comply with sec. 223.02, Stats., it is obvious that only such forms of security as are mentioned in the section may be deposited with the state treasurer. Clearly, depositing securities with the federal reserve bank is not depositing them with the state treasurer; certainly, then, the deposit of a trust receipt issued by the federal reserve bank covering such securities cannot be considered as a deposit of the securities themselves with the state treasurer.

ML
Courts—Statute of Limitations—Taxation—Tax Sales—

County treasurer, under provisions of sec. 75.06, Stats., is authorized to pay out of general fund amount of money paid in redemption of land from tax sale to owner of lost certificate of tax sale who complies with sec. 75.06, although more than six years have elapsed since sale.

September 27, 1928.

FULTON COLLP,
District Attorney,
Friendship, Wisconsin.

You state that on June 8, 1920, certain lands were sold at the annual tax sale for delinquent taxes and the certificates of sale issued to the purchaser at such sale; that on May 22, 1922, the lands so sold were redeemed from such sale, and that the redemption money was paid to the county treasurer by the county clerk and that on June 8, 1926 such redemption money became a part of the general fund of the county as provided by sec. 75.05, Stats.; that the holder of the tax certificates made no effort to obtain the redemption money from the county treasurer until September 14, 1928, when he made claim thereto as the holder of lost certificates and filed the affidavit and bond required by sec. 75.06, Stats.

You ask whether the owner of the lost certificates of sale is now entitled to the redemption money, and if so, and his claim is not barred by the statute of limitations, how and in what manner and from what it should be paid to him. In this connection you state that the county treasurer takes the position that he cannot pay the claimant out of the redemption money in his hands, nor out of the general fund as all moneys therein have been appropriated.

I think that the authority of the county treasurer to pay out of the general fund to the owner of the lost certificates the amount paid upon the redemption is plain from the express provisions of sec. 75.05, Stats., which, after providing that the county clerk shall pay to the county treasurer all redemption money in his hands and thereafter upon demand issue an order upon the treasurer to pay the same to the persons entitled to it and that all such money shall, after the expiration of six years from the date of sale of
the property become a part of the general fund and be disbursed as other money belonging thereto, further provides:

"* * * The legal holder of any certificate so redeemed may *thereafter* [that is, after the expiration of the six years] present the same to the county clerk who shall issue an order upon the county treasurer to pay the amount paid upon such redemption."

Of course, if there is actually *no* money in the general fund unappropriated (which is not likely to be the case) payment of the order will have to wait until there is unappropriated money in the fund; but I think that it is the county clerk's duty to issue the order under the circumstances stated by you, and that it is the duty of the treasurer to pay the order out of any available general fund money in his hands. If the treasurer, having unappropriated general fund money in his hands, refuses to pay the order, probably payment could be compelled by mandamus.

Whether an action to recover the amount would be barred by subsec. (4), sec. 330.19, or some other statute, I think is not a question for the attorney general to answer. See Knudtson v. Leary, 108 Wis. 203, 207.

FEB

*Public Health—Basic Science Law*—Persons who are not authorized medical practitioners but who practice healing through use of Scriptures and laying-on of hands and even making suggestions that patients drink grape juice or olive oil or refrain from eating certain foods, where no charge is made and compensation claimed and performance is not done in expectation of compensation, do not violate ch. 147, Stats.

Dr. G. W. Henika,

Assistant State Health Officer,

Board of Health.

You state that from time to time the question is asked your department as to whether individuals who treat the sick are violating ch. 147, Wis. Stats., when they have no

September 27, 1928.
license to practice and are not qualified in the basic sciences and have not a certificate of registration thereof, and are, therefore, not duly authorized medical practitioners, but practice their healing through using the Scriptures and the laying-on of hands, and in conjunction therewith, suggest that the patient take grape juice or olive oil and refrain from eating certain foods. They make no specific charge for their services and claim no compensation, but the patient usually leaves a dollar.

You inquire whether individuals practicing along the above lines are violating the provisions of ch. 147, Wis. Stats.

In sec. 147.01 it is provided:

"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."

In sec. 147.02 it is provided:

"No person shall treat, or attempt to treat, the sick unless he shall have a certificate of registration in the basic sciences, and shall have recorded the same with the county clerk in the manner provided in section 147.14, and shall have complied with all other requirements of law. * * *"

In sec. 147.14 it is provided:

"No person shall practice or attempt to 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, nor unless he shall record the same with the county clerk of the county in which he shall practice and pay a fee of fifty cents for each recording."

There are exceptions to this law and the one here material is given in sec. 147.19, subsec. (2), Stats., which reads thus:

"None of the provisions of this chapter or the laws of the state regulating the practice of medicine or healing shall be construed to interfere with the practice of Christian Science, or with any person who administers to or treats
the sick or suffering by mental or spiritual means, nor shall any person who selects such treatment for the cure of disease be compelled to submit to any form of medical treatment."

Your attention is particularly directed to the phrase in the above statute which provides that it shall not interfere "with any person who administers to or treats the sick or suffering by mental or spiritual means."

To heal by using the Scriptures and the laying-on of hands as it was done in the apostolic age can, in my opinion, not be construed as coming within the inhibition of this statute. That is a purely spiritual means within the pur-view of this statute.

The suggestion that the patient take grape juice or olive oil and refrain from eating certain foods cannot, in my estimation, be considered a prescription, as suggestions of this kind may be made by anyone without violating any of our statutes.

I am of the opinion that, so long as no charge or compensation is claimed and the whole performance is not in the expectation of compensation, no violation of ch. 147, Wis. Stats., is committed.

JEM

Courts—Physicians and Surgeons—Under provisions of sec. 325.21, Stats., physician or surgeon is absolutely prohibited from disclosing information he may have acquired in attending patient professionally, except as there specified.

September 28, 1928.

Board of Control.

With your letter of September 14 you enclose a letter signed by August C. Hoppmann, circuit judge, and addressed to the warden of the hospital for the criminal insane, in which he says:

"Permit the bearer, Mr. Earl F. Gill, to examine the records of Everett Cooper and Everett Cooper personally, at said institution."

You advise that Everett Cooper is now confined as an insane criminal under commitment in a proceeding in which he was adjudged a criminally insane person and committed to said institution. You state that efforts are being made by the relatives of this person to have the said Everett Cooper returned to the circuit court of Dane county for a rehearing and this "order" is a result of the move made by this person's relatives and you ask to be advised if the board should disclose the criminal and medical records at the central state hospital for the insane to Mr. Gill under the circumstances or whether your records are private records and not subject to the "order" of a court, or whether you should recognize the "order" of the court and permit an attorney to examine these records and interview this inmate personally.

You are advised that any official records are public records and can be examined at any proper time for any proper purpose. Sec. 325.21, Stats., provides:

"No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in all lunacy inquiries, (3) in actions, civil or criminal, against the physician for malpractice, (4) with the express consent of the patient or in case of his death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health or physical condition.

You will notice that statute is an absolute prohibition on the physician or surgeon except in the cases specified, so that any information on your books or records that might be in the nature of information obtained by the physician from the patient or upon his examination or treatment of the patient would be absolutely protected under the provisions of the statute except for the purposes and in the cases excepted.

You say that efforts are being made by the relatives of Everett Cooper to have him returned to the circuit court of Dane county for a rehearing as to his present condition
and this examination is desired to obtain information to be used in that proceeding. If that is the purpose, you are advised it is not yet a proceeding in lunacy or a lunacy inquiry within the provisions of exception (2) of that section, so as to protect the physician in disclosing any information within the prohibition of the statute. If a lunacy inquiry or proceeding is actually commenced and pending in court, then the court might issue a subpoena requiring the attendance of the doctor or the proper officers of the institution and require the production of any records or information bearing upon the subject and the court could then order or direct the doctor to testify or require the records or information to be disclosed, if in the judgment of the court it would be proper to so disclose it, and that would protect the doctor as well as the officers of the institution in disclosing such information; but I do not think this letter of the circuit judge, although he signs it as circuit judge, would justify the doctor's disclosing any communications or information that he may have obtained professionally in treating the patient. This letter signed by Judge Hoppmann as circuit judge, is a mere letter and not "a court order," and as I understand it, is not in any proceeding pending before the court in any lunacy inquiry. For that reason the exceptions stated in sec. 325.21 would not apply and the letter would have no greater force or effect than it would have had the letter been written by me or any other person.

Exception (4) of sec. 325.21 says, "with the express consent of the patient or in case of his death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life * * * or physical condition." Under that provision, if this person was not under the disability of insanity, he could consent to the doctor's disclosure of any information he might have obtained within the provisions of the statute, and the doctor could then be compelled to disclose the information. But, under the conditions here, the patient is still presumed to be insane. I do not think the doctor would be released from the prohibition except in an actual proceeding in court in a lunacy inquiry within the provisions of exception (2). As I under-
stand it, no such proceeding is now pending and until such a proceeding is actually pending, I do not think you would be justified or protected in disclosing any information received by the doctor in attending the patient to enable him to serve such patient professionally. Of course any information that you might have in the way of records or otherwise that do not come within the provisions of the statute could be disclosed at any proper time and under any proper circumstances without violating the prohibitions of that statute.

You ask whether the criminal and medical records of the central state hospital for the insane are private records and not subject to the order of a court or if they are public records so that the public would be entitled to examine them.

You are advised that any records required by law to be kept are public records and open to the inspection of the public, but any private entries made by the doctors or any of the officers or employees for mere private information are not public records or documents that would be open to the examination of the public. I find no provision of the statute requiring a doctor to make or keep a public record of information obtained by him while treating patients so I do not think that any notes or memoranda made by the doctor relating to such matters would be public records within the rule. The public officers of the state are not interested in obstructing any legal proceeding or inquiry and for that reason should not be technical, but rather willing to accommodate the public in any proper way or proceeding, but when an express prohibition is made in the statute, that cannot be waived excepting in the cases and in the manner provided in XI Op. Atty. Gen.

I might state in this connection, that although the officers might believe that a patient had not recovered from lunacy or insanity sufficient to be permitted to be at large, that, of course, would not justify the officers in trying to prevent a subsequent inquiry as to the lunacy of the person in case a proper proceeding was commenced; but until such a proceeding is actually pending and in court, I do not
think you should disclose any information that comes within the prohibitions of the statute.

Your attention is called to an opinion by the attorney general in XVII Op. Atty. Gen. 385.

TLM

Courts—In case where justice of peace binds person over to circuit court when such justice had jurisdiction to try case, circuit court does not acquire jurisdiction; case should be dismissed and started again.

September 28, 1928.

K. J. Callahan,

District Attorney,

Montello, Wisconsin,

You state that one X was arrested on a warrant issued by a justice of the peace for violation of the game laws on three counts; that the penalty for any one of the said counts is not less than $50 nor more than $100 or not less than a month nor more than six months. You state that you were under the impression that the total would be more than $200, which would prevent the justice from trying the case, but that you were wrong in this; that as a result the defendant X came before the court believing also that he was to be bound over to circuit court. He waived preliminary hearing and gave bond for his appearance in circuit court.

You inquire:

"Can defendant in circuit court object to the jurisdiction of the court and if he so does what should the circuit court do?"

It is a well recognized statutory law that a justice may hold a preliminary examination in cases where the offense is one whose punishment is such that it is greater than the justice has jurisdiction to impose. In such cases he cannot try the defendant but must bind the case over to the circuit court. In cases where he has jurisdiction it is his duty to try the defendant.

In the case of Miles v. Chamberlain, 17 Wis. 460, a case was pending in justice court and it was supposed that the
question of title to land was in issue and for that reason the justice sent the cause to the circuit court for trial, the defendant giving the bond required by statute. It was held that the circuit court had no jurisdiction of the suit but should have dismissed it on the defendant's motion. See also Verbeck v. Verbeck, 6 Wis. 159; Clark v. Bowers, 2 Wis. 123; Palmer v. Peterson, 46 Wis. 401; Felt v. Felt, 19 Wis. 193; Plano Mfg. Co. v. Rasey, 69 Wis. 246; Faust v. The State, 45 Wis. 273.

Under these authorities I am constrained to hold that the circuit court would acquire no jurisdiction and, the defendant not having been put in jeopardy, I believe the best practice is to dismiss the case and issue a new warrant, as sec. 269.51, Stats., is probably not broad enough to change the above rule.

JEM

Criminal Law—Gambling—Mint vending machine in which nickel is dropped and player gets package of mints worth five cents but sometimes gets in addition thereto one or more tokens which he can play in machine, which will never give him package of mints and turns cylinder upon which his fortune is told, is gambling device.

September 29, 1928.

GEORGE GIEFFS,
District Attorney,
Janesville, Wisconsin.

You have submitted a letter to this department sent to you which describes a certain mint vending machine and you request an opinion as to whether the machine is a gambling device violating our gambling laws. Said machine is described as follows:

"This machine is all enclosed and has four cylinders in it, each of which is loaded with packages of mints of exactly the same kind. If a customer desires to buy a package, he drops his nickel in the opening at the top of the machine and pulls a handle to the right. He always obtains therefor one, and one only five-cent package of mints, the same as are sold regularly all over the country for five cents. Sometimes one or more tokens are expelled with the pack-
age of mints. These are small round pieces of metal with a hole in the center and the only printing on the token is the following: On one side it reads: ‘This token has no cash or trade value.’ On the other side it reads: ‘For amusement only. The tokens are not redeemable in either cash or trade. When the token is dropped in the machine and the handle at the right side of the machine is pulled, no mints or money or anything is expelled except sometimes one or more of the same tokens are expelled. The token when placed into the machine causes a cylinder to revolve and to thus bring into view of the customer one of several lines of print on the cylinder each of which is some frivolous statement relative to the reader’s future, on which the player’s fortune or future is foretold.”

You also state that on the front of the machine it conspicuously appears that “the tokens vended from this machine have no cash or exchange value,” and that the customer therefore knows before he plays the first time that he is not to receive tokens of any value and you also note further that the instant these cylinders are emptied of mints, the machine automatically shuts off and no coins or tokens can be thereafter placed in the same until it is again loaded with mints.

We are of the opinion that said mint vending machine is a gambling device. It is true that these tokens which by chance the player gets have no cash or exchange value for goods or merchandise, but we believe that they are nevertheless a thing of value because through them a person may have his fortune told. Some people will pay and sometimes have to pay in order to get that done. These tokens may be sold to some one who is anxious to have his fortune told and in that sense they would have an exchange value as cash could be obtained from them.

We quite often have to pay and are willing to pay for our amusements. It is our opinion that with this vending machine a person by chance gets a thing of value and therefore the machine is a gambling device and prohibited under our statute.

JEM
Agriculture—Agricultural Fairs—Taxation—Stockholders of Rock River Valley Agriculture Corporation, which is Jefferson county fair, are not subject to assessment on their shares of stock as taxable property.

September 29, 1928.

HAROLD C. SMITH,
District Attorney,
Fort Atkinson, Wisconsin.

You ask for an opinion as to whether or not the stockholders of the Rock River Valley Agriculture Corporation, which is the Jefferson county fair, are subject to assessment on their shares of stock.

The stock of the stockholders in said corporation is exempt from taxation under the provisions of sec. 70.11, subsec. (10), Stats., which so far as is here material, reads as follows, viz.:

"* * * All stocks and bonds, including bonds issued by any county, town, city, village, school district or other political subdivision of this state, not otherwise specifically provided for, are exempt from taxation.

I do not find that the stock to which you refer is "otherwise specifically provided for" in our statutes, and hence comes within the provisions of the above quoted section.

TLM
Banks and Banking—Insurance—Bankers’ savings deposit agreement, under which regular deposits are made in savings account from which bank pays premium on life insurance policy, held legal.

October 1, 1928.

M. A. FREEDY,
Commissioner of Insurance.

C. F. SCHWENKER,
Commissioner of Banking.

Some time ago you submitted to this office for an opinion as to legality of a proposed bankers’ savings deposit agreement under which regular deposits are made in a savings account from which the bank pays the premium on a life insurance policy solicited by a licensed agent of an insurance company authorized to do business in Wisconsin. The agreement between the bank and the depositor is as follows:

"SPECIAL SAVINGS CERTIFICATE AND AGREEMENT

The ______________ Bank of ____________, Wisconsin
(heretinafter called the bank)

hereby certifies that ___________ is a depositor under its Savings Plan (Account No. ___) and that the bank is holding as agent for such depositors Policy Number _____ issued to the depositor by the Continental Assurance Company, the face of said policy being in the sum of _______ Dollars.

"(1) Depositor agrees to make for 120 consecutive months on or before the ____ day of each month a monthly deposit of $____ in said savings account. Depositor may stop such payments and withdraw balance of his deposit at any time on surrendering this certificate and shall then be entitled to receive from bank said balance in said savings account consisting of deposits plus interest computed at the regular rate and in accordance with regular practice of said bank on savings accounts, less any sums paid out by said bank on account of premiums on said insurance policy. If such deposits are not promptly made, bank has right to recall this certificate and corresponding pass book, return said policy to depositor and pay depositor balance in said savings account as above stated less any sums paid out for premiums and thereafter all liabilities and duties of said bank for said depositor shall cease.

"(2) The depositor authorizes said bank to pay for his account and as his agent and in his behalf the premiums
on said life insurance policy No. _____ of Continental Assurance Company and charge such premiums to said savings account. Said bank shall be under no obligation to pay such premium unless there is a balance in said account sufficient to pay same.

"(3) Said bank agrees that if said payments are duly made as agreed for said 120 months, then on the ___ day of ______ bank will pay depositor on the surrender of this certificate and corresponding pass book the sum of $__ and also agrees as the agent of depositor to send in and surrender for said depositor said insurance policy and collect the cash surrender value thereof which said insurance company has guaranteed to be _____ on said ______ day of ______ 19___, making a total sum of $____.

"(4) Said bank further agrees that if depositor has duly made all such payments and does not desire to surrender said policy, the bank on said ___ day of ______ will pay to depositor $____ and will deliver the policy to depositor so that depositor may thereafter take care of and pay the premiums on said policy himself or dispose of same as he may see fit.

"(5) Depositor authorizes bank to hold said policy for him and in event of his death, deliver the policy to the beneficiary thereof. In case of depositor's death, balance in said savings account shall be paid to the lawful representative of depositor or such person as shall have been made the assignee thereof by depositor in accordance with law and the rules applicable to savings accounts in said bank. Such amount shall in such case be paid entirely in addition to any amount payable under said policy by the insurance company.

"(6) The bank is authorized to pay the first year's premium on said policy in quarterly installments and thereafter annually. The depositor has elected and does elect that all coupons on said life insurance policy shall remain attached to it, thereby accepting coupon option No. 1 and directs the bank to act accordingly on payment of premiums. It is agreed the bank is not acting for said insurance company but shall act as agent for depositor during life of this agreement. It is agreed the bank assumes no responsibility for the performance of the contract of insurance by said insurance company and make no representations or warranties in respect thereto. This agreement embraces the entire understanding between the parties hereto and there are no other stipulations or representations."

In a letter written by the attorneys who prepared the agreement it is represented: that the agreement is the only
agreement to be executed and that there is no agreement between the bank and the insurance company; that there is to be no solicitation by the bank, or any of its employes, of these accounts; that there is to be no advertising done by the bank inviting or soliciting these accounts; that the insurance policy is to be solicited and written by a licensed agent of a lawful insurance company licensed to do business in Wisconsin; that the bank receives no commission or compensation of any kind from the insurance company.

The plan submitted, if carried out in accordance with the representations made in the accompanying letter, does not violate any laws of this state. The plan was obviously skillfully—and successfully—devised to avoid the objection made by this office to a somewhat similar plan considered in XVI Op. Atty. Gen. 825. In that opinion subsecs. (1) and (6) of sec. 209.04, Stats., which prevent a corporation from acting for or aiding in any manner in the transacting of the business of an insurance corporation in placing risks or collecting premiums, were considered and held applicable. In the present plan it is considered that the bank has nothing to do with the writing of the insurance or collection of the premium, but merely acts for the insured, after the policy has been written, in forwarding the insurance premiums to the insurance company.

ML

Appropriations and Expenditures—Bridges and Highways—Toll bridge acquired by state under sec. 87.04, Stats., and made free bridge may be insured by state in state insurance fund and cost of such insurance may be debited to appropriation made to highway commission under sec. 20.49, subsec. (4), Stats.

October 3, 1928.

HIGHWAY COMMISSION.

In your letter of August 27 you state that the state of Wisconsin, Grant and Crawford counties recently acquired the toll bridge across the Wisconsin river formerly owned by the city of Boscobel. The bridge is now a free bridge, and under the provisions of sec. 20.49, subsec. (4), Stats., three thousand dollars is available each year for mainte-
nance purposes. You state also that during the time the bridge was owned by the city of Boscobel the city carried a certain amount of fire and tornado insurance thereon. Under these facts you present the following questions:

(1) Can the state carry insurance and pay premiums out of the appropriation made for the particular bridge under sec. 20.49, subsec. (4), Stats.?

(2) If the answer to question 1 is "yes" can the state take over the unexpired insurance carried by the city of Boscobel and reimburse them for the premium on the unexpired term or must this insurance be carried in the state fire fund?

We have made a careful examination of the statutes, and while there is no specific provision on the subject, it is fairly to be implied that the title to the bridge in question, under sec. 87.04, rests in the state of Wisconsin. In such circumstances, if any insurance is carried on the structure, it must be carried in the state fire fund. Sec. 210.01, Stats.

Subsec. (8), sec. 87.04 provides:

"The cost of maintaining and operating any bridge on the state trunk highway system or on a road or street within a city of the fourth class, forming a direct connection between portions of the state trunk highway system, which has been or shall be built, purchased or acquired under the provisions of sections 87.02, 87.03, 87.04 or 87.05 shall be paid by the state and by the counties determined to have been especially benefited, in such proportions and manners as shall be determined by the state highway commission and said commission may first set aside each year from the funds provided for the maintenance of the state trunk highway system in that year an amount sufficient to pay the state's share, as determined, of the cost of maintaining and operating any such bridge."

While your statement of facts is silent on the question as to whether the bridge is on the state trunk highway system, for the purposes of this opinion, it will be assumed that the bridge is in fact on the state highway system. In accordance with the foregoing provisions, the highway commission may set aside from the funds provided for the maintenance of the state trunk highway system an amount sufficient to pay the state's proportion of such maintenance.
The appropriation for such maintenance is made by sub-
sec. (4), sec. 20.49, Stats. It follows that the state, if it
determines to insure the bridge structure, may do so, and,
under sec. 210.02, have the cost thereof debited through the
appropriation made to the highway commission under the
provisions of sec. 20.49 (4), Stats.

SOA

Constitutional Law—Trust Funds—Certain questions
propounded by legislative interim committee on investment
of state trust funds on constitutionality of proposed leg-
islation answered.

October 4, 1928.

H. E. Boldt, Chairman,
Legislative Interim Committee On Investment of State
Trust Funds,
Sheboygan Falls, Wisconsin,

You state that the interim committee on investment of
state trust funds, which was created by the 1927 legislature
to make recommendations to the 1929 legislature for the
improvement of the handling of the trust and investment
funds of the state, is giving thought to the creation of a
central investment board or department and that in this
connection your committee finds that it needs the advice of
the attorney general upon the following constitutional
question:

Question No. 1: “Can the legislature, under the au-
thority given it in section 8 of article X of the constitution,
to prescribe the manner in which the commissioners of pub-
lic lands shall invest the school funds, provide that the com-
misioners shall invest these funds only in such securities
as the proposed central investment board may recommend,
excepting investments in school district loans and United
States bonds?”

Question No. 2: “Can the legislature provide that the
proposed central investment board shall make all collections
of the principal and interest of loans from the state school
funds for the commissioners of public lands?”

Question No. 3: “In the event that your answer to
question (1) is in the negative, is there any constitutional
objection to a law providing that the proposed central in-
vestment board shall make and handle all investments from the state school funds, when so requested by the commissioners of public lands?"

Question No. 4: "Can the same plan which is suggested with regard to the investment of the school funds in questions (1), (2), and (3) above, be applied to the investment of the so-called 'university trust funds,' which we understand are funds which the donors have stipulated shall be under the control and management of the board of regents of the university?"

Question No. 5: "Can the legislature, by appropriate amendments to the statutes provide that all moneys hereafter donated to the university as trust funds shall be invested by the proposed central investment board?"

Question No. 6: "Can the legislature provide that the teachers' retirement fund and all other investment funds, which are not constitutional funds, or whose investment is controlled by the gift or will of some donor, shall be invested by the proposed central investment board?"

Answer to Question No. 1: The "land commissioners," so designated in our constitution, but not infrequently, under authority of sec. 23.01, Stats., referred to as "commissioners of the public lands" is a constitutional board or body, a creature of the constitution itself.

Sec. 7, art. X, Wis. Const., provides:

"Land commissioners. SECTION 7. The secretary of state, treasurer and attorney general shall constitute a board of commissioners for the sale of the school and university lands and for the investment of the funds arising therefrom. Any two of said commissioners shall be a quorum for the transaction of all business pertaining to the duties of their office."

Sec. 8 of the same article reads:

"Lands, how sold; payment. SECTION 8. Provision shall be made by law for the sale of all school and university lands after they shall have been appraised; and when any portion of such lands shall be sold and the purchase money shall not be paid at the time of the sale, the commissioners shall take security by mortgage upon the land sold for the sum remaining unpaid, with seven per cent interest thereon, payable annually at the office of the treasurer. The commissioners shall be authorized to execute a good and sufficient conveyance to all purchasers of such lands, and to discharge any mortgages taken as security, when the sum due thereon shall have been paid. The commissioners
shall have power to withhold from sale any portion of such lands when they shall deem it expedient, and shall invest all moneys arising from the sale of such lands, as well as all other university and school funds, in such manner as the legislature shall provide, and shall give such security for the faithful performance of their duties as may be required by law."

From the first of the foregoing quoted provisions of our constitution it will be observed:

(1) That the following named constitutional state officers, viz., secretary of state, treasurer, and attorney general constitute the board of commissioners; and

(2) The purposes of the creation of such board, are,
(a) For the sale of the school and university lands, and
(b) For the investment of the funds arising therefrom.

From the second of the above quoted constitutional provisions it will be noted that authority is thereby vested in the lawmaking body of the state to, among other things, prescribe by appropriate legislation the manner in which such funds shall be invested by the board.

I gather from your first question that your committee contemplates the recommendation of legislation: (1) creating a new board or department to be known as a central investment board or department; (2) prescribing that the land commissioners shall invest said funds only in such securities as the proposed central investment board may recommend, excepting investment in school district loans and United States bonds; and, (3) the repeal of existing statutes in conflict or inconsistent with such proposed legislation.

In my opinion such legislation cannot be accomplished without violating not only the letter but also the spirit of the above quoted constitutional provisions.

Our supreme court in the cases of State ex rel. Crawford v. Hastings, 10 Wis. 525, and State ex rel. Kennedy v. Brunst, 26 Wis. 412, unqualifiedly held that the legislature has no power to alter, impair or transfer to any other officer, board or department the powers and duties recognized as belonging or appertaining to officers created or perpetuated by the constitution at the time of its adoption, or by the constitution conferred or imposed upon constitutional
officers. In this connection see also *State ex rel. Sweet v. Cunningham*, 88 Wis. 81; *McCabe v. Mazzuchelli*, 13 Wis. 478; *State ex rel. Owen v. Donald*, 160 Wis. 21.

In the case of *State ex rel. Owen v. Donald*, supra, the court at page 66 said:

"It is very plain that the constitution made the three constitutional officers a board of commissioners for the administration of the university and school lands and the funds derived therefrom. Sec. 7, art. X, Const. * * * The board was made an independent entity, substantially an artificial person like a corporation, referable for its authority solely to the fundamental law, except as to some particulars, and not to the legislature. * * *" (Italics ours.)

In view of the foregoing I think it must be held that any legislation which tends to subordinate any of the constitutional powers or duties of the commissioners of the public lands to those of any other officer or board must fail of its purpose. Any unconstitutional disturbance of the commissioners of the public lands in either the control or administration of the property and funds which the constitution has charged them with must necessarily come to naught, and hence the conclusion that your first question must be answered in the negative.

Answer to Question No. 2: Likewise, and for the reasons assigned above, your second question is answered in the negative.

I fail to find even any constitutional intimation of authority for the legislation suggested. The constitution in sec. 8, art. X, in words as plain and certain of purpose and meaning as might be employed, says:

"* * * The commissioners * * * shall invest all moneys arising from the sale of such lands, as well as all other university and school funds, in such manner as the legislature shall provide."

I take it that a constitutional direction, imposition or duty charged upon a body which is a creature of the constitution itself may not, in whole or in part, be nullified or emasculated by legislative enactment. A duty to "invest moneys" must necessarily include the handling of the "funds" out of
which such investments are made, both as to principal and interest on the same.

Moreover, the same section of our constitution further provides that said commissioners "shall give such security for the faithful performance of their duties as may be required by law," plainly indicating a purpose on the part of the framers of our constitution to charge upon such commissioners an undivided duty to take into their possession and under their control, and so retain the same, all of such funds for investment purposes and to make due account of their administration thereof.

Answer to Question No. 3: I feel that for the reasons assigned for answers to Questions No. 1 and No. 2 above, this question must be answered in the affirmative.

Whatever may be the powers and duties of the commissioners of the public lands in respect to the handling and investment of the state school funds, the same may not by such commissioners be transferred or delegated to any other officer or board, even with legislative sanction or authority to do so.

Answer to Question No. 4: The plan here suggested is objectionable for the same reasons assigned in answers to preceding questions, and calls for a negative answer.

Answer to Question No. 5: This question is answered in the affirmative, except as to gifts where the donor requires or makes his gift conditional upon its being administered by some other person, board or body. The legislature can, of course, provide that no gift shall be accepted unless the same is to be administered by said proposed central investment board.

Answer to Question No. 6: Your sixth and last question is answered in the affirmative as to the teachers' retirement fund. The administration of the teachers' retirement fund is at the present time vested in a board which is purely a creature of legislative enactment. There are no constitutional restrictions upon the legislature preventing it from creating the proposed central investment board, or any other board, abolishing the present board administering said fund and transferring to the newly created board the powers and duties of the old board with such lesser or additional powers and duties conferred on the new board as
is by the legislature deemed advisable for the due administration of such fund.

It is impossible to express any opinion except as to investment funds specifically mentioned.

I sincerely trust that the foregoing will be of some assistance to you in your consideration of the questions involved.

HAM

Bonds—Municipal Corporations—Municipal Borrowing
—Subsec. (3), sec. 67.14, Stats., providing for referendum on petition of electors of question of whether county highway improvement bonds shall be issued pursuant to sec. 67.13, Stats., does not apply to county highway improvement bonds already legally authorized by sole action of county board under provisions of sec. 67.13 and subsec. (1), sec. 67.14, Stats.

October 8, 1928.

VICTOR M. STOLTS,
District Attorney,
Eau Claire, Wisconsin.

You state that at a legal meeting of the county board on May 5, 1928, resolutions were adopted providing for the issuing by sole action of the county board under the provisions of sec. 67.13, Stats., of $182,000 of bonds of Eau Claire county for the purpose of the original improvement of portions of the state trunk highway system and the county system of prospective state highways; that the amount of the issue is less than two fifths of one per cent of the assessed valuation of the county as fixed by the several local boards of review, and that there are no bonds issued under said section now outstanding; that on October 3 a petition stating that it was made pursuant to subsec. (3), sec. 67.14, Stats., and containing signatures numbering more than ten per cent of the number of votes cast in the county for governor at the last general election, was filed with the county clerk requesting the submission to the electors of the county at the general election in November of the question of whether the said $182,00 of highway im-
provement bonds authorized by said resolutions of May 5 shall be issued. You submit copies of the county board proceedings and of the body of said petition referred to.

You inquire whether said petition requires or permits the submission to the electors of the county at the ensuing general election of the question of the issuing of the said $182,000 of highway improvement bonds so authorized by the county board.

I think the question should be answered in the negative. The amount of the bond issue in question, being within the limitation of subsec. (1), sec. 67.14, Stats., is one which the law authorizes the county board to issue by its sole action, and the proceedings were complete on the adoption of the resolutions referred to by the county board on May 5, so that the bonds could have been issued by the chairman of the county board and the county clerk and sold by said officers and the county highway committee immediately thereafter, and the law does not contemplate that the issue and sale thereof may be suspended by a petition for a referendum.

Subsec. (3), sec. 67.14, Stats., under the provisions of which the said petition for a referendum purports to be filed, in my opinion does not apply to a bond issue already authorized by the county board where the amount is within two fifths of one per cent of the assessed valuation provided by subsec. (1) of said section, and applies only to a situation where the board fails to act at all in the matter of issuing bonds for highway improvements and ten per cent or more of the qualified electors of the county desire to have the question of whether the county shall issue bonds for such purpose submitted; in other words, that the purpose of said subsec. (3) is to enable the electors of the county to take the initiative in the matter of a highway bond issue if they so desire. It is clear, I think, that the filing of a petition for referendum under the provisions of that subsection does not stay or prevent the issuing of bonds already legally authorized by sole action of the board; but the filing of a proper petition under the said subsection would require the submission to the electors of the question of a further issue of bonds.

Since the petition filed is for the submission of the ques-
tion of issuing specific bonds already legally authorized and subject to immediate sale, it does not comply with subsec. (3), sec. 67.13, Stats., and does not require or permit the submission of any question to the electors at the coming general election.

*Education—Public Officers*—State superintendent of public instruction is not entitled to opinion to settle dispute between city attorney and board of education or other city officers or citizens as to proper method of filling vacancy on school board.

October 9, 1928.

JOHN CALLAHAN, State Superintendent,

*Department of Public Instruction.*

In your letter of September 25 you say it seems advisable that this department should be called upon to determine a controversy which has arisen in the city of West Allis over the question of authority to fill a vacancy caused in the board of education through the resignation of one of its members. You say the city attorney holds that it is the privilege of the city mayor to appoint some one to fill the vacancy and you submit the question apparently for the sole purpose of settling that controversy, which is between the city attorney of West Allis and its school board or some of its citizens.

You are advised that it is not the duty of this department to settle disputes and controversies between city officers or between certain city officers and citizens or employees of such city.

It appears from your statement that the city attorney has given an official opinion to the city officers as to the proper manner of performing their duties as such officers. That is clearly within his powers and official duties and if they do not like that opinion, their remedy is to go into court and have it settled in the manner provided by law. This department should not be called upon to settle such disputes and controversies, especially so when the city attorney, whose duty it is to advise them, has given an opinion on the subject.
If this were a question you had to decide officially, so it would be your official duty, and you were in doubt, you would have the right to secure an official opinion to aid you in performing that official duty, but I do not think that situation is involved.

TLM

Public Health—Sterilization—Under provisions of sec. 46.12, Stats., board of control may have inmates of certain institutions sterilized but sterilization is not authorized except as specified in said section.

October 10, 1928.

DR. R. C. Buerki, Superintendent,
Wisconsin General Hospital.

You ask for an opinion as to the legality of sterilization of both men and women, minors and adults who are not inmates of state institutions, but who voluntarily request sterilization of themselves. In the case of an adult, written consent for same is given, or if married, the consent of the other member of the family as well is obtained. If a minor, the written consent of both parents is given. You give an illustration of a girl of sixteen years of age with a mentality of nine and one-half years, where the mother consents and the father is dead and the girl is about to marry and her future husband consents to the procedure.

Personally I think the facts you have stated would justify the legislature in authorizing such sterilization and that it ought to be done, but I do not find any law at present that would authorize such an operation on the minor mentioned.

Sec. 46.12 with its subsections is the only law that I find giving express authority to perform such operations. You will notice that is confined to persons legally confined in the state institutions there described. That power is so specifically granted and so carefully limited and guarded I do not see how it could be said to grant power excepting in the cases there specified.

TLM
Elections—Absent Voting—Methods by which absent electors may register and vote under registration laws and those governing voting by mail.

October 10, 1928.

THEODORE DAMMANN,
Secretary of State.

In your letter of the 5th inst. you enclose a copy of a letter which you received from Frank Jenks, city attorney of Madison, wherein are set forth three specific requests from individuals living outside of Wisconsin for instructions which, when complied with, will permit such persons to vote at the coming general election in Madison, notwithstanding that they have not registered, that they do not intend to make a personal application for registration as required by the provisions of sec. 6.17, subsec. (2), Stats., and that it is not their purpose to swear in their votes under the provisions of sec. 6.44, Stats.

One of such persons is living at Mount Rainier, Maryland; another in Philadelphia, Pennsylvania; and the third in Washington, D. C. The stories of these three persons differ widely respecting length of absence from Madison, reasons for leaving the city, and on many other points. All assert, however, that they never voted except in Wisconsin and that the last time they voted they voted in the city of Madison; that they are only temporarily absent from Madison; and that when they left here it was, and ever since has been, their intention to retain their residence here. Many other evidentiary facts are stated by each in support of the claim of legal residence in Madison and the right to vote here.

In the situation described and detailed in the city attorney's letter the attorney general cannot, of course, undertake to pass upon the question as to whether or not any or all of such persons have a legal residence in Madison and are entitled to cast a vote here. The extent to which this office can go in such cases is to point out to you the statutory provisions, compliance with which may enable the elector to obtain what he is entitled to.

An "absent elector" has a choice of either of two ways of voting, viz.: (1) by swearing in his vote when not registered as provided by sec. 11.54, subsec. (2), which reads:
"Any elector who is not registered may swear in his vote by his affidavit, substantiated by the affidavit of two freeholders, as provided in section 6.44, except that the affidavit may be delivered to the election inspectors by either freeholder whose name appears thereon;"

or, (2) by registering under the provisions of sec. 6.17, subsec. (5) (which is below quoted), and then voting by mail as provided in secs. 11.54 to 11.68, inclusive, Stats. However, if the absent elector makes choice of the first method of voting he does not thereby accomplish registration and the process of swearing in his vote must be repeated every time he votes until he is duly registered by filing original and duplicate affidavit of registration.

Sec. 6.16, subsec. (2), Stats., prescribes the form of registration affidavit which must be substantially followed. Registration of an elector can be accomplished only by the filing of such affidavit.

Sec. 6.17, subsec. (2), Stats., provides:

"Applications for registration shall be made in person by the elector who shall be required to sign the original and duplicate affidavit."

The necessity for the signing by the elector of both an original and a duplicate affidavit of registration is disclosed in subsecs. (3) and (4), said sec. 6.16.

Notwithstanding the mandatory requirement of sec. 6.17, subsec. (2), that applications for registration shall be made in person by the elector, your attention is invited to subsec. (5) of the same section which prescribes that:

"Any elector who is more than fifty miles away from his legal residence may be registered prior to the close of registration before any election or primary in the following manner: He shall secure from the clerk of the municipality blank registration affidavits with suitable instructions, and shall appear before a notary public or other officer legally authorized to administer oaths, and have the original and duplicate registration affidavits properly made out and signed by the elector. The notary public or other officer administering the oath shall sign his name on the line for the signature of the registration officer and affix his seal thereto. The original and duplicate shall be returned to the clerk of the municipality, and shall reach him not later than the close of office hours on the last day of
registration prior to the election or primary in order for
the elector to be registered for that election or primary.”

If the elector, therefore, procures his registration in the
manner provided for in sec. 6.17, subsec. (5) he may then
vote by mail as provided for by secs. 11.54 to 11.68, in-
clusive, Stats.

I trust that the foregoing will be sufficient for you to
answer the questions submitted in your election correspond-
ence.

HAM

Elections—When territory is annexed to city within ten
days prior to election, electors residing in such attached
territory are entitled to vote in city to which they are at-
tached, under provisions of sec. 6.02, subsec. (3), Stats.

October 12, 1928.

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

You refer to sec. 6.01, Stats., which requires that the
elector must reside in the election district where he offers
to vote ten days, and you say that certain territory now
part of the township of Somers in your county is in process
of being annexed to the city of Kenosha, and you say by
election day it will become a part of the city. You ask
where the electors of that territory will vote.

Your attention is called to the provisions of sec. 6.02,
subsec. (3), Stats., which expressly provides that the elec-
tors residing in such territory shall be entitled to vote in
the city, town or village to which such territory is annexed.

TLM
Bridges and Highways—Signs—County highway commissioner has power to remove signs placed within limits of state trunk highways, even though such highway is within corporate limits of town, city or village.

October 13, 1928.

HIGHWAY COMMISSION.

In your letter of September 27 you state that in a number of cities advertising signs have been placed within the limits of the state trunk highways. You inquire whether under sec. 86.19, Stats., a county highway commissioner may order such signs removed.

Subsec. (1), sec. 86.19 provides as follows:

“No sign shall be placed within the limits of any public street or highway, except such as are necessary for the guidance or warning of travel. It shall be the duty of the county highway committee in each county to cause the removal of all other signs from the state and county trunk highways, and the duty of the town, village and city officers to cause the removal of such other signs from all other roads and streets within their respective towns, villages and cities. Any sign on any public street or highway in violation of this section after June 30, 1925, shall be removed therefrom by the officers responsible for the maintenance of such street or highway, or by any state highway employee, and disposed of in such manner as they may deem advisable.”

The statute imposes upon the county highway committee the duty of removing signs from the state and county trunk highways, and it is the duty of the town, village and city officers to cause the removal of such other signs from all other roads and streets within their respective towns, villages and cities. It thus clearly appears the county highway committee is charged with the duty of removing signs on state and county trunk highways, even though such highways may be within the corporate limits of a town, village or city. If the statute were ambiguous in this respect, the further provision that any sign on any public street or highway in violation of sec. 86.19 after June 30, 1925, “shall be removed therefrom by the officers responsible for the maintenance of such street or highway” clears up such ambiguity.

It is apparent that the county is responsible for the
maintenance of a state trunk highway within a city up to the point where the houses average less than 200 feet apart. XV Op. Atty. Gen. 175. Since the county is responsible for such maintenance, under the plain terms of the statute, the county highway committee not only has the power, but is charged with the duty of removing such signs as may be placed within the limits of such state trunk highway.

SOA

Elections—Ch. 510, Laws 1927, dropped from sec. 6.35, subsec. (2), Stats., provision for petition for extension of time for opening and closing of polls in cities of fourth class, towns and villages. Subsec. (3), giving same right to extend time, is inoperative.

October 15, 1928.

Paul B. Conley,
District Attorney,
Darlington, Wisconsin.

You refer to sec. 6.35, Stats., and ask what is necessary for the town board of Wiota in your county to do to have the polls closed at future primary elections at 5:30 o'clock. You say the provisions of subsecs. (1) and (2) are clear but subsec. (3) refers to a petition as provided for in subsec. (2) but subsec. (2) does not contain any reference to a petition.

You will notice by consulting prior statutes which were in force at the time subsec. (3) was enacted, that subsec. (2) had in it a provision that the city, town or village might, upon petition, extend the time during which the polls should remain open to an hour not earlier than six o'clock in the morning nor later than eight o'clock in the evening. Subsec. (2) was amended by the last legislature, dropping out the provision for a petition and leaving the power to the city, town or village to extend the time without such a petition. I do not think now an extension could be made under the provisions of subsec. (2) because that provision is based upon the filing of a petition and the filing of that petition in itself extended and changed the time of opening and closing polls. You will notice that to have
that effect, it had to be done in the manner provided by sub-
sec. (2), which now has no provision for filing a petition, 
so I would agree with you that the time would not be 
changed under subsec. (3) and that provision is now in-
operative.
TLM

Agriculture—Agricultural Societies—Stock of agricul-
tural society, constitution of which provides that such stock 
shall not be assessed for any purpose whatsoever, is not 
assessable until constitution has been amended in such man-
ner as to provide for such assessment.

W. A. DUFFY,
Commissioner of Agriculture.

With your letter of September 29 you enclose copy of 
constitution of the Jefferson County and Rock River Val-
ley Agricultural Society as amended March 21, 1888. You 
request an opinion on the following questions:

(1) Is the stock of the Jefferson County and Rock River 
Valley Agricultural Society assessable, and if so, to what 
extent?

(2) What procedure must be followed in order to com-
pel the members of the Jefferson County and Rock River 
Valley Agricultural Society to surrender their stock, in 
case such members are unwilling to give the society fi-
ncial support by paying an assessment on their stock?

You do not state whether the Jefferson County and Rock 
River Valley Agricultural Society is a corporation. The 
secretary of state has informed me that no articles of incor-
poration of the society are on file in his office. Possibly 
the society was incorporated under ch. 60, R. S. 1878, in 
which case the articles of incorporation would be on file in 
the office of the register of deeds of Jefferson county.

It would seem that the answer to your question is found 
in article 16 of the constitution of the society, which pro-
vides:

"The stock of this society shall not be assessed for any 
purpose whatever."
I can see no way in which an assessment can be levied so long as the constitution remains in its present form.

The constitution of the society contains the further provision:

"The constitution may be altered or amended at any annual meeting by the two-thirds vote of the stockholders present voting."

Undoubtedly an amendment can be adopted by the society authorizing the assessment of stock. In case an amendment is adopted, the members of the society will be in a position to take all necessary steps in order to collect the assessment.

SOA

Public Officers—County Board—County Highway Committee—Sec. 66.11, subsec. (2), Stats., held not to prevent member of county board from being elected or appointed member of county highway committee under provisions of sec. 82.05.

October 15, 1928.

Martin Gulbrandsen,
District Attorney,
Viroqua, Wisconsin.

You ask if a member of the county board of supervisors is eligible to the office of a member of the road and bridge committee under sec. 82.05, Stats.

You say you have read the opinions of the attorney general in XV Op. Atty. Gen. 318 and XVI Op. Atty. Gen. 372 but neither of these opinions takes into consideration sec. 66.11, which provides in subsec. (2):

"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 time has been created by or the selection to which is vested in such board or council."

It has been the construction of this department that sec. 66.11 (2) did not apply to the appointment of committees and under the provisions of sec. 82.01 the county highway committee is a committee appointed by the county board.
with the duties specifically prescribed in sec. 82.06, except as modified by sec. 82.05 (3), which makes the town chairman of each town ex officio a member of such highway committee as to highway construction in his town.

I think that has been the very general construction placed upon that provision by county boards and county officers and county boards have not permitted others than county board members to be members of such highway committee.

If sec. 66.11 (2) were to be held to apply to the appointment of committees or to the creation and appointment of committees, then no member of the county board could be appointed on any of such committees, which, of course, would defeat the very theory and purpose of the provisions of the statutes authorizing the appointment of committees in the transaction of the business of the county. I do not think the legislature had in mind in the enactment of sec. 66.11 (2) that it would apply to the creation and appointment of committees of the county board.

TLM

Contracts—Public Officers—Board of Appeals—City Plan Commission—Person holding contract from city or from school board for public work is not prohibited under malfeasance statute from serving as member of appeal board created in certain zoning ordinance; neither is architect nor contractor doing public contract work with city barred from occupying position on city plan commission.

October 15, 1928.

FRANK B. KEEFE,
District Attorney,
Oshkosh, Wisconsin.

You say the city of Oshkosh has adopted a zoning ordinance which creates a board of appeals to pass upon all matters relating to exceptions to the construction of buildings in prohibited areas and you ask if an individual who accepts contracts from the city and from the school board for public work is prohibited under the malfeasance statute from serving as a member of the appeal board.
The statute provides for a city plan commission which has supervision over all plats, the location of public buildings, the location of monuments, etc. You inquire if an architect or a contractor doing public contract work with the city of Oshkosh is barred from occupying a position on the city plan commission.

You are advised that both of your questions should be answered in the negative.

TLM

Municipal Corporations — Towns — Fire Protection — Question of right of towns and city to enter into agreement to have city purchase fire equipment to be paid for by city and to be used for fire protection both in city and in towns is without express statutory authority. Sec. 60.29, subsec. (18), Stats., does not cover such situation.

October 15, 1928.

J. E. Kennedy,

Deputy Insurance Commissioner.

You refer to the opinion of this office, XVII Op. Atty. Gen. 437, holding that a town has no power to enter into an agreement with another town or city to purchase and maintain for use of the town or towns and city jointly fire fighting equipment, and you desire now to be advised if it would be lawful for a town to appropriate expense money for fire protection, such towns entering separately into an agreement with the city of Edgerton, under the terms of which agreement Edgerton will purchase additional fire equipment and will agree to give these towns fire protection and service, for which each town will pay an agreed price.

The language of sec. 60.29, subsec. (18), Stats., which gives towns the power to provide protection from fire by the purchase, use and maintenance of fire engines and other necessary apparatus, is specific. If it had stopped with the language, "to provide protection from fire," then, clearly, the town could have provided that protection in any way it saw fit, but it goes on to prescribe with particularity how that protection should be furnished—"by the purchase, use and maintenance of fire engines and other necessary ap-
paratus." I do not see any power in the city to purchase fire apparatus to go into the business of extinguishing fires in surrounding towns. I think the most serious problem would be the want of power on the part of the city to purchase fire apparatus for that purpose. There is nothing in subsec. (18) referred to that seems to confer any such power on the city to make such an expenditure.

In the absence of express statutory provision authorizing it, the plan suggested cannot be legally followed.

TLM

Appropriations and Expenditures—Counties—Courts—Fees of witnesses, reporters and those of district attorney pro tempore in John Doe proceeding are properly payable out of county funds.

October 17, 1928.

GLEN D. ROBERTS,
District Attorney,
Madison, Wisconsin.

In our communication you state that on September 26 one, Conrad Hansen, a resident of Dane county, appeared before S. B. Schein, judge of the superior court of Dane county, and made oath to three complaints, copies of which you enclose.

The complaints, in short, allege violations of the corrupt practices act by one John Doe.

You also state that on October 2, 1928, you personally swore to a complaint before the superior court of Dane county, and you enclose a copy of the same, the gist of which is that one John Doe, as secretary of a campaign committee, filed a financial statement which was false and incorrect.

Your communication further reads as follows:

"Upon my application that I was unable to handle said matter, the court, by order, appointed special counsel to assist in determining the truth or falsity of said complaints, and to that end various witnesses have been called to testify as to information within their knowledge touching on said matter."
And the next paragraph puts up the concrete question that you desire answered, which is:

"The county treasurer now wishes to know if said proceedings are regular and if the expenses connected therewith, namely, witness fees, reporters' fees and special counsel fees are properly out of county funds."

Sec. 59.47, subsecs. (1) and (2), Stats., as far as applicable here, under "District attorney; duties" provides:

"The district attorney shall:

(1) Prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party; * * *

(2) Prosecute all criminal actions, except for common assault and battery or for the use of language intended or naturally tending to provoke an assault or breach of the peace, before any magistrate in his county, * * * when requested by such magistrate; and upon like request, conduct all criminal examinations which may be had before such magistrate, and prosecute or defend all civil actions before such magistrates in which the county is interested or a party."

It was your duty, if you were able, to conduct those examinations.

Sec. 59.44, subsec. (1), provides as follows:

"District attorney pro tempore; assistants in criminal and civil cases. (1) When there is no district attorney for the county, or he is absent from the court, or has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged and for which he is to be tried, or is near of kin to the party to be tried on a criminal charge, or is unable to attend to his duties, the circuit court, by an order entered in the minutes stating the cause therefor, may appoint some suitable person to perform, for the time being, or for the trial of such accused person, the duties of such district attorney, and the person so appointed shall have all the powers of the district attorney while so acting."

You will notice that the above section provides that the circuit court may appoint some suitable person to perform, for the time being, your duties.

This is substantially what the superior court of Dane county has done as per your communication.

Ch. 136, Laws 1917, sec. 12, reads as follows:
"The superior court of Dane county shall have jurisdiction equal to and concurrent with the circuit court of Dane county in all cases of crimes and misdemeanors arising in said county, * * *.”

The provision of the statutes quoted above, providing for the appointment of counsel to assist the district attorney, is applicable to the municipal court of Milwaukee county and the judge thereof. Biemel v. The State, 71 Wis. 444.

It is certainly applicable to the superior court of Dane county.

It is your duty to appear before the magistrate in a John Doe case the same as any other and hence another person can be appointed to perform your duties. State ex rel. Long and another v. Keyes, 75 Wis. 288.

The first part of your question, tersely stated, “Are the proceedings regular?” is answered in the affirmative.

The second part of your question, simply stated, is, “Are the expenses called fees, including the fees of the person appointed district attorney pro tempore, properly payable out of county funds?”

The counsel to assist the district attorney is paid in the manner provided by law for the payment of counsel for indigent criminals. See the last part of 59.44 (2). County of Dane v. Smith, 13 Wis. 585; Carpenter v. County of Dane, 9 Wis. 274.

That the county is liable to pay counsel to assist the district attorney has been passed upon directly on several occasions by the supreme court. Wiesbrod v. Board of Supervisors of Winnebago County, 20 Wis. 440; Biemel v. The State, 71 Wis. 444; Bliss v. State, 117 Wis. 596; Green Lake County v. Waupaca County, 113 Wis. 425; Rock v. Ekern, 162 Wis. 291.

That witness fees and reporters’ fees are payable out of the county funds is elementary and hence the second part of your question is already answered from the reading and in the affirmative.

JWR
Taxation—Tax Sales—Tax certificates for general taxes and certificates for delinquent drainage taxes may be sold separately, as provided for by sec. 89.37, Stats.; sec. 75.34 held not to apply to special drainage assessment certificates.

**FULTON COLLIPP,**

*District Attorney,*

Friendship, Wisconsin.

You ask whether general tax certificates and drainage certificates held by the county and issued on the same land can be sold separately, that is, if the county can sell the general tax certificate to a person who refuses to take the drainage certificate.

I think your question is answered in the affirmative by sec. 89.37, Stats., and I do not think sec. 75.34 changes that rule, for that section evidently relates to general tax certificates for different years.

Your attention is called to an opinion in XVI Op. Atty. Gen. 833, which I think covers the general principles of your question.

TLM

Public Officers—School District Clerk—United States Government Farmer—Person holding position of government farmer on Indian reservation is not officer under United States and therefore is eligible to hold office of school district clerk.

**G. ARTHUR JOHNSON,**

*District Attorney,*

Ashland, Wisconsin.

You present the question whether or not a person who holds the office of government farmer on the Bad River Indian reservation is eligible to the office of district school clerk in view of the provisions of sec. 3, art. XIII, Wis. Const.

“No member of congress, nor any person holding any office of trust or profit under the United States (postmasters
excepted) * * * shall be eligible to any office of trust, profit, or honor in this state.”

It becomes necessary to ascertain whether or not the position of government farmer in an Indian reservation constitutes “an office of profit or trust under the United States.” Par. [2], art. II, U. S. Const., prescribes the manner in which officers of the United States shall be appointed. It declares that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Offices, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

In the case of United States v. Germaine, 99 U. S. 508, 511, the court pointed out that the term “heads of departments” did not refer to “inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments.”

We will now turn to an examination of the sections of the statutes under which a government farmer in an Indian reservation is appointed. Sec. 13, title 25, United States Code, makes provision for expenditure by the bureau of Indian affairs for “employment of * * * farmers * * * and other employees.”

Sec. 49, Title 25, sets forth the qualifications of farmers and limits their salary to $50 a month, unless such farmer procures and files a prescribed certificate of competency. After an examination of these two sections it becomes apparent that the position of government farmer does not come within the federal constitutional concept of “officer,” and accordingly such position is not included in the prohibition found in sec. 3, art. XIII, Wis. Const.

AJM
Automobiles—Law of Road—Intoxicating Liquors—Order revoking automobile driver’s license on ground that licensee operated motor vehicle while under influence of intoxicating liquors and providing that no license shall be issued to such licensee for period of one year is irrevocable, and no new license can be issued to such person during such year upon recommendation of judge or anyone else.

October 25, 1928.

Theodore Dammann,
Secretary of State.

You state that one A, who resides at Janesville, was convicted in the municipal court in that place on February 25, 1928 for driving an automobile while intoxicated; that the penalty imposed was a fine of $100 or six months in jail and the court recommended the revocation of his operator’s license, No. 546646, and that a new license should not be issued to him for a period of one year; that upon such recommendation your department revoked his license for a period of one year from the date of his conviction.

You enclose a letter received from an attorney at Janesville, together with thirty-five copies of affidavits from members of the police department, accompanied by a note from the municipal judge asking that A’s license be restored to him. You inquire whether you have the power to restore A’s license upon these recommendations and, if not, whether a license may be restored prior to the period of termination of revocation under any conditions and, if so, by whom and how.

Sec. 85.33, subsec. (10), provides that under certain conditions prescribed therein “the secretary of state shall upon recommendation of any court of record revoke any motor vehicle operator’s license without any refunding of the fee paid for such license, and the order of revocation may further direct that no new license shall be issued within a stated period not more than one year thereafter. During such period no such license shall be issued to such licensee.”

One of the reasons for which a license may be revoked is for the conviction of the licensee for operating a motor vehicle while under the influence of intoxicating liquor. Subsec. (11) of said section contains the following:
“Whenever any such licensee shall have been convicted in a court of record for operating a motor vehicle while under the influence of intoxicating liquor, * * * the judge of said court may recommend the revocation of the license of such person for such period as is provided for in subsection (10). The court, or clerk thereof, shall within twenty-four hours after such conviction forward to the secretary of state upon blanks furnished for that purpose, the name of the person convicted, his address, the date of conviction, the license number, violation or violations of which convicted, the name of the complainant, the penalty imposed and the period of revocation recommended.”

You will note that in subsec. (10) it is expressly provided:

“During such period no such license shall be issued to such licensee.”

This is a mandate of the statute which cannot be violated. I am therefore constrained to advise you that you have not the power to restore A’s license upon the recommendations submitted to you which you have mentioned in your letter. A was convicted of operating a motor vehicle while under the influence of intoxicating liquor and the judge recommended that his license be revoked and that he should not receive a new license for a period of one year. Thereupon you revoked the license and ordered that no license should be issued to him for a period of one year. This cannot be changed. There is no way in the law by which such revocation may be abrogated before the expiration of the year.

JEM

**Bridges and Highways**—Whether construction of bridge structures over natural channels of river constitutes single project eligible to construction with state aid under provisions of sec. 87.04; Stats., is primarily question of fact for state highway commission to determine.

Stated facts examined and conclusion arrived at that commission may properly find that project in question is single and eligible to construction under said section.

**October 26, 1928.**

**HIGHWAY COMMISSION.**

You have submitted blueprints and other data in a bridge reconstruction project over the Rib river in the vil-
lage of Marathon, Marathon county, on state trunk highways Nos. 107 and 29, from which it appears that the river divides into two separate natural channels at the crossing of said highways, both of which channels are bridged by old bridges connected by a roadway constructed on an island formed by the two channels and both of which old bridge structures are required to be replaced or reconstructed; that the old bridge over the south channel is 150 feet long and the one over the north channel is 170 feet long; that a short distance below the roadway connecting the two bridge structures proper, the two channels of the river are connected by a cross stream bed and the two channels come together as one stream a considerable distance farther down the river.

You ask whether reconstruction can be considered as one project and eligible to construction under the provisions of sec. 87.04, Stats.

Confirming an oral opinion given you some time ago, you are advised that while the question you ask is primarily one of fact for the commission to determine if the county board petitions for a reconstruction under the provisions of said sec. 87.04, it is my opinion that it may properly be found that the project is single and therefore eligible to construction under said section as a bridge necessarily more than 300 feet long. See XIV Op. Atty. Gen. 362, 363, in which an entirely different situation was discussed but where it was said:

"This opinion is confined to the facts as stated. I do not want to be understood as saying that there may not be situations (such as where a stream divides into two or more natural channels with solid ground between the channels on which a roadway may be constructed as a part of the entire project of bridging the stream) where the construction or reconstruction of bridges over the several channels may not be considered as one bridge within the statute referred to. As already indicated each application for state aid under the statute must be considered and decided on its own peculiar facts and with reference to the precise situation involved."

I think that the physical conditions involved in your inquiry are exactly those referred to in the quotation from the former opinion.

FEB
Elections—Corrupt Practices—Promise by candidate for office of register of deeds to voters to appoint certain person as deputy in case of his election is violation of sec. 12.18, Stats.

October 26, 1928.

FRANK B. MOSS,
District Attorney,
Baraboo, Wisconsin.

In your communication you state that an independent candidate for a county office to be voted for at the coming election in your county has authorized and circulated a sample official state and county ballot at the foot of which is found the following printed statement:

"A vote for Harold Boyd for register of deeds means that Miss Bernice Johnson will be retained as deputy which will insure the same efficient service as in the past. To vote for me mark a cross after my name in the INDEPENDENT column as indicated above.

"Authorized and circulated by Harold Boyd, Baraboo, Wis."

You state that you have been requested to give a written legal opinion as to whether this literature is in violation of the corrupt practices act, more particularly under sec. 12.18, Stats.

Said section reads thus:

"No person shall, in order to aid or promote his nomination or election, directly or indirectly, himself or through any other person, appoint or promise to appoint any person, or secure or promise to secure or aid in securing the appointment, nomination or election of any person to any public or private position or employment, or to any position of honor, trust or emolument. Nothing herein contained, however, shall prevent a candidate from stating publicly his preference for or support of any other candidate for any office to be voted for at the same primary or election; nor prevent a candidate, for any (office in which the person elected will be charged with the duty of participating in the election or the nomination of any person as a candidate for any office, from publicly stating or pledging his preference for or support of any person for such office or nomination."
The provision as expressed in the first sentence of this statute is broad enough to clearly apply to the case submitted by you. The inhibition applies in case of a public office as well as to a private position or employment or any position of honor, trust or emolument. This certainly includes the position of deputy register of deeds, which is expressly designated as an office in our statute. The only question which must be given serious consideration is whether the case comes within the saving clause of the statute, which provides:

"Nothing herein contained, however, shall prevent a candidate for any office in which the person elected will be charged with the duty of participating in the election or the nomination of any person as a candidate for any office, from publicly stating or pledging his preference for or support of any person for such office or nomination."

It is the opinion of this department that the case does not come within the saving clause, and that the circulation of the sample ballot submitted is in violation of law. You will note that in the first sentence the words "appointment, nomination, or election" are all three used, while in the latter provision the word "appointment" is left out while the words "election" or "nomination" are used. This prevents a construction given to the word "election" broad enough to include appointment and it follows that a promise to appoint to an office is not taken out of the statute by this exception.

JEM
Elections — Citizenship — Public Officers — Governor
—Prisons—Pardons—Pardon power of governor covers all offenses, after conviction, except treason and cases of impeachment.

Pardon may be granted to alien, after conviction, when sentence and judgment of court prescribe pecuniary penalty, but when penalty has been paid into public treasury it may not be restored through pardon power.

Legislature may prescribe only such regulations as pertain to manner of applying for pardons, and in situations wherein legislature has failed to act, governor himself may prescribe same.

October 26, 1928.

HONORABLE FRED R. ZIMMERMAN,
Governor.

In your letter of recent date you requested to be advised whether or not you have jurisdiction and power to grant a pardon on an application therefor under the following facts and circumstances, viz.:

The applicant, an alien, on the 23d day of April, 1928 in the circuit court for Buffalo county, Wisconsin, pleaded guilty to the crime of grand larceny and was sentenced to pay a fine of $500 and costs amounting to $154.61, and in default of such payment to be committed to the county jail of La Crosse county until the fine and costs be paid, not exceeding, however, six months from 12 o’clock noon on the day of the sentence, which was the same day he pleaded guilty; that he immediately paid said fine and costs and has been at liberty since that time; that he now asks for an absolute pardon, setting forth in his application that although he has paid said fine and costs he still suffers from the stigma of the sentence and the consequences that flow from the sentence; that he is an alien of Canadian birth and has been notified by the United States department of labor that he must leave this country within a very short time or be forcibly deported; that, except as hereinbefore stated, he has lived an exemplary life, is engaged in business in La Crosse, where he desires to remain with the hope of becoming a United States citizen, and intends to make application to be naturalized as such; that he has made full and complete restitution of the money involved and has
the good will of the people of La Crosse county with whom he comes in contact.

Upon the foregoing you are advised:

Aliens domiciled in a country other than the one whose subjects they are owe a temporary allegiance to the government of their domicile. They are subject to the laws of that government, and therefore when guilty of violation of such laws they are entitled to the benefits of executive clemency exercised through the pardoning power vested in the governor. 24 Am. & Eng. Encyc. of Law (2d ed.) 570; Carlisle v. United States, 83 U. S. (16 Wall.) 147.

Your authority for granting pardons is found in sec. 6, art. V, Wis. Const. So far as is here material, it reads:

"The governor shall have the power to grant * * * pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. * * *"

From a reading of the foregoing quoted constitutional provision it will be observed that (except in cases of treason and impeachment) there are no limitations or restrictions placed upon the power granted, save and except that in the exercise of such grant of power the same shall be "subject to such regulations as may be provided by law relative to the manner of applying for pardons."

The only statutory regulations which the legislature has seen fit to enact "relative to the manner of applying for pardons" are contained in secs. 57.08 to 57.10, Stats., inclusive. Such statutory regulations do not prescribe "the manner of applying for pardons" except in the instances set forth therein. Sec. 57.08, Stats., provides:

"All applications for pardons of any convict serving sentence of one year or more, except for pardons to be granted within ten days next before the time when the convict would be otherwise entitled to discharge pursuant to law, shall be made and conducted in the manner hereinafter prescribed, and according to such additional regulations as may from time to time be prescribed by the governor."

Clearly the application under consideration does not come within the provisions of such quoted section, and since the
legislature has not prescribed any other or further regulations on the subject of the manner of applying for pardons, you may proceed in the matter of the consideration of the instant application in such manner as you may deem advisable.

The instant application discloses that the punishment visited upon the applicant by the sentence and judgment of the court was a pecuniary penalty only, coupled with the usual alternative of a specified imprisonment in the event of default of payment of such penalty; that the penalty imposed was immediately paid in full; and that thereupon the applicant was discharged from custody of the law.

The constitution cited and quoted above grants to the governor the power to pardon for all offenses, after conviction. The application sets forth the conviction. The fact that the court inflicted pecuniary penalty only does not destroy the pardon power.

While it is true that a full or absolute pardon "absolves the party from all the legal consequences of his crime and his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided," and notwithstanding that the power to grant pardons is generally interpreted as inclusive of the power to remit fines and penalties, the pardoning power, however, does not embrace the power to restore the fine or penalty after it has been paid into the treasury of the state or to the persons or body entitled by law to receive the same. 24 Am. & Eng. Encyc. of Law (2d ed.) 551, 570, 571.

Under the facts and circumstances related above the governor has full and complete jurisdiction and power to grant the applicant a pardon, prescribing his own regulations relative to the manner of applying therefor.

HAM
Indigent, Insane, Etc.—Straight jackets and anklets used in hospital for insane are not public charge against county or estate of any patient; they are part of equipment of institution. 

Frederick C. Aebischer,  
District Attorney,  
Chilton, Wisconsin.

You have submitted the question whether straight jackets and anklets required in state institutions such as an asylum in the care and treatment of insane patients may be charged against your county by the Waukesha county asylum and county home.

You state that in your opinion straight jackets and anklets used in such institutions do not constitute clothing within the meaning of the statute, but on the contrary constitute equipment to be used by the hospital or asylum which should be charged to general expenses rather than against the insane person's estate or against the county from which the insane person was committed.

We agree with your conclusion. Straight jackets and anklets are a part of the equipment in the institution. They are not purchased and given to any definite inmate like clothing. It is necessary to have these straight jackets and anklets to use on all such patients as require them.

You are therefore advised that a charge for such equipment is not a proper charge against an inmate of your county.

JEM

Bonds—Public Officers—County judge is not required by statute to file official bond.

George Geffs,  
District Attorney,  
Janesville, Wisconsin.

You have inquired by telephone whether under the present statute the county judge is required to file an official oath when he assumes the duties of his office. Formerly the statute expressly required an official oath to be given
by county judges. This statute, sec. 2442, Stats. 1917, was repealed by sec. 7, ch. 93, laws of 1919. The reviser’s note to said section as given in the reviser’s bill, No. 2, S., concerning this sec. 7 is as follows:

“Note: If the preceeding sections proposed by this bill shall be enacted the sections here proposed for repeal will be superseded. Proposed new section 2564 will provide the form of oath for all judges while proposed new section 19.01 will provide a place for filing every such oath.”

It thus appears that provision was made in the bill for the filing of an oath for a county judge but no provision was made in any section for the filing of a bond. I find no provision in any statute requiring the county judge to file an official bond. You are therefore advised that he is not required to do so.

JEM

Real Estate—Plats—Map drawn on scale two hundred feet to one inch is not entitled to be recorded under sec. 236.02, Stats.

October 29, 1928.

JAMES R. HILE,
District Attorney,
Superior, Wisconsin.

In your letter of October 19 you inquire whether under sec. 236.02, Stats., a plat is entitled to be recorded which is drawn on a scale of two hundred feet to one inch.

It is the opinion of this department that the plat to which you refer is not entitled to be recorded. Sec. 236.02 provides:

“All maps shall be drawn on a scale of not less than one hundred feet to one inch, * * *”

The legislature has thus set up a minimum standard as to the scale on which a map shall be drawn. The statute must be interpreted as if it read—“all maps shall be drawn on a scale of not less than one inch to one hundred feet.”

Clearly, a map which is drawn on a scale of two hundred feet to one inch is drawn on a smaller scale than that permitted by the statute.

SOA
Public Officers—County Highway Commissioner—Vacancies—When vacancy in office of county highway commissioner is filled by county board, office terminates on first Monday of January of second year next succeeding appointment. If such vacancy occurs while county board is not in session, it is filled by county state road and bridge committee; such term expires first Monday of January next succeeding such appointment; his successor should be appointed by county board at its first regular meeting next succeeding such appointment, to take office on Tuesday following first Monday in January next succeeding and hold for full term.

October 30, 1928.

E. L. Kennedy,
District Attorney,
Rhineland, Wisconsin.

You ask for an opinion on the following question:

“Our county highway commissioner was elected by the county board on May 3d, 1927, to finish the unexpired term of the county highway commissioner who had resigned, and at the regular November meeting of 1927 this highway commissioner who was elected on May 3d was re-elected to serve as county highway commissioner.

“Does such election of May 3d constitute a regular term under the statute so that it will not be necessary for the commissioner to be re-elected in November, 1928, or from this set of facts is it necessary for the commissioner to be voted upon in this fall election?”

I think your question is answered by the opinion of the attorney general in X Op. Atty. Gen. 1191.

You will notice that sec. 17.22, Stats., specifically provides that the term of any person appointed by the county board to fill a vacancy in the office of county highway commissioner shall terminate the first Monday of January of the second year next succeeding the appointment. Subsec. (2) of that section provides that vacancies in offices of officers appointed by the county board occurring when the board is not in session shall be filled in the manner and for the terms there specified. Par. (b) says:

“In the office of county highway commissioner, by appointment by the county state road and bridge committee.
A person so appointed shall hold office until the first Monday of January next succeeding his appointment, and his successor shall be appointed by the county board at its first regular meeting next succeeding such appointment and shall take office on the Tuesday following the first Monday of January next succeeding and shall hold office for a term as prescribed in subsection (1)."

So that in every case where the appointment is made by the county board whether for a new or full term or to fill a vacancy the appointment "shall terminate the first Monday of January of the second year next succeeding the appointment," but if a vacancy occurs when the board is not in session, such appointment is filled under par. (b) by the county road and bridge committee until the first Monday of January next succeeding his appointment and the county board makes a regular appointment or election at its first regular meeting next succeeding such temporary appointment and the person chosen or appointed by the board takes office on the following first Monday of January and holds for a full term of two years the same as if regularly elected or appointed at the expiration of the regular term.

That seems to be the clearly expressed intent of the legislature, and I do not think it would make any difference whether the motion or election or appointment was in form for a particular term or to expire at a particular time, for the statute expressly declares the effect in each case and controls the form of the election or appointment. If he was re-elected at a time when his term had not expired, I think that election would be absolutely a nullity and would not change in any way the term for which he was originally elected, which would be two years.

Applying that rule to your question, I should say the election of May 3d constitutes a regular term under the statute, so that it will not be necessary for the commissioner to be re-elected in November, 1928.

TLM
Indigent, Insane, Etc.—City, not county, is liable for expenses incurred in hospital in case of ill poor person who was taken there by city authorities and who was not under arrest, until after he had recovered and was discharged from hospital.

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

You have submitted the following statement of facts as a basis for an official opinion:

"On March 14, of this year a man shot a girl and then turned his revolver on himself. He was picked up by an ambulance and taken to a local hospital where the city physician attended to his wounds and gave him such other medical attention as he needed. His condition was quite serious and he was not expected to live, however, he continued to linger and two days later the head nurse at the hospital called the police, stating that this man was being threatened with physical violence by people outside of the hospital and they requested the local police to send a guard to the hospital to protect him from outsiders and also prevent him from completing the suicide which he had attempted. The police were short of men that evening and called me and requested advice as to what should be done. I stated that if they could not provide guards, then perhaps the sheriff could employ deputies for that purpose. Guards were placed in the room and in a few days it appeared that this injured man would recover. When he had recovered so that he could be taken to the county jail, he was served with a warrant which had been prepared and his case was thereafter disposed of.

"The injured person was a resident of the city of Eau Claire, but was without means to pay his hospital bill and after his case had been disposed of, the hospital filed a bill with the county which was composed of the following items: twelve days' board and room; use of operating room; X-ray picture; special nurse; drugs, dressing and board of guards. The county board after considering the bill, disallowed all of it, except as to the board for guards."

You inquire whether the city or the county is liable for this hospital bill.

I understand your county is under the township system. Sec. 49.01 provides for the support of indigent by the common council of the city in which they are found who have
a lawful settlement therein. In the case of *Patrick v. Town of Baldwin*, 109 Wis. 342, our court held that the municipality or county is not liable upon an implied contract for the care given to a poor person unless such expense was incurred at the instance of the officer of the municipality.

In IV Op. Atty. Gen. 1015 it was held that the municipality is not liable to a physician who attends a poor person unless upon prior order of the proper authorities. In XIII Op. Atty. Gen. 123 it was held that Burnett county was not liable to pay the hospital bill of an indigent pauper where treatment was given by a hospital in Polk county without order or direction from the county authority of Burnett county. Under these authorities it is clear that the county is not liable for the expense incurred at the hospital. No order was given by any county officer to provide for these services. The man was not arrested until after he had become well and the furnishing of the guards to protect the man was not in any way an arrest but rather done for the convenience of the hospital. That fact could not create a liability for the county.

On the other hand, the officers and employes of the city took this person to the hospital and incurred the expense for him. You are therefore advised that it is the city of Eau Claire and not the county of Eau Claire that is liable for these expenses.

JEM
Appropriations and Expenditures—School Fund Income—Taxation—Income Taxes—Moneys in common school fund income prior to January 1, 1928 not derived from sources specified in sec. 20.24, subsec. (2), Stats., were on that date automatically transferred to public school fund income, and any excess of state's share of income taxes collected in 1928 over amount of mill taxes for support of university and normal schools, also became part of public school fund income and available for payment of salaries and expenses of supervising teachers and other appropriations made bysec. 20.25, Stats.

November 1, 1928.

THEODORE DAMMANN,
Secretary of State.

I quote your statement and question as follows:

"The state superintendent of schools has presented to this department a certification, covering salary and expenses for supervising teachers for the year ending June 30, 1928, in accordance with secs. 39.14 and 20.25 (a) of the statutes.

"Chapter 536, laws of 1927, effective January 1, 1928, repeals section 20.25 (2), covering aid to supervising teachers; said chapter re-enacts section 20.25, payable from the public school fund income.

"In view of the fact that under chapter 536 there will be no money in the public school fund income until the 1928 taxes are paid into the state treasury (2nd Monday in March, 1929), how can aid to supervising teachers be paid at this time, covering the last half of the fiscal year ending June 30, 1928? Aid for the first half of the fiscal year would be payable out of the school fund income as provided for by section 20.25 (2), statutes of 1925."

In connection with your inquiry the state superintendent of public instruction has furnished, at my request, the following official statement:

"There are now two funds from which aid is distributed by the state for the benefit of the common schools. Under section 20.24 there is the common school fund and paragraph (4) of that section provides for its distribution. You may see from this that it will be the duty of the state superintendent to ascertain in December of each year how much the income of this fund is and certify its distribution to the secretary of state. There will never be any occa-
sion to put any money into this fund either from mill taxes or from the income taxes as provided by section 20.255, as the state department of public instruction will never certify any more than the income of the fund.

"The second fund is the public school fund income as provided in section 20.245. This fund is to consist of money derived from the appropriation under section 20.25, or from money taken from the income tax and used to offset this property tax as provided in section 20.255.

"This fund is the fund from which the $250.00 per teacher is paid to every district in the state, as well as the equalization fund which is paid to districts with a valuation of less than $250,000 per teacher.

"There is also paid from this fund the reimbursement to counties for the salaries and expenses of supervising teachers as provided in section 39.14, and to districts reimbursement for transportation and tuition of pupils as provided in section 40.34.

"In section 20.255 the term ‘common schools’ is used. However, this should be perfectly clear, as there is no question about their being the same schools which are aided from the public school fund income."

After a careful examination of the former statutes and the changes made by ch. 536, laws of 1927, it seems to me that the statement of the superintendent of public instruction is in accordance with the intent of the present statute as created and amended by said ch. 536.

I am of the opinion that on January 1, 1928, when said chapter went into effect, there was automatically transferred from the common school fund income to the newly created public school fund income, all moneys in the former fund except interest derived from the common school fund (defined by sec. 20.24, subsec. (1)) and from unpaid balances of purchase money on sales of common school lands and other revenues derived from the common school lands, and that the latter moneys are now the only moneys which are or can be placed in the common school fund income. Sec. 20.24 (2). In other words, all moneys theretofore accruing from the mill taxes levied by sec. 20.25, which, until January 1, 1928, had been a part of the common school fund income and were in the latter fund on that date, were transferred to and became a part of the public school fund income, and, further, any part of the state’s share of the income tax collected in 1928 not required for the remitted mill
taxes for the support of the university and normal schools and available for the remitted mill tax for the support of the common schools also automatically passed into the public school fund income (sec. 20.255); and are available for the payment of salaries and expenses of supervising teachers as certified by the state superintendent and for transportation and tuition of pupils, in accordance with the express appropriations of sec. 20.25.

I assume that on January 1, 1928, there were moneys in the common school fund income as theretofore constituted not derived from the sources specified in sec. 20.24 (2), and that some portion of the state’s share of income taxes collected in 1928 exceeded the remitted mill taxes for the support of the university and normal schools.

FEB

_Civil Service—Public Officers—Real Estate Brokers Board_Wisconsin real estate brokers board may appoint without examination one stenographer for board as being in exempt class of classified state service, and may assign such stenographer to duties in offices established and maintained by board in city of Milwaukee._

November 1, 1928.

_REAL ESTATE BROKERS BOARD_,

Mr. A. H. Smith, Secretary and Counsel,

1005 Straus Building, Milwaukee, Wisconsin.

You state that on August 29 the board adopted a resolution reciting that it was necessary to employ a stenographer at the Milwaukee office of the board and authorizing the secretary and counsel of the board to employ such stenographer as may be necessary to fill the position in the Milwaukee office and that such stenographer be employed as a special stenographer for the board exempted from the operation of the civil service law under the provisions of par. (b), subsec. (2), sec. 16.08, Stats.; that pursuant to said resolution, a Miss B. has been employed as such stenographer and assigned to duties in the Milwaukee office of the board, and that she possesses certain peculiar qualifica-
tions required for the position; that the board has no other exempt stenographer.

You inquire whether the appointment in question is proper under the law.

Your question, I think, should be answered in the affirmative.

Sec. 14.71, Stats., so far as material to your inquiry, provides:

"Except as expressly provided by law, the governor * * * Wisconsin real estate brokers board * * * are each authorized to appoint such * * * stenographers * * * as shall be necessary for the execution of their functions, and to designate the titles, prescribe the duties, and fix the compensation of such subordinates, but these powers shall be exercised subject to the state civil service law, unless the position filled by any such subordinate has been expressly exempted from the operation of chapter 16 * * * ."

By par. (b), subsec. (2), sec. 16.08, Stats., there is included in the exempt class of the civil service (and thereby "expressly exempted from the operation of chapter 16") "one stenographer for each appointing officer, board or commission." There is in the civil service law, or any other law so far as I have been able to discover, no limitation or qualification of this provision, which is as clear as language can make it and is free from any sort of ambiguity.

Under this provision the Wisconsin real estate brokers board is clearly entitled to appoint one stenographer for the board without examination (sec. 16.16, Stats.) as being in the exempt class of the classified service of the state. Your statement shows that the appointee in question holds the only appointment made by the board under this provision. Her appointment is therefore with the sanction of the law, and she holds the position and is entitled to the emoluments appertaining to it.

It has been suggested that because this appointee is stationed in the Milwaukee office of the board and not in its office in the capitol, she was not eligible to appointment as in the exempt class. But the law does not so provide. True, the board is required to keep its offices in the capitol, but it is also authorized to "hold meetings, hearings or in-
vestigations at such points in the state as it may deem ad-
visable, and any such meetings or investigations may be
conducted by any member of the board, the secretary, or
by any duly authorized employe of the board.” Sec. 136.01
(9), Stats. Other state boards and commissions are re-
quired to keep their offices in the capitol under similar pro-
visions (for example, sec. 101.04 relating to the industrial
commission; sec. 195.01 (10) relating to the railroad com-
mision) but maintain offices in the city of Milwaukee for
hearings, investigations, etc. If the volume of business of
the board in Milwaukee is such as to require the establish-
ment and maintenance in that city of more or less per-
manent offices for the holding of meetings, hearings and
investigations, the board unquestionably has authority so
to determine; and, likewise, it may, in its discretion, assign
the one stenographer in the exempt class appointed by it
to duties in that Milwaukee office.

As already indicated, the provision of sec. 16.08 (2) (b)
is wholly without ambiguity either in language or applica-
tility to the Wisconsin real estate brokers board, and, un-
der a familiar rule, is not open to construction. Its plain
terms cannot be limited or qualified.

FEB

Appropriations and Expenditures—Historical Society—
Balance unexpended on June 30, 1927 in appropriation to
state historical society in par. (a), subsec. (1), sec. 20.16,
Stats. 1925, does not lapse, and shall be available until ex-
pended to carry into effect powers, duties and functions of
said society.

November 3, 1928.

Board of Public Affairs.

In your recent letter you state that par. (a), subsec (1),
sec. 20.16, Stats. 1925, appropriated to the state historical
society “annually, beginning July 1, 1925, fifty-seven thou-
sand five hundred dollars to carry into effect the powers,
duties and functions of said society.” This paragraph was
amended by ch. 497, laws of 1927, so that there is appropri-
ated to the state historical society “for the fiscal year be-
ginning July 1, 1927, sixty-two thousand five hundred dollars and for the fiscal year beginning July 1, 1928 sixty-two thousand five hundred dollars to carry into effect the powers, duties and functions of said society.” You inquire whether the balance unexpended on June 30, 1927 in the appropriation to the state historical society in par. (a), subsec. (1), sec. 20.16, Stats. 1925, lapsed.

Subsec. (2), sec. 20.77, Wis. Stats., provides that where an appropriation is worded as was the appropriation in the statutes of 1925 it shall be construed to be a continuing, nonlapsible appropriation and shall be available until used, but where an appropriation is worded as is the appropriation in ch. 497, laws of 1927, it shall be construed to be a lapsible appropriation and balance unexpended at the close of the appropriation period shall revert to the fund from which they were appropriated. Thus, it is clear that any balances unexpended at the close of the fiscal years July 1, 1927 and July 1, 1928 respectively of the amounts appropriated to the state historical society by ch. 497, laws of 1927, will lapse and shall revert to the fund from which they are appropriated.

Subsec. (7), sec. 20.77, Wis. Stats., provides:

“In any case where a nonlapsible or a continuing nonlapsible appropriation is amended, either as to amount or purpose, the balance shall go forward as if the same had not been amended, and shall be available for the purposes, and subject to the conditions or limitations set out in the appropriation as amended, unless otherwise specifically provided by law.”

Inasmuch as ch. 497, laws of 1927, amending par. (a), subsec. (1), sec. 20.16, Stats. 1925, did not specifically provide otherwise it follows that the balance of the sum appropriated to the state historical society by par. (a), subsec. (1), sec. 20.16, Stats. 1925, does not lapse but may be spent at any time the historical society sees fit to use it to carry into effect the powers, duties and functions of said society.

HHN
Elections—Split Tickets—Voter may vote for candidates on ballot irrespective of party designation; if voter puts cross in large circle at head of party column he may then show preference for candidate in another column by placing cross in square following candidate's name; vote should be counted even though name in column where large circle is marked is not struck out.

GLENN D. ROBERTS,
District Attorney,
Madison, Wisconsin.

You submit the following questions, to which I submit answers:

May a voter split the ticket; that is, may he in the coming general election vote for candidates on the ballot irrespective of party designation? If so, how should it be done?

Answer: Yes. In any way that indicates the intent of the elector. See sec. 6.42.

If a voter puts a cross in the large circle at the head of the party column, may he then show his preference for a candidate in another column by placing a cross in the square following the candidate's name?

Answer: Yes. See sec. 6.42 (1).

Should the vote be counted even though the name of the candidate in the column where the large circle is marked is not struck out?

Answer: Yes. See sec. 6.42 (1).

November 3, 1928.
Constitutional Law—School Fund—Public Lands—Escheated Lands—All lands title to which shall fail from defect of heirs shall escheat to people. Art. IX, sec. 3, Wis. Const.


“School fund” is beyond power of legislature to divert to any other use than support of schools of state. Art. X, sec. 2, Wis. Const.

Sale of lands belonging to “school fund” is exclusively confined to commissioners of public lands and lies in no other office or body. Art. X, sec. 8, Wis. Const.

November 13, 1928.

COMMISSIONERS OF PUBLIC LANDS.

This will acknowledge receipt of your letter of the 9th inst. reading as follows:

“Will you kindly advise whether or not chapter 103 of the laws of 1927, directing the commissioners of public lands to execute a quitclaim deed to the city of Marinette, covering certain escheated lands stated in that chapter, is a valid enactment?

“Also whether or not the commissioners of public lands are authorized under the supreme court decisions [citing cases] to issue a conveyance for this land?”

Upon your statement that the lands described in ch. 103, laws of 1927, are escheated lands you are advised:

The act above referred to provides:

“AN ACT to convey to the city of Marinette certain lands for public park purposes.

“The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

“SECTION 1. All of the right, title, and interest of the state of Wisconsin in and to the following described land is hereby ceded, granted, quitclaimed, and conveyed for public park purposes to the city of Marinette in fee, to wit:” [description of premises]

“SECTION 2. The commissioners of public lands are hereby directed to execute and deliver to the said city of Marinette a quitclaim deed for said tract of land.”

Sec. 3, art. IX of our state constitution, so far as is here material, provides:
"* * * All lands the title to which shall fail from a defect of heirs shall revert or escheat to the people."

So much of sec. 2, art. X, Const., as has any bearing on your questions, reads as follows:

"* * * The clear proceeds of all property that may accrue to the state by * * * escheat * * * shall be set apart as a separate fund to be called 'the school fund,' the interest of which and all other revenues derived from the school lands shall be exclusively applied to the following objects, to wit:

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

"2. The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable librarian and apparatus therefor."

The relevant part of sec. 8, art. X, Const. reads:

"Provision shall be made by law for the sale of all school and university lands after they shall have been appraised; * * *. The commissioners shall be authorized to execute a good and sufficient conveyance to all purchasers of such lands, * * *. The commissioners shall have power to withhold from sale any portion of such lands when they shall deem it expedient, * * *.”

From the foregoing quoted provisions of our constitution it will be observed that escheated property belongs to "the school fund" of the state.

In the case of State ex rel. Sweet v. Cunningham, 88 Wis. 81, 83, our supreme court, in passing on the power of the legislature to divert said fund to a purpose other than those specified in sec. 2, art. X, Const., said

"The school fund is a trust fund, and is placed by the constitution beyond the power of the legislature to divert it to any other use than the support of the schools of the state. It could not set them, or any part of them, apart for a state park. Const. Wis. art. X, sec. 2; Lynch v. The Economy, 27 Wis. 69; People v. Allen, 42 N. Y. 404. Neither could it withhold these lands from sale. That power is confided to the discretion of the commissioners of public lands by the constitution, and lies in no other office or body. Const. Wis. art. X, sec. 8; State ex rel. Crawford v. Hastings, 10 Wis. 525; McCabe v. Mazzuchelli, 13 Wis. 478; State ex rel. Kennedy v. Brunst, 26 Wis. 412. * * *"

36
In the opinion of the court in the *Sweet-Cunningham* case, *supra*, and from which the foregoing quotation is taken, it appears that the legislature by the enactment of ch. 324, laws of 1878, dedicated and set apart for a state park certain lands belonging to “the school fund” of the state. Holding that “the school fund” is a trust fund and by the constitution placed beyond the reach of the legislature to divert for “state park” purposes is, I believe, a full and complete answer to your question concerning the validity of ch. 103, laws of 1927. If the legislature is by the provisions of our constitution denied the power to divert lands belonging to “the school fund” of the state and dedicate and set apart the same for a state park, then it most naturally must follow that no lands belonging to such fund may by legislative enactment be diverted therefrom and be “ceded, granted, quitclaimed and conveyed for public park purposes to the city of Marinette in fee,” as set forth in said ch. 103, laws of 1927. Such enactment is absolutely void and of no validity and the premises therein attempted to be conveyed to said city still belong to said trust fund notwithstanding such legislative attempt to divert the same therefrom.

And for the same reasons, and by the same token, must it be held that the legislative direction in sec. 2 of said ch. 103, directing that you execute and deliver to the city of Marinette a quitclaim deed for said tract of land, is also invalid and forms no legal reason, basis or justification for your complying therewith.

In view of the foregoing you are advised that the premises described in said ch. 103, laws of 1927, still belong to “the school fund” of the state, and may, like all other lands belonging to such fund, be sold and disposed of by you.

HAM
Public Officers—Real Estate Brokers Board—Practice before real estate brokers board on complaint in writing for suspension or revocation of license of broker is not very specifically prescribed by statute. In view of fact that review is given by certiorari, public hearing should be had and testimony taken in writing so that court can determine whether action of board was justified by evidence in case.

November 13, 1928.

G. M. Sheldon, President,
Real Estate Brokers Board,
Tomahawk, Wisconsin.

You submit the following questions for information:
1. As the law now stands, is the board obliged to hold a public hearing when a duly verified complaint has been filed, or may the board cause an investigation to be made and refuse such hearing if such investigation seems to disclose that there is no cause for complaint?

2. It has been suggested that the common law frowns upon the practice of disinterested persons paying attorneys to prosecute an action in court. There might be some question whether our courts of general jurisdiction would permit an attorney employed by a real estate dealers' association from appearing in an action to recover for fraud or deceit connected with a real estate deal. In your judgment is it proper for attorneys employed by the Milwaukee real estate board to appear for complainants on hearings brought before the Wisconsin real estate brokers board?

You say in recent months the Milwaukee real estate board has employed private counsel to investigate complaints respecting real estate brokers and to assist in prosecuting such complaints before the board. You say it has been the practice of your board when a complaint has been filed to make an investigation before a public hearing is held, for the purpose of determining whether a hearing should be held in the case or not.

The law prescribing the powers and duties of your board may be found in ch. 136, Stats. It would look as though that law might have been drawn by real estate men instead of lawyers, for its provisions are not very specific or comprehensive.
Subsec. (17), sec. 136.01, Stats., provides that the board may, upon complaint in writing, duly signed and verified, upon not less than ten days’ notice, suspend any such license and may revoke such license if it finds, after a hearing as provided in subsec. (18), that the holder of such license has done any of the things specified therein.

It will be noticed that does not say how the suspension may be made nor how soon the hearing shall be had or that the suspension is simply pending the hearing and determination on the complaint.

The practice prescribed in the law for certain other commissions is quite specific that the suspension is only during the pendency of the hearing or as a sort of penalty or punishment imposed after the hearing. As stated, the procedure or practice here is left uncertain and I do not see how this department can add anything to the powers of the board or commission as to the procedure to be adopted.

You say you have made it a practice to investigate informally in the first instance before determining whether or not to hold a public hearing. I see no objection to the board’s getting information in any way it desires, but I think it would be advisable for the board to make it a practice to hold a regular public hearing on each complaint so as to give the interested parties an opportunity to be heard and to give the commission the benefit of whatever information they might have bearing on the question, with the right of the person complained of to be present and defend himself in the usual manner rather than to refuse a complaining party the right to be heard, and to present whatever evidence he might have to the commission in an orderly manner, for he might have information that the commission would not get on an ex parte investigation.

So, in answer to your first question I would say the better practice would be for the commission to hold a public hearing on each complaint whether it makes an independent investigation or not. I think that is clearly implied in the fact that under the provisions of subsec. (24) the action of the board in refusing to grant a license or in revoking a license is made reviewable by writ of certiorari brought in the circuit court for Dane county. That, of course, means that the action of the board in every case would have to be
tried and determined by *certiorari* on the record made before the board. So you can see that before the board takes any action affecting the rights of any broker a record should be made in the proceeding and hearing before the board that would justify whatever action the board took, for its actions in each case have to stand or fall in the proceeding in court to review it, based upon the evidence and showing made before the board. That proceeding should be taken down in shorthand and the evidence and proceeding made a part of the record for such review.

I see no legal objection to the practice which you say has prevailed in hearing before the board on complaints permitting attorneys employed by the Milwaukee real estate board to appear for the person making the complaint or of permitting any other person or persons who might feel that they were interested in the subject matter to appear either in person or by attorney.

The practice before our boards and commissions has been quite informal and usually at the commencement of a hearing the commission or board asks for an announcement of all persons and attorneys appearing in the proceeding and for whom they appear. They are usually permitted to take part in the proceedings and their interest in the matter may be considered by the commission in weighing or determining the weight or importance to be given to their actions and, like the hearing before other boards and commission, the board can limit them to relevant matters so as not to unnecessarily prolong the proceedings. The commission usually desires to obtain all the information necessary to enable it to properly perform and discharge its duties and if interested parties desire to be heard by attorneys I think they should be given that right, although any person can appear without attorney.

I see no objection to the board’s having witnesses subpoenaed and questioned by the board or by anyone for the board or for the complaining witness or other person interested, in order to get the information needed to enable the board to properly discharge its duties in any case whether the persons are represented by attorneys or not, for it is the duty of the board to act intelligently and impartially in all cases. While the private investigation
might be cheaper, I think it should be followed by a public hearing so as to have a public record made which would justify the action of the board in case an appeal or review should be taken by certiorari by either or any of the interested parties.

You assume that in case the board made an informal investigation and decided not to grant the relief asked, you would not then have to hold a public hearing. The difficulty with that procedure would be that the complaining party would be denied an opportunity to make a record by producing evidence upon which he could appeal to the circuit court by writ of certiorari. I think the law gives him that right, so he could, by mandamus, compel the board to hold a proper hearing and trial so as to enable him to make a record which he could have reviewed by certiorari action in circuit court.

TLM

Charitable and Penal Institutions—County Homes—If facilities are available county authorities may receive into county home persons who are not indigent upon payment of not less than actual cost to county.

November 16, 1928.

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

In your letter of November 14 you say that Wood county is building a county home pursuant to the provisions of sec. 49.14, Stats., and you ask whether the county board has authority to receive persons who are not indigent into the county home in somewhat the same manner that persons who are not indigent may be received into county hospitals.

Subsec. (2), sec. 49.145 provides that persons who are not indigent shall receive treatment at county hospitals at "rates not exceeding the actual cost to said county."

If the facilities are available the county authorities may receive into the county home persons who are not indigent upon payment of not less than the actual cost to the county.
Subsec. (1), sec. 49.14, Stats., provides:

"Each county, whether having abolished the distinction between county poor and town, village or city poor or not, may establish a county home for the relief and support of the county poor, pursuant to the provisions of section 46.17."

The county homes established under this section must, of course, be used primarily for the relief and support of the county poor. As long as the county poor are taken care of in the county home, there is no objection to accepting other persons into the home provided proper payment is made. To charge less than the actual cost to the county would be improper, for it would constitute the use of county funds for the partial support of persons not indigent and hence not entitled to county aid.

ML

Public Health—Public Officers—Mayor and city council should, if possible co-operate to appoint health commissioner under sec. 141.02, Stats. Otherwise state board of health may take control of enforcement of health laws in municipality.

City may also pass ordinance providing for appointment of board of health in city under provisions of sec. 141.01, Stats., which board, when organized, can appoint health officer.

November 16, 1928.

R. W. Peterson,
District Attorney,
Berlin, Wisconsin.

You state that in Princeton there are two physicians; that the mayor has appointed one of these physicians as health officer or commissioner; but that the council refused to confirm the appointment and request the mayor to appoint the other; that this the mayor refuses to do. You ask to be advised what steps the mayor or council shall take so that a health commissioner can be appointed; you say that Princeton is existing under the general charter law.

The matter of the nomination of a health commissioner by the mayor is left to his discretion and he cannot be man-
damused to appoint anyone whom he desires not to appoint. Likewise the council cannot be mandamused to confirm a nomination that the mayor has made for the same reason that the court does not control the discretion which is vested in the council. The council and mayor should co-operate in such a way that they get results. If they cannot do it then the state board of health will have to take hold of the local situation and enforce the health laws in the locality comprising your municipal territory.

I may suggest that sec. 141.02, Stats., which provides for the appointment of a health commissioner in cities under general charter, on nomination of the mayor, applies "unless otherwise provided by ordinance" in said city. This would indicate that the city may pass an ordinance providing for a board of health and officers of said board including the health officer under the provisions of sec. 141.01.

In that case a board of health may be organized by the city council and such board of health, when organized, can appoint a health officer. I hope that the above will give you enough information to solve the local difficulty.

JEM

Corporations—Foreign Corporations—Words and Phrases—Words "or for other lawful consideration," used in subsec. (2), sec. 226.02, Stats., refer only to consideration advanced by foreign trust company itself.

November 19, 1928.

Theodore Dammann,
Secretary of State.

You call attention to sec. 226.02, subsec. (2), Stats., especially the words "or for other lawful consideration," and ask:

"Does this term refer to consideration advanced by the foreign trust company itself or may it be consideration advanced by a third party for whom such trust company is acting as trustee by being named as such in the mortgage or trust deed?"

The words "other lawful consideration" refer merely to consideration advanced by the foreign trust company, and
do not include consideration advanced by a third party for whom the trust company is acting as trustee under a mortgage or trust deed.

Subsec. (2), sec. 226.02, Stats., provides in part:

"* * * Any foreign corporation, including any bank or trust company, may, in its corporate name, and without being licensed to do business in this state, advance and loan money therein, and take, acquire, hold and enforce notes, bonds, mortgages or trust deeds given to represent or secure money so loaned or advanced or for other lawful consideration, and all such notes, bonds mortgages or trust deeds which heretofore have been or shall hereafter be taken, acquired or held by any such foreign corporation shall be as valid and enforceable as though it were an individual, and such right of enforcement shall include the right to acquire the mortgaged property upon foreclosure, or in virtue of the provisions of the mortgage or trust deed, and to dispose of the same; provided, however, that any such corporation which shall hereafter transact in this state the business above provided for shall first file with the secretary of state a statement in writing by its president, secretary, treasurer or general manager that it constitutes the secretary of state its attorney for the service of process as provided in paragraph (f) of subsection (3) of this section * * *

The obvious purpose of this provision is to permit foreign corporations to lend money in this state and to enforce the collection thereof. It cannot possibly be construed as granting power to foreign trust companies to act as trustee in Wisconsin. The rights of foreign trust companies are considered in sec. 223.12, Stats.; and this section does not grant them the right to act as trustee under a mortgage or trust deed.

ML
Opinions of the Attorney General

Insurance—Domestic fraternal society may adopt by-law abrogating presumption of death from seven years' unexplained absence.

If by-laws contain provision against presumption of death, face amount of policy is not payable on filing of affidavit of seven years' unexplained absence.

By-law abrogating presumption of death resulting from seven years' unexplained absence may be approved.

November 19, 1928.

M. A. Freedy,
Commissioner of Insurance.

You state that a domestic fraternal society has adopted the following by-law:

"The continued absence or disappearance for any length of time of any member heretofore or hereafter admitted into this society, from his home or last known place of residence, shall not be evidence of the death of such member, and no right shall accrue to any beneficiary under the benefit membership or benefit contract issued to any such member, nor shall any benefits be paid under such benefit membership or benefit contract issued to any such member, until conclusive proof has been made of the death of the member aside from, and in addition to, any presumption of death that might arise by reason of his absence or disappearance; anything in the law or the statutes of any state or county to the contrary notwithstanding.

You ask whether this by-law contravenes the common law rule under which there is a presumption of death from an unexplained absence at the expiration of the seven year period following: This by-law changes the common law rule in regard to the presumption of death resulting from an unexplained absence of seven years. The common law rule, however, is merely a presumption and there is no reason why the parties may not agree to an abrogation of the presumption.

You ask:

"If the certificate or policy is in force, is not the face amount payable upon proper filing of affidavits as to the unexplained absence of seven years?"

If the by-laws provide that there shall be no presumption of death, the face of the policy is not payable upon
filing of affidavits as to an unexplained absence for seven years. Even if the parties could not agree to abrogate the presumption of death, the policy would not be payable on the filing of affidavits, for the presumption is a presumption of evidence merely and has this effect: When the parties sue for recovery on the policy, testimony as to an unexplained seven years' absence creates the presumption of death which may be rebutted by the insurance company. If they fail to offer any evidence to rebut the presumption, an order of payment would be the inevitable result.

You ask whether the language in the last two lines of the by-laws may be approved.

There is no reason why the language in the two lines of the by-laws may not be approved. It is true that if there were a law or a statute in the state requiring the payment of an insurance policy upon an unexplained absence of seven years, the parties could not change this by a by-law. However, the change made by the by-laws is not contrary to any law or statute. It is simply an agreement to make inapplicable a certain rule of evidence.

ML

Appropriations and Expenditures—Counties—County cannot appropriate public funds for expense of representation of county on Good Will Tour.

November 19, 1928.

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

In your letter of November 15 you submit the question whether or not the county board can appropriate any funds to defray the expense of the representation by Wood county to accompany a proposed Good Will Tour. On January 4, 1928 an opinion was rendered to George E. O'Connor, district attorney of Forest county, in which opinion your question was answered in the negative. XVII Op. Atty. Gen. 7.

AJM
Fish and Game—Order of conservation commission requiring person to whom nonresident fishing license or resident or nonresident hunting license is issued shall wear a button when hunting or fishing with proper inscription on it is not valid because it was not legally published.

November 19, 1928.

L. B. Nagler, Director,
Conservation Commission.

You state that on December 22, 1927, the state conservation commission upon motion duly made and carried directed that thereafter persons to whom nonresident fishing licenses or resident or nonresident hunting licenses are issued shall, in addition to the license, receive a button with proper inscription, which should be worn on the outside of the clothing while the holder thereof is hunting or fishing, as the case may be.

You state that this action on the part of the commission was published throughout the state as a news item but not in the form of an order of the commission; that neither was it so published in the official state paper; and the question arises whether, under these circumstances, this order may be enforced or whether the holder of a license and button may refuse to wear this button as provided by the resolution without being subjected to arrest and prosecution.

Without passing upon the question as to the legality of an order of that kind as being within the powers of the commission, I will say that the order was not properly published, and for that reason is not binding upon any person. The publication of an order as a news item is not a legal publication of the same as required by law. It follows that the holder of a license may refuse to wear such button at the present time.

JEM
Public Officers—Bank Examiner—Expenses—Bank examiner having no official residence and no office may charge traveling expenses while going to and from banks he intends to examine.

November 19, 1928.

C. F. Schwenker,

Commissioner of Banking.

You call attention to a recent opinion of this office to the secretary of state in which it was held that a bank examiner could not charge for expenses incurred in going from his home to his official place of business, XVII Op. Atty. Gen. 580. You explain that the state banking department has arranged this state in seven districts. Examiners are assigned to each district; they are not assigned to a particular city or a particular office in a city, because no examiner has an office, his duty carrying him to the several banks in the district. You then ask whether in view of the fact that an examiner has no official residence or office, but is assigned to a district comprising a number of counties, he is held to be at his own expense in going to and from his domicile to work in the several banks located throughout the several counties.

Since the bank examiner has no office and apparently no official residence, it seems clear that in going from the place at which he is staying in the district to the bank he wishes to examine he is on official business; and, of course, he is entitled to charge his traveling expenses while on official business.

ML

Fish and Game—Decoy left in water unattended over night by person who owns premises on which blind is located is public nuisance; practice is in violation of law.

November 20, 1928.

Conservation Commission.

You state that you have been asked for an interpretation of sec. 29.25, Stats., pertaining to the use of decoys.

The material part of said sec. 29.25 is as follows:
"No person shall hunt any game bird in open water with any decoys left in the water unattended."

You state that the question has arisen whether a hunter who is the exclusive owner of the land on which the blind is located may leave his decoys in the water unattended over night.

Sec. 29.03, Stats., contains the following provision:

"The following are declared public nuisances:

(7) any decoys left in the water unattended."

This latter provision strengthens the provision in sec. 29.25 to which you direct my attention. There is no exception to this statute for a person who owns the premises on which the blind is located in which the hunter is concealed.

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

JEM

Corporations—Common law trust composed of four persons and not proposing to sell any beneficial interests, certificates or memberships therein, need not file its declaration of trust with secretary of state or register of deeds.

No opinion is expressed on question of whether particular declaration of trust however executed is sufficient to authorize doing of business in this state without incurring personal liability.

November 20, 1928.

Theodore Dammann,
Secretary of State.

You state that a group of four residents of Milwaukee have organized a "common law trust." The membership will be limited to these four persons and no beneficial interests of any kind will be disposed of in the future. You ask the following question:

"Is it necessary that the declaration of trust under these conditions should be filed with the secretary of state and with the register of deeds for Milwaukee county, and is the
mere drawing up of the declaration of trust, signed by the four trustees, each receiving a copy thereof, sufficient to do business in this state without incurring personal liability?"

Under the facts presented it is unnecessary to file the declaration of trust with the secretary of state or with the register of deeds for Milwaukee county. No opinion is expressed on the question of whether the particular declaration of trust however executed is sufficient to authorize the doing of business in this state without incurring personal liability.

Subsec. (1), sec. 226.14, Stats., 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 trustees 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, or a true copy thereof, and all amendments which may be made, verified as such by the affidavits of two of the signers thereof. A like verified copy of the declaration and such amendments, and a certificate of the secretary of state, showing the date when such declaration was filed and accepted by him, within thirty days of such filing and acceptance, shall be recorded with the register of deeds of the county in which such trust has its principal office or place of business in this state. * * *"

This section refers only to common law trusts which "shall have issued to five or more persons, or which shall sell or propose to sell beneficial interests, certificates or memberships therein." Since the proposed common law trust has only four members and does not propose to sell any beneficial interests, certificates or memberships, it is not obliged to comply with the requirements for registering the declaration of trust with the secretary of state and the register of deeds.

In Baker v. Stern, 194 Wis. 233, 261–262, it was held that a certain common law trust was not contrary to public policy. The court there said:
In view of the variety of plans devised to meet varying situations arising in the business world, no broad dogmatic statements can be made. Each plan must be tested by applicable rules of law in order that its nature and validity may be determined. Attention is directed to the fact that what may be said in the course of the opinion is specifically limited to the facts presented in this case and is not to be construed as a wholesale approval of any form of so-called business trusts which may be hereafter considered.

It is no part of the duties of the attorney general to express an opinion on the question of whether a declaration of trust executed in a certain manner is sufficient to enable the trustees to do business without incurring personal liability. Advice concerning the liability of trustees under any particular declaration of trust must be procured from attorneys in private practice.

ML

Agriculture—Farm Drainage—Bridges and Highways—Counties—If county can lawfully be made liable for benefits to highways which it is required to maintain under farm drainage law, ch. 88, Stats., notice of hearing on report of drainage board and assessment by posting as provided by subsec. (2), sec. 88.03, complies with requirement for giving of such notice prescribed by subsec. (9), sec. 88.06 as applied to county.

November 21, 1928.

BRUCE M. BLUM,
District Attorney,
Monroe, Wisconsin.

You state that the Green county farm drainage board, on proper application, laid out and constructed a drainage ditch in Green county and later made and assessed the benefits and damages as required; that in giving notice of the assessment, the notice was posted but was not served on Green county or upon the highway commissioner; that an assessment was placed against the county in excess of the highway committee’s valuation of the benefits; that Green county at best is the owner of an easement for highway purposes and not an owner of the fee.
You refer to subsec. (9), sec. 88.06, Stats., and inquire whether the posting of the notice of assessment was sufficient notice to bind the county.

In my opinion, the posting of notice of assessment was a sufficient compliance with the law.

Said subsec. (9), sec. 88.06, provides that the notice of hearing on the report of the drainage board making the assessment shall be "given to the owners of all lands by posting a copy of the order as provided in subsection (2) of section 88.03, and to all mortgagees by mailing a copy of such order to such mortgagees at their post office addresses, if known to the board or shown upon the recorded mortgages, at least ten days before such hearing." The county is not a mortgagee, and subsec. (2), sec. 88.03 provides:

"All notices required to be given under the farm drainage law, unless otherwise therein specifically provided, shall be given by posting a written notice in three public places on or in the immediate vicinity of the lands proposed to be drained at least ten days before the time fixed for hearing."

The posting of this notice seems to me to be a compliance with these provisions as to the county holding an easement in land for highway purposes.

I think, however, that I should suggest to you the query as to whether the county, charged with the maintenance of highways within the farm drainage district, is liable for assessment of benefits under the farm drainage law, ch. 88. That it is so liable under the farm drainage law, ch. 89, was held in 172 Wis. 431, but that holding was based largely upon the amendment to the definition of "corporations" in the drainage district act expressly including counties.

You will note that the drainage district law defines "corporations" as follows:

"'Corporation' shall include all corporations, both private and public, counties, towns, cities, villages, other drainage districts, and all other drainage corporations" (sec. 89.02) ; whereas the farm drainage law provides merely:

"'Corporation' means all private and public corporations including drainage districts, farm 'drainages' and all other drainage corporations" (88.02 (5)).
It may be argued with considerable force that these differing definitions indicate that the legislature did not intend that counties, towns, cities, or villages should be affected by the farm drainage law. So far as I am aware, there has been no decision of the supreme court on the question here suggested, which is therefore an open one and is merely brought to your attention in connection with your inquiry.

FEB

Courts—Criminal Law—Sentence to state prison for crime of robbery on October 12, 1926, for term of five to fifteen years is erroneous; minimum sentence for this offense under statute is three years.

Time for appeal to supreme court having expired, there is no way to correct error.

November 21, 1928.

BOARD OF CONTROL.

You state that Carlos Justesen was sentenced to the Wisconsin state prison on October 12, 1926 for a term of five to fifteen years for bank robbery; that the minimum sentence for this offense is three years. You ask to be advised if your board has the right to amend the record of sentence in this case, recording this sentence as three to fifteen years instead of five to fifteen years.

This question must be answered in the negative. I know of no authority in the statute which authorizes you to change the sentence of the court as you propose. It is true that after this judgment was imposed, the legislature by ch. 527, laws of 1927 amended sec. 359.05 to authorize the imposition of a sentence such as the court did in this case. This, however, did not affect the sentences that were already imposed prior to the amendment of the law. In an official opinion to your board, XVI Op. Atty. Gen. 509, two ways were suggested in which erroneous sentences might be changed:

(1) By the court itself in a criminal case during the term at which the judgment and sentence were pronounced and before this sentence had been executed or put into execu-
tion, citing State ex rel. Zabel v. Municipal Court, 179 Wis. 195.

(2) Another way to correct the error is to take a writ of error to the supreme court if the statute of limitations has not run. I presume that in this case neither one of these remedies is available as too long a time has elapsed since the sentence was imposed.

JEM

Fish and Game—County clerk should issue hunting licenses only to residents of his county.

L. E. Gooding,  
District Attorney,  
Fond du Lac, Wisconsin.

You refer me to sec. 29.10, Wis. Stats., which provides:

"Resident hunting licenses and deer tags shall be issued subject to the provisions of section 29.09 by the county clerks of the several counties upon blanks supplied to them by the state conservation commission, to residents of each county duly applying therefor who have resided in this state for at least one year next preceding the application."

You state that application was made to the county clerk of your county by residents of other counties for such hunting licenses, which your county clerk has refused to grant on the ground that under the statute she is to issue licenses only to the residents of your county. You believe she is correct in her interpretation of the statute and you are correctly informed that this is the practice that the conservation commission has recommended. You inquire, for the guidance of the county clerk, whether she is authorized to issue such resident hunting license to a resident of the state of Wisconsin who is not a resident of Fond du Lac county.

This question has never been passed upon by this department nor by the supreme court. While the question is not entirely free from doubt, until the supreme court has passed on the question, I will say that I believe the interpretation placed upon this statute is a reasonable one and would
probably be upheld by the supreme court. I am informed by the assistant conservation director that such an interpretation greatly aids the commission in the enforcement of the law as frauds can be more easily detected if the county clerk issues licenses only to residents of his county.

JEM

Automobiles—Copyrights—Automobile license and title application used by secretary of state and his certificate of title do not infringe on patent No. 1,433,975 or copyright Class A, XXc No. 491,492.

November 21, 1928.

Col. J. L. Johns,
Private Secretary to Governor Zimmerman.

Some time ago you submitted a letter from Mr. Cecil L. Snyder, who claims to be a trustee of the Automobile Abstract & Title Company of Detroit, Michigan. In his letter Mr. Snyder claims that the automobile license and title application and the certificate of title or ownership used by the state of Wisconsin are in violation of a patent upon what he terms "the abstract of title and the method of making the same," for which he holds patent No. 1,433,975, issued to him on October 31, 1922. You ask the following questions:

"(1) Is the patent covering an application for automobile abstract of title valid under the patent laws?

"(2) If such patent on application for automobile abstract of title is valid, does the automobile license and title application used by the secretary of state in this state, and his certificate of title, infringe on any of the claims covered by the patent of the Automobile Abstract & Title Company, which Mr. Snyder claims to represent?"

It is unnecessary to determine whether the patent covering an application for an automobile abstract or title is valid under the patent law, for the automobile license and title certificate used by the secretary of state, and his certificate of title, do not infringe on any of the claims allowed by the United States patent office in patent No. 1,433,975.

The essential feature of Mr. Snyder's patent is "A motor vehicle title disclosing record consisting of a book having
a plurality of sets of leaves, one leaf of each set being permanently secured in the book, etc. The secretary of state uses a one page form for the automobile license and title application and issues a one page "certificate of title to a motor vehicle." It is obvious that there is not the slightest infringement on Mr. Snyder's patent.

The correspondence discloses that Mr. Snyder also claims a copyright upon the term "automobile abstract of title." This term is not used in the certificate granted by the secretary of state and hence there can be no infringement of any of the rights which Mr. Snyder may have gained through his copyright.

Bridges and Highways—Under sec. 83.06, subsec. (1), Stats., bridge in town on portion of county highway system which has become state highway as provided by sec. 83.01 is required to be repaired or reconstructed by county.

November 21, 1928.

Clinton G. Price,
District Attorney,
Mauston, Wisconsin.

You state that you have advised your county highway committee that where a bridge has been washed out on a county trunk highway the county is required to replace the same, and ask whether there are any opinions of the attorney general on the point.

I do not find that any opinion has been rendered on the precise point, but in XIV Op. Atty. Gen. 287 it was held that the repair and maintenance of a bridge located on a county trunk highway within a city is a charge on the city under the provisions of subsec. (1), sec. 83.06. Conversely, it would seem to follow that the maintenance, repair, or necessary reconstruction of a bridge on the county trunk system which does not lie within any city or village is upon the county under the express provisions of the statute referred to if the portion of the county trunk system on which the bridge is located has become a state highway as provided by sec. 83.01 (5), Stats.
Of course, you understand that the county trunk system, by reason of its selection as such by the county board, becomes a part of the county system of prospective state highways; but a county trunk highway (that is any specific portion of the county trunk system) is not necessarily a state highway imposing the duty of maintenance upon the county. It only becomes a state highway when it has been improved under the provisions of ch. 83 and has been accepted as a state highway commission.

If the bridge in question is in a town on a portion of the county trunk system which has not become a state highway, it must be repaired or reconstructed by the town.

FEB

_Tuberculosis Sanatoriums_—Administering of artificial pneumothorax in county tuberculosis sanatoriums is part of regular cost of maintenance.

November 22, 1928.

BOARD OF CONTROL.

You state that it has come to your attention that in the treatment of tuberculosis it is becoming the practice to administer artificial pneumothorax in the county sanatoriums in certain cases and you wish to be advised if this treatment may be considered in the light of emergency surgical care and a part of the maintenance charge in which no fee shall be charged to the county for the service, or whether it may be considered a service to the patient for which a fee might be charged the counties in addition to the regular cost of maintenance.

Sec. 50.07, subsec. (2), Stats., provides:

"Any such person who is unable to pay for his care may be admitted and maintained in such institution at the charge of the county in which he has his legal settlement, pursuant to subsection (2) of section 50.03, except that the county chargeability shall be determined by his legal settlement in the county charged. Such maintenance shall include necessary traveling expenses including the expenses for an attendant when such person cannot travel alone, necessary clothing, toilet articles, emergency surgical and dental work, and all other necessary and reasonable expenses incident to his care in such institution."
I do not believe that this can be considered emergency surgical work but I do believe that it is a part of the regular cost of maintenance. I am informed that this practice is quite common and that a skillful physician is able to administer the same. For that reason I believe no extra charge can be made for it.

JEM

Prisons—Parole—Inmate of state prison whose record shows that he was convicted of minor offenses but of no felony is first offender within parole statute.

November 22, 1928.

Board of Control.

You state that one Walter Pillsbury has the following criminal record on the books of the Wisconsin state prison:

“Arrested 1926, Glenwood, Minnesota; larceny of auto; 1 day county jail.

“Arrested 1926, Madison, Wisconsin; selling mortgaged car; six months probation.

“Arrested 1928; Woonsocket, South Dakota; drunk; fined $12.50.”

You inquire whether he is to be considered a first or second offender under sec. 57.06, the parole statute. Subsec. (1) of said statute provides:

“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 question with which we are confronted is: What is meant by the term “first offender”? Does it mean that
the offender has committed a first felony or does it mean that he has committed a first crime, and does it require a conviction for such felony or crime before he can be considered a second offender?

In sec. 57.01 the court is authorized to suspend sentence whenever an adult is convicted of a felony punishable by imprisonment for a term not exceeding ten years, convictions under sec. 351.30 excepted, and when it appears to the satisfaction of the court that such person has never before been convicted of a felony, then he may be put on probation. You have informed me that your practice has been to consider first offenders all such offenders as have not been previously convicted of a felony. I believe you are correct in your ruling.

The question then presented by your inquiry is whether Pillsbury has committed a felony in this state or elsewhere. The penalty in South Dakota was for being drunk, and a fine is imposed, which is not a felony. The conviction in Madison, Wisconsin, was for selling a mortgaged car. This was a conviction under sec. 343.69, for selling mortgaged property, the penalty for which is imprisonment in the county jail not more than six months. This is a misdemeanor and not a felony. See sec. 353.31 Stats., in which the term felony is defined as meaning an offense for which the offender on conviction shall be liable by law to be punished by imprisonment in a state prison.

The arrest in Minnesota was for larceny of an automobile and he was punished by imprisonment in the county jail for one day. It does not appear whether this was grand larceny or petty larceny, but from the small penalty imposed I think it is safe to come to the conclusion that it was petty larceny, which is not a felony.

You are advised, therefore, that Walter Pillsbury is a first offender as disclosed by his record.

JEM
Courts—Prisons—Parole—Sentence for definite term in all crimes covered by sec. 359.05, Stats., may be considered as indeterminate sentence in which minimum fixed by statute as penalty will be minimum of sentence in indeterminate sentence.

November 22, 1928.

BOARD OF CONTROL.

You state that one Harry Swanson was sentenced to the Wisconsin state prison on November 11, 1927 for the crime of assault with intent to murder and given a definite sentence of thirty years with no minimum stated.

You ask to be advised if the board has the right to record this man's sentence to the Wisconsin state prison as an indeterminate sentence of one to thirty years or whether this man, if a first offender, would be eligible for consideration for parole at the expiration of the minimum of one year.

The punishment for assault with intent to murder under sec. 340.40 is imprisonment in the state prison from one to thirty years. Sec. 359.05, which is applicable here, contains the following 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. * * *

The difficulty which we are facing in answering your question is the fact that this sec. 359.05 was amended by ch. 527, laws of 1927. Prior to said amendment the indeterminate sentence would always contain the minimum of the penalty prescribed by statute and the maximum penalty could be varied by the court. The amendment permits the court to change also the minimum penalty, and it is difficult now to know just what the indeterminate sentence should be, as the courts might have changed the minimum, as well as the maximum. Had no amendment been made to the statute, the indeterminate sentence would be from one to thirty years.

I believe that in order to give effect to the sentence quoted from this statute we are justified in holding that the
indeterminate sentence would still be from one to thirty years under the circumstances here described. The court not having changed the minimum of the penalty imposed by statute, we must presume that the minimum in the indeterminate sentence is such minimum. You are therefore advised that this sentence may be considered as a sentence from one to thirty years.

JEM

Agriculture—Counties—Agricultural Fairs—County board of any county when authorized by majority of electors upon referendum therefor may provide for and conduct county fair and exhibition and county is entitled to state aid.

Edward Meyer,
District Attorney,
Manitowoc, Wisconsin.

I have your letter of November 20, in which you advise that since 1912 the Manitowoc County Fair Association has held a county fair in your county; that in 1918 the county board adopted a resolution submitting to the electors of the county the question of whether the county should purchase the lands and improvements of the association for $55,000, and that in such election a majority of the votes were in favor of the question; that in accordance therewith the county purchased the property; that thereafter and ever since the fair has been conducted by the fair association under some arrangement with the county; that the fair association has drawn state aid for holding such fairs. You state that the county board is now desirous of severing its connection with the county fair association and operating its own fairs but the county fair association refuses to dissolve, and you ask:

1. Can the county board run its own fairs by passing a resolution to that effect?

2. Has the county complied with the requirements of sec. 59.865, Stats., without another referendum?

3. If the county can run the fairs itself, will it still receive the state aid as it would if run by a county fair association?
I think your first two questions must be answered in the negative. I think the question that was submitted to the voters simply authorized the county to purchase the property of the fair association, which it did, but there is nothing in the form of the question submitted and voted upon authorizing the county to conduct the fair itself, which seems to be required by sec. 59.865. I think in order to make it safe, that question should be submitted and voted upon in such form that the vote will specifically authorize the county to “conduct county fairs and exhibitions” on its properties so as to expressly comply with the provisions of sec. 59.865.

Your third question is answered in the affirmative. Sec. 20.61 provides state aid for a number of purposes there specified and subsec. (11) provides:

“Annually, beginning July 1, 1925, such sums as may be necessary for state aid to counties and agricultural societies, associations or boards that have fully complied with the rules and requirements prescribed by this subsection as follows:

“(a) To each county, and any such organized agricultural society, association or board in the state, eighty per cent of the first five thousand dollars actually paid in net premiums and fifty per cent of all net premiums paid in excess of five thousand dollars at its annual fair upon live stock,” etc.

Par. (b) provides:

“After July 1, 1925, state aid shall be paid to only such counties as conduct fairs, and to but one society, board, or association in any county which does not conduct a fair” the amount there specified.

I think that shows very clearly that if the county conducts the fair it is entitled to the state aid to county fairs. You will notice that sec. 59.865, giving counties the power to acquire property for and to conduct county fairs, was only adopted in 1923 and sec. 20.61 (11), authorizing state aid to counties that conduct county fairs, was only passed in 1925, so that I think now there is no question but that the county can conduct county fairs itself and receive the state aid therefor if it is authorized by vote of the electors.

TLM
Corporations—Criminal Law—Embezzlement—Taxation

Trustees of church corporation and officers of unincorporated ladies' aid society hold property of such institutions, whether acquired by purchase or gift, charged with trust to apply it to uses for which acquired and not to inconsistent ones.

Such trustees and officers are guilty of embezzlement of said property if, in violation of such trust, they wrongfully and fraudulently convert and appropriate same to personal use and benefit of themselves and others.

Other members of such organizations who aid or abet in such conversion are guilty as accessories to embezzlement.

Nonexempt real estate erroneously omitted from assessment of taxes in any of three next previous years shall be entered once additionally for each previous year of such omission, affixing just valuation to each such entry as same should then have been assessed and collected on tax roll for such entry.

Payment of real estate taxes is direct and personal obligation against owner and may be enforced by action of debt in same manner as are taxes assessed on personal property.

Frank B. Moss,

District Attorney,

Baraboo, Wisconsin.

In your letter of November 13 you state the following facts pertaining to a certain church corporation and an unincorporated ladies’ aid society, and the sale of certain real estate belonging to said corporation, together with the distribution of the proceeds of such sale as well as the distribution of the funds belonging to said aid society, and on such facts you propound seven questions, set out below, viz.:

FACTS

"By a declaration or certificate recorded with the Sauk county register of deeds July 13, 1903, five persons and those who are or who may become associated with them organized said church as a corporation. A Ladies' Aid, an unincorporated society, was organized in conjunction with
the church to assist in its work. The church proper and the Ladies' Aid functioned until somewhat over seven years ago. This church was under the discipline and regulation of the Norwegian Synod of the American Evangelical Lutheran Church, which was the next higher organization. That the said Synod is not incorporated under the laws of Wisconsin.

"In 1903 the church obtained title to certain vacant lands in this city. Although the deed does not disclose this, the owner of an undivided one-half interest in said lands made the church a gift of her interest, the church and Aid paying for the other grantor's interest. The land had no building on it while owned by the church, and it was never actually used for church purposes and no taxes were assessed or paid on it. This land was sold by the trustees December 24, 1927, to the City of Baraboo. Notice of the meeting to consider the proposed sale was given to eight persons, or but a small number of those who were members when the church ceased active work.

"At this meeting of a few of the former members the question of the disposition of the property of the church arose, and by a slight majority it was voted to divide these funds of the church equally between eight former members instead of turning it over to the Norwegian Synod of the American Evangelical Lutheran Church, the next higher organization. The trustees were among the eight who shared as individuals in the division, and they and all of those at the meeting were informed before the vote was taken or any money disbursed pursuant to the vote that such action was unlawful. Except for one or possibly two of the eight who refused to accept the money offered, the trustees paid out all of the moneys of the church, including the proceeds of the real estate, to the said eight persons about January 1, 1928 and deposited the shares refused in the bank to the order of the persons allotted the same.

"The Ladies Aid had several hundred dollars in its treasury at that time, and it followed the example of the church and with notice to but a few of the former members held a meeting at which it was voted to divide its funds between nine persons. There were a number of the members at this meeting who dissented from this action of the majority. The officers of the Aid were beneficiaries under this division.

"Both funds were entirely the fruit of donations for the work of this particular church.

"Neither the Aid funds nor the church funds were divided among all who had been members when the church ceased active work, nor among all such members who still lived here, nor among such of those members who had not trans-
ferred to other churches or aids since active work ceased in the church in question, nor all the regular contributors, in short a favored few divided the church funds and the Aid funds among themselves despite the protest of some of those members who were to share and without the consent of those members who were given no notice of the meeting nor a share in the division.

"Neither the Aid nor the church had done any active work for more than six years before the sale of the lands, and the division of their respective funds. Neither the donor of the one-half interest in the lands referred to nor her heirs consented to the division in question."

QUESTIONS

"1. Under the foregoing facts was the division of the church funds between the eight persons a proper and lawful disposition of such funds?

"2. If not, is there a jury question on the foregoing facts on the issue of whether or not the trustees are guilty of embezzlement of the funds of the church?

"3. If the disposition of the church funds was not proper and lawful, then is there a jury question on the foregoing facts on the issue of whether or not those who voted in favor of such disposition and accepted a portion of the church's funds are guilty as accessories to embezzlement?

"4. Under the foregoing facts was the division of the Ladies Aid funds between the nine persons a proper and lawful disposition of such funds?

"5. If not, is there a jury question on the foregoing facts on the issue of whether or not the officers of the aid are guilty of embezzlement of the funds of that society?

"6. If the disposition of the Ladies Aid funds was not proper and lawful, then is there a jury question on the foregoing facts on the issue of whether or not those who voted in favor of such disposition and accepted a portion of the Aid funds are guilty as accessories to embezzlement?

"7. Is there any proceeding whereby back taxes on the said vacant lands can be collected?"

Accompanying your letter is a memorandum brief with citations of authorities and cases in support of your view of the law applicable to the situation and which brief has been of inestimable assistance in the preparation of the following opinion.

For quite obvious reasons questions 1 and 4 may be treated and answered together as a single question; the same treatment will be afforded questions 2 and 5; also
questions 3 and 6. In your brief you have so grouped and discussed these first six questions.

Answer to questions 1 and 4:

Each of these two questions must be answered in the negative under the authority of the following cases:

Affirming the holding in Fadness v. Braunborg, 73 Wis. 257, 293, the court in the case of Franke et al. v. Mann et al., 106 Wis. 118, 130, makes use of the following language:

"* * * It was said in the Fadness Case, in effect, that if officers temporarily in charge of the corporate affairs divert its property from the legitimate uses of the corporation, as limited by the grant of such property to it, or the purposes of its organization as regards the particular religious faith it was organized to promote, a court of equity has ample power to interfere to protect the minority; * * *"

Again in the Franke-Mann case, supra, 129, the court said:

"We come now to the broad question of whether a majority of the members of a church corporation, organized as a body of Christian believers of a particular sect, can devote its property to a use inconsistent with the purposes of the corporation. That question, it would seem, on the most familiar principles, requires a negative answer. It is the law of such corporations, the same as of all others, that they cannot lawfully divert their property to uses in disregard of the limitations contained in the acts creating them. There is no difference between church and other corporations in that regard. Church corporations are creatures of the law the same as business or municipal corporations, and when it comes to property rights a court of equity has the same power to protect the minority in the one as in the other. If every taxpayer in a city but one were to favor the use of public property for a purely private use, the one, backed by the power of the court, would prevail. If all of the stockholders of a business corporation but one were to favor the use of the corporate property for something entirely foreign to the purposes of the corporation, the one stockholder, with right on his side, and the power of the court to enforce it, would control and prevent the mischief. * * *"

And continuing on page 133 of the same case it is said by the court:
The governing idea in all such cases is that property held by the trustees of a church society has impressed upon it a character in harmony with the creation of the trust, and that any change of such character is a violation of such trust. If property be conveyed to trustees for use of the corporation, and its organic act proclaims the religious belief of its members and sect to which it belongs, so as to indicate clearly the particular use intended by the grantor, or the conveyance expressly indicates the particular use intended by the grantor, or the conveyance expressly indicates the limitations upon such use, or if a corporate organization be formed as a society of a particular church and it becomes possessed of property in any way in trust to that end, in either case the property is held in trust for the use so indicated, and such use cannot be perverted without consent of all the parties to the trust.

In a later case, that of Marien v. Evangelical Creed Congregation, 132 Wis. 650, the court, 652, said:

"* * * It is, however, fully established by our own court, in common with most others, that when property has been acquired, whether by gift or purchase, for the maintenance and support of the faith of any recognized denomination or church, every member of the association acquiring it, corporate or unincorporated, has a right to resist its diversion to other antagonistic uses, whether secular or religious, and therefore those who hold the title or control, whether a corporation or the officers of the association, hold it charged with a trust to apply it to the uses for which acquired and not to inconsistent ones. Such trusts the courts will protect and enforce. Fadness v. Braunborg, 73 Wis. 257, 293, 41 N. W. 84; Franke v. Mann, 106 Wis. 118, 81 N. W. 1014; Cape v. Plymouth Cong. Church, 117 Wis. 150, 93 N. W. 449; S. C. 130 Wis. 174, 109 N. W. 928. Although there be no limitation or trust in terms imposed by the grantor, yet if the property be acquired by a religious association itself connected with and devoted to one of the recognized denominations or churches, especially if synodical, it usually becomes charged with a trust as fully as if limited by the grantor to use for such denomination. While the grantor from whom the property is purchased may make no such qualification of his grant, there can be no doubt of the intention of those who supply the money, and thus in effect donate the property, that their contributions are to be used for the purposes for which the association is organized. * * *"

Upon a second appeal (140 Wis. 31) in the Marien case, supra, the court quotes approvingly the above quoted language used by it upon the former appeal.
From a reading of the foregoing cited cases I do not believe that there can be any doubt as to the correctness of the answer to these two questions, 1 and 4.

On presentation of the facts detailed by you to a court of equity at the suit of an interested objector the court would certainly afford him full and adequate relief from the wrong perpetrated, either enjoin the commission thereof or, if accomplished, set it aside as an unlawful deprivation of his rights.

Answer to questions 2 and 5:

Upon your statement of facts it is assumed in this opinion that the Synod under whose government and control the church in question operated, was not incorporated under the laws of this state. In that situation the devolution of real estate prescribed in sec. 187.08, Stats., could not, in my opinion, affect the title to the real estate involved, and the church corporation could, in the manner prescribed by law, convey it to the city of Baraboo.

With the right in the trustees of the church corporation to convey its real estate, the proceeds of a sale thereof must be held to be funds in their hands “charged with a trust to apply it to the uses for which acquired and not to inconsistent ones.” In the instant case this, you say, was not done. You state that, on the contrary, at a meeting called upon notice to but a small number of those who were members of the church when it ceased active work, the proceeds of such sale were, over the objection of some members of said church, by a slight majority, voted to be divided equally between eight (8) former members of the church; the trustees were among the eight (8) who shared as individuals in the division and disposition thereof; that by those members objecting to such action all of the members at the meeting were informed, before the vote was taken or any money disbursed pursuant thereto, that such disposition of the proceeds of said sale was unlawful; and that said trust fund was divided and disbursed in accordance with such vote so taken.

The ladies' aid society, you state, followed the example of the church trustees and with notice to but a few of those former members held a meeting at which it was voted to
594  OPINIONS OF THE ATTORNEY GENERAL

divide its funds between nine of its members; that a number of the members at this meeting dissented from such action; and that the officers of the aid society were beneficiaries under this division and the disposition of such funds.

Both funds were entirely the fruit of donations for the work of said church and society.  Query:  Does the action taken at such meetings protect the trustees and officers from criminal liability for disbursing said funds for a clearly improper purpose, particularly where the trustees and officers themselves have benefited individually thereby?

I do not believe that the action taken at said meeting will afford any legal protection to the trustees or officers involved.  They had timely notice that their action was unlawful and that there was not unanimous consent of interested members to the distribution made of the funds.  It is said by the court in Cape v. Plymouth Cong. Church, 130 Wis. 174, 179–180:

"* * * A religious corporation holding property charged with a trust for certain purposes can no more divert it to other and inconsistent uses, even by due corporate action, than can any other trustee.  When such is for the promotion of the doctrines and discipline of some particular denomination, courts will prevent diversion to the support of a different and inconsistent one, even if a single individual legally interested objects.  * * *" (Italics ours.)

If, as said in the foregoing quotation, "due corporate action" will not constitute legal ground for an unlawful diversion of such property, it is difficult to understand how the same action will afford legal protection to those who accomplish a conversion of such property to their own use in violation and in fraud of the rights of others.  The rule prevails in this state that the act of an officer of a corporation in committing embezzlement is personal and not official, and he is subject to the same responsibility for such an act done by him through the instrumentality of the corporation as though it were accomplished by any other means.  To this effect, as I understand it, is the holding of the court in the case of Milbrath v. State, 138 Wis. 354.  In my opinion such fraudulent conversion constitutes the crime of embezzlement as defined in sec. 343.20, Stats., and
under the holding of the court in the case of *Prinslow v. State*, 140 Wis. 131, I do not think it necessary, with the proofs at your command in these cases, that demand be made for the restoration of said funds prior to the commencement of criminal proceedings. It was held in that case that proof of a demand for money alleged to have been embezzled is necessary only where a demand is necessary to show the fraudulent conversion embraced in the offense. The court said at page 135 of the case:

* * * "It is the fraudulent conversion of the money that constitutes the offense, and that may be proved without a demand. * * *"

In *9 R. C. L. 1926* it is said:

"In order to establish the crime of embezzlement, it is usually necessary to show, (1) the trust relation of the person charged, and that he falls within that class of persons named by the statute; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession, or was placed in the care, of the accused, under and by virtue of his office, place, or employment; (5) that his manner of dealing with or disposing of the property constituted a fraudulent conversion and an appropriation of the same to his own use; and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof. * * *" 

And in *20 C. J. 413* the author there says:

"To make out a case of embezzlement under the statutes it is necessary to show first, that the thing converted or appropriated is of such a character as to be within the protection of the statute; second, that it belonged to the master or principal, or someone other than accused; third, that it was in the possession of the accused at the time of the conversion, so that no trespass was committed in taking it; fourth, that accused occupied the designated fiduciary relation, and that the property came into his possession and was held by him by virtue of his employment or office; fifth, that his dealing with the property constituted a conversion or appropriation of the same; and sixth, that there was a fraudulent intent to deprive the owner of his property."

Under the foregoing citations it is my opinion that questions 2 and 5 above should be answered in the affirmative and they are so answered.
Answer to questions 3 and 6:

In my opinion these two questions must be answered in the affirmative under the provisions of secs. 343.20, subsec. (2), 353.05, and 353.06, Stats. I do not believe that any good purpose would be served by setting out in this opinion the statutes cited.

I quite agree with you that if the trustees and officers of the church and aid society are guilty of embezzlement as principles the members of each such organization who by their votes and acceptance of a division and disposition of said funds aided or abetted said principals in the fraudulent conversion of said monies are guilty as accessories before the fact. Such is the provision of sec. 353.05, Stats., and the punishment therein prescribed is the same as is visited upon the principal felons.

While it might be successfully claimed or argued that members who are not trustees or officials of the church or aid society cannot be prosecuted for embezzling the funds of such institutions, the trustees or officers, although members thereof, cannot defend a prosecution for embezzling such funds on the ground that they are part owners of such funds or have an interest therein, nor may such defense be urged by those other members charged with being accessories before the fact. See secs. 343.20, subsec. (2), and 353.05.

Answer to question 7:

Under the provisions of sec. 70.11, subsec. (4), Stats., the real property necessary for the location and convenience of the buildings of any religious association and embracing the same, not exceeding ten acres, if not leased or otherwise used for pecuniary profit, shall be exempt from taxation.

You state that although there was no building on this land while owned by the church and was never actually used for church purposes, yet during such period of time no taxes were assessed or paid on it. Clearly under such facts it was improper to exempt the same from taxation.

However, the failure to assess such lands for taxes during said period of time does not necessarily result in a complete escape from the obligation to pay such taxes as should have been assessed against it so that it would bear its just
tax in relation to all other taxable property in the city. The provisions of sec. 70.44, Stats., furnish ample authority for the assessment of taxes on said lands for at least a portion of said period of time. That section provides:

"Real * * * property omitted from assessment in any of the three next previous years * * * shall be entered once additionally for each previous year of such omission, * * * and affixing a just valuation to each entry for a former year as the same should then have been assessed * * *, and collected on the tax roll for such entry."

You state that the church trustees conveyed this land by warranty deed to the city of Baraboo; that it is now owned and used by the city for school purposes and is exempt from taxation; that at the time of such transfer of title there were no outstanding tax liens or obligations against the same; and that since there was no provision in the statutes making the owner personally liable for real estate taxes, this seventh question narrows down to whether or not if taxes are assessed under sec. 70.44, Stats., after the land has been conveyed, nonpayment thereof constitutes a breach of the covenant against incumbrances. In this conclusion I cannot agree with you. I do not believe that you are confronted with any such question. A much more simple solution of the situation is provided if you proceed under sec. 70.17, Stats., to a collection of such taxes as may be assessed under sec. 70.44, Stats. By the provisions of sec. 70.17, Stats., the payment of real estate taxes is made a direct and personal obligation against the owner of real estate and may be enforced by action of debt in the same manner as are taxes assessed on personal property. Your attention is directed to the last sentence of such section, which reads:

"The tax thereon [real estate] 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."

In this same connection your attention is also directed to what is said in XV Op. Atty. Gen. 236.

I sincerely trust that what is said above on this last ques-
tion will furnish you with rather an uninvolved and effec-
tual method of enforcing payment of the taxes under con-
sideration.

HAM

Public Officers—Police Justice—Office of police justice abolished by action of city council subsequent to revision of general charter law as contained in ch. 242, Laws 1921, can be re-established under present statute only by city ordi-
nance duly enacted.

Office of police justice abolished by ordinance prior to enactment of ch. 242, Laws 1921, has been re-established by enactment of said general charter law as contained in sec. 62.24.

November 22, 1928.

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

You state that the city council a number of years ago in a certain city in your county abolished the police court and so far as you can find out it has never been re-established; that at the last city election a police justice was elected and has been holding a police court. You ask to be advised whether a police court can be re-established without an ordi-
nance to that effect passed by the council.

The general charter law for cities underwent a revision in ch. 242, laws of 1921, which is now contained in ch. 62, Wis. Stats. Sec. 62.24, subsec. (1) provides:

“A police justice shall be elected every fourth year as other city officers are elected.

In subsec. (4) of said section it is provided:

“(a) The council may by ordinance abolish the police court, and thereupon the jurisdiction of said court shall be exercised by any municipal court located in the city, if any, otherwise by the justices of the peace of the city.

Subsec. (5) of the same section provides:

“This section shall not apply to cities having a court or judge with substantially the same jurisdiction as that con-
ferred by subsection (2).”

You do not state whether the city council abolished the police court prior to the revision of 1921. If the counsel
Note: On the question as to whether or not payment of real estate taxes is a personal obligation against the owner of the land assessed, see XI Op. Atty. Gen. 95 and Allen v. Allen, 114 Wis. 615, 627. See also Baldwin v. Barber, 164 Wis. 622, 623.
acted subsequent to the revision of the general charter law then the answer is clear that such police court has been abolished and can only be re-established by an act of the city council. If, however, the police justice was abolished prior to the revision then sec. 62.24, in my opinion, re-establishes such a police court because it expressly provides that a police justice shall be elected every 4th year as other city officers are elected.

In coming to this conclusion I have not overlooked the provisions of sec. 62.01, which declares in subsec. (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.”

This, I take it, does not apply to offices that are not in existence when the change in the city charter takes place. If the police justice was abolished by act of the city council prior to the revision, then there was no police justice to whom this provision could apply, for such office was not in existence.

JEM

Public Health—Cemeteries—Where cemetery association has been formed under law and cemetery grounds have been purchased, lots have been sold for cemetery purposes, interment has been made, some or all of bodies removed and some of lots are now being used for residence purposes without proceedings had to authorize sale for purposes other than cemetery, such residence use is unlawful.

Such unlawful use or failure of proper use or abandonment of grounds for cemetery purposes does not escheat property to state. City becomes vested with control and should manage and care for property or force its proper use or sale so as to get it back upon tax roll either under provisions of law or by amendment thereto.

November 24, 1928.

A. D. Campbell, Chief Clerk.
Commissioners of Public Lands.

You advise that there is a cemetery located in the city of Racine known as the Evergreen Cemetery, which was organized in 1851 and acquired government lot 3, section
21, township 3, range 23, for cemetery purposes. You have furnished an abstract showing that that transfer and thereafter several other transfers were made by the association to individuals for cemetery purposes. In each of the transfers made by the cemetery association it was specified that such transfers were for cemetery purposes and to be used for no other purpose, in accordance with the provisions of the statute.

Among other transfers by the association was one to Daniel Bull and thereafter several lots were transferred to him by quitclaim from persons who purchased certain lots for cemetery purposes from the association. I have examined the instruments from the association as they appear in the office of register of deeds and I find each one of said instruments contains the required restriction "to be used for cemetery purposes only," but the quitclaim deeds from such purchasers to Daniel Bull do not have any restrictions as to the use, but of course the quitclaim simply transferred the title of the original purchasers, which was subject to that restriction.

You say that Daniel Bull has since built a house on these lots so purchased by him and uses the same for his residence and occupies and cultivates other lots.

I find that Daniel Bull does not reside on said premises but resides in the city and has three houses located in the cemetery that look to be houses moved to the lots and they are occupied by persons presumably renting from Daniel Bull. There is an old fence around part of the cemetery but it is down in some places and it could hardly be said that it is enclosed.

You say you are advised that afterwards the bodies were removed and the cemetery is not used now for cemetery purposes.

From my inspection of the premises, it appears that some of the bodies were removed but in other places it would appear that there were graves that had not been opened, for there were some places where there were foundations for tombstones or markers that indicated that burial had been made and there was no indication that the graves had been opened or bodies removed.

You refer to sec. 157.08, subsec. (2), Stats., which au-
Opinions of the Attorney General

The transfer of cemetery lots for purposes other than burial where no burials had been made, by a proceeding in county court authorizing the same. You say you do not know whether such a proceeding had been taken. I examined the records in the county court of Racine county but found no such record, so that the only transfers made by the cemetery association, so far as I found, were transfers in accordance with the requirements of the statutes, with the restriction that they should be used for cemetery purposes only. Evidently, the use of the lots occupied by buildings is unlawful and without legal authority and the parties so using the same could be removed by proper proceedings by anyone having an interest therein, but I do not see how the lands could be escheated to the state.

Sec. 237.01 (7) provides that where a person dies intestate, having no heirs, his estate shall escheat.

Sec. 24.03 provides:

"The commissioners of public lands shall, whenever they shall have reason to believe that any lands have escheated to the state for defect of heirs, cause due inquiry to be made to ascertain the rights of the state, and the attorney general shall bring any suit or action or take any requisite proceeding necessary to protect and secure the rights of the state. * * *

That section gives the commissioners the right to sue for and recover any lands escheated to the state or to sell the state's interest therein without first obtaining possession thereof or without first establishing title thereto by action. So that, if such lands escheated to the state, the land commissioners could sell whatever interest the state has in them, which would convey whatever title, if any, the state had. But, under the conditions existing here, I do not see how the state can claim that these lands have escheated, for the cemetery association is still a corporation under the laws of this state and the land, other than that which has been sold for cemetery purposes, is still in the name of the association, and no effort has been made to transfer the title under the provisions of the statute except in the cases named.

The fact that cemetery grounds are neglected by the association or that the association abandons or fails to manage
or care for the cemetery in a proper way, would not escheat the land because sec. 157.04 (2) expressly provides:

"When a cemetery association abandons or fails to manage or care for the cemetery for a period of five or more years, and is not reorganized in the meantime, the municipality wherein the cemetery is becomes vested with the control of the property, and shall manage and care for it, and collect and manage all trust funds connected therewith received other than by a will."

That seems to be an express provision for a situation like this, and it would seem that the city of Racine would be authorized if not required to take charge of, control and manage the property if it is still a cemetery property. If it is not a cemetery property, then the city of Racine is interested in getting the property back upon the tax roll, for it is a valuable property within that city. That might be the best way to force the cemetery association to keep it up or to maintain it as a cemetery or to make proper application to sell the property for purposes other than a cemetery so it would get back upon the tax roll again and be made to contribute its proper share for maintaining the government if it is not used for cemetery purposes.

If the situation cannot be worked out by the city, then I think an amendment should be made to the law which would authorize an escheat or the taxation of cemetery property in a situation like this.

TLM
Opinions of the Attorney General

Counties—Public Officers—County Judge—County Officers—Requirement to file statements mentioned in sec. 59.77, subsec. (3), Stats., “on or before the first Monday in November in each year” is mandatory; neglect to comply therewith results in forfeiture of right to compensation mentioned in such section.

Public officer on salary basis in lieu of fees shall nevertheless collect fees appertaining to office, except when such fees are payable by county, and turn them over to county treasurer.

Public officer takes his office cum onere and is entitled to no salary or fees except what statute provides.

November 24, 1928.

Martin Gulbrandsen,
District Attorney,
Viroqua, Wisconsin.

In your letter of November 17 you request an opinion on the following questions:

"Question: If the county judge fails to file the statement [required by the provisions of sec. 59.77, subsec. (3), Stats.], on or before the first Monday of November, but files the same with the county clerk on the 15th or 16th day of November, is he entitled to fees for services in criminal cases had before him during the preceding year while acting as a justice of the peace of the county?"

"Question: In view of the opinion contained in Vol. 16, Opinions of the Attorney General of Wisconsin at page 669, is the county judge of Vernon county entitled, under section 253.15, Wisconsin statutes, to receive $5.00 per day while engaged in receiving a plea of guilty under section 357.20, Wisconsin statutes, and is he entitled to the compensation for examination and commitment of insane person to the hospital for insane, under section 51.07 (1) and for time spent in administering the mothers’ pension law, under section 48.33 and for committing persons to the Wisconsin general hospital under section 142.01, which makes no provision for compensation for services rendered by the county judge?"

Answer to Question No. 1: Sec. 59.77, subsec. (3), Stats., provides:

"County judges, court commissioners and justices of the peace shall, on or before the first Monday of November in
each year, forward to the county clerk of their respective counties a correct statement of all actions or proceedings had before them, during the year next preceding, in which the county shall have become liable for costs, giving the names of the parties in each action or proceeding, the nature and result of the same, the amount of costs in detail in each case, and what items, if any, have been paid and the amount thereof. The county clerk shall file such statements in his office; and no such officer who shall neglect to make and return such statements within the time above prescribed shall receive any compensation from the county for any service rendered by him in any criminal case or proceeding during the year next preceding the time when such statement is required to be made and returned. Each such justice of the peace shall also, at the time of making any such statement, annex thereto and file with the said clerk a sworn statement, giving the titles of all criminal actions tried before him during the same period in which the defendant or any defendant, shall have been convicted, and shall also state therein that he filed a certificate of conviction in each such case as and within the time required by law; and no bill of any justice of the peace shall be allowed, in whole or in part, unless accompanied by such sworn statement, nor unless all such certificates of conviction have been filed."

Sec. 59.04, subsec. (1), Stats., so far as is here material, provides:

"Every county board shall meet on the Tuesday next succeeding the second Monday of November in each year at the county seat for the purpose of transacting business as a board of supervisors. * * * ."

There can be little doubt as to the reason for the requirement prescribed in said sec. 59.77, subsec. (3), that the first statement therein mentioned "shall" be forwarded to the county clerk "on or before the first Monday in November in each year." This statutory requirement as to the time when such statement "shall" be forwarded, etc., was undoubtedly intended to insure the filing of the same prior to the time prescribed by sec. 59.04, subsec. (1), Stats., for the annual meeting of the county board. A very similar provision, and presumably for the same reason, is the requirement prescribed by sec. 59.77, subsec. (4), par. (a).

"At least ten days before the annual meeting of such board every such officer shall make and file with the county
clerk a certified statement of all actions or proceedings had or tried before him in which the state was a party,* * *"

In my opinion, if sec. 59.77, subsec. (3) and sec. 59.77, subsec. (4), are read together with sec. 59.77, subsec. (2), and I think they should be, little, if any, doubt will remain as to the meaning or construction of the word "shall" as it is used in connection with the time of forwarding or filing the statements specified in either sec. 59.77, subsec. (3), or 59.77, subsec. (4). To hold that such provisions are directory and not mandatory as to the time when such requirements must be complied with would do such violence to the statutes under consideration as would entirely defeat the purpose thereof. It must therefore be held that such statutory requirements are mandatory and not directory merely. Sec. 59.77, subsec. (3), specifically provides:

"* * * Each such justice of the peace shall also, at the time of making" the statement first described in said subsec. (3), "annex thereto and file" therewith a certain sworn statement "and no bill of any justice of the peace shall be allowed, * * * unless accompanied by such sworn statement, * * *.”

In view of the statutory requirement that said "sworn statement" shall, at the time of the making of the first statement mentioned in said subsec. (3), be "annexed" thereto and filed therewith, it is rather difficult to understand how such "sworn statement" could have been annexed to the first statement "on or before the first Monday of November" when, according to the facts detailed by you, the first "statement" was not then in existence.

When we have a statutory requirement that a certain "statement" be "annexed to and filed with" a certain other "statement" at the time of the making of the latter, it is rather a difficult physical accomplishment unless the latter "statement" is at hand so that the former "statement" can be "annexed" to it. Such a feat not only borders upon, but is, an actual physical impossibility, at least so far as the ordinary individual is concerned.

The mandate of the statute to a justice of the peace is twofold: (1) he "shall on or before the first Monday of
November in each year, forward to the county clerk" the statement first mentioned in the statute, and (2) he "shall also, at the time of making any such statement, annex thereto and file with the said clerk a sworn statement" setting forth the information required by the statute. Neglect to make and return the statement first required within the time aforesaid or to annex thereto and file therewith the sworn statement specified in the statute results in his forfeiture of all compensation from the county to which he would otherwise be entitled under the statute.

For the foregoing reasons your first question is answered in the negative.

Answer to Question No. 2: In connection with your second question you state:

"The salary of the county judge of Vernon county was fixed at the annual county board meeting in 1924" at $1,500. "Nothing was said as to fees which would be collected by the county judge for certified copies in probate court or about compensation under the mothers' pension law or the Wisconsin general hospital law for the examination and commitment of insane persons under sec. 51.07."

In my opinion a portion of your second question finds a ready answer in subsecs. (1) and (7), sec. 59.15, Stats. Said subsec. (1) reads:

"The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer's term, and shall be in lieu of all fees, per diem and compensation for services rendered, * * *"

And said subsec. (7) provides:

"Any officer who shall receive a salary in lieu of fees shall collect the fees appertaining to the office and turn them over to the county treasurer. * * *"

In the light of the foregoing quoted statutes it is the duty of the county judge, in the situation under consideration and notwithstanding that he may not retain the same for himself, to collect the fees specified by law for furnish-
ing certified copies of the records and files in each office and pay the same over to the county treasurer.

In view of the statutory requirement in said subsec. (7) it would serve no good purpose to require the county judge to collect from the county the fee specified in sec. 253.15, subsec. (2), Stats., when he is required to pay it over to the source from which it came. I do not believe that the law contemplates the necessity of such fruitless proceedings.

With respect to the fee prescribed in sec. 51.07, subsec. (1), Stats., what is said in the preceding paragraph should govern.

The remaining portion of your second question is, in substance: In administering the mothers' pension law under sec. 48.33, Stats., and for committing persons to the Wisconsin general hospital under sec. 142.01, Stats., is the county judge entitled to compensation for time spent in the performance of such duties, although the law makes no provision for compensation therefor?

A solution to this question involves little difficulty if we recognize the universal rule that in all cases the right of public officers to compensation is such only as may be prescribed by law. A public official's right to compensation is purely statutory; what the statute gives, he receives, but no more. On the question here under consideration our supreme court in the case of Henry v. Dolen, 186 Wis. 622, 624, said:

"A consideration of this case must be premised upon the well established proposition that a public officer takes his office cum onere and is entitled to no salary or fees except what the statute provides."

On this latter branch of your second question, therefore, you are advised that no right to compensation accrues to the county judge for having rendered official services where the statutes make no provision therefor.

HAM
Elections—Sample official primary ballot with cross marked after certain candidate’s name and mailed to prospective voter is violation of corrupt practices act unless name of author is disclosed.

FRANK B. MOSS,
District Attorney,
Baraboo, Wisconsin.

Your written communication states in part as follows:

"There has been submitted to me a sample official primary ballot for Sauk county which was circulated and used in the primary campaign of September 4, 1928.

"At the top of this sample ballot is found the following printed statement:

"'Sample Official Primary Ballot, General Election, Republican Party. To vote for a person whose name is printed on the ballot, mark a cross (X) in the square at the right of the name of the person for whom you desire to vote. To vote for a person whose name is not printed on the ballot write his name in the blank space provided for that purpose.'

"Then below that is a list of state, legislative and county officers who were on the ticket at the September primary."

You also state that opposite the name of a certain county candidate was a large printed cross. You state that this was not circulated as an official sample ballot and obtained from the county clerk’s office. You state that there was no authorization of this campaign material, that is, that it does not disclose the author. You ask whether or not this campaign material was in violation of the corrupt practices act under ch. 12, Stats., particularly under sec. 12.16.

The statute to which you refer, to wit: 12.16, provides as follows:

"Campaign literature must disclose author and candidate. 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."
It is the opinion of this department that this piece of campaign material should disclose the author and that since it does not it is in violation of this section. A marked sample ballot is clearly literature tending to influence voting and hence comes squarely within the provisions of 12.16, Wis. Stats.

JWR

Insurance—Workmen’s Compensation—Corporation purchasing plant may be held to pay workmen’s compensation insurance premium on exposure of plant prior to its acquisition by it when such premium has been computed by applying rate which was promulgated by using experience although that rate might be affected by method of operation of plant after such transfer if plant is operated by entirely new set of officers and employees, who are inexperienced in operation of such plant.

November 28, 1928.

Compensation Insurance Board.

You state that at a recent meeting of the Wisconsin compensation rating and inspection bureau the rating committee of the bureau discussed the following rule which is a part of the Wisconsin experience rating plan appearing on page 13 thereof:

"Experience incurred by a given employer in a plant subsequently sold by him, shall be included in the future rating of that employer’s operations notwithstanding such sale."

You say:

"While the application of that rule is defensible the question was raised whether the result of an experience rating—modification factor—could better follow the plant or risk wherein the experience was developed instead of the individual or management responsible therefor."

You then give illustration as follows:

"* * * We have a manufacturer engaged in a multiple line of stamping operations wherein an adverse experience is developed, resulting in a charge of fifteen percent above manual rates. The executive body of this concern sells the plant and business to a new group of individuals who continue its operation uninterrupted, and purchase a plant wherein gasoline engines are manufactured.
"Under the present plan the experience incurred by the original owners of the stamping plant follows the management to the engine factory for the future rating of their operations, while the new owners of the stamping plant have no past experience to apply to their operations, although the plant experience has been adverse, and purchase insurance at manual or schedule rates."

You say opinion differs on the subject: one contention is that the aforementioned rule harmonizes with the moral attitude of the employer while, on the other hand, another contention is that the physical condition of the plant produced the experience and that experience incurred therein shall be used for future ratings regardless of ownership or operative management. You say in this respect you ask for an opinion on the following:

"Can a corporation be held to pay workmen's compensation insurance premium on the exposure of a plant recently acquired by it when such premium has been computed by applying a rate which was promulgated by using the experience of the plant prior to the control of the corporation?"

I think the situation is somewhat involved and I think it involves questions of fact as well as law.

If, in the sale of a plant by one corporation to another corporation, the employes and operators of the plant continued with the new concern, then I should say your question should be answered in the affirmative, because both the plant or machinery and the operatives would be tried and experienced, and that, I would assume, would be a large factor in determining the risk.

A corporation employer is not like an individual employer because the stockholders and officers of such corporation might change at any time without changing either the machinery or the operatives and in that case the risk would not be changed or affected. So I think, as a general proposition, your question could be answered in the affirmative with a possible modification to fit cases where the conditions entirely changed with the sale so that it could not be said that the experience in the operation of the old plant or the plant before the sale passed with the sale to the new corporation.
Counties—County Board Proceedings—Public Printing—Newspapers—Publication by county board of its proceedings is made mandatory upon such board by terms of sec. 59.09, subsec. (2), Stats.

Refusal or neglect of member of board to comply, without just cause therefor, with such mandate subjects such member to forfeiture prescribed in sec. 59.10, Stats.

Restriction of cost of such publication is limited to rate per folio, only, by sec. 59.09 (2), Stats.

Rate per folio fixed by county board (not in excess of one dollar) must be such as will be acceptable to at least one qualified newspaper published in county, for publication of such proceedings, and thus enable board to comply with mandate.

Publication, in pamphlet form, of proceedings of county board and general distribution thereof as authorized by sec. 59.09 (3) does not relieve board from complying with mandate of subsec. (2) of said section. Such publication and distribution is for additional publicity only.

November 28, 1928.

Gad Jones,
District Attorney,
Wautoma, Wisconsin.

Out of your letter of November 23 I read your request to be for an opinion on the questions set out below. For convenience my answer thereto immediately follows each such question, viz.:

Question No. 1: If the county board fails and neglects to provide for the publication of its proceedings as provided for in sec. 59.09, subsec. (2), Stats., can any, or all of the members of the board be subjected to the penalty prescribed in sec. 59.10, Stats.?

Answer to Question No. 1:
So much of said sec. 59.09, subsec. (2), as is here material, reads:

"Said board shall, by ordinance or resolution, provide for one publication of a certified copy of all its proceedings had at any meeting, regular or special, in one or more newspapers published and having a general circulation therein, * * * ."
Sec. 59.10 aforesaid reads as follows:

"Any supervisor who refuses or neglects to perform any of the duties which are required of him by law as a member of the county board of supervisors, without just cause therefor, shall for each such refusal or neglect forfeit a sum of not less than fifty dollars nor more than two hundred dollars."

In my opinion the above-quoted portion of sec. 59.09, subsec. (2), is mandatory in its terms. I do not believe that there is any room for giving any other construction to the language used. Since it is mandatory, neglect or refusal to perform the duty there charged upon the board must necessarily result in incurring the forfeiture prescribed in sec. 59.10, Stats. The duty to comply with the mandate of said sec. 59.09, subsec. (2), rests alike on each and every member of the board. Failure of a member to offer appropriate draft of "ordinance or resolution" mentioned therein or to vote for the passage or adoption thereof, would, in my opinion, constitute neglect of duty. Such neglect may as well be claimed for an act of omission as one of commission on the member's part. The one statute charges the members of the board with performance of a specified duty, the other statute prescribes a forfeiture for refusal or neglect to perform such duty. The member has his option of performing or paying.

Question No. 2: "Is the price that may be paid for the publication of the proceedings (whether published in one or in more than one paper) limited to one dollar per folio for the entire publication?"

Answer to Question No. 2:
Sec. 59.09, subsec. (2), Stats., provides, among other things, that the publication of the county board proceedings shall be in one or more newspapers, and then specifically prescribes:

"* * * But the cost of any such publication under this subsection shall in no case exceed the rate per folio fixed by law for the publication of legal notices."

Sec. 331.25, Stats., prescribes the maximum date per folio for publication of legal notices at one dollar for the first insertion.
You will note that I have italicized the word "rate" in the quotation above from sec. 59.09, subsec. (2), because I believe that the maximum limitation of the cost of the publication of such proceedings as in said section provided was intended to apply to the "rate" per folio which might be paid to any one newspaper, that is to say: If the proceedings published consist of one hundred folios the maximum sum total payable to each newspaper employed in such service might not exceed one hundred dollars, irrespective of the number of newspapers so employed.

Question No. 3: "The maximum price having been fixed by law, can the county board fix a lower price by resolution and refuse to award a contract at a higher price? If the board cannot fix the price, how must it be fixed and determined?"

Answer to Question No. 3:
This question is double and for convenience in answering it I have subdivided it into (a) and (b).

Taking up subdivision (a) of the question, you are advised that the county board can, of course, fix a lower maximum rate per folio than that fixed in the statute and may refuse to enter into a contract for such service at a higher rate, subject however, to the mandate contained in sec. 59.09, subsec. (2), Stats., that the board "shall" obtain publication of its proceedings in one or more newspapers published and having a general circulation in such county. In awarding a contract for such service the board is restricted to the newspapers of the county in which such proceedings are had, unless there is not a newspaper published in such county meeting the statutory requirements or qualifications. So if there is published in your county a newspaper "having a general circulation therein" the board is limited to its own county in obtaining the publication service which by the mandatory terms of sec. 59.09, subsec. (2), the board "shall" furnish. That brings the board to this: It must furnish the service and it is limited in so doing to the newspapers of its own county, if a qualified one is published therein, and consequently the maximum rate folio which it may fix or determine upon (not in excess of one dollar) must be such as will be agreeable to at least some qualified newspaper of the county.
The board may not set the maximum rate so low that no qualified newspaper of the county will furnish the publication service at such rate, in the thought that the members of the board may thereby escape the forfeiture prescribed in sec. 59.10, claiming that through no fault on their part it became impossible for them to comply with the mandate to furnish such service. The statute has fixed the maximum rate and within such rate it is the bounden duty of the board to furnish the service.

Under subdivision (b) of this question it is necessary only to say that the board has the undoubted right to fix and determine upon any rate within the statutory maximum, but it may not by its own act in such respect do that which will prevent it from furnishing or accomplishing the service. Since it is the statutory duty of the board to furnish the service it is also the duty of the board in fixing the rate therefor to so fix it that the first duty may be performed.

Question No. 4:

"Is the publication provided for by sec. 59.09, subsec. (3), a sufficient publication of the board proceedings in a county having a population of less than two hundred fifty thousand?"

Answer to Question No. 4:

Sec. 59.09, subsec. (3), Stats., so far as is here material reads as follows:

"Said board may at any meeting, * * * provide by resolution for the publication in pamphlet form by the lowest and best bidder therefor, of a sufficient and designated number of copies of its duly certified proceedings, for general distribution."

In my opinion there is nothing in said subsec. 59.09, subsec. (3), indicating a purpose on the part of the legislature to give a county board the option of publishing its proceedings under the mandate of sec. 59.09, subsec. (2), or doing that which the board is authorized to do under the provisions of sec. 59.09, subsec. (3). This necessitates a negative answer to your question. The authorization for publication of county board proceedings in pamphlet form
specified in subsec. (3) of said section was intended merely as a means of giving additional publicity to the board's proceedings.

HAM

Taxation—Forest crop lands within provisions of ch. 77, Stats., becoming and remaining such prior to first Monday in August of any year are exempt from taxes for that year under irrepealable levy made by school district or other municipality at time of obtaining loan from state trust funds under ch. 25, Stats., or incurring of indebtedness under ch. 67, Stats., and from other general taxes.

November 30, 1928.

L. B. Nagler, Director,
Conservation Commission.

Your inquiry, as I understand your question, is:

Where at the time of the consummation of a loan from the state trust funds under the provisions of ch. 25, Stats., lands situated within a school district and subject to general taxation therein for school purposes (including the payment of indebtedness lawfully incurred by the district) thereafter become "forest crop lands" under the provisions of ch. 77, Stats., are such lands thenceforth while remaining forest crop lands exempt from general taxation, and particularly, are they exempt from the tax levied by the school district for the purpose of paying the principal and interest of such a loan as it falls due.

I think that the answer to the question should be in the affirmative.

Sec. 77.03, Stats., provides:

"From and after the filing of the order [approving any tract of land of not less than 160 acres as 'forest crop lands' as provided by sec. 77.02] * * * * the lands described therein shall be 'Forest Crop Lands,' on which taxes shall thereafter be payable only as hereinafter provided. * * * *"

Sec. 77.04, subsec. (1), provides:

"The clerk on thereafter making up the tax roll shall enter as to each forest crop land description in the column
designating the name of the owner, or in a separate column, or some other appropriate place, the words 'Forest Crop land' or the initials 'F. C. L.,' which shall be a sufficient designation that such description is subject to this chapter. Such lands shall thenceforth not be assessed or tax levied thereon as provided in chapter 70 of the statutes entitled 'Assessment of Taxes,' but shall be subject to annual specific taxes as hereinafter provided."

The specific taxes provided by the chapter are an annual tax of ten cents per acre, payable to the town treasurer, and severance taxes on wood products cut and removed, payable to the state treasurer.

By sec. 3, art. XI of the state constitution, it is provided:

"* * * Any * * * school district * * * or other municipal corporation incurring any indebtedness * * * shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same; * * * *

And sec. 25.05 (5) requires that the municipality applying for a loan from the state trust funds shall by resolution levy "upon all the taxable property of the municipality a direct annual tax for the purpose of paying and sufficient to pay" the principal and interest on the loan as it falls due, which levy "shall remain valid and irrepealable until the loan and all interest thereon shall be fully paid;"

and sec. 25.07 provides:

"All the taxable property in any municipality which has obtained or shall obtain any loan from the state or from any of its trust funds shall stand charged for the payment of the principal and interest thereof. The annual tax levied as provided by subsection (5) of section 25.05 shall be a special charge to be paid next after the state tax out of any moneys collected as taxes within said municipality."

Similar provisions are found in ch. 67, Stats., relating to general municipal borrowing in secs. 67.05 (10) and 67.06.

While the levy of taxes sufficient to pay the principal and interest becoming due from year to year is, under the constitutional and statutory provisions above quoted and referred to, a present, irrepealable levy on all the taxable property in the school district or other municipality, such
taxes in any year can be assessed and extended only against the taxable property—that is, the property not exempt from the general taxation provisions of ch. 70, Stats.—existing in a municipality on the first Monday of August, when the tax roll is delivered to the clerk; there is no lien for taxes on any property in any given year until that date. Petition of Wausau Investment Co., 163 Wis. 283, 289–290.

The taxable property in any municipality varies from year to year—some previously taxable has become exempt by law, some has been destroyed by fire or other cause, some has been removed out of the taxing district, other property has been created or developed or has been brought into the taxing district, property formerly exempt has become taxable, etc., etc. Obviously, the annual tax collected in any given year is levied by the irrepealable tax levy made at the time of obtaining the loan only upon and must be borne entirely by the taxable property existing in the municipality in the assessment year whether such property is greater or less than that which was taxable in the prior year or years. Borner v. Prescott, 150 Wis. 197, 202–203.

The legislature has expressly exempted “Forest Crop Lands” from all taxes except certain specific taxes while they remain in that class. I assume and believe that the classification for the purposes stated by ch. 77 is a proper one and that the exemption is a valid exemption. The conclusion, therefore, is that forest crop lands cannot be charged with general taxes for the purpose of paying principal and interest on the indebtedness of the municipality in which they are situated or for other municipal purposes, and that the owners of such lands are subject only to the specific taxes provided for in ch. 77 as long as the lands remain within the classification; if they cease to be forest crop lands as provided by that chapter, provision is made by sec. 77.10 for the determination and payment of the amount of general taxes they would have been subject to had they not been exempt from such taxation under the provisions of the chapter.

FEB
Charitable and Penal Institutions—Minors—Industrial Schools—Board of control has power to dismiss any child from industrial school when in its judgment such child is detrimental to institution.

Board of control has not power to retain child in such institution committed thereto after conviction for crime and pardoned by governor.

Governor has no power to compel board of control to keep child in institution who in its judgment is detrimental to institution.

Governor can pardon only person convicted of crime; those committed to industrial schools without having been convicted of offense are not subject to pardon.

Board of control has power to parole any inmate of industrial schools.

December 4, 1928.

BOARD OF CONTROL.

You ask for an interpretation of secs. 48.15 and 48.16, Stats. The question to be determined is what jurisdiction the board has in paroling boys and girls who have been sent to the industrial school for boys or girls under sec. 48.15.

Sec. 48.15 contains the following:

“(1) Any male child under the age of seventeen or any female child, under the age of eighteen, convicted of a criminal offense may, in the discretion of the judge or magistrate before whom the case is tried, be committed to one of the industrial schools of this state instead of to the state prison, house of correction, county jail or police station, as the case may be.

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

In subsec. (3) of the same section it is provided that all commitments to such schools “shall in the case of boys be to the age of eighteen years and in the case of girls to the age of twenty-one years.”
Sec. 48.16 provides:

“(1) The state board of control is hereby clothed with the sole authority to discharge any child or children from either of said industrial schools who shall have been legally committed thereto, subject to the power of the governor to grant pardons, and it may return any such child to the court, justice or other authority which ordered or directed its commitment, when in its judgment such child is an improper subject for its care and management or shall be found incorrigible, whose continuance in the school it may deem prejudicial to the management and discipline thereof, or who, for any other cause, in its judgment, ought to be removed therefrom; and in such case said court, justice or other authority shall have power and is hereby required to proceed as might have been done if the commitment had not been ordered to such school.

“(2) The board may restore any child duly committed to either of said schools to the care of its parents or guardians before the expiration of its term of commitment if in its judgment it would be most for the future benefit and advantage of such child.”

The industrial schools for boys and girls are not prisons. They are, as their names designate, schools. They are institutions to which boys and girls are sent, not to punish them for offenses that they may have committed, but for the purpose of teaching them not to commit offenses in the future. Reformation, not punishment, is the aim, even in those cases where the commitment is made after conviction of a crime in a court of justice.

In State v. Scholl, 167 Wis. 504, where the constitutionality of our juvenile court law was under consideration, the late Justice Winslow, speaking for the court, said p. 509:

“It is sufficient to say on this point that the proceedings under this law are in no sense criminal proceedings, nor is the result in any case a conviction or punishment for crime. They are simply statutory proceedings by which the state, in the legitimate exercise of its police power, or, in other words, its right to preserve its own integrity and future existence, reaches out its arm in a kindly way and provides for the protection of its children from parental neglect or from vicious influences and surroundings, either by keeping watch over the child while in its natural home, or, where that seems impracticable, by placing it in an institution designed for the purpose.”
The power of the state to exercise such control over children when neglected by their parents is fully vindicated in a learned opinion by Chief Justice Ryan in the case of *Milwaukee Industrial School v. Milwaukee*, 40 Wis. 328.

You will note that the commitment under sec. 48.15, sub-sec. (1), is made after the conviction of a criminal offense, but even this is not to be considered as the imposition of a sentence on the offending child, for the commitment to the industrial school will be in the case of boys to the age of eighteen and in the case of girls to the age of twenty-one, irrespective of the penalty prescribed for the offense by the statute. You will also note that under sec. 48.16 the board is given power to return such child to the court which ordered the commitment when in the judgment of the board such child is an improper subject for its care and management or found incorrigible or when for any cause in the judgment of the board the child ought to be removed therefrom. The court to which the child is returned may then impose the sentence that it withheld in the first place when it committed the child to the industrial school.

In sec. 48.16 the state board of control is given sole authority to discharge any child or children from either of said industrial schools legally committed thereto subject, however, to the power of the governor to grant a pardon. We stop here to consider what the limitations are on the governor to grant a pardon. Under sec. (6), art. V of our constitution it is provided:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons."

The power here given to the governor by the constitution cannot be taken from him directly or indirectly by any provision of the statute. You will note, however, that such pardoning power is limited to cases where the person has been convicted of an offense. It does not apply to cases where persons are committed to an institution without conviction. A pardon cannot be given to one committed to a
hospital for the insane or to a county home. Under the above provision of the statute quoted, commitments to the industrial schools are often made when the child has committed no offense and in a great many cases when no conviction was obtained. In such cases the governor has no power to pardon. It follows that any child committed to these institutions after conviction in pursuance to the provisions of subsec. (1), sec. 48.15 may be pardoned by the governor and, if pardoned, I believe you will have no power to retain such child after such pardon. The governor has the right to give such child its liberty by a pardon.

In all other respects, however, the power of the board of control to dismiss any inmate from the institutions is plenary. While the governor has the power to grant to an inmate of one of the industrial schools sent there after the conviction of a crime its liberty by a pardon, still the governor has not the power to compel the board of control to retain any child in the institution when in its judgment such child ought to be removed therefrom.

In other words, the board of control, under sec. 48.16, has the power to discharge any child from the institution. If the child has been sentenced to the institution after a conviction under sec. 48.15, subsec. (1), and is found to be detrimental to the welfare of the institution, then the board has the power to cause said child to be sent back to the court from which it was committed for further action by said court.

Under subsec. (2), sec. 48.16 the board is authorized to restore any child committed to either of said schools to the care of its parent or guardian if in its judgment it would be for the future benefit and advantage of the child. Under sec. 57.07 the board is also given the power to parole any inmate in the 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. These parole inmates, however, remain in the legal custody of the board and may be returned to the institution from which paroled in the manner prescribed in subsec. (3), sec. 57.06.

It is apparent that such power necessarily must be placed
in the board that has control of these institutions. These schools must be places of order and obedience to reasonable rules, and it is plainly necessary that any child who is so vicious as to be detrimental to the best interests of the school should not remain in it. No one is better qualified to pass upon this question than the board of control and for that reason the lawmakers have placed this power in the said board.

In re Mason, 3 Wash. 609, is a case where the court has construed a law similar to the Wisconsin statute. The construction placed upon the Wisconsin law is upon the authority of that case. See also Ex parte Crouse, 4 Wharton 1 (Penn.); State v. Scholl, 167 Wis. 504; Milwaukee Ind. School v. Milwaukee, 40 Wis. 328; Lindsay v. Lindsay, 257 Ill. 328, with note in 45 L. R. A. (N. S.) 908, and 1 Wharton's Criminal Law, 11th ed., sec. 372.

JEM

Public Health—Pharmacy—Graduate from school of pharmacy in 1926 from two-year course which was changed in 1927 to three-year course, law at time of such graduation requiring credit in examination on four-year pharmaceutical training but now requiring three-year course, may be recognized by board of pharmacy but credit to be given on four-year training should be two not three years.

Board has no power to require certificate of registration of pharmacist to be displayed in front window of store; statute is complied with if certificate is placed in conspicuous place in store.

Member of board of pharmacy may properly search for evidence of violation of pharmacy law so long as he is not violating any statute.

December 4, 1928.

Board of Pharmacy,
Milwaukee, Wisconsin.

You ask to be advised as to the questions raised in letters enclosed with your inquiry.

In the first letter the writer states that he is a graduate of the Columbia University College of Pharmacy, which is
at present giving a full three-year course; that his graduation class, however, matriculated in 1926 and was the last graduating class from the two-year course. The three-year course was installed in 1927. At the time of the matriculation of the writer of the letter in the said college of pharmacy in 1926 the two-year course was still recognized by the board under the then existing statute. The writer desires to know whether his degree ought to be recognized by the board as meeting the requirements of admission to the examination.

The provision of sec. 151.02, Stats., pertinent to this inquiry follows:

"(2) Every such applicant for examination and registration as pharmacist must, in addition, file with the secretary proof satisfactory to the board, of having had at least four years of pharmaceutical training consisting of:

"(a) Graduation from a school or college of pharmacy or a department of pharmacy of a university, which is recognized by the board and which requires for graduation at least a three-year course, consisting of not less than three nine-month terms. Credit for actual time of attendance at the school, college or department of pharmacy of a university shall be given on the required four years of pharmaceutical training; the remainder of the four years must be practice and experience in a retail pharmacy or drug store under the direction and supervision of a registered pharmacist, which practice and experience shall be predominantly work directly related to the selling of drugs, preparing and compounding of pharmaceutical preparations and physicians' prescriptions, and keeping of records and making of reports required under state and federal statutes."

As the writer of the letter is a graduate of a duly recognized college of pharmacy with a three-year course, I believe that your board should recognize the same, but he should be given two years' credit toward the four years of pharmaceutical training. I base this on the above provision that "credit for actual time of attendance at the school, college or department of pharmacy of a university shall be given on the required four years of pharmaceutical training." As he has attended only two years at said college of pharmacy, under this provision he is entitled to only two years' credit. Since he is a graduate of a college that has a three-year course now, it is only fair to him to recognize
the work in said college, and I believe the statute authorizes you to do so.

A second letter contains a criticism of the board for making a ruling making it compulsory to attach a renewal to the original certificate of registration and requiring it to be displayed in the front window of the drug store. The writer contends that the statute requires only that such certificate of registration "shall be conspicuously displayed in the respective place of business." (See sec. 151.02, subsec. (9).)

I believe this criticism is well taken. I find no provision in the law which authorizes the board to make rules and regulations as to this matter. It is true that all the statute requires is that the certificate of registration shall be conspicuously displayed in the respective place of business. If this is done by the pharmacist, although it is not displayed in the front window, he has not violated any statute nor valid rule of any board. It is, of course, a question of fact in each case as to what is a conspicuous place in any particular drug store. No general rule can be laid down for this. Each case must be passed on according to the particular situation.

The third letter criticizes the pharmacy board for calling on grocers and other stores in hunting for aspirin, essence of peppermint, tincture of iodine and for other pharmaceutical preparations that only duly registered pharmacists can sell.

While there is no provision in the statute requiring any member of the board to do this, I see no objection to such activity by any member of the board, so long as he does not violate any statute of the state.

JEM
Agriculture—Dogs—Counties—Liability of county for injury to domestic animals by dogs as fixed by sec. 174.11, Stats., should be confined to domestic animals specified in subsec. (4) of that section and does not include deer in park.

E. J. Morrison,
District Attorney,
Portage, Wisconsin.

You say the city of Columbus has presented a claim to the county board for damages it has sustained by reason of the death of three deer killed in the city park by dogs. You say they are claiming damages against the county under sec. 174.11, Stats. You state that the deer were born in the city park about a year or two ago and have been there ever since, and that you are in doubt whether the section referred to contemplates payment in such a situation.

The liability imposed by sec. 174.11, Stats., is purely a statutory liability and exists only in the cases and for the amounts specified in that section, which would not affect the liability of the dog owners in other cases. Because that liability is special and the procedure for its collection against the county is specific, the words "domestic animals" as used in subsec. (1) should be confined to the domestic animals specified in subsec. (4), which fixes the amount of such liability that can be recovered against the county for each of the animals so injured or killed.

Public Health—Toweling contained in locked cabinet with loops hanging out permitting each user to pull out clean portion after pushing button, soiled portion being automatically drawn into separate compartment mechanically locked to prevent reuse, complies with provisions of sec. 131.05, Stats., requiring individual towel for each guest in hotels.

Dr. C. A. Harper,
State Health Officer.

You state that there has been demonstrated to you a continuous towel cabinet; that the toweling is contained in
locked cabinets with loops hanging out, permitting each user to pull out a clean portion after pushing a button; that the soiled portion is automatically drawn into a separate compartment and mechanically locked to prevent withdrawal for reuse; that this cabinet, with its toweling apparatus, complies with the individual towel provisions as outlined in sec. 131.05, Stats.

You ask for an opinion of this department whether the use of toweling in a cabinet of this type is in violation of sec. 131.05.

Said sec. 131.05 provides in subsec. (1) as follows:

"All towels for the use of guests in any hotel, whether in their private rooms or the public wash room, and all towels in such places or buildings, whether publicly or privately owned, as the state board of public health may find the use of the common towel therein to be inimical to the public health, shall be individual towels and when used and discarded by the individual, shall not be again used until thoroughly washed and dried."

In subsec. (2) of the same section the violation is made a misdemeanor and a penalty of a fine of not less than $10 nor more than $50 is prescribed. A demonstration of the working of this cabinet was presented to this department on December 5.

Although the toweling is in one long piece and is not divided into separate towels or pieces, still it is apparent from your description and said demonstration that it affords to each guest wherever used a clean, unused piece of said toweling, and I am therefore of the opinion that it affords an individual towel to each guest within contemplation of sec. 131.05.

This cabinet is, in fact, an improvement on the practice of having clean individual towels strung on a chain or string so as to permit each guest to take a clean towel and discard those that have already been used. In those cases it is optional with the guest whether he will use a clean towel or a used one. The cabinet is an improvement on this arrangement.

A ruling that this cabinet does not comply with the statute requiring an individual towel for each guest would be one that would emphasize the form rather than the sub-
stance of this statute. A strict construction of the criminal statute constrains us to advise you that the cabinet complies in every respect with the requirements of sec. 131.05.

JEM

COUNTIES—COUNTY BOARD MEETINGS—PUBLIC OFFICERS—REGISTER OF DEEDS—Fixing of compensation of register of deeds at salary of $2500 per annum instead of fee basis at adjourned annual meeting of county board and requiring strict account to be kept of all fees, same to be paid each month to county treasurer, changed in effect office from fee office to salaried office.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

You say that at an adjourned meeting of the county board of your county, on the 19th day of April, 1928, the record shows the following proceedings taken:

Report of special committee:

"To the Members of the County Board of Portage County, Wisconsin:

Gentlemen:

"We, your special committee, which was appointed to report and recommend salaries to be paid by Portage county for various county officials from the 1st day of January, 1929 for the following two years, do submit the following:

"That the salary of the register of deeds be fixed at $2,500 per annum. That a strict account be kept of all fees received and the same be paid monthly to the county treasurer."

On motion, the report of the committee was adopted. The original motion was then carried, there being 25 ayes and 3 nays. You say the register of deeds has heretofore been on a fee basis and you ask to be advised if that action changes it to a salaried office.

Sec. 59.15, subsec. (1), Stats., gives the county board at its annual meeting authority to fix the annual salary for each county officer.

December 11, 1928.
Opinions of the Attorney General

Subsec. (5) provides that the county board may at any time change the compensation of any county officer from fees collected and returned by him to a salary and may fix the annual salary of such officer.

Subsec. (7) provides that any officer who shall receive a salary in lieu of fees shall collect the fees appertaining to the office and turn them over to the county treasurer.

The action of your county board was taken at an adjourned day of the annual meeting, so it would be within the provisions of the statute, and, while it does not specifically state that the compensation of the register of deeds shall be changed from fees to a salary, there can be no question of the effect of the action taken because it specifically fixes the salary and states that a strict account be kept of all fees received and that the same be paid monthly to the county treasurer, which is the provision of the statute where a salary is fixed in lieu of fees. There can be no question of the intent of the county board, and the register of deeds accepted the office with the full knowledge of the action taken by the board in fixing the salary in lieu of the fees, for he was required to account for all fees received.

TLM

Corporations—Blue Sky Law—Agreement which provides that upon payment of ten dollars by customer he shall have privilege of purchasing groceries and merchandise at store, at factory or wholesale cost plus operating expenses consisting of light, heat, water, rent, taxes, insurance and salaries of store clerks, such operating expenses in no case to exceed ten per cent of item prices, and which contains further provision that if at end of twelve months of operation it is found that operating cost of store has been less than ten per cent allowed, store will prorate same and remit difference between actual operating expenses and ten per cent charged, is security within meaning of blue sky law.

December 11, 1928.

Railroad Commission.

With your letter of October 29 you submit copy of an agreement, and you request an opinion as to whether the
language constitutes a security within the meaning of ch. 189, Stats., commonly known as the blue sky law.

Subsec. (7), sec. 189.02, Stats., defines the term "security" as follows:

"‘Security’ or ‘securities’ include all bonds, stocks, land trust certificates, collateral trust certificates, mortgage certificates, 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."

The agreement submitted provides that the Tick Tock Stores of Madison, Wisconsin, shall establish a store in the city of Madison, to be known as Store No. 1; that the store shall carry during the life of the agreement a full and complete line of general groceries, available for purchase by the customer; that the customer will pay cash for all groceries and merchandise purchased; that in consideration of the payment of ten dollars by the customer, the store agrees to permit the customer to make purchases; that the store shall charge for the items purchased, the actual cost, either at wholesale or at the factory, plus the operating cost of the store, consisting of light, heat, water, rent, taxes, insurance and salaries of store clerks; that the agreement may be extended from time to time by mutual agreement and upon the payment of ten dollars by the customer; that the agreement shall not be negotiable except by written consent of an officer of the store.

The foregoing provisions relate solely to the service rendered by the store to a consumer. There is nothing in the agreement which makes it a security within the statute. A contract containing practically the same terms was held not to be a security in Creasy Corporation v. Enz Bros. Co., 177 Wis. 49. In that case the plaintiff entered into a contract with the defendant by the terms of which the defendant agreed to pay three hundred dollars and the plaintiff agreed to furnish merchandise to the defendant for a period of twenty years at cost, plus necessary expenses of doing business. The contract was transferable by the defendant to a party acceptable to the plaintiff. The defendant purchased
goods of the plaintiff and refused to pay for them, alleging that the contract was a security within the meaning of subsec. (c), sec. 1753—48, Stats. 1919, now subsec. (7), sec. 189.02, Stats. The court in holding that the contract was not a security within the meaning of the statute, and that the plaintiff could recover, said, p. 52:

"* * * In the contract in question there is no obligation to pay money on the part of the plaintiff. Its obligation is to render a certain service to the defendant for a period of twenty years, which service it has fully rendered up to the date of the suit. The service consisted in selling its goods to the member for cost plus a very small per cent. of profit. The member acquired no rights either in the capital or profits of the company. The contract would be fully discharged by plaintiff rendering the specified service for the required length of time. It is clear that our railroad commission correctly held, as the evidence shows, that the contract in question does not come within the purview of the statute."

The court further said, p. 53:

"* * * It may be argued that in one sense every contract is a security because it guarantees to the parties thereof something of value. But as before stated, the Blue Sky Law was enacted for the purpose of protecting against the sale of worthless money obligations and not against entering into other contracts where service is to be rendered, as here, or other obligations are incurred that do not partake of the sale of securities or of a sharing in either the capital or profits of a company."

To the same effect, Lewis v. Creasy Corp., 248 S. W. 1046.

The contract, however, contains the following provision:

"If, at the end of twelve months of operation of the store, it is found that the operating cost of the store shall have been less than the 10% allowed, the store agrees to prorate the same and remit the difference between the actual operating expenses and the 10% charged to each of the total list of the store's customers."

In view of the foregoing provision, it is clear that the contract is a security within the meaning of subsec. (7), sec. 189.02, Stats. The store has clearly obligated itself to pay money to the customer in those cases where the cost of operation is less than the amount represented by the whole-
sale or factory price of the goods purchased, plus ten per cent. The contract is the evidence of such indebtedness, and is, in addition, the evidence of an interest in the profits of a venture. It follows that the contract comes within the purview of the blue sky law. XVII Op. Atty. Gen. 343; Creasy Corp. v. Enz Bros., 177 Wis. 49.

Criminal Law—Fraudulent Advertising—Dealer who advertises eggs for sale as being “from Nelson’s Certified Egg Farm,” when no such farm exists and he receives his eggs from farmers in general, is guilty of fraudulent advertising under sec. 343.413, Stats.

December 12, 1928.

Glenn D. Roberts,
District Attorney,
Madison, Wisconsin.

You submit the following statement as a basis for an official opinion.

“The dealer sells eggs in a carton along the top of which, in prominent letters, appears the following: ‘High Vitamin Eggs.’ At the bottom, in distinct type, is the following, ‘From Nelson’s Certified Egg Farm.’ The dealer has no egg farm of his own but goes out among the farmers and picks up enough eggs to meet his trade. We are advised that none of the farmers from whom he buys have certified egg farms, but it may be that they feed their chickens some mineral or other oils claimed to increase the vitamin content.”

The question is whether this is in violation of the statute, prohibiting fraudulent advertising under sec. 343.413, Stats.

That the dealer is advertising his eggs within contemplation of the statute is apparent from a reading of the statute. The only question left is whether this advertising contains “any assertion, representation or statement of fact which is untrue, deceptive or misleading.”

Under your statement of facts we believe that this dealer is clearly violating said statute. He advertises that the eggs are from “Nelson’s Certified Egg Farm,” which is not
the case. His eggs are not from any farm known as the “Nelson Farm.” You state that this dealer gets about twenty cents a dozen above the market price for his eggs because of this advertising. This shows that he is deceiving the purchasers by the deception in his advertising. This is the very thing that the statute aims to prevent.

JEM

Bonds—Municipal Corporations—Municipal Borrowing

—Premium received on sale of county highway improvement bonds issued under provisions of secs. 67.13 and 67.14, Stats., must be placed in county treasury as part of sinking fund for retirement of such bonds, as provided by par. 4, subsec. (1), sec. 67.11, Stats., and may not be used for construction purposes “as proceeds from county bonds” authorized to be used for construction purposes by sec. 67.13, Stats.

December 17, 1928.

HIGHWAY COMMISSION.

Attention K. G. Kurtenacher,
Chief Accountant.

Referring to the provision of subsec. (3), sec. 67.13, Stats., that “the proceeds from county bonds herefore 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,” you inquire whether the premium for which county highway bonds issued under the provisions of secs. 67.13 and 67.14, Stats., have been sold may be regarded as “proceeds from county bonds” and used for construction purposes, or whether such premium must be placed in the sinking fund provided by subsec. (1), sec. 67.11, Stats.

I have carefully examined the provisions referred to in the light of the time and history of their enactment and I am forced to the conclusion that the premium received on the sale of such bonds must be placed in the sinking fund and cannot be made a part of the construction funds. Without going into detail, it is sufficient to say that in my opinion the express provision of par. 4, subsec. (1), sec. 67.11 that “the premium, if any, for which the bonds had
been sold over and above par value and accrued interest,” shall be placed in the county treasury as a part of the fund which the county is required to keep separate and distinct from every other fund, designated as the sinking fund for the particular bond issue, and which the county is required to maintain until the indebtedness is fully paid or otherwise extinguished, was by ch. 108, laws of 1923, made applicable to county highway improvement bonds, and has ever since remained so applicable.

FEB

Counties—Condemnation—Under sec. 83.07, Wis. Stats., county may dismiss its appeal from award in condemnation proceedings where landowner has taken no appeal.

December 19, 1928.

L. W. Bruemmer,
District Attorney,
Kewaunee, Wisconsin.

You state that sec. 83.07, Wis. Stats., provides a method whereby counties may acquire gravel pits, lands and quarries by exercise of the right of eminent domain. This section provides for a separate appeal by either the landowner or the county aggrieved by the decision of the county court. You inquire whether, under sec. 83.07, Stats., the landowner has the right to a new trial of the condemnation proceedings, upon the county’s appeal, if the county does not wish to press its appeal, that is, whether the county may dismiss its appeal in a case where the landowner himself has taken no appeal from the decision of the county court.

Sec. 83.07, subsecs. (4) and (5), Wis. Stats., provide:

“If the owner shall deem himself aggrieved he may, within thirty days after the award is made, file with such judge a notice of appeal to the circuit court, whereupon such judge shall certify all the papers in the proceedings to such court, and thereupon such matters shall be regarded as at issue, and the proceedings shall be as provided in section 32.11.”

“In case the committee or board shall deem the county or town aggrieved by the award, it may appeal to the circuit court in the same manner and the subsequent procedure
shall be like that upon the owner’s appeal. Payment or tender of award shall not defeat the county’s or town’s right to appeal.”

The above-quoted subsections of sec. 83.07, Wis. Stats., provide for an appeal by either the landowner or the county or town aggrieved in condemnation proceedings under this section. In the event that the landowner shall deem himself aggrieved he may take an appeal to the circuit court within thirty days after the award is made. Sec. 83.07, subsec. (4). Where the county takes an appeal and the landowner does not, the county is entitled to dismiss its appeal if it later decides not to press such appeal. IV Op. Atty. Gen. 739; Wright v. Wis. Cent. R. R. Co., 29 Wis. 341; Upper Coös R. R. Co. v. Parson, 66 N. H. 181; Fall River R. R. Co. v. Chase, 125 Mass. 483; Berggren v. Fremont etc. R. R. Co., 23 Neb. 620, 37 N. W. 470; Robbins v. Omaha etc. R. R. Co., 27 Neb. 73, 42 N. W. 905; Contra: Brown v. Corey, 43 Pa. St. 495; Schuylkill Riv. E. S. R. Co. v. Harris, 124 Pa. St. 215, 16 Atl. 838.

It is, therefore, the opinion of this department that under sec. 83.07, Wis. Stats., the county may dismiss its appeal from an award in condemnation proceedings where the landowner has taken no appeal.

HHN

Appropriations and Expenditures—Public Officers—District Attorney—County board may not during district attorney’s term allow him any sums in addition to salary for office rent.

December 19, 1928.

Paul B. Conley,
District Attorney,
Darlington, Wisconsin.

In your communication of December 14 you inquire whether La Fayette county is required to furnish the district attorney with an office. You state that an office is provided in the courthouse at Darlington for the district attorney but it seems that the local county judge has always used such office for his private consultations while attend-
ing court. You state that such office has never been occupied by any district attorney since the courthouse was built.

You state further that the county board has always allowed the district attorney a reasonable amount in addition to his salary for office rent. At the January, 1928, session of the county board the bonds and salary committee recommended and a resolution was passed by the whole board raising the district attorney’s salary for the next two years to $2,000 a year, with no extra allowance for office rent. The salary of the district attorney was $1,500.

In XI Op. Atty. Gen. 388 this department held that the county board may not during the district attorney’s term, allow him any sums in addition to his salary for clerk hire or office rent. It further held that the county is not required to furnish the district attorney with an office or to equip or to maintain the same. See also sec. 59.15, Wis. Stats.

It follows therefore that the county board is not authorized to make an allowance for office rent in addition to your salary.

HHN

Charitable and Penal Institutions—Minors—Deformed child sent to Wisconsin General Hospital from Rock county is charge to Iowa county if its legal settlement is in Iowa county.

December 20, 1928.

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

You state that a man and his wife moved to Rock county from Iowa county; that they have not yet lived in Rock county for one year; that since their arrival in Rock county a baby has been born to them which is deformed; that it has club feet; that they have made application to the county to send the child to the General Hospital at Madison, at the expense of Rock county. You further state that you are of the opinion that the legal residence of the child follows that of his parents and that inasmuch as the parents have not gained a legal residence in Rock county the expense
should be borne by Iowa county. You ask for an opinion on this proposition. When you speak of legal residence, I take it that you mean legal settlement.

Ch. 142, Wis. Stats., expressly provides that the net cost of caring for a certified patient at the Wisconsin General Hospital shall be paid one-half by the state and one-half by the county of his legal settlement. Sec. 142.08. This child has not yet a legal settlement in Rock county, for the parents of said child have not yet lived in Rock county for one year, and, under sec. 49.02 (3) the legal settlement of legitimate children follows that of their father, but if such children have no father, then the legal settlement follows that of their mother.

You are therefore advised that the legal settlement of the child in question is in Iowa county, instead of Rock county, and that Rock county is not required to pay any part of its expense at the Wisconsin General Hospital.

JEM

Loans from Trust Funds—Municipal Corporations—Municipal Borrowing—Commissioners of public lands cannot make loan to village to make repairs to auditorium building and to refund present indebtedness against such building unless such loan is authorized by vote of electors and unless it appears that such present indebtedness was for purpose for which loan could be made in first instance.

December 24, 1928.

Commissioners of Public Lands.

I do not see how I can approve of the loan to the village of Shell Lake. It is for the purpose of “making general repairs to auditorium building, to install new heating system in said building, and to pay the present indebtedness against the said auditorium building.”

Sec. 67.04, subsec. (4), Stats., provides:

“Villages shall not borrow money * * * for any purpose except only * * * ” for the purposes for which a city is authorized to issue bonds * * *”

Subsec. (2) of the same section provides that cities shall not borrow money except for the purposes there specified
and par. (i) thereof provides for the erection and equipment of auditoriums.

Sec. 25.05, subsec. (4), provides that whenever any municipality is not empowered by law to incur indebtedness for a particular purpose without first submitting the question to its electors, the application for a loan for that purpose must be approved and authorized by a majority vote of such electors at a special election called, noticed and held for that purpose.

Sec. 67.04, (2) (r) authorizes cities to borrow money "To refund a prior indebtedness of any city in any case where such indebtedness was created for a purpose for which general municipal bonds might have been issued in the original instance; * * *"

It will be noted one of the purposes for which this money is wanted is to pay the present indebtedness against the said auditorium building. It does not appear for what that was incurred and it does not appear that the question has been submitted to and approved by the electors.

TLM

Appropriations and Expenditures—Bridges and Highways—Proper method indicated for paying over and disbursing that part of funds derived from motor vehicle fuel taxes, registration fees and license fees under provisions of sec. 20.49, subsecs. (8) and (10), Stats., for improvement of roads and streets which are not apportioned to state or county trunk highway systems and which are not direct connections through cities between state trunk highways.

December 27, 1928.

FULTON COLLIPP,
District Attorney,
Friendship, Wisconsin.

You ask for a construction of sec. 20.49, subsec. (8), Stats., as to the proper method of expending and disbursing part of the motor vehicle fuel taxes, license and registration fees appropriated to the towns, villages and cities of the state under subsec. (8) of that section of the stat-
utes, and you say you find that there are several plans in
operation in different counties.
Sec. 20.49 says:

"There is appropriated from the general fund to the state
highway commission, annually, an amount equal to
* * *. This amount shall be appropriated and distrib-
uted by the state highway commission as follows:"

Subsec. (8) then provides:

"On January 1, 1926, and annually thereafter, to the
towns, villages and cities of the state, for the improve-
ment of public roads and streets within their respective limits
which are open and used for travel, and which are not por-
tions of the state or county trunk highway systems, and
which are not direct connections through cities between
state trunk highways, the following sums: Each town
and village shall receive for each mile of such road or street,
the sum of twenty-five dollars; * * * ."

Then follow a number of specific appropriations to cer-
tain classes of cities and it then provides:

" * * * The amounts allotted to cities under this sub-
section shall be paid into their respective treasuries; the
amounts allotted to the towns and villages shall be paid
into the treasuries of the counties in which such towns and
villages are located. The amounts allotted to the towns
and villages shall be expended by the town and village offi-
cers, subject to the supervision and approval of the county
highway committee, * * * ."

Subsec. (10) provides:

"Payments from the appropriations made by subsections
* * * (8) * * * shall be made only on the order
of the state highway commission from which order the sec-
retary of state shall draw his warrant upon the general
fund of the state in favor of the payee and charge the same
to the proper appropriation. * * * ."

I think that the amount to be drawn by the secretary of
state from the general fund must mean the amount payable
to the different towns, villages and cities under the provi-
sions of subsec. (8), the amount due to cities being payable
direct to the cities and the amount for each town and vil-
lage is made payable to the county, to be expended by the
town or village officers subject to the supervision and ap-
proval of the county highway committee, and all of such officers are responsible for the proper expenditure of such funds.

TLM

Trade Regulation—Trade-Marks—Secretary of state cannot refuse to file trade-mark consisting of crescent and star if necessary papers are filed and necessary fees are paid; cannot thereafter revoke such filing upon theory that it violated federal statutes. Whether such filing protects persons in use of trade-mark not determined.

December 27, 1928.

THEODORE DAMMANN,
Secretary of State.

You say on March 14, 1928 you accepted and recorded application for registration of trade-mark by Roupen Kaprelian of Milwaukee, which consisted of a star and crescent; that thereafter another application for registration of the same symbols was made but denied on account of previous registration; that from time to time you have received complaints relative to the first trade-mark in which it is claimed that the crescent and star trade-mark is in violation of the statutes of the United States, which provides that no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark consists of or comprises the flag or coat of arms or other insignia of the United States or of any foreign nation and you enclose a letter from a Milwaukee attorney showing the use of the trade-mark and claiming that it is in violation of that statute and advising you that unless you revoke such trade-mark he will take the matter before the district court and have it stopped by getting an injunction against the party. You ask to be advised if it is your duty to revoke such trade-mark or to await an order from the court.

You are advised that sec. 132.01 provides that any person who has heretofore adopted or used or shall hereafter adopt or use any trade-mark may file an original, a copy or photographs or cuts with specifications of the same for record in
the office of the secretary of state by leaving two such origi-
inals, copies, etc., with such secretary of state and by filing
a sworn statement of the things there required. Subsec.
(3) provides that the papers required to be filed hereunder
shall be recorded in a book for that purpose and fixes a fee
of three dollars for such recording.

However, our statute does not constitute you a judge or
court to determine whether or not the papers referred to
should be filed by you. It says what such person may file
with you, and if he presented the proper papers and paid
the proper recording fee, I think you would have no discre-
tion in the matter, except as provided in sec. 132.09.

The statute then provides a penalty for violating the
rights of the person so protected.

The federal statutes have quite similar provisions and ex-
pressly provide that no mark by which the goods of the
owner of the mark may be distinguishable from other goods
of the same class shall be refused registration as a trade-
mark on account of the nature of such mark unless such
mark, among other things, consists of or comprises the flag
or coat of arms or other insignia of any foreign nation, etc.
43 Stats. at L. 647. It is well established by the federal de-
cisions that a trade-mark cannot be acquired which depends
solely upon the color as a distinguishing feature, so that if
this trade-mark comprises a flag or coat of arms of any for-
eign country it would probably be a violation of the federal
statutes, so that it could not be used by the person filing it
without violating the statute. But I do not think that deter-
mines your right and duty to file the same and does not give
you the power to revoke or cancel it. If it is in violation of
the federal statute it does not protect the person in the use
of it.

TLM
Public Officers—County Clerk—County Highway Commissioner—Offices of county clerk and county highway commissioner are not incompatible.

December 27, 1928.

MARTIN GULBRANDSEN,
District Attorney,
Viroqua, Wisconsin.

You state that at the annual session of your county board the county clerk was elected county highway commissioner by the board of supervisors pursuant to sec. 82.03, Stats., and you say that at the November election the county clerk was re-elected. You ask if the offices of county clerk and county highway commissioner are compatible.

You are advised that I do not find any duties imposed upon either of the offices named that would make them incompatible unless some duty was imposed upon the county highway commissioner by the county board or the county highway committee under the provisions of sec. 82.04 that would conflict with the duties of the clerk.

Of course if a salary was fixed for either office on the basis or condition of a full time service in such office it might be a fraud upon the public to accept another office with a salary during such term, but that would not go to the question of the compatibility of the offices. I assume the county board might have considered it a matter of economy to combine the two offices.

You will notice under the provisions of sec. 59.18 certain county offices there specified cannot be held by the same person. That would seem to imply that other county offices might be held by the same person unless incompatible. Duties are imposed on such offices and it does not occur to me that any such incompatible duties are imposed on the two officers named.

TLM
Public Officers—Board of Deposits—Any member of board of deposits may refuse to vote on any resolution or motion offered at any meeting of board.

Where one of board of four members refuses to vote, vote of any two members becomes majority vote of board.

It is unnecessary for members of board to assign any reason for his refusal to vote on any resolution or motion.

December 27, 1928.

Honorable Fred R. Zimmerman,
Governor.

In your letter of December 20 you ask three questions which will be considered in turn.

“(1) Can any one of the members of the board of deposits, which is made up of the governor, the secretary of state, the state treasurer, and the attorney general, refuse to vote on any resolution or motion that is offered at any one of their meetings?”

Any member of the board of deposits may refuse to vote on any resolution or motion offered at any meeting of the board.

The right of members of boards and committees to refuse to vote has long been recognized and acquiesced in. Many cases deal with the question of what happens when a member of a body refuses to vote; no cases have been found in which the right to refuse to vote has been questioned.

“(2) If one of the four members of the board refuses to vote and two of the remaining three members vote in the affirmative and one in the negative, or if two vote in the negative and one in the affirmative, does the vote of the two members become a majority vote of the board?”

Where one of a board of four members refuses to vote, the vote of any two members becomes the majority vote of the board.

Subsec. (3), sec. 370.01, Stats., provides:

“All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons unless it shall be otherwise expressly declared in the law giving the authority.”
In *State ex rel. Board of Regents v. Zimmerman*, 183 Wis. 132, 148, the court said:

"The rule is too familiar to require any citation of authority that when a board is created by statute a majority may act."

The rule given in 29 Cyc. 1690, citing cases, is:

"Where a quorum is present a proposition is carried by a majority of the votes cast, although some of the members present refused to vote."

Three members of the board are clearly qualified to act; and when only three votes are cast, obviously two votes constitute the majority necessary for board action.

"(3) Can the state treasurer refuse to vote on any resolution or motion because of his former or present association with the Commercial National Bank of Madison?"

Yes. However, it is unnecessary for a member of a board to assign any reason for his refusal to vote on any resolution or motion.

No authority has been found which requires any member of any body or board to state his reasons for refusing to vote on any resolution or motion. Of course, since no reason need be assigned, any reason assigned is sufficient to justify a refusal to vote.
<table>
<thead>
<tr>
<th>INDEX</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>ABANDONMENT</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedure in county court, La Crosse county, is special jurisdiction; jurors are obtained as</td>
<td></td>
</tr>
<tr>
<td>provided in 324.17 (5) from list of jurors furnished by jury commission as provided in 255.03;</td>
<td></td>
</tr>
<tr>
<td>or county court may transfer case to circuit court under provisions of 324.17 (3)</td>
<td>1</td>
</tr>
<tr>
<td>Father is liable for support of his minor child after divorce where jurisdiction in case was</td>
<td></td>
</tr>
<tr>
<td>obtained by publication; if he neglects to support child he may be prosecuted under 351.30</td>
<td>176</td>
</tr>
</tbody>
</table>

| Absent voting. See Elections.                                                                 |      |
| Adjutant general. See Public Officers.                                                        |      |
| Adoption. See Courts.                                                                          |      |
| Adoption. See Minors.                                                                          |      |
| Agricultural agent. See Agriculture.                                                           |      |
| Agricultural agent. See Counties.                                                              |      |
| Agricultural agent. See Public Officers.                                                        |      |
| Agricultural experiment association. See Appropriations and Expenditures.                      |      |
| Agricultural fairs. See Agriculture.                                                            |      |
| Agricultural representative. See Agriculture.                                                   |      |
| Agricultural representative. See Civil Service.                                                |      |
| Agricultural societies. See Agriculture.                                                       |      |
| Agricultural society president. See Agriculture.                                               |      |
| Agricultural society president. See Public Officers.                                           |      |

| AGRICULTURE                                                                                      |      |
| Agricultural fair—games that are gambling devices and immoral shows are prohibited; commissioner of agriculture has duty to prohibit them and may, if not satisfied that county fair has been maintained according to regulations, withhold state aid. | 3    |
| Agricultural society—fair association is entitled to state aid based on total net premiums paid, regardless of source from which funds were secured. | 187  |
| Agricultural association—20.61 (11) (b) does not prohibit payments to two fairs held in one county provided there is no duplication of premiums. | 252  |
| Agricultural representative is within unclassified service of civil service.                    | 326  |
| Dogs—owner of mink cannot recover damages from owners of dogs nor from any local municipality. | 348  |
| Agricultural agent—county agent appointed under 59.87 may be employed also as secretary of county fair association. | 389  |
| Agricultural society president and county treasurer—offices not incompatible.                  | 466  |
| Agricultural fair—stockholders of Rock River Valley Agriculture Corporation, Jefferson county fair, are not subject to assessment on their shares of stock. | 511  |
AGRICULTURE—Continued

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>530</td>
</tr>
<tr>
<td>576</td>
</tr>
<tr>
<td>586</td>
</tr>
<tr>
<td>625</td>
</tr>
<tr>
<td>7</td>
</tr>
<tr>
<td>28</td>
</tr>
<tr>
<td>40</td>
</tr>
<tr>
<td>69</td>
</tr>
<tr>
<td>76</td>
</tr>
<tr>
<td>87</td>
</tr>
<tr>
<td>111</td>
</tr>
<tr>
<td>112</td>
</tr>
<tr>
<td>129</td>
</tr>
<tr>
<td>170</td>
</tr>
<tr>
<td>171</td>
</tr>
<tr>
<td>171</td>
</tr>
</tbody>
</table>

Agricultural society—stock is not assessable if constitution provides that it shall not be assessed.

Farm drainage—if county can lawfully be made liable for benefits to highways which it is required to maintain under ch. 88, Stats., notice of hearing on report of drainage board and assessment by posting as provided by 88.03 (2) complies with requirement for giving of such notice prescribed by 88.06 (9) as applied to county.

Agricultural fair—county board of any county when authorized by majority of electors upon referendum may provide for and conduct; county is entitled to state aid.

Dogs—liability of county for injury to domestic animals by dogs as fixed by 174.11 should be confined to domestic animals specified therein; does not include deer in park.

Air ports. See Counties.

Alderman. See Public Officers.

APPROPRIATIONS AND EXPENDITURES

County cannot pay out public funds for expense of taking exhibition carload of farm and other products to states for advertising purposes.

County cannot pay out public funds for purpose of promoting development of county except by creating county board of immigration and appropriating money to it under 59.08 (10).

County which creates board of immigration under 59.03 (10) may appropriate funds to aid in promoting settlement of vacant lands; such funds may be used by created board in printing and distributing advertising matter.

County board may appropriate to school district in which county farm operated in connection with county asylum is located, money for school purposes.

County board cannot appropriate sum to agricultural committee composed of three members of county board, with instructions to use money as committee deems necessary for promotion of agricultural interests.

Constitutionality of 20.605 (fund for dams in drainage districts) is doubtful.

Members of legislature are entitled to travel compensation in attending sessions of legislature in cases only where such travel is actual.

Cost of additional surety company bond to be furnished annuity board by state treasurer is chargeable to appropriation to board.

Appointive members of state highway commission—per diem and traveling expenses allowable.

Fund under 20.01 (9) is available for service mentioned therein after close of either special or regular session.

Special session under call has authority to fix amount of appropriation necessary to relieve emergency.

Special session may not consider appropriation not emergency as ordered in call.

Special session may consider money available in funds, if such funds exist, over which statutes control—except teachers' retirement fund.
APPROPRIATIONS AND EXPENDITURES—Continued

Special session—legislature may raise necessary money by revenue bill.

Bill No. 8, S., 1928 second special session, providing for transfer of funds, is not legislation within call to appropriate funds.

Forest crop lands—appropriation under 20.05 (7) is cumulative; unexpended amount is available for future use.

Forest crop lands—fund in 20.05 (7) is not available for expenses of publication of notices, traveling expenses of commissioners and others to attend hearings, and compensation and expenses of cruisers of offered lands.

Board of examiners in optometry—may not use accumulated funds in state treasury for purposes of enforcing optometry law.

Agricultural experiment association—may purchase motor truck.

Change of time of payment of income taxes into state treasury—effect upon crediting mill tax levies to university, normal school and common school fund incomes, where amount of mill taxes levied has been reduced to estimate amount of state's share of income taxes under 20.255.

Resolution carrying money expenditure is valid if adopted same day as presented by majority vote with quorum present at lawful special meeting of county board even though rules of county board require such resolutions to be laid over one day before final action.

Purchase of motor car, which is part of salary agreed to be paid to president of university, does not require approval of governor.

Regents of university may lease to Wisconsin University Building Corporation university lands occupied by stadium, for purpose of providing for construction financing and acquisition of field house; revenues derived from operation must, and surplus revenues derived from operation of stadium may, be applied by regents to payment of rentals under lease or for acquisition of title to field house.

Expenditure of city's money by council and mayor for printing pamphlets and other advertising, advising voters to vote for erection of city hall, is improper but not violation of criminal law.

Soldiers' relief commission—consent must be had for expenditure of funds appropriated to them.

Soldiers' relief commission—town board, village board and city aldermen cannot grant burial allowances without obtaining approval of commission.

Sheriff's fees and expenses incurred in executing governor's warrant under 57.11, in proceeding for revocation of pardon and remanding convict to prison, are chargeable to appropriation provided for in 20.02 (4).

County board cannot appropriate sum to district attorney to investigate accounts of county; if audit of county's books is desired, should proceed under 73.03 (14) (a) or 59.72.

Appropriation made by 20.495 is based on actual receipts as shown by books of state treasurer.
APPROPRIATIONS AND EXPENDITURES—Continued

Apportionment tax levied under 76.54 for 1927 may be made at present time...........................................477
Funds available under 20.495 must be paid to counties to which they are apportioned...............................477
Provisions of 84.03 (9) apply to apportionment of funds derived under 20.495........................................477
Highway commission cannot, under 84.03 (9), use funds allotted under 20.495 for execution of improvements of highway as federal aid project.................................................................477
Toll bridge acquired by state—may be insured in state insurance fund; cost of insurance may be debited to appropriation in 20.49 (4).......................................................514
Fees of witnesses, reporters and those of district attorney pro tempore in John Doe proceeding are payable out of county funds..................................................534
School fund income—money in common school fund income prior to Jan. 1, 1928 not derived from sources specified in 20.24 (2) were on that date automatically transferred to public school fund income; any excess of state's share of income taxes collected in 1928 over amount of mill taxes for support of university and normal schools also became part of public school fund income and available for payment of salaries and expenses of supervising teachers and other appropriations made by 20.25..................................................553
Historical society—balance unexpended on June 30, 1927 in appropriation made by 20.16 (1) (a) does not lapse...............................................................557
County cannot appropriate public funds for expense of representation on Good Will Tour..................................................571
County board may not during district attorney's term allow him any sums in addition to salary for office rent .................................................................634
Motor vehicle fuel taxes, registration fees and license fees—proper method indicated for paying over and disbursing, under 20.49 (8) and (10) for improvement of roads and streets not apportioned to state or county trunk highway system and not direct connections through cities between state trunk highways.................................................................637

ARMORIES

Fond du Lac Guards may sell and dispose of property provided all holders of certificates join in conveyance.....330
Aspirin. See Public Health, pharmacy.
Assemblyman. See Legislature.
Assistant fireman, county. See Public Officers—fireman, assistant.

AUTOMOBILES

Common carrier—bond required of freight carrier under 194.14 (1) needs cover only damage caused to pedestrian.................................................................................................................................36
Common carrier—shipper who has entered into thirty-one contracts for transporting freight is common carrier, subject to provisions of ch. 395, L. 1927.................................................................48
Law of road—highway commission is not authorized to issue general special permit to public utility for transportation of poles over public highways where total length of vehicle and load exceeds limitation contained in 85.18 (4); local officers may issue specific permit under 85.18 (5) (a).......................................................................................85
AUTOMOBILES—Continued

Law of road—statute prohibits person under sixteen years from obtaining driver's license; prohibits such person from driving. 113

Law of road—windshield display, after March 1, 1928, of "sticker" receipts issued by secretary of state evidencing payment of motor license fee does not constitute violation of 85.085 (3). 124

Law of road—"gross and culpable negligence," as used in drivers' license law, defined. 128

Law of road—provisions of sec. 85.32 apply to Wisconsin national guard. 133

Law of road—penalty prescribed in 353.27 is applicable to provisions of 85.01 (6), (7), (8), (9), (10), and 85.14. 138

Law of road—reflective signals approved under 85.13 (3a) are not authorized to be used as substitute for required clearance lamps as required by 85.13 (3b). 144

Law of road—reflective signals approved under 85.13 (3a) are not authorized to be used as substitute for required red light at top on rear end of projecting load as required by 85.18 (5) (b). 150

Law of road—85.08 does not create any precise speed limits. 190

Law of road—order of industrial commission requiring sticker to be affixed to windshield to indicate legality of lighting equipment is not violation of 85.085 (3). 203

Motor vehicle fuel tax—dealer is required to report to state treasurer all sales of gasoline in state and pay license tax thereon; is subject to penalties prescribed. 228

Motor vehicle fuel tax—state treasurer must enforce collection. 228

Motor vehicle fuel tax—question of right of seller to refund or power of treasurer to repay part of license tax should be passed upon in each case. 228

Law of road—out-of-state student is nonresident. 230

Motor vehicle fuel tax—78.095, providing for refund of gasoline license taxes paid by dealers in towns, villages and cities on boundary line of another state, is unconstitutional and void. 242

Law of road—county board may not enact ordinance regulating operation on public highways in county and imposing fine and imprisonment in county jail; it is limited by statute to prescribe forfeiture. 281

Law of road—violation of statute requiring street cars to stop and drivers of vehicles to pass to right side of curb upon approach of fire apparatus is punishable under 353.27. 284

Law of road—car owned and used by garage for towing to garage or for pulling out of mud holes or snow banks for hire must be registered as motor vehicle; cannot be operated under manufacturer's, distributor's or dealer's certificate. 336

Law of road—trucks and cars owned by residents of Michigan operated in Wisconsin to tow cars to garages for repair and to tow cars for hire need not be licensed under 85.15 (2); are covered by general registration laws and are subject to provisions of 85.15 (1). 336
AUTOMOBILES—Continued

Law of road—Minnesota owned motor vehicle used regularly for delivery of merchandise in Superior from Minnesota points must pay Wisconsin registration fee and display Wisconsin number plate. 486

Order revoking license and providing that no new license shall be issued is irrevocable; no new license can be issued during year upon recommendation of judge or anyone. 539

License and title application used by secretary of state and his certificate of title do not infringe on patent No. 1,433,975 or copyright Class A, XXc No. 491,492. 580

Baby farms. See Charitable and Penal Institutions, maternity homes.

Bank examiner. See Public Officers.

BANKS AND BANKING

Double liability can be collected from all persons mentioned if shares of stock are issued to "A—H—and/or J—B—and/or H—B—"; all should agree upon vote of shares; dividends should be paid by check or draft payable to order of such persons in manner specified in shares; in case of transfer all should join. 89

Mutual savings bank—real estate mortgage bonds are included in "all other loans" as used in 222.13. 96

Mutual savings bank—finance committee must certify to value of real estate upon which mortgage bonds are issued. 96

Mutual savings bank—may invest in real estate mortgage bonds issued on property in Wisconsin and adjoining states. 96

State bank—lending bank which has filed general claim against bank in process of liquidation may compromise on collection of collateral it holds to secure note, without amending general claim. 107

Land mortgage association—commissioner of banking may take charge of affairs when it cannot meet its interest on bonds issued. 108

Land mortgage association—when banking department liquidates, state treasurer can turn over mortgages deposited to secure bonds only when so ordered by court. 108

Land mortgage association—if necessary to conserve assets, commissioner of banking should commence action to collect on guaranties of association which issued mortgages originally. 108

Proportionate amount of loss on settlement of bank tax levied on stock, paid under protest and afterward compromised without adjudication need not be paid back to city by state, county or other subdivision. 206

Trust company bank—trust agreement cannot be substituted for securities deposited with state treasurer under 223.02. 214

Where share of bank stock is issued to man and wife jointly, without proxy or other evidence of agency neither one acting alone can vote stock. 396

Banking law is violated by insurance company issuing bonds maturing in certain number of years or on death of holder, price being dependent upon maturity date and age of purchaser. 406
BANKS AND BANKING—Continued

State bank—transferor of bank stock less than six months prior to closing of bank should be joined with record owner in suit to enforce stockholder's liability

Delinquent bank may be reorganized under 220.08 (15) and assessment levied by directors prior to delinquency may be enforced

Small loans act—securities issued by corporation conducting small loans business are not exempt from provisions of blue sky law

Where insolvent bank turned over assets to another bank for liquidation purposes and losses resulted to guarantors, commissioner of banking may still take possession of insolvent bank

Trust company bank—statute requiring deposit of securities with state treasurer is not complied with by depositing trust receipt of federal reserve bank covering such securities

Bankers' savings deposit agreement under which regular deposits are made in savings account from which bank pays premium on life insurance policy, held legal

Basic science law. See Physicians and Surgeons.
Basic science law. See Public Health.
Beauty parlors. See Public Health.
Beaver. See Fish and Game.
Blind. See Education.
Blue sky law. See Corporations.
Board of appeals. See Public Officers.
Board of control. See Public Officers.
Board of deposits. See Public Officers.
Board of education. See Public Officers.
Board of examiners in optometry. See Appropriations and Expenditures.
Board of examiners in optometry. See Optometry.
Board of health. See Public Officers.
Board of immigration. See Counties.

BONDS

Village has no power to borrow money and issue short time promissory notes therefor, except under provisions of 67.12; it has no power to issue bonds to provide money with which to pay such notes whether issued under said section or otherwise

Proceedings preliminary to issue of bonds by village for public improvements to be made only and not for payment of obligations incurred for such improvements already made, may be approved and bonds certified by attorney general

Bond required of freight carrier under 194.14 (1) needs cover only damage caused to pedestrian

Validity of issue for cost of improvement based on survey made by member of town board is not affected by malfeasance of members voting for order to pay for such services

Real estate mortgage bonds are included in words “all other loans” in 222.13

Finance committee must certify to value of real estate upon which mortgage bonds are issued
BONDS—Continued

Mutual savings bank may invest in real estate mortgage bonds issued on property in Wisconsin and adjoining states

Cost of additional surety company bond to be furnished to annuity board by state treasurer is chargeable to appropriation to board

Constitutional and statutory limitations on indebtedness which may be incurred by city apply to bond issue for purpose of enlarging existing vocational school

Neither city council nor local board of vocational education may enter into contract with builder or contractor whereby contractor is to construct addition and receive compensation in annual installments extending over period of years

Subsec. (3), sec. 67.14, providing for referendum on petition of electors of question of whether county highway improvement bonds shall be issued pursuant to 67.13 does not apply to county highway improvement bonds already authorized by sole action of county board under 67.13 and 67.14 (1)

County judge is not required to file official bond

Premium received on sale of county highway improvement bonds must be placed in county treasury as part of sinking fund for retirement; may not be used for construction purposes "as proceeds from county bonds"

Bounties. See Fish and Game.

BRIDGES AND HIGHWAYS

Law of road—highway commission is not authorized to issue general special permit to public utility for transportation of poles over public highways where total length of vehicle and load exceeds limitation contained in 85.18 (4); local officers may issue specific permit for such purpose only under provisions of 85.18 (5) (a)

Trunk highways—proceedings for alteration of state system may be instituted under 83.08 or 84.02

Trunk highways—minor changes in state system may be made under 83.08 without notice to localities concerned

Trunk highways—"due notice" required to be given under 84.02 must be determined in connection with particular facts in each case

Trunk highways—funds under control of highway commission for improvement of state system may be used in payment of state's share (as fixed by railroad commission in proceedings under 195.19) of cost of grade separation project on state trunk highway U. S. No. 41 on street center of which is boundary line between city of Appleton and town of Grand Chute, improvement being within construction limits provided by 1313, 1, Stats. 1921

Town highway—apportionment and charge to towns of expense of repairs made by county board to town line highway in proceedings under 81.14 is to be made without regard to any apportionment of maintenance liability existing between towns made under
BRIDGES AND HIGHWAYS—Continued

Page

80.11; is to be made by county board in proportion to equalized value of taxable property pursuant to 70.61 and 70.63; either town must seek its own remedy against other for readjustment of such expense based on any claimed apportionment of maintenance agreement existing between them. 114

State highway—entry on land acquired by agreement with owner under 83.07 or 83.08 may be made immediately upon consummation of contract or conveyance 118

County line road placed on county systems of prospective state highways by contemporaneous action of county boards of counties may be taken off such system by one county; no question of county liability for maintenance is involved 158

County may condemn land for construction of county trunk highway 192

County board cannot be compelled to grant aid to town for improvement of highway within town unless such highway is portion of system of prospective state highways 219

County board cannot be compelled to grant aid to town for improvement of highway within town which is part of prospective state highway system unless town has received donations or voted tax equal to amount of aid petitioned for 219

Town highway—town board may vacate portions of county trunk highway originally located on irregular town highway but straightened by county by relocation 247

Conveyance of property to county for highway purposes construed 253

Town highway—city should pay county treasurer its special benefit assessment for bridge not later than settlement day 272

Town highway—if bonds are sold for special benefit assessment for bridge, such money must be promptly deposited with county treasurer 272

Sign—circular tube without advertising, erected along highway, does not constitute advertising; is not violation of 86.19 292

See XVI 814

Sign—whether circular tube without advertising, erected along highway, is obstruction or injures highway, and is therefore illegal under other sections is question of fact 292

Highway authorities may, without creating liability to abutting land owners for damages, divert surface water which causes damage to roadway from one side of highway to opposite side, although diverted water flows upon adjoining land 373

See XII 356

XIII 444

Limitation on amount of tax to provide proportion of cost of highway improvement assessed against municipality by county board is not upon total proportion assessed but only upon amount of tax to be raised in any one year 411
BRIDGES AND HIGHWAYS—Continued

Where cost of improvement of highway requires it, total assessment by county board against municipality may be spread over series of years, tax for each year being within limitation 411

Town board has no power, in absence of action taken by town meeting, to transfer money from general funds for improving highway on prospective state highway system 460

Law of road—words "motor vehicle on a highway," as used in 85.09 (2) (a) are not broad enough to include motor boat on navigable lake or river 469

Appropriation made by 20.495 is based on actual receipts as shown by books of state treasurer 477

Apportionment tax levied under 76.54 for 1927 may be made at present time 477

Funds available under 20.495 must be paid to counties to which they are apportioned 477

Provisions of 84.03 (9) apply to apportionment of funds derived under 20.495 477

Highway commission cannot, under 84.03 (9), use funds allotted under provisions of 20.495 for execution of improvements of highway as federal aid project 477

Toll bridge acquired by state may be insured in state insurance fund; cost may be debited to appropriation made under 20.49 (4) 514

Signs—county highway commissioner may remove within limits of state trunk highway even though highway is within corporate limits of town, city or village 528

Whether construction of bridge structures over natural channels of river constitutes single project with state aid under 87.04 is primarily question of fact for state highway commission to determine 540

If county can lawfully be made liable for benefits to highways which it is required to maintain under farm drainage law, notice of hearing on report of drainage board and assessment by posting as provided by 88.03 (2) complies with requirement for giving such notice prescribed by 88.06 (9) as applied to county 576

Bridge in town on portion of county highway system which has become state highway is required to be repaired or reconstructed by county 581

Motor vehicle fuel taxes, registration fees and license fees—proper method indicated for paying over and disbursing, under 20.49 (8) and (10) for improvement of roads and streets not apportioned to state or county trunk highway system and not direct connections through cities between state trunk highways 637

BUILDING AND LOAN ASSOCIATIONS

Several questions answered as to rights of associations and owners of shares of installment stock and paid-up stock 97

Cemeteries. See Public Health.

CHARITABLE AND PENAL INSTITUTIONS

Maternity homes—58.04, applying to licensing of homes and baby farms, applies only to such cases as are engaged in business, not to homes where children are occasionally kept 131
CHARITABLE AND PENAL INSTITUTIONS—Continued Page

Board of control may not make order to stop courts from making commitments to state public school at Sparta because of epidemic of scarlet fever 245

Commitment to poor farm must be made by court of record; transient cannot be so committed 401

Boy charged with murder in first degree, tried in juvenile court, cannot be sentenced to serve term in industrial school until he is eighteen years of age and thereafter balance of definite term in some other institution 410

County home—if facilities are available, may receive persons who are not indigent upon payment of not less than actual cost to county 566

Board of control has power to dismiss any child from industrial school when in its judgment such child is detrimental to institution 618

Board of control has not power to retain child in industrial school committed thereto after conviction for crime and pardoned by governor 618

Governor has no power to compel board of control to keep child in industrial school who in its judgment is detrimental to institution 618

Persons committed to industrial school without having been convicted of offense are not subject to pardon 618

Board of control has power to parole any inmate of industrial school 618

Deformed child sent to Wisconsin general hospital from Rock county is charge to Iowa county if its legal settlement is in Iowa county 635

Cheat. See Criminal Law.

Child protection. See Courts.

Child protection. See Minors.

Chiropodists. See Public Health.

Chiropractors. See Physicians and Surgeons.

Citizenship. See Elections.

City council. See Public Officers—council, city.

City plan commission. See Public Officers.

City supervisors. See Public Officers—supervisors, city.

CIVIL SERVICE

Deputy state treasury agent is subject to provisions of law; tenure of position of office does not automatically expire with termination of incumbency of appointing officer 209

Contra V 890

Rule as to certification cannot apply to deputy treasury agents, deputy game wardens, and oil inspectors; persons so appointed cannot recover their salaries from state but persons appointing them are liable 235

Veterinarian employed by U. S. department of agriculture cannot be employed by state unless he has qualified under law 251

Oil inspector, deputy—abolishing oil inspection district to which deputy inspector has been assigned does not automatically discharge him from service 303

Oil inspector, deputy—when district is abolished and inspector is discharged he may be reinstated in any vacant or newly created district within year 303

Agricultural representative is within unclassified service 326
Wisconsin Potato Growers Association is not a department of state; does not come under provisions of law.

Director of memorial union is not within unclassified service.

Real estate brokers board may appoint without examination one stenographer for board as being in exempt class of classified state service and may assign such stenographer to duties in offices maintained by board in Milwaukee.

Closed seasons. See Fish and Game.
Commissioner of agriculture. See Public Officers.
Commissioner of banking. See Public Officers.
Commissioner of banking, special deputy. See Public Officers.
Common carriers. See Automobiles.
Common law marriages. See Marriage.
Common law trusts. See Corporations.
Condemnation. See eminent domain.
Confiscation. See Fish and Game.
Conservation commission. See Public Officers.
Constable. See Public Officers.

Constitutionality of 20.605 (for dams in drainage districts) is doubtful.

Joint resolution of legislature does not have force of law.

Joint Resolution No. 13, 1928 first session, does not carry authorization for board of control to grant easement to city of Waukesha.

Motor vehicle fuel tax—provision authorizing refund of gasoline license taxes paid by dealers in towns, villages and cities on boundary line of adjoining state is unconstitutional and void.

Trust funds—certain questions on proposed legislation relating to creation of central investment board answered.

School fund—lands escheated to state belong.

School fund—may not be diverted by legislature to other use than support of schools.

School fund—sale of lands is confided to commissioners of public lands exclusively.

Conservation commission may not enter into agreement for term of years with fisherman to remove rough fish unless he binds himself to remove snags, stumps and stones.

Commissioner of agriculture may enter into contracts for term of years longer than his term of office.

Miller & Rose leases for operating attractions on state fair grounds are valid.

Renewal clause in Miller & Rose contracts is binding.

Commissioner of agriculture should insist upon payment for concessions under original contract.

Contractor for state printing is required to furnish customary bond for faithful performance of contract whether service is performed personally or is farmed out to others.
CONTRACTS—Continued
Person holding contract from city or school board for public work is not prohibited under malfeasance statute from serving as member of appeal board created in zoning ordinance. 532
Architect and contractor doing public contract work with city is not barred from occupying position on city plan commission. 532

Co-operative associations. See Corporations.

COPYRIGHTS
Superintendent of public property has not power to purchase copyright and sell guide book of capitol. 105
Automobile license and title application used by secretary of state and his certificate of title do not infringe on patent No. 1,453,975 or copyright Class A, XXc No. 491,492 580

Coroner. See Public Officers.

CORPORATIONS
Public utility—income received by telephone company for performing switching for another company constitutes part of gross receipts of switching company. 18
Public utility—license fee upon that portion of gross receipts received for switching service should be paid to locality in which company performing switching service is located. 18
Credit union—cannot apply for or receive permit to lend money pursuant to provisions of 115.07. 51
Mortgage to corporation can be satisfied as provided in 235.55 by entry in margin of record thereof, acknowledging satisfaction and signed by corporation as mortgagee, and signature witnessed by register of deeds. 72
Public utility—“pin money” and “subscribers' deposits defaulted” constitute gross receipts upon which telephone license fees are computed. 94
Public utility—interest received on savings deposits does not constitute part of gross receipts upon which telephone license is computed. 94
Firm located outside state which advertised in Wisconsin publications may be prosecuted for violation of 343.413 provided service can be had on officer or agent of company in state. 194
Co-operative association—not more than ten per cent of common stock may be recalled during period between any two regular stockholders' meetings. 233
Trade-mark—“The Eastsider” may be registered as trade name for protection of magazine. 334
Securities—contract between owners of fur farm and purchasers by which purchasers acquire title to units of muskrats, company being obligated to ranch muskrats and purchasers being entitled to receive their prorata share of progeny of units comes within provisions of 189.02 (7). 343
Securities—contract between owner of fur farm and purchaser providing that delivery of animals be made to purchaser but which, in operation, does not contemplate delivery, comes within definition in 189.02. 427
CORPORATIONS—Continued

Land mortgage association—state treasurer is not required to maintain collateral issued segregated to cover each series of bonds issued.

Corporation in promotional stage which has been declared forfeited by secretary of state for failure to file annual report may perfect its organization and submit to secretary of state affidavit under 180.08 (6).

Blue sky law—securities issued by corporation conducting small loans business are not exempt from provisions.

Foreign corporation—words "or for other lawful consideration," used in 226.02 (2) refer only to consideration advanced by foreign trust company itself.

Common law trust composed of four persons, and not proposing to sell any beneficial interests, certificates or memberships need not file its declaration of trust with secretary of state or register of deeds.

Trustees and officers of church organization are guilty of embezzlement if they wrongfully convert to personal use property of organization; members aiding and abetting such conversion are guilty as accessories.

Blue sky law—agreement which provides that upon payment of ten dollars customer shall have privilege of purchasing groceries and merchandise at store at factory or wholesale cost plus operating expenses, such expenses not to exceed ten percent of item prices, and which contains further provision that if at end of year of operation it is found that operating cost has been less than ten percent, store will prorate same and remit difference, is security within meaning of law.

Corrupt practices act. See Elections.

Council, city. See Public Officers.

COUNTIES

County cannot pay out public funds for expense of taking exhibition carload of farm and other products of state to different states for advertising purposes.

County cannot pay out public funds for purpose of promoting development of county except by creating county board of immigration and appropriating money to it under 59.08 (10).

Board of immigration—county which creates, under 59.08 (10) may appropriate funds to aid in promoting settlement of vacant lands; such funds may be used by created board in printing and distributing advertising matter.

County board—ordinance of board of nineteen members present proposing to abolish office of county highway commissioner, on question of adoption of which nine members voted aye, eight members no, and two members did not vote, chairman of board who declared ordinance adopted being one of those voting aye, was not adopted by majority vote and is ineffective.

County highway commissioner—resolutions requesting state highway commission to take charge of construction and maintenance of state aided highways and placing discharge of duties imposed by law on county highway commissioner in hands of county highway committee are ineffective.
COUNTIES—Continued

County board—chairman as well as any other member of board is eligible to election as member of county highway committee

County highway committee—chairman of county board as well as any other member of county board is eligible to election as member

County highway committee—terms of office of members begin immediately upon election and qualification upon expiration of year for which any former committee was elected

County board—has authority to appropriate to school district in which county farm operated in connection with county asylum is located, amount of money for school purposes

County board—cannot, under 59.09 (1), pass resolution asking for bids from newspapers for publication of its ordinances

County board—may, under 59.09 (2), pass resolution asking for bids from newspapers for publication of its proceedings

County board—cannot appropriate sum to agricultural committee composed of three members of board, with instructions to use fund as committee deems necessary for promotion of agricultural interests

County board—has no power to give bounties on foxes and wolves under 29.60

Land for construction of county trunk highway may be condemned

Loan made to school district may not be repaid; payment of such loan may not be guaranteed

Conveyance of property to county for highway purposes construed

County board—resolution adopted during term of sheriff to change compensation for meals and to make allowance for use of car is void in toto unless it is determined that change for meals would have been made without other change

County board—hiring of deputies by sheriff on recommendation of county board chairman to guard prisoners in county jail does not create valid claim, if chairman was not authorized by board to make such recommendation

County board—may ratify actions of chairman and pay claims created on his recommendation

Ordinance regulating operation of automobiles on public highways and imposing fine and imprisonment in county jail is beyond power of county board; it is limited to prescribe only forfeiture for violation

County officers, except county judge, are not entitled to extra compensation unless it is expressly so provided by statute

County board resolution carrying money appropriation is valid if adopted same day as presented by majority vote with quorum present at lawful special meeting of board even though rules require such resolutions to be laid over one day before final action

County board proceedings—board need not advertise for bids to publish; but whether it does or not, it can let contract to paper which it considers best
COUNTIES—Continued

| County board—must reorganize and elect new officers at special meeting held after town chairman and town supervisors have been elected and have qualified. | 333 |
| Ordinance adopted by town regulating amusement park located in town is void if it conflicts with one enacted by county board regulating amusements. | 366 |
| Agricultural agent—county agent appointed under 59.87 may be employed also as secretary of county fair association. | 389 |
| Dance hall ordinance which permits licenses to be issued for dances in pavilion but does not permit them in barn is not discrimination between members of same class. | 431 |
| Air port—county board may not enact rules and regulations governing. | 433 |
| County board cannot appropriate sum to district attorney to investigate accounts of county; if audit of county’s books is desired, should proceed under 73.03 (14) (a) or 59.72. | 445 |
| Fees of witnesses, reporters and district attorney pro tempore in John Doe proceeding are payable out of county funds. | 534 |
| Public funds cannot be appropriated for expense of representation on Good Will Tour. | 571 |
| Notice of hearing on report of drainage board and assessment by posting as provided by 88.03 (2) complies with requirement for giving notice prescribed by 88.06 (9), if county can lawfully be made liable for benefits to highways which it is required to maintain under farm drainage law. | 576 |
| County board when authorized by majority of electors upon referendum may provide for and conduct county fair and exhibition; county is entitled to aid. | 586 |
| County judge—neglect to file statements mentioned in 59.77 (3) results in forfeiture of right to compensation. | 603 |
| County judge on salary basis should collect fees appertaining to office, except when such fees are payable by county, and turn them over to county treasurer. | 603 |
| County officer—neglect to file statements mentioned in 59.77 (3) results in forfeiture of right to compensation. | 603 |
| County officer on salary basis should collect fees appertaining to office, except when such fees are payable by county, and turn them over to county treasurer. | 603 |
| County board proceedings—publication is mandatory; refusal or neglect of member of board to comply with mandate subjects him to forfeiture. | 611 |
| County board proceedings—restriction of cost of publication is limited to rate per folio. | 611 |
| County board proceedings—rate per folio fixed by county board (not in excess of one dollar) must be such as will be acceptable to at least one qualified newspaper published in county. | 611 |
| County board proceedings—publication in pamphlet form and general distribution as authorized by 59.09 (3) does not relieve board from complying with mandate in (2). | 611 |
| Liability for injury to domestic animals by dogs as fixed by 174.11 should be confined to domestic animals specified therein; does not include deer in park. | 625 |
COUNTIES—Continued
County board meeting—fixing compensation of register of deeds at salary of $2500 per annum instead of fee basis at adjourned annual meeting and requiring strict account to be kept of all fees, same to be paid each month to county treasurer, changed office from fee office to salaried office

Condemnation—county may dismiss its appeal from award in proceedings where landowner has taken no appeal

County agent. See agricultural agent.
County agricultural society president. See Agriculture, agricultural society president.
County agricultural society president. See Public Officers, agricultural society president.
County board. See Counties.
County board. See Public Officers.
County board. See also Public Officers, supervisors.
County board chairman. See Public Officers.
County board meetings. See Counties.
County board proceedings. See Counties.
County clerk. See Public Officers.
County fair association secretary. See Public Officers.
County highway commissioner. See Counties.
County highway commissioner. See Public Officers—highway commissioner, county.
County highway committee. See Counties.
County highway committee. See Public Officers—highway committee, county.
County homes. See Charitable and Penal Institutions.
County judge. See Counties.
County judge. See Public Officers—judge, county.
County officers. See Counties.
County officers. See Public Officers.
County physician. See Public Officers.
County supervisor. See Public Officers—supervisor, county.
County treasurer. See Public Officers.
Court commissioner. See Courts.

COURTS
Civil and criminal jurisdiction of county court, La Crosse county, is to be exercised under procedure governing justice court practice, including procedure of such court in jury cases.

Procedure in county court, LaCrosse county, for abandonment of wife or child is special jurisdiction imposed by 351.30 and 351.31; jurors are obtained as provided in 324.17 (5) from list furnished by jury commission as provided in 255.03; or case may be transferred to circuit court under 324.17 (3).

Court commissioner—has not power to act in proceeding to hear application charging person with insanity and issuing order of commitment therein.

Jurors—a circuit court may dismiss for limited and specified time jurors summoned for service without finally discharging him from other duties; juror so excused is not entitled to per diem fixed by statute.

Subpoena—state treasurer is required to comply with direction to produce in court original records and documents; production of photostatic copies is not compliance with requirement.
COURTS—Continued

Justice of peace—cannot issue search warrant to search person

Adoption—Iowa Children's Home Society, organized at Des Moines, probably has not power to give its consent for adoption of child in court in Wisconsin.

Court commissioner probably may issue search warrant to search person; question is not free from doubt.

Interpreter's fees in civil action are not paid for by county.

Justice of peace—no law requires filing with clerk of court or secretary or state, any proof of continued authority to act as hold-over officer.

Injunction—does not lie to restrain commission of criminal or illegal acts in absence of any injury to property or property rights.

Estate—county court of county of which deceased prisoner in state prison was resident has exclusive jurisdiction to probate his will and administer his estate; presumption is that county of his residence at time of his commitment continued to be his residence during prison term.

See IX 104

Hospital records—protection afforded by 325.21 is for benefit of patient; it may be waived only in manner and in instances therein set forth.

Child protection—crippled and deformed boy thirteen years of age whose condition cannot be cured by surgical or medical attention cannot be committed to state public school at Sparta; if conditions are such that he cannot be committed to any other state institution or county asylum he may be committed by judge to care of some association until age of sixteen, when he may be committed to county home.

Action to enforce turning over to county tax levied by county for highway purposes and collected in part by city should be commenced in name of county against city treasurer and his bondsmen.

Conviction for violation of fish and game law ipso facto revokes any license theretofore issued pursuant to Ch. 29; this does not include conviction obtained in justice court from which appeal has been taken entitling applicant to trial de novo in circuit court; license is not revoked until conviction is obtained in circuit court.

Statute of limitations—county treasurer is authorized to pay out of general fund amount of money paid in redemption of land from tax sale to owner of lost certificate of tax sale who complies with 75.06 although more than six years have elapsed since sale.

Physician or surgeon is prohibited from disclosing information acquired in attending patient except as specified in 325.21.

When justice of peace has bound person over to circuit court in case where such justice had jurisdiction to try case, circuit court does not acquire jurisdiction; case should be dismissed and started again.

Fees of witnesses, reporters and district attorney pro tempore in John Doe proceeding are payable out of county funds.
COURTS—Continued
Sentence to state prison for crime of robbery on October 12, 1926, for term of five to fifteen years is erroneous; minimum sentence for this offense under statute is three years; time for appeal to supreme court having expired, there is no way to correct error.-------------------------578
Sentence for definite term in all crimes covered by 359.05 may be considered as indeterminate sentence in which minimum fixed by statute as penalty will be minimum of sentence in indeterminate sentence--------------------------585

Credit unions. See Corporations.

CRIMINAL LAW
Second sentence—person convicted of felony second time cannot be placed on probation under 57.01 nor under 54.0262
False pretenses—under facts stated all elements constituting crime of obtaining money by false pretenses are present and warrant may issue upon complaint duly made-----------------------------73
Cheat—complaint should be drawn under specific statute if such exist; otherwise offense of gross fraud or cheat at common law should be charged, specifying act constituting offense-----------------------------83
False statements—complaint should be drawn under specific statute if such exist; otherwise offense of gross fraud or cheat at common law should be charged, specifying act constituting offense-----------------------------83

See XVI 802
1910 247

Person responsible for death of man hit by train in Illinois who dies in Wisconsin may be prosecuted in Wisconsin under 353.12--------------------122
Inquest—district attorney of county where death takes place has power to direct coroner or justice of peace to make; otherwise coroner has no right to take charge of body or hold inquest or incur expense and collect from county--------------------122
Penalty prescribed in 353.27 is applicable to provisions of 85.01 (6), (7), (8), (9), (10) and 85.14--------------------138
Neglect of duty—city officials whose duty it is to relieve and take care of indigent person may be prosecuted if they refuse or wilfully neglect to perform such duty--------------------147
False pretenses—crime of obtaining money or property under, is not complete where there was no defrauding, as where stock is sold for price it is worth--------------------180
Fraudulent advertising—firm located outside state which advertises in Wisconsin publications may be prosecuted for violation of 343.413 provided service can be had on officer or agent of company in state--------------------194
Fraudulent advertising—publisher is not responsible for fraudulent matter in advertisement unless he has knowledge of unlawful nature of such matter--------------------194
State must prove that beaver have been unlawfully killed when skins are not tagged--------------------269
Failure of street car to stop and of driver of any vehicle to pass to right side of curb upon approach of fire apparatus is punishable under 353.27--------------------284

Firearms—sale of toy is prohibited--------------------403
CRIMINAL LAW—Continued

Owner of land on shore of Lake Michigan may not dredge out and sell sand under such waters; cannot be criminally prosecuted under 348.42 because under that section one is criminally liable only where he is not riparian owner. 443

Search warrant—issuing when neither complaint nor docket discloses that facts and circumstances were adduced sufficient to justify finding of probable cause by justice is illegal; evidence obtained by such warrant cannot be introduced in criminal prosecution. 449

Deputy sheriff acting under instructions of town board is not authorized by 343.485 to order removal from town highway of automobile temporarily parked on highway while occupants are swimming in lake adjoining highway. 454

Definite sentence for offense for which statute does not provide minimum penalty must be considered as definite sentence; should be so recorded by prison authorities. 459

Motor boat—no statute regulates speed in navigable waters of state, but driver may be liable in civil action for damages and may also be liable for manslaughter. 464

Search warrant—proceeding for issuing, is included within purview of 353.10, which provides that offenses committed within one hundred rods of county line may be prosecuted in either county. 495

Gambling—mint vending machine in which nickel is dropped and player gets package of mints worth five cents but sometimes in addition one or more tokens which he can play in machine and which turns cylinder upon which his fortune is told, is gambling device. 509

Sentence to state prison for crime of robbery on October 12, 1926, for term of five to fifteen years is erroneous; minimum sentence for this offense under statute is three years. 578

Embezzlement—trustees and officers of church organization violate law if they wrongfully convert property of such organization to personal use; members who aid or abet such conversion are guilty as accessories. 588

Fraudulent advertising—dealer who advertises eggs for sale as being “from Nelson’s Certified Egg Farm,” when no such farm exists and he receives his eggs from farmers in general violates law. 631

DAIRY AND FOOD

Dairy and food commissioner—may prescribe rule authorizing revocation of cheese factory license for manufacture of unlawful cheese. 241

Dairy and food commissioner. See Dairy and Food.
Dairy and food commissioner. See Public Officers.
Dance hall ordinances. See Counties.
Deaf. See Education, blind.
Deeds. See Mortgages, Deeds, etc.
Delinquent taxes. See Taxation.
Dentistry. See Public Health.
Deputy game wardens. See Civil Service, rule as to certification.
Deputy oil inspector. See Civil Service—oil inspector, deputy.
Deputy oil inspector. See Public Officers—oil inspector, deputy.
Deputy prohibition commissioner. See Public Officers—prohibition commissioner, deputy.

Deputy sheriff. See Public Officers—sheriff, deputy.

Deputy state treasury agent. See Civil Service, rule as to certification.

Deputy state treasury agent. See Public Officers—treasury agent, state.

Director of memorial union. See Civil Service.

Director of memorial union. See University.

District attorney. See Public Officers.

Divorce. See Marriage.

Divorce counsel. See Public Officers.

Dogs. See Agriculture.

Domestic fraternal societies. See Insurance.

EDUCATION

Industrial education—land commissioners are not authorized to make loans to vocational board of education. 22

Funds belonging to board of education in city school system of which is governed by provisions of special charter cannot be expended except in accordance with provisions of special charter. 29

Transportation of pupils—school board which has suspended school must pay tuition of children who attend other district schools and provide transportation to and from school. 32

Transportation of pupils—in case board which has suspended school in own district refuses to pay tuition or furnish transportation to another district such duty may be enforced in action of mandamus. 32

County board has authority to appropriate to school district in which county farm operated in connection with county asylum is located, amount for school purposes. 69

Vocational education—local board has power to employ teachers in vocational schools subject to approval of state board. 216

Vocational education—action taken at special meeting expressing desire to re-engage teachers to school board of city is not contract of employment. 216

Blind—granting of pensions to blind and to blind and deaf is mandatory under terms of 47.08; amount of aid is within discretion of county board within limitations prescribed by said section. 221

Contra XIII 65

Blind—one must be deprived of all useful vision of eye, need not be totally blind, to be entitled to aid under 47.08. 221

See VI 39

Blind—one person may not receive both mothers’ pension and blind pension. 267

Resolution by school district to raise $300 for band purposes is legal if school board determined to give instruction in band music and fund is to be used for that purpose. 354

Vocational education—constitutional and statutory limitations on indebtedness incurred by city apply to bond issue for purpose of enlarging existing school. 398
EDUCATION—Continued

Vocational education—in absence of regulation adopted by board to contrary, any business which may be taken up at regular meeting may be disposed of at special meeting

Minor child who has been emancipated and who has established residence in state may attend normal school without paying nonresident tuition even though parents are nonresidents.

Superintendent of public instruction is not entitled to opinion to settle dispute between city attorney and board of education as to proper method of filling vacancy on school board.

Election officer. See Elections.
Election officer. See Public Officers.

ELECTIONS

Registration—voter who has not previously registered may do so in March primary where such primary is held and in April primary and election where no previous primary has been held.

Publication of notices—weekly paper is entitled to $1.00 per square regardless of number of publications; daily paper is entitled to $1.00 per square for first publication and 70 cents per square for each subsequent publication.

Election officer—may not act as such at election in which he is candidate.

Election officer—one violates 6.32 (1) can be punished under 348.24.

Election officer—no criminal law is violated by assisting elector in marking his ballot without making record on ballot.

Nomination papers—basis for computing number of names required by 5.05 is vote of party for presidential elector receiving largest vote at last preceding election.

One not legal elector who votes at regular school election can be prosecuted for illegal voting although conduct of election and canvass of votes may have been illegal so as to avoid election.

Nomination paper in which elector did not sign affidavit before officer and no officer’s name is attached to jurat is hopelessly defective; should be disregarded.

Four questions answered as to rights of voter to vote when he has moved from one place to another in precinct or from one ward to another or from one town or city to another within five days before primary election.

See III 314.

Citizenship—several questions answered as to right of woman to elect to change her residence for voting purposes from residence of her husband.

Compensation cannot be paid for publication of election notices in weekly newspaper not printed in county for which notices are published.

Absent voting—methods by which absent electors may register and vote.
ELECTIONS—Continued

Electors residing in territory annexed to city within ten days of election are entitled to vote in city to which they are attached. 527

Subsec. (3), sec. 6.35, giving right to extend time for opening and closing of polls is inoperative. 529

Corrupt practices act—promise by candidate for office of register of deeds to voters to appoint certain person as deputy in case of his election is violation of law. 542

Citizenship—pardon may be granted to alien, after conviction, when sentence and judgment of court prescribe pecuniary penalty only, even after payment of such penalty; but when penalty has been paid into public treasury it may not be restored through pardon power. 544

Split ticket—if voter puts cross in large circle at head of party column he may place cross in square following candidate's name in another column; vote should be counted although name in column in which large circle is marked is not struck out. 559

Sample official primary ballot with cross marked after certain candidate's name and mailed to prospective voter is violation of corrupt practices act unless name of author is disclosed. 608

Embezzlement. See Criminal Law.

Eminent domain—county may dismiss its appeal from award in condemnation proceedings where landowner has taken no appeal. 633

Eminent domain. See School Districts.

Escheated lands. See Public Lands.

Estates. See Courts.

Expenses of public officers. See Public Officers.

Fair associations. See Agriculture, agricultural societies.

False pretenses. See Criminal Law.

False statements. See Criminal Law.

Farm drainage. See Agriculture.

Feeble-minded. See Indigent, Insane, etc.—residence.

Fire insurance. See Insurance.

Fire protection. See Municipal Corporations, towns.

Firearms. See Criminal Law.

Fireman, assistant. See Public Officers.

FISH AND GAME

Mink—there can be no open season in Grant county until January 1, 1930. 6

Muskrat—there can be no open season in Grant county until January 1, 1930. 6

Applicant for license who has been convicted of violating any provision of ch. 29, Stats., cannot be licensed for one year after conviction; licensee can be prosecuted as if no license has been issued. 38

Applicant who swears falsely to obtain license can be prosecuted for perjury or for unlawfully having game in his possession. 38

Licenses for muskrat, beaver and fur farms may not issue covering any land submerged by navigable lake or pond but may issue covering navigable stream. 52

If lake or pond is entirely surrounded by privately owned land having no outlet or inlet, is small or large, no fur farm license may issue covering such lake or pond. 52
FISH AND GAME—Continued

No person may place screen across nonnavigable stream which prevents free passage of fish up or down stream when such stream has been stocked by state. 52

Wholesale fish market—wholesale grocery concern incidentally selling salted fish in barrels does not require license. 63

Wholesale fish market—concern which has as its primary business selling of fish at wholesale is required to be licensed. 63

Wholesale fish market—concern selling at wholesale must be licensed whether sales are made wholly in state or out of state. 63

Wholesale fish market—license goes to person operating; more than one market may be operated under one license. 63

Wild life refuge—privately owned lands in Northern Forest Park, established by ch. 434, Laws 1927, are no part of state park, but under provisions of 29.56 (1) and (2) they are made part of wild life refuge; no game can be killed therein during any part of year. 65

Bounty—county board has no power to give on foxes and wolves under 29.60. 80

Wolf—although bounty is given for killing, person shooting without hunting license may be prosecuted. 168

Wild life refuge—conservation commission must investigate and have public hearing before establishing; under 23.09 (7). 204

Wild life refuge—conservation commission may make orders to prohibit hunting and fishing. under 23.09 (7) (a). 204

Wild life refuge—violation of commission orders made under 23.09 (7) (a) is punishable under 23.09 (11). 204

Conservation commission has no power to enter into contract with fisherman to remove rough fish unless he binds himself to remove snags, stumps and stones. 266

Beaver—state must prove unlawful killing when skins are not tagged. 269

Conservation commission has authority to furnish game warden for American Legion forest preserve and game refuge. 309

Use of buffalo nets and frame nets may be licensed in Mississippi river north of La Crosse, and south of La-Crosse such nets of certain sizes with certain sized meshes may be used in running waters of Mississippi for catching rough fish only through entire year. 310

Bounties—29.61, requiring counties, townes, cities and villages to provide for, for certain animals is mandatory. 316

Bounties—29.61 applies to counties as well as to other municipalities. 316

Bounties—towns, cities or villages cannot be reimbursed by county unless county board has acted either voluntarily or under mandate of court. 316

Bag limit for fish as provided under 29.19 should be enforced when fish are caught with hook and line from outlying waters as well as in waters of other parts of state. 334

Reward provided for in 29.63 (6), to informers, may be recovered by deputy sheriff. 359
Index 669

FISH AND GAME—Continued

Waters of Fox River and those of Swan Lake must be held to be separate waters for construing 29.191, prescribing rules for open and closed seasons and regulating fishing

Confiscation—vehicle is not confiscated and conservation commission may return it to its owner if transcript of justice's docket does not contain order for confiscation of automobile said to have been used in violation of game laws and no proof was taken of such illegal use

Deputy sheriff may be appointed by sheriff for purpose of enforcing fish and game laws

Fish hatchery—slough not connected with Mississippi river by reason of dam of railroad company does not come within purview of 29.63, authorizing owner to receive certificate to operate private hatchery

Search—one who has in his possession unlawfully caught fish or game may not be searched without warrant unless he has been legally arrested prior to such search

Search—automobile carrying illegally caught fish or game may be searched by officer if he has proper cause to believe such vehicle is used in violation of game laws

Mink—open season is in even numbered years only in Oneida county from Jan. 1 to Apr. 1 and from Oct. 25 to Jan. 1 following

Muskrat—open season is in even numbered years only in Oneida county from Jan. 1 to Apr. 1 and from Oct. 25 to Jan. 1 following

Provision that no person shall fish from motor-driven boat or from boat in tow of motor boat when motor is in motion applies to outlying waters as well as to inland waters

Minnow nets—deputy sheriff or police officer may supervise seining of minnows under 29.32 (2) for conservation commission

Minnow nets—it is within discretion of conservation commission to furnish deputy to supervise seining; statute is not mandatory

Closed season—conservation commission has power to order, for game bird after investigation and public hearing

Muskrat farm—license may be issued for land covering former bed of river

Muskrat farm—license in question must be considered new license, not renewal of old license, when several months have elapsed since expiration of former license

One charged with violating laws and bound over to circuit court, but case not having been tried and defendant not having been convicted of any other violation of fish and game laws, is entitled to license; if he is thereafter convicted, license issued is ipso facto revoked

Conviction for violation of law ipso facto revokes any license issued under ch. 29; this does not include conviction obtained in justice court from which appeal has been taken entitling applicant to trial de novo in circuit court; license is not revoked until conviction is obtained in circuit court.
Fish and Game—Continued

Order of conservation commission requiring person to whom nonresident fishing license or resident or non-resident hunting license is issued shall wear button with proper inscription when hunting or fishing not legally published is not valid— 572

Decoy left in water unattended over night by one who owns premises on which blind is located is public nuisance; practice violates law — 573

Hunting license—county clerk should issue only to resident of his county 579

Fish hatcheries. See Fish and Game.
Foreign corporations. See Corporations.
Forest crop lands. See Taxation.
Fraternal benefit societies. See Insurance.
Fraudulent advertising. See Criminal Law.
Gambling. See Criminal Law.
Game warden, deputy. See Civil Service, rule as to certification.
Governor. See Public Officers.
Grain and warehouse commissioner. See Public Officers.
“Gross and culpable negligence.” See Words and Phrases.
Gross fraud. See Criminal Law, cheat.
Health officer, local. See Public Health.
Health officer, local. See Public Officers.
Highway commission. See Public Officers.
Highway commissioner, county. See Counties, county highway commissioner.
Highway commissioner, county. See Public Officers.
Highway committee, county. See Counties county highway committee.
Highway committee, county. See Public Officers.
Historical society. See Appropriations and Expenditures.
Hospital records. See Courts.
Hospital records. See Physicians and Surgeons.
Hospitals. See Public Health.
Income taxes. See Taxation.

Indians

Personal property of citizen whether property is situated or citizen resides on Indian reservation, or elsewhere, within Wisconsin, is subject to taxation to same extent that personal property of other citizens and residents of state is subject 220

Indigent, Insane, Etc.

Court commissioner has not power to act in proceeding to hear application charging person with insanity and issuing order of commitment therein 12

City officials whose duty it is to properly relieve and take care of indigent persons may be prosecuted under 348.29 if they refuse or wilfully neglect to perform such duty 147

Liability of county and state for expense of keeping minor discussed, effect of removal of parent from state and return and determination as to proper charge 155

Wife’s legal settlement follows that of her husband; it requires year of residence of her husband in town for her to acquire legal settlement therein 208
INDIGENT. INSANE, ETC.—Continued

Feeble-minded—one who has not mental powers sufficient to enable him to conduct business matters and whose condition borders on actual insanity is incompetent to acquire residence.------------------------------------- 257

Legal settlement—relief given to family in each county and in each state in which it lived prevents first county in which it lived from being relieved of liability for its support.----------------------------- 339

Legal settlement—municipality continues liable for support of pauper who has removed to another municipality wherein she has been supported as pauper within year of such removal-------------------------------------------- 370

Legal settlement of minor children follows that of their father; another county than that of residence, which has supported them as transients, may be reimbursed.---------------------------------- 391

Commitment to poor farm must be made by court of record; transient cannot be so committed----------------------------------------------- 401

Board of control cannot enter into contract with other states or their representatives for exchange of insane patients----------------------------------------------- 475

Straight jackets and anklets used in hospital for insane are not public charge against county or estate of patient------------------------------------------------------------- 547

City, not county is liable for expenses of poor person taken to hospital by city authorities who was not under arrest until after he had recovered and was discharged from hospital--------------------------------------------------------------- 550

Industrial education. See Education.
Industrial schools. See Charitable and Penal Institutions—board of control.
Industrial schools. See Minors.
Injunction. See Courts.
Inspector of county highway work. See Public Officers.

INSURANCE

Insurance carried by state under provisions of ch. 210, Stats., does not cover loss of personal property of employe or officer.----------------------------------------------- 31

Fire insurance—company can issue coverage against loss by tornado, windstorm or cyclone by attaching rider to standard policy, except that damage to crops by hail, although accompanied by tornado, wind or cyclone, is required to be written in separate policy.----------------------------- 105

Domestic mutual hail and cyclone company organized under 1966-2 to 1966-12, Stats. 1898, which were repealed, provisions being continued as by-law, must set up unearned premium reserve under 203.12 and 201.18------------------------------------- 159

Commissioner is justified in refusing to approve of clause added to standard form of policy that modifies provisions and conditions of such policy otherwise than is authorized in 203.06.----------------------------------------------- 163

Life insurance—company which lost negotiable note can recover on note.----------------------------------------------- 189

Life insurance—lost note secured by mortgage is loan under 206.34 (3)--------------------------------------------------------------- 189

Deputy oil inspector is not denied right to engage in--------------------------------------------------------------- 227

Company must have on hand premiums for full term of policy contract----------------------------------------------- 239

See XVI 596
INSURANCE—Continued

Fraternal benefit society—effect of subsecs. (4) and (5), sec. 208.01 ----------------------------- 274
Contra X 616

Sums accruing to commissioner of insurance through failure of towns, cities and villages to comply with 101.29 and 201.59, may be used for conducting investigations as provided in 200.19----------------------------- 298

Fraternal benefit society should give each of its members letter or card stating that they are members in good standing without certifying as to amount due on death of holder ___________________________________________ 356

Foreign corporation licensed to transact business in Wisconsin to March 1, 1928 only, which continues to insure through one of its former agents is subject to penalty prescribed by 201.46----------------------------- 372

Fraternal benefit society—must, in order to remain within limits of statute, elect to grant one of benefits referred to in 208.01 (4) (e); cannot remain within limits of statute if it grants both benefits----------------------------- 436

Fraternal benefit society—can adopt by-laws requiring claims to be filed within ninety days and action to be commenced within six months from disallowance----------------------------- 471

Fraternal benefit society—commissioner should file form of application and certificate of insurance containing certain limitations of liability----------------------------- 472

Bankers' savings deposit agreement under which regular deposits are made in savings account from which bank pays premium on policy, held legal----------------------------- 512

Domestic fraternal society may adopt by-laws abrogating presumption of death from seven years' unexplained absence __________________________ 570

Domestic fraternal society—if by-laws contain provision against presumption of death, face amount of policy is not payable on filing of affidavit of seven years' unexplained absence ___________________________________________ 570

By-law abrogating presumption of death resulting from seven years' unexplained absence may be approved----------------------------- 570

Corporation purchasing plant may be held to pay workmen's compensation insurance premium on exposure of plant prior to its acquisition by it when such premium has been computed by applying rate promulgated by using experience although that rate might be affected by method of operation of plant after transfer. 609

Interpreters. See Courts.

INTOXICATING LIQUORS

Search warrant—justice of peace cannot issue, to search person __________________________ 146

Search warrant—court commissioner probably has power to issue, to search person; question is not free from doubt __________________________ 195

Nonintoxicating liquors—applicant for license to sell under 165.31 (1), cannot be denied such license by town board adopting resolution or other similar action limiting number of licenses it will issue in such town________________________ 341

Nonintoxicating liquors—each applicant is entitled to license to sell, if and when board determines applicant is proper person to license________________________ 341
INTOXICATING LIQUORS—Continued
Nuisance—165.24 subjects premises to lien for fines imposed only after conviction for maintaining.— 404
Nonintoxicating liquors—town or village board or city council cannot refuse license for soft drink parlor under 165.31 merely because premises are near school house.— 444
Provision of 165.29 (2) that prosecuting attorney must plead and prove previous convictions of accused for violation of this act apply only to previous convictions under ch. 165; it may be duty of prosecuting attorney to prove previous conviction under 359.14 when such section applies.— 455
Licensing board is not required to grant license to sell nonintoxicating liquors if applicant is not deemed proper person to receive such license.— 487
Order revoking driver's license and providing that no license shall be issued for period of year is irrevocable; no new license can be issued to such person during year upon recommendation of judge or anyone else.— 539

Judge, county. See Counties, county judge.
Judge, county. See Public Officers.
Judge, municipal. See Public Officers.
Jurors. See Courts.
Justice of peace. See Courts.
Justice of peace. See Public Officers.

LABOR
Town board may not bind out minor under sixteen years of age.— 283
In advertisement for labor for Waukesha plant of firm subsequent to strike in its Milwaukee plant it is not necessary to state that strike exists in Milwaukee.— 416

Land mortgage associations. See Banks and Banking.
Land mortgage associations. See Corporations.
Law of road. See Automobiles.
Law of road. See Bridges and Highways.
Legal settlement. See Indigent, Insane, etc.
Legal settlement. See Minors.

LEGISLATURE
Members are entitled to traveling expenses in attending sessions in cases only where such travel is actual.— 111
Joint resolution does not have force of law.— 166
Joint Resolution No. 13, 1928 first special session, does not carry authorization for board of control to grant easement to city of Waukesha.— 166
Appropriation under 20.01 (9) is available for service mentioned therein after close of either special or regular session.— 170
Special session has authority under call to fix amount of appropriation necessary to relieve emergency.— 171
Special session may not consider appropriation not such emergency appropriation as ordered in call.— 171
Special session may consider money available in funds, if such funds exist, over which statutes control—except teachers' retirement fund.— 171
Special session—may raise necessary money by revenue bill.— 171
LEGISLATURE—Continued

Bill No. 8, S., 1928 second special session, providing for transfer of funds, is not legislation within call to appropriate funds 181
Assemblyman and member of county board—offices are compatible 261

Life insurance. See Insurance.

LIVE STOCK
Dehorning cattle is not practice of veterinary medicine or surgery; castrating horses for compensation is 465

LOANS FROM TRUST FUNDS
Land commissioners are not authorized to make loans to vocational board of education 22
County may not repay loan made to school district nor guarantee payment of such loan 193
First meeting of newly created school district held outside boundaries of district is not lawful meeting; loan cannot be authorized at such meeting 413
Commissioners of public lands cannot make loan to village to repair auditorium building and to refund present indebtedness against such building unless such loan is authorized by vote of electors and it appears that present indebtedness was for purpose for which loan could be made in first instance 636

Malsfeasance. See Public Officers.

MARRIAGE
Divorce—father is liable for support of minor child where jurisdiction in divorce case was obtained by publication; neglect to support child may be prosecuted under 351.30 176
Marriage of girl of fourteen years and man of twenty-one at Waukegan, Illinois, who expected to return to Milwaukee to make their home, is voidable; consent of parents to such marriage would not add anything to legality of it 351
Common law marriage—is not recognized in Wisconsin 383

Maternity homes. See Charitable and Penal Institutions.
Mayor. See Public Officers.

MILITARY SERVICE
Soldier who is entitled to receive bonus of federal government and of state government is entitled to be buried at public expense under 45.16 if he otherwise comes within purview of statute 353
Soldiers' relief commission—town board, village board and city aldermen cannot grant burial allowances from soldiers' relief fund without obtaining approval 395

Mink. See Fish and Game.
Minnow nets. See Fish and Game.

MINORS
Child protection—upon commitment of child to state public school at Sparta board of control becomes legal guardian; any money or estate in hands of general guardian at time must be turned over to board of control 75
INDEX

MINORS—Continued

Liability of county and state for expense of keeping insane, effect of removal of parent from state and return and determination as to proper charge discussed. 155

Adoption—power of out-of-state society to give consent. 182

Town board may not bind out minor under sixteen years of age. 283

Legal settlement of children follows that of their father; another county than that of residence, which has supported them as transients, may be reimbursed. 391

Child protection—boy charged with murder in first degree, tried in juvenile court, cannot be sentenced to term in industrial school until he is eighteen years old and thereafter balance of definite term in some other institution. 410

Child who has been emancipated and who has established residence in state may attend normal school without paying nonresident tuition even though parents are nonresidents. 419

Child protection—crippled and deformed boy thirteen years old whose condition cannot be cured by surgical or medical attention cannot be committed to state public school at Sparta; if conditions are such that he cannot be committed to any other state institution or county asylum he may be committed to care of some association until sixteen years of age, when he may be committed to county home. 423

Child protection—county is liable for cost of maintenance of child committed temporarily to boarding home. 432

Industrial school—board of control has power to dismiss any child when in its judgment such child is detrimental to institution. 618

Industrial school—board of control has not power to retain child committed thereto after conviction for crime and pardoned by governor. 618

Industrial school—governor has no power to compel board of control to keep child who in its judgment is detrimental to institution. 618

Industrial school—person committed without having been convicted of offense is not subject to pardon. 618

Industrial school—board of control has power to parole any inmate. 618

Deformed child sent to Wisconsin general hospital from Rock county is charge to Iowa county if its legal settlement is in Iowa county. 635

MORTGAGES, DEEDS, ETC.

Mortgage to corporation can be satisfied as provided in 235.55 by entry in margin of record thereof, acknowledging satisfaction and signed by corporation as mortgagee and signature witnessed by register of deeds. 72

Deed—acknowledgment before notary public of another state does not need date of expiration of commission of notary. 234

Fond du Lac Guards may sell and dispose of its property provided all holders of certificates join in conveyance. 330

MOTHERS' PENSIONS

Family receiving aid cannot receive funeral costs of member. 131
MOTHERS' PENSIONS—Continued

Residence (not legal settlement or merely physical presence) of mother and children in county determines right to aid. 264

One person cannot receive both mothers' pension and blind pension. 267

Illegitimate children while in custody of mother are entitled to aid. 268

Emergency aid may not be granted for hospital and surgeon's charges for operation on mother of dependent children; aid under 48.33 (6) is for dependent children only. 402

Motor boats. See Criminal Law.
Motor boats. See Navigable Waters.
Motor vehicle fuel tax. See Automobiles.
Motor vehicle fuel tax. See Taxation.
Municipal borrowing. See Municipal Corporations.

MUNICIPAL CORPORATIONS

Question in city council whether they will make compromise settlement involving payment by city of $13,000 requires majority vote of all members of council; if vote is tie mayor may cast deciding vote. 14

Municipal borrowing—village has no power to borrow money and issue short time promissory notes therefor, except under provisions of 67.12; it has no power to issue bonds to provide money with which to pay short time notes whether issued under said section or otherwise. 23

Ordinance—city cannot provide for inspection of premises of milk producers outside city limits, requiring producers whose premises are inspected to pay one dollar to city. 119

Ordinance—city may prohibit peddling within its limits. 256

Town meeting—may not put town officer compensated on per diem basis by statute on annual salary basis. 291

Funds raised by board of education of city for erection of high school building are under direction and supervision of school board; common council cannot use such funds for general city purposes. 322

Municipal borrowing—county board in counties other than Milwaukee may, after tax levy has been made, borrow not exceeding fifty per cent of such levy and issue county orders therefor on or before February 15 next following. 329

Bill for electric light furnished by city may be charged up to lot or parcel of real estate to which it is furnished. 338

Ordinance adopted by town regulating amusement park located in town is void if it conflicts with one enacted by county board. 366

Expenditure of city's money by council and mayor for printing pamphlets and other advertising, advising voters to vote for city hall, is improper but not violation of criminal law. 380

Municipal borrowing—constitutional and statutory limitations on indebtedness which may be incurred by city apply to bond issue for purpose of enlarging vocational school. 398
MUNICIPAL CORPORATIONS—Continued

Municipal borrowing—neither city council nor local board of vocational education may enter into contract with builder or contractor whereby contractor is to build addition to existing vocational school and receive compensation therefor in annual installments extending over period of years.----------------------------- 398

Town containing unincorporated village has not power to enter into agreement with another town or with city to purchase and maintain for use of towns or town and city jointly fire fighting equipment.---------- 437

Municipal borrowing—subsec. (3), 67.14, providing for referendum on petition of electors of question whether county highway improvement bonds shall be issued pursuant to 67.13 does not apply to county highway improvement bonds already authorized by sole action of county board under provisions of 67.13 and 67.14 (1) 521

Towns—question of right of towns and city to enter into agreement to have city purchase fire equipment to be paid for by city and to be used both in city and in towns is without express statutory authority; 60.29 (18) does not cover such situation.---------- 533

Municipal borrowing—premium received on sale of county highway improvement bonds must be placed in county treasury as part of sinking fund for retirement of such bonds; may not be used for construction purposes “as proceeds from county bonds”---------- 632

Municipal borrowing—commissioners of public lands cannot make loan to village to repair auditorium building and to refund present indebtedness against such building unless loan is authorized by vote of electors and it appears that present indebtedness was for purpose for which loan could be made in first instance.---------- 636

Municipal judge. See Public Officers—judge, municipal.
Muskrat. See Fish and Game.
Muskrat farms. See Fish and Game.
Mutual savings banks. See Banks and Banking.

NATIONAL GUARD
Provisions of 14.71 (4) and (5) do not apply----------- 133
Provisions of 85.32 apply------------------------------- 133
Adjutant general may sell unserviceable or unsuitable property to board of control in accordance with board’s bid ---------------- 331

NAVIGABLE WATERS
Lands uncovered by gradual recession of waters of meandered navigable lakes inure to riparian owners to next eighth line; beyond next eighth line title is in state ----------------------------- 41
All lakes and streams meandered or those that have been declared navigable by statute and those navigable in fact are navigable waters.----------------------------- 52
Licenses for muskrat, beaver and fur animal farms may not issue covering any land submerged by navigable lake or pond but may issue covering navigable stream 52
Head waters of stream may be nonnavigable while other parts of stream are navigable----------------------------- 52
NAVIGABLE WATERS—Continued
If stream is nonnavigable and dam is legally constructed, causing greater depth and making stream navigable, general public has not right to enjoy privileges afforded by navigable waters unless they acquire such right by prescription or otherwise.

If railroad commission permits one to build obstruction across navigable stream provision is made for public to travel through or around obstruction.

There is no definite size that lake must be in order to be navigable; whether it is navigable in fact must be decided upon facts present.

If lake or pond is entirely surrounded by privately owned land having no outlet or inlet, whether small or large, and is classified as navigable waters, no fur farm license may issuing covering such lake or pond.

No screen may be placed across nonnavigable stream which prevents free passage of fish when such stream has been stocked by state authorities.

Owner of land on shore of Lake Michigan may not dredge out and sell sand under said waters.

Owner of land on shore of Lake Michigan cannot be criminally prosecuted under 343.42 for dredging out and selling sand under said water.

Motor boat—no statute regulates speed in navigable waters of state, but driver may be liable in civil action for damages and may also be liable for manslaughter.

Motor boat—words “motor vehicle on a highway,” as used in 85.09 (2) (a) are not broad enough to include boat on navigable lake or river.

Neglect of duty. See Criminal Law.
Newspaper—under 6.22 (4), Stats., weekly paper is entitled to $1.00 per square for publication of election notices regardless of number of publications; daily paper may receive $1.00 per square for first publication and 70 cents per square for each subsequent publication.

Newspaper—county board need not advertise for bids to publish its proceedings, but whether it does or not board can let contract to paper which it considers best.

Newspapers—lots belonging to one person and advertised under 74.37 entitle printer to maximum fee of twenty-five cents on total descriptions rather than on each tract.

Newspapers. See Public Printing.
Nomination papers. See Elections.
Nonintoxicating liquors. See Intoxicating Liquors.

NORMAL SCHOOLS
Minor child who has been emancipated and who has established residence in state may attend, without paying nonresident tuition even though parents are nonresidents.

Notary. See Public Officers.
Nuisances. See Intoxicating Liquors.

OIL INSPECTION
Sec. 168.05 and subsections thereof impose penalty against both selling and using gasoline and other petroleum products that have not been properly examined and stamped, sealed and marked.
OIL INSPECTION—Continued

Any person who fails to have oils inspected which should be tested under 168.05 (3) and to pay inspection fees should be prosecuted under that section.

Oil inspector. See Civil Service, rule as to certification.
Oil inspector, deputy. See Civil Service.
Oil inspector, deputy. See Public Officers.

OPTOMETRY

Board of examiners in optometry—may not use accumulated funds in state treasury for purposes of enforcing law.

Optometrist may not use word "doctor" or "specialist" in connection with his business.

Ordinances. See Counties.
Ordinances. See Municipal Corporations.
Pardons. See Prisons.
Parole. See Prisons.
Passes and franks. See Public Officers.

PEDDLERS

City may by ordinance prohibit within its limits.
City enacting ordinance prohibiting peddling may refuse to grant city license to one who has state license.

Pharmacy. See Public Health.
Pharmacy board. See Public Officers.

PHYSICIANS AND SURGEONS

Basic science law—147.20 (3), authorizing board of medical examiners to revoke license upon conviction of crime committed in course of professional conduct, is applicable only to convictions obtained after amendment of 1927.

Basic science law—license may be revoked: first, under sec. 147.20 (2); second, under 147.20 (3).
Pardon does not restore license.
Basic science law—procedure for revoking license obtained through fraudulent credentials discussed.
Duties of board of medical examiners regarding reinstatement of physician's license where governor has granted unconditional pardon of physician convicted of manslaughter.
Basic science law—student who had matriculated at time of enactment of ch. 306, Laws 1901, in medical college of this state offering course required by statute, was eligible to be admitted to practice without examination.
Chiropractor—person who performs operation called electrocoagulation of tonsils by use of electric current performs surgical operation within provisions of 147.14 (1); such person must be licensed as surgeon.
Hospital records—protection afforded by 325.21 is for benefit of patient; it may be waived only in manner and in instances therein set forth.
Under provisions of 325.21 physician or surgeon is prohibited from disclosing information acquired in attending patient except as there specified.

Plats. See Real Estate.
Plumbing. See Public Health.
Police justice. See Public Officers.
Poor commissioner. See Public Officers.
Potato Growers' Association. See Civil Service.
President county agricultural society. See Agriculture, agricultural society president.
President county agricultural society. See Public Officers, agricultural society president.
Prison labor. See Prisons.
Prisoners. See Prisons.

PRISONS
Probation—person convicted of felony second time cannot be placed on probation under 57.01 nor 54.02. 62
Prisoner—money earned while inmate of state prison must be considered as part of estate after death which occurred in prison. 89
Prison labor—if dependents of convict have not been determined at time of his conviction as required by 56.08 (6), court may, during time for which convict is sentenced, make such determination. 99
Probation—court cannot place convict on probation after he has begun to serve his sentence. 99
See XII 532
County court of county of which deceased prisoner was resident has exclusive jurisdiction to probate his will and administer his estate. 382
See IX 104
Pardon power of governor covers all offenses, after conviction, except treason and cases of imprisonment. 544
Pardon may be granted alien, after conviction, when sentence and judgment of court prescribe pecuniary penalty only, even after payment of penalty; but when penalty has been paid into public treasury it may not be restored through pardon power. 544
Pardon—legislature may prescribe only such regulations as pertain to manner of applying for; in situations where legislature has failed to act governor may prescribe regulations. 544
Parole—inmate of state prison whose record shows that he was convicted of minor offenses but of no felony is first offender within parole statute. 583
Parole—sentence for definite term in all crimes covered by 359.05 may be considered as indeterminate sentence in which minimum fixed by statute as penalty will be minimum of sentence in indeterminate sentence. 585

Probation. See Prisons.
Probation commissioner, deputy. See Public Officers.

PUBLIC HEALTH
Pharmacy—use of word “retail” in 151.04 (2), as applied to sale of aspirin as poison drug held not to refer so much to quantity sold as to character of sale for consumption. 15
Basic science law—147.20 (3), authorizing board of medical examiners to revoke license of physician upon his conviction of crime committed in course of his professional conduct, is applicable only to convictions obtained after 1927 amendment. 16
PUBLIC HEALTH—Continued

Basic science law—procedure for revoking license of doctor obtained through fraudulent credentials discussed 67

Chiropractor—person licensed as, must be licensed each year or license must be renewed as provided in 154.04; in case it is not so renewed, chiropractor must be licensed as original applicant 67

Chiropractor—practicing without license or renewal thereof subjects person to prosecution and punishment as provided in 154.06 67

Board of health has no power to fix prices to be charged for work done on public in school of cosmetic art 78

Cemetery board is required to inclose grounds of cemetery with suitable fence without aid from adjoining land owners 81

City cannot provide by ordinance for inspection of premises of milk producers outside city limits, requiring producers whose premises are inspected to pay one dollar to city 119

Dentistry—license to practice, which has been revoked may be restored by order of court as provided in 147.20 (4) 149

Pharmacy—board is required to issue permit if application is made therefor and law is otherwise complied with 153

Quarantine—Christian Science healer is not physician or clergyman within meaning of 143.05 (3); may not visit quarantined place without permit of health officer 157

See V 642
VII 68

Plumbing—changes in state code by amending Rule 1 and creating Rules 12, 13, 14 are authorized 248

Beauty parlor—husband can legally work in shop of which his wife is legal owner and licensed operator 297

Beauty parlor—permanent waving constitutes practice of cosmetic art 332

Hospital—no law is violated by retaining body of deceased patient for three hours after death 332

Pharmacy—board should submit specific facts as to violation of law to district attorney of county where offense was committed; district attorney should pass upon question whether prosecution should be brought under 151.05 or under perjury and false swearing statutes 346

Secs. 140.05 (7), 236.03 and 236.09 cannot be construed as applying to plats of land made prior to enactment of such law 371

Pharmacy—every drug store and pharmacy conducted under supervision of registered pharmacist must be registered annually on first day of June and fee of one dollar paid; failure to so register subjects person to fine of $50 for each offense 384

Pharmacy—no drug store, apothecary shop, pharmacy or any similar place of business can be kept open for transaction of drug business until it has been registered with and permit therefor has been issued by board of pharmacy 424
Pharmacy—Bayer aspirin tablets patented, with word "aspirin" registered as trade-mark, may be sold by persons or stores not licensed to sell drugs. Contra XVI 140

Basic science law—person not authorized medical practitioner but who practices healing through use of Scriptures and laying-on of hands and even making suggestions that patients drink grape juice or olive oil or refrain from eating certain foods, where no charge is made and compensation claimed and performance is not in expectation of compensation, does not violate ch. 147

Sterilization—board of control may have inmates of certain institutions sterilized under 46.12; sterilization is not authorized except as specified in said section.

Health officer, local—mayor and city council should cooperate to appoint health commissioner; state board of health may take control of enforcement of health laws in municipality in case of their failure to appoint.

Health officer, local—city may pass ordinance providing for appointment of board of health in city; such board can appoint officer.

Cemetery—where association has been formed under law and grounds have been purchased, lots sold, interments made, some or all bodies removed and some lots are now being used for residence purposes without proceedings to authorize sale for purposes other than cemetery, such residence use is unlawful.

Cemetery—unlawful use for residence purposes or failure of proper use or abandonment of grounds for cemetery purposes does not escheat property to state; city is vested with control and should so manage as to get property back upon tax roll.

Pharmacy—graduate from school of pharmacy in 1926 from two-year course which was changed in 1927 to three-year course, law at time of graduation requiring credit in examination on four-year pharmaceutical training but now requiring three-year course, may be recognized by board, but credit should be two not three years.

Pharmacy—board may not require certificate of registration to be displayed in front window of store.

Pharmacy—member of board may search for evidence of violation of law so long as he is not violating any statute.

Toweling contained in locked cabinet with loops hanging out permitting each user to pull out clean portion after pushing button, soiled portion being automatically drawn into separate compartment locked to prevent reuse, complies with statute requiring individual towel for each guest in hotels.

PUBLIC LANDS

Lands uncovered by gradual recession of waters of meandered navigable lakes inure to riparian owners to next eighth line; beyond next eighth line title is in state.
PUBLIC LANDS—Continued

Privately owned lands in Northern Forest Park are no part of state park but under 29.56 (1) and (2) they are made part of wild life refuge.  

Commissioner of agriculture may not lease or license portions of state property so as to convey interest in land.  

Escheated lands—belong exclusively to school fund.  

Escheated lands—sale is exclusively confided to commissioners of public lands.

PUBLIC OFFICERS

Adjutant general—may sell unserviceable or unsuitable property to board of control in accordance with board’s bid.  

Agricultural agent—county agent appointed under 59.87 may be employed also as secretary of county fair association.  

Agricultural society president and county treasurer—offices not incompatible.  

Alderman and county supervisor—offices may be held by same person.

Bank examiner who lives in Shorewood but whose official residence is in Milwaukee cannot charge car fare between home and Milwaukee; cannot charge for noonday meal in Milwaukee.  

Bank examiner having no official residence and no office may charge traveling expenses while going to and from banks he is examining.  

Board of appeals created by zoning ordinance—one holding contract from city or school board for public work is not prohibited by malfeasance statute from serving as member.  

Board of control—may not make order to stop courts from making commitments to state public school because of epidemic.  

Board of control—may not enter into contract with other states or their representatives for exchange of insane patients.  

Board of deposits—any member may refuse to vote on any resolution or motion offered at any meeting of board.  

Board of deposits—where one of board of four members refuses to vote, vote of any two members becomes majority vote of board.  

Board of deposits—it is unnecessary for member to assign any reason for his refusal to vote on any resolution or motion.  

Board of education—member who is stockholder in paving corporation doing paving for city in which stockholder lives does not violate 348.28.  

Board of health—has no power to fix prices to be charged for work done on public in school of cosmetic art.  

Board of health—in fixing salary of social workers agreement can be made that car fare be paid in addition to salary.  

City plan commission member—neither architect nor contractor doing work with city is barred from occupying position.
PUBLIC OFFICERS—Continued

Commissioner of agriculture—may withhold state aid if not satisfied that county fair has been maintained according to regulations.  3

Commissioner of agriculture—may not lease or license portions of state property so as to convey interest in land 120

Commissioner of agriculture—may enter into contracts for term of years longer than his term of office.  286

Commissioner of agriculture—should insist upon payment for concessions under original Miller & Rose contract; may not accept tax receipts as part of payment as provided by attempted modification of contract.  286

Contra XVI 446

XVII 120

Commissioner of banking—may take charge of affairs of land mortgage association when it cannot meet its interest on bonds issued.  108

Commissioner of banking—can turn over mortgages deposited to secure bonds only when so ordered by court, when liquidating land mortgage association.  108

Commissioner of banking—should commence action to collect guaranties of land mortgage association if necessary to conserve assets.  108

Commissioner of banking, special deputy—is subject to provisions of 348.11.  195

Conservation commission—has authority to furnish game warden for American Legion forest preserve and game refuge.  309

Constable and deputy prohibition commissioner—offices are compatible.  321

Coroner—has no right to take charge of body or hold inquest or incur and collect expense except on order of district attorney of county where death occurred.  122

Council, city—members may be prosecuted under 348.29 for refusal or wilful neglect to properly relieve and take care of indigent person.  147

Council, city—expenditure of city's money for advertising matter advising voters to vote for city hall is improper but not violation of criminal law.  380

County board ordinance on question of adoption of which nine out of nineteen members voted aye, eight no, and two members did not vote, chairman of board who declared ordinance adopted being member voting aye, was not adopted by majority vote required by 59.04 (3); subsequent resolutions requesting state highway commission to take charge of construction and maintenance of state aided highways and placing duties imposed by law upon county highway commissioner in hands of county highway committee fail with failure of ordinance to pass.  43

County board—chairman as well as any other member of board is eligible to election as member of county highway committee.  45

County board—member by accepting office vacates appointive office of member of state highway commission.  164

County board member and grain and warehouse commissioner—offices not incompatible.  198

County board member—cannot be employed by board as inspector of county highway work.  237
PUBLIC OFFICERS—Continued

County board—may select A. for position created by board while A. is member but during previous term, selection of whom is not now made by board. 244
County board chairman—hiring of deputies by sheriff on recommendation of chairman does not create valid claim against county if chairman was not authorized to make such recommendation; county board may ratify such actions and pay claims 258
County board member and assemblyman—offices are compatible 261
County board—must reorganize and elect new officers at special meeting held after town chairmen and town supervisors have been elected and have qualified 333
County board member and soldiers' relief commissioner—offices are incompatible 393
County board member and county treasurer—offices are incompatible 466
County board member—may be elected or appointed member of county highway committee 531
County clerk and county highway commissioner—offices are not incompatible 641
County fair association secretary—county agent may be 389
County officer—salary may be changed by county board at its annual meeting only; such action affects only such officers as are elected during ensuing year 452
County officer—neglect to file statements mentioned in 59.77 (3) results in forfeiture of right to compensation 603
County officer on salary basis should collect fees appertaining to office, except when such fees are payable by county, and turn them over to county treasurer 603
County physician and mayor—offices are compatible 498
County treasurer and county board member—offices are incompatible 466
County treasurer and president of county agricultural society—offices compatible 466
Dairy and food commissioner—may prescribe rule authorizing revocation of cheese factory license for manufacturing unlawful cheese 241
District attorney—salary cannot be increased during term 452
District attorney—salary may be changed by county board at its annual meeting only 452
District attorney—county board may not during term of officer allow him any sums in addition to salary for office rent 634
Divorce counsel and county judge—offices are incompatible 480
Election officer—may not act as such at election in which he is candidate 318
Election officer who violates 6.32 (1) can be punished under provisions of 348.24 for willful violation of law 318
Election officer—violates no criminal law by assisting elector in marking his ballot without making record on ballot 323
Expenses of public officer—bank examiner who lives in Shorewood but whose official residence is in Milwaukee cannot charge car fare between home and Milwaukee; cannot charge for noonday meal in Milwaukee 381
PUBLIC OFFICERS—Continued

Expenses of public officer—agreement can be made to pay car fare of social workers under board of health in addition to salary.------------------------------- 441

Expenses of public officer—bank examiner having no official residence and no office may charge traveling expenses while going to and from banks he is examining.------------------------- 573

Fireman, assistant—selection of A. for position created by county board while A. is member but during previous term, selection of whom is not now made by board is not prohibited.------------------------ 244

Governor—pardon power covers all offenses, after conviction, except treason and cases of imprisonment.--------------------------------------------- 544

Governor—pardon may be granted to alien, after conviction, when sentence prescribes pecuniary penalty only, even after payment of penalty; when it has been paid it may not be restored through pardon power.------------------ 544

Governor—may act when legislature has failed to prescribe regulations pertaining to manner of applying for pardons.-------------------------- 544

Grain and warehouse commissioner and county board member—offices are not incompatible.----------------------------------------------- 198

Health officer, local—should be appointed by mayor and city council; state board may take control of enforcement of health laws in case of their failure so to do.------------------ 567

Health officer, local—city may pass ordinance providing for appointment of board of health; such board can appoint officer.-------------------------- 567

Highway commission, state—appointive members are entitled to five dollars per day for each day of actual attendance at meeting of commission or public meeting to discuss highway administration, etc.-------------------- 129

Highway commission, state—appointive members are not entitled to per diem for days other than meeting days.------------------------- 129

Highway commission, state—members are entitled to reimbursement for necessary traveling expenses incurred in discharge of their duties, whether in attendance at meetings or not.------------------------ 129

Highway commission, state—appointive member vacates office by acceptance of office of county board member----------------------------- 164

Highway commission, state—appointive member vacates office by acceptance of office of town chairman.------------------------------- 164

Highway commissioner, county—ordinance of county board proposing to abolish office, on question of adoption of which nine members out of nineteen voted aye, eight no and two members did not vote, chairman of board who declared ordinance adopted being one voting aye, was not adopted by majority vote required by 59.04 (3); subsequent resolutions fail with failure of ordinance to pass.--------------------- 43

Highway commissioner, county—when vacancy is filled by county board office terminates first Monday of January of second year next succeeding appointment.--------------------- 549
PUBLIC OFFICERS—Continued

Highway commissioner, county—when vacancy occurs while county board is not in session it is filled by county state road and bridge committee; term expires first Monday of January next succeeding appointment; successor should be appointed by county board at first regular meeting succeeding appointment, to take office Tuesday following first Monday of January next succeeding and hold for full term. 549

Highway commissioner, county and county clerk—offices are not incompatible. 641

Highway committee, county—chairman of county board as well as any other member of board is eligible to election as member 45

Highway committee, county—terms of members begin immediately upon election and qualification upon expiration of year for which any former committee was elected. 45

Highway committee, county—member cannot be appointed as inspector of county highway work if member of county board 237

Highway committee, county—may construct machine shed by day labor without advertising for bids or letting contract 238

Highway committee, county—duties of members are prescribed and compensation that can be paid is limited by statute; compensation is not open to review by county board 379

Highway committee, county—member of county board may be elected or appointed 531

Inspector of county highway work—member of county board cannot be employed; member of county highway committee who is member of county board comes within rule 237

Judge, county—except where value of estate of minor in guardianship proceedings does not exceed $500 judge is prohibited from assisting guardian in making or drafting his annual accounts. 82

See VIII 480

Judge, county—legislature may change salary during his term of office. 182

See XIV 463

Contra XIII 486

Judge, county, and divorce counsel—offices are incompatible 480

Judge, county—is not required to file official bond. 547

Judge, county—must file statements mentioned in 59.77 (3); failure results in forfeiture of right to compensation 603

Judge, county—should collect fees appertaining to office, even if on salary basis, except when fees are payable to county, and turn them over to county treasurer 603

Judge, municipal—refusal to qualify creates vacancy authorizing governor to fill 352

Justice of peace and city mayor—offices are incompatible 327

Justice of peace—no law provides for filing with clerk of court or secretary of state proof of continued authority to act as hold-over officer 355
PUBLIC OFFICERS—Continued

Malfeasance—members of town board voting to pay one of their number for survey for town are guilty. 84

Malfeasance—member of board of education who is stockholder in paving corporation doing paving for city in which stockholder lives does not violate 348.28. 192

Malfeasance—deputy oil inspector may engage in other business except those activities specified in 168.11. 227

Mayor—may cast deciding vote in case of tie on question in city council regarding compromise settlement involving payment by city of $13,000. 14

Mayor and school district treasurer—after July 1, 1928 offices cannot be held by same person. 296

Mayor and justice of peace—offices are incompatible. 327

Mayor—expenditure of city’s money for advertising matter advising voters to vote for city hall is improper but not violation of criminal law. 380

Mayor and county physician—offices are compatible. 498

Notary—acknowledgment of deed before notary public of another state does not need date of expiration of commission. 234

Oil inspector, deputy—may engage in other business except those activities specified in 168.11. 227

Passes and franks—special deputy commissioner of banking appointed in liquidation of bank is subject to provisions of 348.311. 195

Pharmacy board—should submit facts as to violation of pharmacy law to district attorney of county where offense has been committed; district attorney should pass upon question whether prosecution should be brought under 151.05 or under perjury and false swearing statutes. 346

Police justice—office abolished by city council subsequent to revision of general charter law by ch. 242, L. 1921, can be re-established only by city ordinance duly enacted. 598

Police justice—office abolished by ordinance prior to enactment of ch. 242, L. 1921, has been re-established by that enactment. 598

Poor commissioner—town clerk may not act as. 291

Prohibition commissioner, deputy, and constable—offices are compatible. 321

Real estate brokers board—may promulgate rule requiring brokers who purchase real estate under land contract and sell same to third persons on installment to deposit agreement with sufficient surety. 312

Real estate brokers board—may appoint without examination one stenographer for board in exempt class and may assign her to duties in offices in Milwaukee. 555

Real estate brokers board—practice before board on complaint in writing for suspension or revocation of license of broker discussed. 563

Register of deeds—must file and index list of lands under forest crop law; need not record; receives no fee for filing and indexing. 462
## Public Officers—Continued

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Register of deeds in county which has adopted tract index system may receive three cents for entering each lot in plat in tract index</td>
<td>483</td>
</tr>
<tr>
<td>Register of deeds—fixing—compensation at salary instead of fee basis at adjourned annual meeting of county board and requiring all fees to be paid each month to county treasurer changed office from fee office to salaried office</td>
<td>627</td>
</tr>
<tr>
<td>School district clerk and village treasurer—offices are compatible</td>
<td>493</td>
</tr>
<tr>
<td>School district clerk—one holding position of government farmer on Indian reservation is eligible to office</td>
<td>537</td>
</tr>
<tr>
<td>School district treasurer and mayor—after July 1, 1928, offices cannot be held by same person</td>
<td>296</td>
</tr>
<tr>
<td>Secretary of state—may rescind forfeiture of corporation failing to file annual report if affidavit contains facts required by 180.08 (6)</td>
<td>429</td>
</tr>
<tr>
<td>Sheriff—attempt to change compensation for meals and to make allowance for use of car is void in toto unless it is determined that change for meals would have been made without other change</td>
<td>254</td>
</tr>
<tr>
<td>Sheriff—hiring deputies on recommendation of chairman of county board does not create valid claim against county if chairman was not authorized by county board to make such recommendation; county board may ratify chairman's action and pay claims</td>
<td>258</td>
</tr>
<tr>
<td>Sheriff on salary may not be reimbursed for expenses incurred in taking person to charitable or penal institution committed thereto</td>
<td>314</td>
</tr>
<tr>
<td>Sheriff, undersheriff or deputy sheriff may not be reimbursed expenses for performance of duties within or without county, except that sheriff may receive compensation for acting in extradition matters as agent of state</td>
<td>314</td>
</tr>
<tr>
<td>See X 592 V 189, 817</td>
<td></td>
</tr>
<tr>
<td>Sheriff, deputy—may not be reimbursed expenses for performance of duties within or without county</td>
<td>314</td>
</tr>
<tr>
<td>See X 592</td>
<td></td>
</tr>
<tr>
<td>Sheriff, deputy—may recover reward provided for in 29.63 (6) to informers</td>
<td>359</td>
</tr>
<tr>
<td>Sheriff, deputy—may be appointed by sheriff for purpose of enforcing fish and game laws</td>
<td>393</td>
</tr>
<tr>
<td>Sheriff—fees and expenses incurred in executing governor's warrant in proceeding for revocation of pardon and remanding convict to prison are chargeable to appropriation in 20.02 (4)</td>
<td>425</td>
</tr>
<tr>
<td>Sheriff, deputy—is not authorized by sec. 343.485, acting under instruction of town board, to order removal from town highway of automobile temporarily parked on such highway while occupants are swimming in lake adjoining highway</td>
<td>454</td>
</tr>
<tr>
<td>Soldiers' relief commission member and county board member—offices are incompatible</td>
<td>393</td>
</tr>
<tr>
<td>State treasurer—cost of additional surety company bond to be furnished to annuity board is chargeable to appropriation of board</td>
<td>112</td>
</tr>
</tbody>
</table>
PUBLIC OFFICERS—Continued

State treasurer—must produce in court original records and documents called for in subpoena duces tecum; production of photostatic or certified copies is not compliance ................................. 141

State treasurer—is not required under ch. 225 to maintain collateral issued by land mortgage association segregated to cover each series of bonds issued ............. 428

Superintendent of public instruction—is not entitled to opinion to settle dispute between city attorney and board of education or other city officers or citizens as to proper method of filling vacancy on school board .......................... 523

Superintendent of public property—has not power to purchase copyright and sell guide book of capitol ............... 105

Supervisor, city—term commences on first day of May succeeding election ........................................ 333

Supervisor, city—ineligible to office if stockholder in telephone company furnishing service to city of which he is officer ................................................................. 394

Supervisor, city, and member of water and light commission—offices are compatible except where commission furnishes service to county ........................................ 498

Supervisor, county, and alderman—offices may be held by same person .................................................. 442

Town board—member cannot be employed to survey for town; order to pay therefor is illegal and members of board are guilty of malfeasance in voting for it ............................................. 84

Town chairman—by accepting office vacates appointive office of member of state highway commission ............. 164

Town clerk—may not act as poor commissioner .................. 291

Town clerk—officer compensated on per diem basis by statute may not be placed on annual salary basis by annual town meeting ........................................ 291

Town clerk—not criminally liable for violation of 11.67 if form of ballot is enclosed with application form sent to elector for voting by mail ............... 323

Treasury agent, deputy—is subject to provisions of civil service law; tenure of office does not expire with termination of incumbency of appointing officer .................. 209

Contra V 890

Undersheriff—is not entitled to any expense for performance of his duties within or without county ........ 314

See X 592

United States government farmer on Indian reservation—is eligible to hold office of school district clerk .......... 537

Vacancy—refusal of municipal judge to qualify creates vacancy authorizing governor to fill ...................... 352

Vacancy in office of county highway commissioner if filled by county board is for term ending first Monday of January of second year next succeeding appointment ... 549

Vacancy in office of county highway commissioner occurring when county board is not in session is filled by county state road and bridge committee for term ending first Monday of January next succeeding appointment; his successor should be appointed by county board at its first regular meeting next succeeding such appointment, to take office Tuesday following first Monday in January next succeeding and hold for full term ...................................................... 549
### PUBLIC OFFICERS—Continued

*Veterinarian in U. S. department of agriculture—cannot be employed by state unless he has qualified under Wisconsin civil service law.*

[Page 251]

*Village treasurer and school district clerk—offices are compatible*.

[Page 493]

*Water and light commission member and city supervisor—offices are compatible except where commission furnishes service to county.*

[Page 498]

### PUBLIC PRINTING

*Newspaper—county board cannot pass resolution asking for bids from, for publication of its ordinances.*

[Page 70]

*Newspaper—county board may pass resolution asking for bids from, for publication of its proceedings.*

[Page 70]

*Matter covered by 35.34 (1) can be procured only upon requisition directed to printing board; board must order all such printing which it determines is needed.*

[Page 124]

*Contractor for state printing is required to furnish customary bond for faithful performance of contract whether service is performed personally or is farmed out to others.*

[Page 461]

*Newspaper—compensation cannot be paid for publication of election notices in weekly paper not printed in county for which notices are published.*

[Page 492]

*Newspaper—publication of county board proceedings is mandatory; refusal or neglect of member of board to comply subjects member to forfeiture.*

[Page 611]

*Newspaper—restriction of cost of publication of county board proceedings is limited to rate per folio.*

[Page 611]

*Newspaper—rate per folio for publication of county board proceedings fixed by county board must be such as will be acceptable to at least one qualified paper published in county.*

[Page 611]

*Public records—state treasurer is required to comply with direction in subpoena duces tecum and produce in court original records and documents; production of photostatic or certified copies is not compliance with requirement.*

[Page 141]

*Public utilities. See Corporations.*

*Quarantine. See Public Health.*

### REAL ESTATE

*Plats and maps must be drawn on scale of not less than one hundred feet to one inch.*

[Page 197]

*Plats of land within second, third and fourth class cities must be filed within sixty days after approval; in villages and towns and lands within three miles of second, third and fourth class cities filing must be had within thirty days after approval.*

[Page 197]

*Real estate brokers board may promulgate rule requiring brokers who purchase real estate under land contract and sell same to third persons on instalment to deposit with board agreement with sufficient surety.*

[Page 312]

*Failure or refusal to comply with rule of board requiring deposit with board of agreement with sufficient surety may be basis for revocation of license.*

[Page 312]
REAL ESTATE—Continued
Plats—140.05 (7), 236.08 and 236.09 cannot be construed as applying to plats of land made prior to enactment of such law.
Plats—register of deeds in county which has adopted tract index system may receive three cents for entering each lot in plat in tract index.
Plats—map drawn on scale of two hundred feet to one inch is not entitled to be recorded.

Real estate brokers board. See Public Officers.
Real estate brokers board. See Real Estate.
Register of deeds. See Public Officers.
Registration. See Elections.
Residence. See Indigent, Insane, etc.
Residence. See Mothers' Pensions.
Retail. See Words and Phrases.
School district clerk. See Public Officers.
School district treasurer. See Public Officers.

SCHOOL DISTRICTS
Funds belonging to board of education in city school system of which is governed by provisions of special charter cannot be expended except in accordance with provisions of charter.
Transportation of pupils—school board of district which has suspended school must pay tuition of children who attend other district and provide transportation.
Transportation of pupils—duty to pay tuition or furnish transportation may be enforced in action of mandamus.
Attorney general declines to attempt to advise regarding application of 40.52 to situations of composition of school boards and terms and method and time of election of members existing in cities within classes specified in 40.50; 40.52 is indefinite and unworkable.

Procedure for purpose of altering common school district should be brought under 40.30.
Territory in district outside city when ch. 425, L. 1927 became effective (July 1, 1927) was by 40.51 attached to city for school purposes.
Electors residing in district outside city may vote on all school matters submitted to and voted on by city electors; may exercise right at city polling place nearest respective residences without registration.
Sec. 40.50 was modified by 40.51 as to districts including territory outside city.

Transportation of pupils—if school district board does not provide, for school children residing in common school district more than two miles from schoolhouse, parents may enter into contract or may compel school board to furnish.
Contra XVI 801

Funds raised by board of education of city for erection of high school building are under direction and supervision of and shall be expended by school board; common council cannot use such funds for general city purposes.
SCHOOL DISTRICTS—Continued

Resolution to raise money for band purposes is legal if school board determined to give instruction in band music and fund is to be used for that purpose. 354

First meeting of newly created district held outside boundaries is not lawful meeting. 413

Loan cannot be authorized at first meeting if held outside boundaries of newly created district. 413

One not legal elector who votes at regular school election can be prosecuted although conduct of election and canvass of votes may have been illegal so as to avoid election. 421

First meeting should be called and held within newly created district; where called and held outside newly created district election is void; new meeting should be called and held within district for election of proper officers. 434

Eminent domain—district may condemn land for addition to schoolhouse site. 444

Town or village board or city council cannot refuse license for soft drink parlor under 165.31 merely because premises are near schoolhouse. 444

School fund. See Constitutional Law.

School fund income. See Appropriations and Expenditures.

Search. See Fish and Game.

Search warrants. See Criminal Law.

Search warrants. See Intoxicating Liquors.

Second sentences. See Criminal Law.

Secretary of state. See Public Officers.

Securities. See Corporations.

Securities. See Words and Phrases.

Sheriff. See Public Officers.

Sheriff, deputy. See Public Officers.

Signs. See Bridges and Highways.

Small loans act. See Banks and Banking.

Soldiers' relief commission. See Appropriations and Expenditures.

Soldiers' relief commission. See Military Service.

Soldiers' relief commission. See Public Officers.

Split tickets. See Elections.

State banks. See Banks and Banking.

STATE FAIR

Commissioner of agriculture may not lease or license portions of state property so as to convey interest in land. 120

Commissioner of agriculture may enter into contracts for term of years longer than his term of office. 286

Miller & Rose leases for operating attractions on grounds are valid. 286

Renewal clause in Miller & Rose contracts is binding. 286

Commissioner of agriculture should insist upon payment for concessions under original contract; should not accept tax receipts as part payment as provided by attempted modification of contract. 286

Contra XVI 446

XVII 120

State highways. See Bridges and Highways.

State treasurer. See Public Officers.

Statute of limitations. See Courts.
<table>
<thead>
<tr>
<th>U. S. Const.</th>
<th>Sec.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. II</td>
<td>2</td>
<td>538</td>
</tr>
<tr>
<td>Art. VI</td>
<td>2</td>
<td>221</td>
</tr>
<tr>
<td>Amendment XIV</td>
<td></td>
<td>243</td>
</tr>
<tr>
<td>Sec. 1</td>
<td></td>
<td>160</td>
</tr>
<tr>
<td>U. S. Stats.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9 Stats. at L. 519</td>
<td></td>
<td>88</td>
</tr>
<tr>
<td>40</td>
<td>565</td>
<td>538</td>
</tr>
<tr>
<td>42</td>
<td>209</td>
<td>538</td>
</tr>
<tr>
<td>43</td>
<td>253</td>
<td>221</td>
</tr>
<tr>
<td>647</td>
<td>640</td>
<td></td>
</tr>
<tr>
<td>Wis. Const.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art. I</td>
<td>11</td>
<td>408</td>
</tr>
<tr>
<td>Art. IV</td>
<td>11</td>
<td>171-172</td>
</tr>
<tr>
<td></td>
<td>17</td>
<td>167</td>
</tr>
<tr>
<td></td>
<td>21</td>
<td>111</td>
</tr>
<tr>
<td>Art. V</td>
<td>4</td>
<td>172</td>
</tr>
<tr>
<td></td>
<td>6</td>
<td>545</td>
</tr>
<tr>
<td></td>
<td>10</td>
<td>620</td>
</tr>
<tr>
<td></td>
<td>10</td>
<td>167</td>
</tr>
<tr>
<td>Art. VIII</td>
<td>10</td>
<td>87-88</td>
</tr>
<tr>
<td>Art. IX</td>
<td>3</td>
<td>560, 561</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>560, 561</td>
</tr>
<tr>
<td></td>
<td>7</td>
<td>517</td>
</tr>
<tr>
<td></td>
<td>8</td>
<td>517-519</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>560</td>
</tr>
<tr>
<td>Art. XI</td>
<td>3</td>
<td>616</td>
</tr>
<tr>
<td>Art. XIII</td>
<td>3</td>
<td>537-538</td>
</tr>
<tr>
<td>Laws 1878</td>
<td>Ch. 324</td>
<td>562</td>
</tr>
<tr>
<td>P. &amp; L. Laws 1883</td>
<td>Ch. 151</td>
<td>30, 31</td>
</tr>
<tr>
<td>Laws 1897</td>
<td>Ch. 129</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>215</td>
<td>247</td>
</tr>
<tr>
<td></td>
<td>264</td>
<td>279</td>
</tr>
<tr>
<td>Laws 1899</td>
<td>Ch. 8</td>
<td>2</td>
</tr>
<tr>
<td>Laws 1901</td>
<td>Ch. 306</td>
<td>279, 280</td>
</tr>
<tr>
<td>Laws 1907</td>
<td>Ch. 283</td>
<td>222</td>
</tr>
<tr>
<td></td>
<td>396</td>
<td>352</td>
</tr>
<tr>
<td>Laws 1911</td>
<td>Ch. 216</td>
<td>436</td>
</tr>
<tr>
<td>Laws 1913</td>
<td>Ch. 465</td>
<td>300</td>
</tr>
<tr>
<td></td>
<td>489</td>
<td>300</td>
</tr>
<tr>
<td>Laws 1915</td>
<td>Ch. 413</td>
<td>287</td>
</tr>
<tr>
<td>Laws 1917</td>
<td>Ch. 136</td>
<td>535-536</td>
</tr>
<tr>
<td></td>
<td>378</td>
<td>223</td>
</tr>
<tr>
<td></td>
<td>501</td>
<td>300</td>
</tr>
<tr>
<td></td>
<td>537</td>
<td>134</td>
</tr>
<tr>
<td>Laws 1919</td>
<td>Ch. 81</td>
<td>223</td>
</tr>
<tr>
<td></td>
<td>93</td>
<td>548</td>
</tr>
<tr>
<td></td>
<td>251</td>
<td>269</td>
</tr>
<tr>
<td></td>
<td>329</td>
<td>134</td>
</tr>
<tr>
<td></td>
<td>563</td>
<td>223</td>
</tr>
<tr>
<td>Bills 1919</td>
<td>No. 2, S.</td>
<td>548</td>
</tr>
<tr>
<td>Laws 1921</td>
<td>Ch. 242</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>579</td>
<td>598</td>
</tr>
<tr>
<td>Laws 1923</td>
<td>Ch. 108</td>
<td>633</td>
</tr>
<tr>
<td></td>
<td>321</td>
<td>342</td>
</tr>
<tr>
<td></td>
<td>355</td>
<td>224</td>
</tr>
<tr>
<td>Laws 1925</td>
<td>Ch. 302</td>
<td>68</td>
</tr>
<tr>
<td>Laws 1927</td>
<td>Ch. 20</td>
<td>412</td>
</tr>
<tr>
<td></td>
<td>26</td>
<td>45</td>
</tr>
<tr>
<td></td>
<td>79</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>95</td>
<td>224-225</td>
</tr>
<tr>
<td></td>
<td>103</td>
<td>560, 562</td>
</tr>
<tr>
<td></td>
<td>170</td>
<td>436</td>
</tr>
<tr>
<td></td>
<td>208</td>
<td>152</td>
</tr>
<tr>
<td></td>
<td>217</td>
<td>190</td>
</tr>
<tr>
<td></td>
<td>334</td>
<td>388</td>
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### Index

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<tr>
<td>159.12</td>
<td>297</td>
</tr>
<tr>
<td>165.02</td>
<td>321</td>
</tr>
<tr>
<td>165.24</td>
<td>404, 405</td>
</tr>
<tr>
<td>165.29 (2)</td>
<td>455</td>
</tr>
<tr>
<td>165.31</td>
<td>487</td>
</tr>
<tr>
<td>(1)</td>
<td>341-442</td>
</tr>
<tr>
<td>168.03 to 168.14</td>
<td>308</td>
</tr>
<tr>
<td>168.05</td>
<td>307</td>
</tr>
<tr>
<td>(3)</td>
<td>308, 309</td>
</tr>
<tr>
<td>168.11</td>
<td>358</td>
</tr>
<tr>
<td>174.02</td>
<td>348-350</td>
</tr>
<tr>
<td>174.11 (1)</td>
<td>625</td>
</tr>
<tr>
<td>(1)</td>
<td>348-350</td>
</tr>
<tr>
<td>180.08</td>
<td>625</td>
</tr>
<tr>
<td>(4)</td>
<td>625</td>
</tr>
<tr>
<td>183.21</td>
<td>429</td>
</tr>
<tr>
<td>(2)</td>
<td>429, 430</td>
</tr>
<tr>
<td>185.081</td>
<td>429, 431</td>
</tr>
<tr>
<td>186.01</td>
<td>90</td>
</tr>
<tr>
<td>187.08</td>
<td>233</td>
</tr>
<tr>
<td>187.08</td>
<td>593</td>
</tr>
<tr>
<td>189.02</td>
<td>343</td>
</tr>
<tr>
<td>(7)</td>
<td>427-428</td>
</tr>
<tr>
<td>189.03 (5)</td>
<td>629, 630</td>
</tr>
<tr>
<td>194.01 (6)</td>
<td>481</td>
</tr>
<tr>
<td>194.02</td>
<td>48-49</td>
</tr>
<tr>
<td>194.14</td>
<td>49</td>
</tr>
<tr>
<td>(1)</td>
<td>49</td>
</tr>
<tr>
<td>195.01 (10)</td>
<td>557</td>
</tr>
<tr>
<td>195.19</td>
<td>101, 102</td>
</tr>
<tr>
<td>200.17</td>
<td>298</td>
</tr>
<tr>
<td>(2)</td>
<td>299</td>
</tr>
<tr>
<td>200.19</td>
<td>298, 300, 302</td>
</tr>
<tr>
<td>201.04</td>
<td>106</td>
</tr>
<tr>
<td>(1)</td>
<td>106</td>
</tr>
<tr>
<td>(12)</td>
<td>106</td>
</tr>
<tr>
<td>201.05 (2)</td>
<td>106</td>
</tr>
<tr>
<td>(3)</td>
<td>106</td>
</tr>
<tr>
<td>(4)</td>
<td>105, 106</td>
</tr>
<tr>
<td>(5)</td>
<td>107</td>
</tr>
<tr>
<td>201.14 (3)</td>
<td>239, 240</td>
</tr>
<tr>
<td>201.18</td>
<td>159-161</td>
</tr>
<tr>
<td>201.44 to 201.48</td>
<td>373</td>
</tr>
<tr>
<td>201.44 (1)</td>
<td>372</td>
</tr>
<tr>
<td>(7)</td>
<td>372, 373</td>
</tr>
<tr>
<td>201.46</td>
<td>298-301</td>
</tr>
<tr>
<td>(2)</td>
<td>299</td>
</tr>
<tr>
<td>(4)</td>
<td>299, 301, 302</td>
</tr>
<tr>
<td>203.01</td>
<td>105</td>
</tr>
<tr>
<td>203.06</td>
<td>163, 164</td>
</tr>
<tr>
<td>(1)</td>
<td>106</td>
</tr>
<tr>
<td>(2)</td>
<td>106</td>
</tr>
<tr>
<td>203.11</td>
<td>162</td>
</tr>
<tr>
<td>204.20</td>
<td>112</td>
</tr>
<tr>
<td>206.34</td>
<td>189</td>
</tr>
<tr>
<td>(1)</td>
<td>189</td>
</tr>
<tr>
<td>208.01 (4)</td>
<td>274-276</td>
</tr>
<tr>
<td>(5)</td>
<td>356-357</td>
</tr>
<tr>
<td>(9)</td>
<td>472, 473</td>
</tr>
<tr>
<td>209.04 (1)</td>
<td>514</td>
</tr>
<tr>
<td>(6)</td>
<td>514</td>
</tr>
<tr>
<td>209.06</td>
<td>473</td>
</tr>
<tr>
<td>210.01</td>
<td>515</td>
</tr>
<tr>
<td>210.02</td>
<td>516</td>
</tr>
<tr>
<td>214.01</td>
<td>481</td>
</tr>
<tr>
<td>214.04</td>
<td>481</td>
</tr>
<tr>
<td>214.06</td>
<td>481</td>
</tr>
<tr>
<td>214.10</td>
<td>481</td>
</tr>
<tr>
<td>215.24</td>
<td>98</td>
</tr>
<tr>
<td>215.26</td>
<td>98</td>
</tr>
<tr>
<td>216.01</td>
<td>482</td>
</tr>
<tr>
<td>(1)</td>
<td>482</td>
</tr>
<tr>
<td>220.01 to 220.14</td>
<td>109</td>
</tr>
<tr>
<td>220.07</td>
<td>417-419</td>
</tr>
<tr>
<td>220.08</td>
<td>488</td>
</tr>
<tr>
<td>(1)</td>
<td>109</td>
</tr>
<tr>
<td>(3)</td>
<td>110</td>
</tr>
<tr>
<td>(15)</td>
<td>417</td>
</tr>
<tr>
<td>221.04 (6)</td>
<td>499-500</td>
</tr>
<tr>
<td>221.11</td>
<td>396</td>
</tr>
<tr>
<td>221.33</td>
<td>107</td>
</tr>
<tr>
<td>221.42</td>
<td>407</td>
</tr>
<tr>
<td>221.43</td>
<td>418</td>
</tr>
<tr>
<td>222.13</td>
<td>419</td>
</tr>
<tr>
<td>222.23</td>
<td>419</td>
</tr>
<tr>
<td>222.02</td>
<td>214, 215</td>
</tr>
<tr>
<td>(11)</td>
<td>499, 500</td>
</tr>
<tr>
<td>222.12</td>
<td>569</td>
</tr>
<tr>
<td>224.02</td>
<td>406</td>
</tr>
<tr>
<td>224.03</td>
<td>406</td>
</tr>
<tr>
<td>225.14</td>
<td>109</td>
</tr>
<tr>
<td>225.34 (1)</td>
<td>423</td>
</tr>
<tr>
<td>(2)</td>
<td>428</td>
</tr>
<tr>
<td>Stats.</td>
<td>Page</td>
</tr>
<tr>
<td>-------</td>
<td>------</td>
</tr>
<tr>
<td>225.35</td>
<td>110</td>
</tr>
<tr>
<td>225.36</td>
<td>110</td>
</tr>
<tr>
<td>225.37</td>
<td>110</td>
</tr>
<tr>
<td>226.02 (2)</td>
<td>568, 569</td>
</tr>
<tr>
<td>226.14 (1)</td>
<td>575</td>
</tr>
<tr>
<td>226.23</td>
<td>235</td>
</tr>
<tr>
<td>226.24</td>
<td>234, 235</td>
</tr>
<tr>
<td>226.55</td>
<td>72</td>
</tr>
<tr>
<td>226.02</td>
<td>197</td>
</tr>
<tr>
<td>236.03</td>
<td>371</td>
</tr>
<tr>
<td>236.05 (1)</td>
<td>197</td>
</tr>
<tr>
<td>236.07</td>
<td>197</td>
</tr>
<tr>
<td>236.08</td>
<td>197</td>
</tr>
<tr>
<td>236.09</td>
<td>197</td>
</tr>
<tr>
<td>237.01 (7)</td>
<td>601</td>
</tr>
<tr>
<td>245.01</td>
<td>384</td>
</tr>
<tr>
<td>245.12</td>
<td>383, 384</td>
</tr>
<tr>
<td>245.32</td>
<td>352</td>
</tr>
<tr>
<td>245.36</td>
<td>384</td>
</tr>
<tr>
<td>247.13</td>
<td>480</td>
</tr>
<tr>
<td>252.15</td>
<td>12, 13</td>
</tr>
<tr>
<td>253.03</td>
<td>383</td>
</tr>
<tr>
<td>253.04</td>
<td>383</td>
</tr>
<tr>
<td>253.08</td>
<td>356</td>
</tr>
<tr>
<td>253.11</td>
<td>82</td>
</tr>
<tr>
<td>253.15</td>
<td>607</td>
</tr>
<tr>
<td>253.16</td>
<td>82</td>
</tr>
<tr>
<td>253.17</td>
<td>82-83</td>
</tr>
<tr>
<td>255.03 to 255.09</td>
<td>2</td>
</tr>
<tr>
<td>255.03</td>
<td>1, 3</td>
</tr>
<tr>
<td>255.04</td>
<td>3</td>
</tr>
<tr>
<td>255.31</td>
<td>34</td>
</tr>
<tr>
<td>256.01</td>
<td>141, 142</td>
</tr>
<tr>
<td>256.02 (1)</td>
<td>141</td>
</tr>
<tr>
<td>256.02 (2)</td>
<td>480</td>
</tr>
<tr>
<td>269.29</td>
<td>13</td>
</tr>
<tr>
<td>269.51</td>
<td>509</td>
</tr>
<tr>
<td>270.15 to 270.31</td>
<td>2</td>
</tr>
<tr>
<td>286.36</td>
<td>430</td>
</tr>
<tr>
<td>288.09</td>
<td>283</td>
</tr>
<tr>
<td>311.01</td>
<td>383</td>
</tr>
<tr>
<td>322.02 (2)</td>
<td>183</td>
</tr>
<tr>
<td>324.17 (3)</td>
<td>1, 3</td>
</tr>
<tr>
<td>325.01 (1)</td>
<td>142</td>
</tr>
<tr>
<td>325.02 (1)</td>
<td>142</td>
</tr>
<tr>
<td>325.11</td>
<td>143</td>
</tr>
<tr>
<td>325.21</td>
<td>385–388</td>
</tr>
<tr>
<td>Stats.</td>
<td>Page</td>
</tr>
<tr>
<td>-------</td>
<td>------</td>
</tr>
<tr>
<td>330.19 (3)</td>
<td>471, 472</td>
</tr>
<tr>
<td>331.20</td>
<td>492</td>
</tr>
<tr>
<td>331.25</td>
<td>612</td>
</tr>
<tr>
<td>340.40</td>
<td>71</td>
</tr>
<tr>
<td>340.70</td>
<td>403-404</td>
</tr>
<tr>
<td>343.20</td>
<td>594</td>
</tr>
<tr>
<td>343.31</td>
<td>596</td>
</tr>
<tr>
<td>343.41</td>
<td>83</td>
</tr>
<tr>
<td>343.413</td>
<td>194</td>
</tr>
<tr>
<td>348.24</td>
<td>318</td>
</tr>
<tr>
<td>348.28</td>
<td>84</td>
</tr>
<tr>
<td>351.30</td>
<td>1, 2</td>
</tr>
<tr>
<td>351.31</td>
<td>176-178, 180</td>
</tr>
<tr>
<td>351.31 (1)</td>
<td>2</td>
</tr>
<tr>
<td>351.57</td>
<td>431</td>
</tr>
<tr>
<td>353.05</td>
<td>596</td>
</tr>
<tr>
<td>353.06</td>
<td>596</td>
</tr>
<tr>
<td>353.10</td>
<td>495, 496</td>
</tr>
<tr>
<td>353.12</td>
<td>122, 123</td>
</tr>
<tr>
<td>353.24</td>
<td>359-360</td>
</tr>
<tr>
<td>353.27</td>
<td>138</td>
</tr>
<tr>
<td>353.31</td>
<td>284, 285</td>
</tr>
<tr>
<td>358.01 et seq.</td>
<td>495</td>
</tr>
<tr>
<td>359.05</td>
<td>578</td>
</tr>
<tr>
<td>359.14</td>
<td>455</td>
</tr>
<tr>
<td>366.01</td>
<td>122</td>
</tr>
<tr>
<td>366.13</td>
<td>122</td>
</tr>
<tr>
<td>370.01 (1)</td>
<td>64</td>
</tr>
<tr>
<td>385-388</td>
<td>504-506</td>
</tr>
</tbody>
</table>

Sterilization. See Public Health.
Stickers. See Public Printing.
Straight jackets. See Indigent, Insane, etc.
Subpoenas. See Courts.
Superintendent of public instruction. See Public Officers.
Superintendent of public property. See Public Officers.
Supervisor, city. See Public Officers.
Supervisor, county. See Public Officers.
Tax liens. See Taxation.
Tax sales. See Taxation.

**TAXATION**

Tax sale—several questions answered as to right of county board to authorize redemption for less than amount of tax and interest, power to delegate authority to sell tax certificate and tax title lands held by county on such terms as in their judgment are to best interests of county.

Income received by telephone company for performing switching for another company constitutes part of gross receipts of switching telephone company.

License fee upon that portion of gross receipts received for switching service should be paid to locality in which company performing switching service is located.

Forest crop lands—ch. 77, Stats., relating to taxation of forest crop lands, its rule of taxation and exemptions, its withdrawal either by owner or by state, discussed.

Tax sale—may not be made by county at less than face value unless authorized by county board; certificate can be sold only after required publication in newspaper has been made.

Tax lien—there is none on personal property other than that of public utilities.

“Pin money” and “subscribers’ deposits defaulted” constitute gross receipts upon which telephone license fees are computed.

Interest received on savings deposits does not constitute part of gross receipts upon which telephone license is computed.

Forest crop lands—delinquent tax lands owned by counties may be entered as provided in ch. 77.

Forest crop lands—county and state must pay to local government unit tax in 77.05.

“Merchandise” as used in 70.13 (7) includes automobiles.

See XVI 322

Merchandise must be in storage in original package in commercial warehouse on May 1 to be “not subject to taxation”.

See XVI 322

Delinquent taxes—county treasurer must credit city treasurer with sums returned by latter as taxes of unpaid instalments of special assessments for local public improvements under 62.21 and 74.19.

Special assessment certificates issued to contractors are not credited by county treasurer to city treasurer.

Delinquent taxes—issuing of special improvement bonds in anticipation of collection of special assessments under 62.21 (2) does not change rule for crediting sums returned by city treasurer.
### TAXATION—Continued

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proportionate amount of loss on settlement of bank tax levied on stock</td>
<td>206</td>
</tr>
<tr>
<td>prior to ch. 396, L. 1927, paid under protest and compromised without</td>
<td></td>
</tr>
<tr>
<td>adjudication, need not be refunded to city by state, county or other</td>
<td></td>
</tr>
<tr>
<td>subdivision</td>
<td></td>
</tr>
<tr>
<td>Personal property of Indian citizen, whether property is situated or</td>
<td>220</td>
</tr>
<tr>
<td>citizen resides on reservation or elsewhere within state, is subject to</td>
<td></td>
</tr>
<tr>
<td>same extent that personal property of other citizens and residents of state</td>
<td></td>
</tr>
<tr>
<td>is subject</td>
<td></td>
</tr>
<tr>
<td>Motor vehicle fuel tax—every dealer is required to report to state</td>
<td>228</td>
</tr>
<tr>
<td>treasurer all sales of gasoline in state and pay license tax thereon;</td>
<td></td>
</tr>
<tr>
<td>is subject to penalties prescribed</td>
<td></td>
</tr>
<tr>
<td>Motor vehicle fuel tax—state treasurer must enforce collection</td>
<td>223</td>
</tr>
<tr>
<td>Motor vehicle fuel tax—question of right of seller to refund or duty of</td>
<td>228</td>
</tr>
<tr>
<td>treasurer to repay should be passed upon in each case</td>
<td></td>
</tr>
<tr>
<td>Motor vehicle fuel tax—attempt to authorize refund of taxes paid by</td>
<td>242</td>
</tr>
<tr>
<td>dealers in towns, villages and cities on state boundary line is</td>
<td></td>
</tr>
<tr>
<td>unconstitutional and void</td>
<td></td>
</tr>
<tr>
<td>Tax sales—erroneous description of land delinquent in taxes in published</td>
<td>246</td>
</tr>
<tr>
<td>redemption notices does not affect groundwork of tax; county is under</td>
<td></td>
</tr>
<tr>
<td>no liability to refund payments made for tax certificates and for tax deed</td>
<td></td>
</tr>
<tr>
<td>containing same description as in redemption notices</td>
<td></td>
</tr>
<tr>
<td>Change of time of payment of income taxes into state treasury does not</td>
<td>276</td>
</tr>
<tr>
<td>prevent crediting to school fund incomes amount of mill tax levies, where</td>
<td></td>
</tr>
<tr>
<td>amount of mill taxes levied has been reduced by estimated amount of state's</td>
<td></td>
</tr>
<tr>
<td>share of income taxes under 20.255</td>
<td></td>
</tr>
<tr>
<td>County board in counties other than Milwaukee may, after tax levy has</td>
<td>329</td>
</tr>
<tr>
<td>been made, borrow not exceeding fifty per cent of such levy and issue</td>
<td></td>
</tr>
<tr>
<td>county orders therefor on or before February 15 next following</td>
<td></td>
</tr>
<tr>
<td>Lots belonging to one person and advertised under 74.37 entitle printer</td>
<td>350</td>
</tr>
<tr>
<td>to maximum fee of twenty-five cents on total descriptions rather than on</td>
<td></td>
</tr>
<tr>
<td>each tract</td>
<td></td>
</tr>
<tr>
<td>Forest crop lands—register of deeds must file and index list; need not</td>
<td>462</td>
</tr>
<tr>
<td>record it, does not receive fee for filing and indexing</td>
<td></td>
</tr>
<tr>
<td>Action to enforce turning over to county tax levied by county for</td>
<td>485</td>
</tr>
<tr>
<td>highway purposes and collected in part by city should be commenced in</td>
<td></td>
</tr>
<tr>
<td>name of county against city treasurer and his bondsmen</td>
<td></td>
</tr>
<tr>
<td>Tax sales—county treasurer may pay out of general fund amount paid in</td>
<td>501</td>
</tr>
<tr>
<td>redemption of land from tax sale to owner of lost certificate of sale who</td>
<td></td>
</tr>
<tr>
<td>complies with 75.06, although more than six years have elapsed since sale</td>
<td></td>
</tr>
<tr>
<td>Stockholders of Rock River Valley Agriculture Corporation, Jefferson</td>
<td>511</td>
</tr>
<tr>
<td>county fair, are not subject to assessment on their shares of stock</td>
<td></td>
</tr>
<tr>
<td>Tax sales—certificates for general taxes and for delinquent drainage</td>
<td>537</td>
</tr>
<tr>
<td>taxes may be sold separately</td>
<td></td>
</tr>
</tbody>
</table>
TAXATION—Continued

Income taxes—any excess of state's share collected in 1928 over amount of mill taxes for support of university and normal schools became part of public school fund income January 1, 1928, and available for payment of salaries and expenses of supervising teachers and other appropriations made by 20.25---------------------- 553

Nonexempt real estate erroneously omitted from tax assessment in any of three next previous years must be entered once additionally for each previous year of such omission ------------------------------- 588

Real estate taxes—payment is direct and personal obligation against owner; may be enforced by action of debt in same manner as are taxes assessed on personal property ------------------------------- 588

Forest crop lands—are exempt from taxes for year if they become such prior to first Monday in August of any year, under irrepealable levy made by school district or other municipality at time of obtaining loan from state trust funds or incurring of indebtedness under ch. 67 and from other general taxes------------------ 615

Toll bridges. See Bridges and Highways.
Town board. See Public Officers.
Town chairman. See Public Officers.
Town clerk. See Public Officers.
Town highways. See Bridges and Highways.
Town meetings. See Municipal Corporations.
Towns. See Municipal Corporations.
Trade-marks. See Corporations.

TRADE REGULATION

Trading stamps—cash register slip representing sales discount but no stated cash value violates trading stamp act ----------------------------------------------- 25

Credit union cannot apply for or receive permit to lend money pursuant to provisions of 115.07---------------------- 51

Warehouse—corporation may be organized to maintain "commercial storage warehouse"----------------------------- 199

"Merchandise" as used in 70.13 (7) includes automobiles-------------------------- 199

See XVI 322

Merchandise must be in storage in original package in commercial warehouse on May 1 to be "not subject to taxation" ----------------------------------------------- 199

See XVI 322

Trading stamps—law is not violated by merchant who issues coupon which states it is redeemable in cash for one cent, to be redeemed by certain bank which has been made agent of merchant and in which he has deposited enough money to cover all coupons issued-------------------------- 457

Trade-mark—secretary of state cannot refuse to file, consisting of crescent and star if necessary papers are filed and fees paid; cannot thereafter revoke such filing upon theory that it violated federal statutes-------------------------- 641

Trading stamps. See Trade Regulation.
Transportation of pupils. See Education.
Transportation of pupils. See School Districts.
Treasury agent, deputy. See Civil Service, rule as to certification.
Index

Treasury agent, deputy. See Public Officers.
Trunk highways. See Bridges and Highways.
Trust company banks. See Banks and Banking.
Trust funds. See Constitutional Law.

TUBERCULOSIS SANATORIUMS
County judge of county A may not commit patient to county sanatorium as charge against county B under 50.07
Administering of artificial pneumothorax in county sanatorium is part of regular cost of maintenance.

Undersheriff. See Public Officers.
United States government farmer. See Public Officers.

UNIVERSITY
Change of time of payment of income taxes into state treasury does not prevent crediting to university fund income amount of mill tax levy, where amount of mill taxes levied has been reduced by estimated amount of state's share of income taxes under 20.255.
Purchase of motor car which is part of salary agreed to be paid by board of regents to president does not require approval of governor; provisions of 14.71 (4) are not applicable.
Regents are empowered to lease to Wisconsin University Building Corporation lands part of which is occupied by stadium, for construction, financing and acquisition of field house; building corporation is authorized to mortgage its leasehold interest as security for its obligations; revenues from operation of field house must, and surplus revenues from stadium may, be applied by regents to payment of rentals under lease or for acquisition of title to field house.
Director of memorial union is not within unclassified service.

Vacancies. See Public Officers.
Veterinarian in U. S. department of agriculture. See Civil Service.
Veterinarian in U. S. department of agriculture. See Public Officers.
Village treasurer. See Public Officers.
Villages. See Municipal Corporations, municipal borrowing.
Vocational education. See Education.
Warehouses. See Trade Regulation.
Water and light commission. See Public Officers.
Wholesale fish markets. See Fish and Game.
Wild life refuges. See Fish and Game.

WISCONSIN STATUTES
Sec. 157.11 (1), requiring cemetery board to inclose grounds of cemetery with fence without aid from adjoining land owners, is special statute and takes precedence over general statute; 90.03 includes same subject.
Sec. 40.52 is so indefinite and unworkable that attorney general declines to attempt to advise regarding its application to situations of composition of school boards and terms and method and time of election of members existing in cities within classes specified in 40.50.

Wolves. See Fish and Game.
**WORDS AND PHRASES**

<table>
<thead>
<tr>
<th>Phrase</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Retail&quot; in 151.04 (2), as applied to sale of aspirin as poison drug, held not to refer so much to quantity sold as to character of sale for use or consumption</td>
<td>15</td>
</tr>
<tr>
<td>&quot;Gross and culpable negligence,&quot; as used in drivers' license law, defined</td>
<td>128</td>
</tr>
<tr>
<td>Securities—contract between owners of fur farm and purchasers by which purchasers acquire title to units of muskrats, company being obligated to ranch muskrats and purchasers being entitled to receive their prorata share of progeny of units, such progeny not being identified as of any particular unit, is security within meaning of 189.02 (7)</td>
<td>343</td>
</tr>
<tr>
<td>&quot;Or for other lawful consideration,&quot; in 226.02 (2)—words refer only to consideration advanced by foreign trust company itself</td>
<td>568</td>
</tr>
</tbody>
</table>

**WORKMEN'S COMPENSATION**

Industrial commission has jurisdiction to modify order allowing death benefit to widow of one killed in industrial employment with separate specified amount allowed to her for maintenance of minor child, when child is committed to industrial school for girls | 302 |

Fifteen per cent penalty may be assessed against employees of governmental subdivisions only where order or law applies to state or its subdivisions | 438 |

Laws concerning safety devices, etc., and consequently commission orders thereon, apply to state and its subdivisions as owner but not as employer; penalty is payable whether accident occurs in governmental or nongovernmental function when accident happens because of violation of law or order placing duty upon owner | 438 |

Corporation purchasing plant may be held to pay premium on exposure of plant prior to its acquisition by it when such premium has been computed by applying rate promulgated by using experience although that rate might be affected by method of operation of plant after transfer | 609 |